

## CREDIT AND DEBT

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This chapter addresses some of the common problems people experiencing homelessness confront in the area of consumer credit and debt. The chapter aims to assist practitioners in helping clients with complaints and disputes arising in a credit and debt context and in advocating more effectively for financially and socially disadvantaged people in credit and debt matters to ensure that their rights are protected.

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## 1. Introduction

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People experiencing homelessness are often confronted with issues of financial hardship. A significant number find themselves grappling with unmanageable debt and credit distress and are unsure how to deal with these problems. Additionally, those people may have received unhelpful advice.

This chapter focuses on several discrete issues commonly faced by homeless clients and provides some practical solutions to help you resolve these issues on your clients' behalf.

The law regulating this area is primarily civil and administrative law. There are often policies, regulations or codes that set out dispute resolution procedures.

This chapter has been drafted as a practical guide. It includes references to the relevant Code and Regulations and provides details of who, where and how to contact relevant authorities on your client's behalf. At the end of the chapter (see section 11), sample letters and forms specific to homelessness advocacy are provided as a guide.

Section two of the chapter examines common disputes with financial institutions that may be relevant to homelessness advocacy. This section includes examples and information about:

- common problems faced by clients;
- who to contact if the matter is not resolved;
- obtaining information for your client;
- changing loan repayments;
- the enforcement of a credit contract;
- mortgage minimisation; and
- credit card debt problems.

Section three focuses on disputes with utility companies such as energy, telephone and water related services.

Section four suggests topics you may wish to discuss with your client to control and manage their current and future debt to prevent further distress.

Section five outlines some processes to follow if a client has to pay an old debt and how to check whether the enforcement of this debt is statute-barred.

Section six examines the implications of a client's credit rating or reporting. This issue is important to discuss with clients so they can appreciate the lasting issues associated with a poor credit rating. Section six outlines some steps you can follow to help mitigate these problems.

Section seven sets out the procedure in the event a client is sued. Section eight outlines a client's rights and obligations in relation to debt collectors. Section nine outlines how a creditor can recover money owed to it. Finally, section 10 lists some relevant contact details.

## 2. Disputes with Financial Institutions

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Homelessness advocacy will often involve disputes with financial institutions, where you may need to renegotiate finance terms for a client, obtain documents or request further information. This section outlines how to address such issues and who to contact if the matter is not addressed properly.

### 2.1 Common problem areas

Most often disputes with financial institutions on behalf of homeless people can be, among other matters, about penalty fees or the cancellation of a direct debit plan. See below for discussion about, and examples of, how to address such issues.

#### **Example**

##### **Problem A — penalty fees**

Sue's fortnightly pension is automatically credited to her bank account. One fortnight, Sue's pension payment is delayed. A longstanding direct debit (that is arranged to come out of her account on the same day as her pension is credited) causes Sue's account to become overdrawn. The bank debits Sue's account a \$50 Account Overdrawing Fee.

##### **What can you do to help Sue?**

Find out who is responsible for the delay in the payment — call the bank and Centrelink.

If it is the bank's fault, then demand that the \$50 fee be recredited to Sue's account.

If it is Centrelink's fault, then you should still ask the bank to recredit the \$50 fee on the grounds of financial hardship and lack of fault (but ask Centrelink to pay for it as well).

You may need to write a letter of demand to Sue's bank and/or Centrelink.

NB: You could also argue that the \$50 fee is a **penalty** and therefore unenforceable.

#### **Example**

##### **Problem B — refusal to cancel direct debit**

Robbie wants to cancel a direct debit authority with Company X because he is in a dispute with them.

Robbie's bank won't cancel the direct debits. They tell him that he has to cancel it with Company X directly first. Company X refuses to cancel the direct debit and continues to debit Robbie's account.

##### **What can you do to help Robbie?**

Clause 19 of the *Banking Code of Conduct* (**the Banking Code**) states that banks must promptly process a client's instruction to cancel a direct debit request and must not direct or suggest that the client should first raise any such request directly with a third party.

The Banking and Financial Services Ombudsman considers this to be good banking practice even if the bank is not a signatory to the Banking Code.

Write to the bank *and* Company X cancelling Robbie's direct debit authority.

You may also demand that the bank recredit any amounts debited after Robbie first asked the bank to cancel the direct debits.

Remember, cancelling the direct debits does not relieve Robbie of his liability for payments to Company X — Robbie may be in breach of his contract.

NB: Credit cards are treated differently — charge-backs apply for disputed transactions.

## 2.2 What if the bank won't resolve the matter appropriately?

If the bank won't resolve the matter appropriately, then complain to the Banking and Financial Services Ombudsman (see section 10 below for contact details).

## 2.3 What if your client is dealing with a credit union?

If your client is dealing with a credit union, then:

- find out which external dispute resolution scheme the credit union is a member of (either the Credit Union Dispute Resolution Centre or the Financial Co-operative Dispute Resolution Scheme (**FCDRS**)); and
- make a complaint to either the Credit Union Dispute Manager (Credit Union Dispute Resolution Centre) or the Ombudsman (FCDRS). See section 10 below for contact details.

## 2.4 How can your client get more information about their loan?

You may be able to request information or relevant documents on your client's behalf if they:

- have lost or misplaced their loan documents;
- want to check how much money they owe;
- need more details about an old debt; or
- want a payout figure (that is, the amount of money they need to pay to clear their debt).

When you contact the relevant organisation, you:

- do not have to explain why your client does not have the documents;
- do not have to explain why your client wants the documents; and
- do not have to get the consent of any co-borrower(s).

You can request copies of documents relating to your client's loan contracts. Lenders are usually obliged to provide copies of loan contracts, as well as some other information upon request, to borrowers. The *Consumer Credit (Victoria) Code* (**the Consumer Credit Code**) covers most consumer credit contracts and states that the lender must give copies of certain documents if asked for them. See further below.

Sometimes the person who contacts your client to ask for payment of a loan will be a debt collector rather than the lender. It is important to note that your client has the same rights to documents and information if a debt collector is involved, as against the lender.

When your client has their loan documents and account statements, they will be able to check what they signed, work out their financial position and get advice about their rights.

### ***What documents and information can your client get?***

If your client is a borrower, mortgagor, or guarantor, then under most consumer credit contracts the lender is obliged by law to give them the following documents on request:

- Copies of:
  - the loan contract;
  - the guarantee contract;
  - the mortgage contract;
  - any credit related insurance contracts that the lender holds (for example, loan insurance, or car insurance); and
  - any notices that have been given under the Consumer Credit Code (for example, default notices — when the creditor sends a letter saying that your client has not paid the money owed).
- A statement of:
  - the current balance of your client's account;
  - any amounts that have been credited or debited during the time nominated;
  - any amounts currently overdue and the date when they became overdue; and
  - any amount that is currently payable and the date that it became due.
- A loan payout figure, with details of all the items that make up the amount (for example, interest and fees).

### ***How do you ask for this information?***

It is usually best to *write* to the lender or debt collector to ask for copies of loan documents and other information.

Before you write to the lender or debt collector:

- think about which documents you need from your client. For example, you might only need loan statements from the last two years, instead of statements covering the history of the account, and
- make sure you obtain a signed authority from your client.

See section 11.1 below for a sample **letter to request information**.

### ***When will you get the information?***

The lender or debt collector should send the information to you:

- within 14 days — if you are asking for information that is less than a year old; or
- within 30 days — if the information is more than a year old.

If the lender does not provide you with the information within this time, or refuses to give you the information, then you can:

- complain to the appropriate industry external dispute resolution scheme;
- complain to Consumer Affairs Victoria; or

- apply to the Credit List of the Victorian Civil and Administrative Tribunal (**VCAT**) for an order that the lender give you the documents.

Note that if you are requesting further copies of statements of amounts owing, then the lender is not obliged to provide further copies if it has already provided them to you or your client in the last three months.

***How much will it cost to get this information?***

A lender can charge a fee for providing information and documents, provided the contract allows such a fee to be charged. Most contracts do say that a fee will be charged and this is often a dollar amount per page.

***What if the lender or debt collector is threatening legal action?***

If a lender or debt collector has threatened legal action, then you should ask them to stop or hold off on any such action while they respond to your request for information.

If the lender or debt collector refuses to stop or delay legal action and sends your client court documents (which will usually be a **Form 4A complaint** or a **writ**), then you should immediately seek particulars of the lender's claim and prepare a defence to the extent possible. If your client does nothing, then a court judgment may be entered against your client.

***What if the Consumer Credit Code does not cover my client's loan?***

If the Consumer Credit Code does not apply, then you can still ask for a copy of your client's documents. In some cases you may still have a right to obtain a copy of the documents under the contract with the creditor.

If the Consumer Credit Code does not apply and the creditor has refused your request for documents, then seek advice from Consumer Action Law Centre, the Financial and Consumer Rights Council, Consumer Affairs Victoria or the Insolvency and Trustee Service of Australia (see section 10 for contact details).

**2.5 Can your client change their loan payments on grounds of hardship?**

If your client is ill or out of work but thinks they can manage smaller loan repayments, and if the Consumer Credit Code covers your client's loan, then your client might have a right to apply to get their payments changed so that they can better manage their loan.

***Consumer Credit Code hardship provisions***

The Consumer Credit Code provides that:

- if a person suffers hardship and cannot pay their loan then they have the right to apply to a lender for a change in the terms of the contract; and
- if a lender does not agree to a change they have asked for, then they can apply to VCAT for an order to change the terms of the contract.

The Consumer Credit Code covers most loans for personal and household (that is, non-business) purposes. However, if you wish to use the hardship provisions, then your client's original loan must have been less than the hardship threshold amount. The

**hardship threshold amount** changes when house prices change. But, as a rough guide, the threshold amount was \$320,100 in February 2008. You can find the most recent hardship threshold amount from the government website <http://www.creditcode.gov.au>.

If you are applying under the Consumer Credit Code for a change to your client's loan due to hardship, then you must show illness, unemployment or another reasonable cause of hardship. Examples of **other reasonable causes** could be funeral expenses or loss of assets through natural disaster such as bushfires.

### ***Variations to the loan***

Your client can ask for the following changes:

- that payments be reduced for a period of time and the term of the loan extended;
- that payments due on a specific date be postponed (if the client is going to need to make repayments later than the date they are usually due); and
- that payments be stopped for a period of time (for example, three or six months) and the term of the loan extended.

If your client's application for a variation is to have any chance of success, then you will need to show that your client will be able to pay the contract even though it will take a little longer. You will need to show that:

- your client is able to resume normal payments after a period of time; or
- your client will be able to maintain any reduced payments.

### ***How to apply for variations to the loan***

Start by writing to the lender asking for the loan to be varied in a particular way. Acceptance by the lender of your client's variation application could depend on a range of factors, including your client's past payment history and the security for the loan. The lender will be thinking about the best way to make sure they get their money back.

If the creditor refuses your application, then you can apply to VCAT for an order that the lender must vary the contract. The cost of the application at VCAT is \$33.30. However, your client could apply to VCAT to have the fee waived on the grounds of hardship.

You may be able to negotiate informally with the lender to stop them charging interest. However, under the Consumer Credit Code, the lender is entitled to charge interest throughout a hardship variation. VCAT will not make an order stopping interest when hearing a hardship application.

The lender and VCAT are not likely to agree to a variation that will extend the period of the loan for too long. What will be accepted will depend on the circumstances? You should also note that the longer the term of the loan, then the more interest your client will have to pay.

### ***Other necessary action***

Applying for a hardship variation will not stop the lender from repossessing and selling a secured car or house while your client waits for their hardship hearing. Your client might

need to apply to VCAT for a stay of proceedings at the same time as applying for a hardship variation, in order to stop any action the lender is taking or is considering taking. You should also simultaneously apply for an urgent hearing of your client's hardship or stay application at VCAT by faxing or hand delivering the application to VCAT as well as making contact with the registrar at the Credit List of VCAT to explain that you need an urgent hearing to apply for a stay of enforcement.

Sometimes a creditor might have started action against your client in the Supreme Court, or another court, to get possession of your client's house or for an order that your client pay the debt. In some cases your client might be able to get the other court action stopped until a hardship application is considered in VCAT.

See section 11.2 below for a sample **hardship variation letter**.

## 2.6 Enforcing a credit contract

Normally, if a borrower fails to make a loan repayment on time, then a lender can take prompt and immediate action to recover amounts owing. Such action includes:

- demanding the full amount of the loan immediately, not just the late payment (that is, **accelerating payment** of the loan);
- taking possession of any secured goods and property;
- issuing legal proceedings to recover the outstanding debt.

Division Two of Part Five of the Consumer Credit Code modifies the common law rights of the lender and sets out protocols for enforcement proceedings under a credit contract.

### ***Default notices under section 80 of the Consumer Credit Code***

If a borrower misses a payment under a loan, then the lender must comply with the requirements of section 80 of the Consumer Credit Code. That is, a lender cannot begin enforcement proceedings unless:

- the debtor is in default of the credit contract;
- the debtor (and any guarantor) has been given a **default notice in compliance with section 80**, which allowed at least **30 days** to remedy the default; and
- the default has not been remedied within that period.

A **section 80 default notice** must:

- specify the default (that is, the payments that are in arrears or a failure to maintain insurance over a secured vehicle);
- specify what is required to remedy the default; and
- state that a subsequent default of the same kind that occurs during the period of the notice will allow the lender to begin enforcement proceedings in reliance on that notice.

### ***When is a section 80 notice not required?***

Under section 80(4) of the Consumer Credit Code a default notice is not required if:

- the credit provider believes that the debtor fraudulently entered into the credit contract;
- the credit provider cannot locate the debtor;
- the court authorises the commencement of enforcement proceedings; or
- the credit provider believes that the debtor has disposed of, or intends to dispose of, mortgaged goods, or that urgent action is necessary to protect the mortgaged property.

### ***Taking possession of mortgaged goods***

After the 30-day period granted by a section 80 notice has expired, a lender can commence enforcement proceedings. For secured contracts, this will involve employing a repossession agent to seize and sell any secured goods.

There are a number of restrictions on a lender's right to repossess secured goods (see below). Remember that these restrictions apply only to mortgaged **goods**. Mortgagee possession of **real property** follows different procedures, normally culminating with a writ in the Supreme Court.

### ***Restrictions on a lender's right to repossess mortgaged goods***

#### **1. Less than 25% owing on the contract**

Under section 83 of the Consumer Credit Code, a lender cannot repossess mortgaged goods if the current balance of the loan is less than 25% of the amount of credit provided, or \$10,000 (whichever is the lesser amount).

However, the lender can nevertheless repossess if:

- the court consents to the repossession, or
- the loan is a **continuing credit contract** (although these are rarely, if ever, secured over goods), or
- the lender believes that the debtor has disposed of, or intends to dispose of, mortgaged goods, or that urgent action is necessary to protect the mortgaged property.

#### **2. Entry onto residential premises**

Under section 91 of the Consumer Credit Code, a lender or its agent cannot enter onto residential premises to repossess mortgaged goods unless:

- the court has authorised entry; or
- the occupier of the premises (not the borrower) has consented in writing, after being informed in writing of the provisions of section 91.

Consent under section 91 can be obtained from an occupier only if the lender complies with regulation 24 of the *Consumer Credit (Victoria) Regulations 1995* (**the Consumer Credit Regulations**). Regulation 24 states:

For the purposes of section 91 of the Code, consent by the occupier of premises to entry to the premises is taken to be given only if the following provisions have been complied with —

- (a) a request to the occupier for entry to the premises must be made by the credit provider or agent by application in writing or by calling at the premises concerned;
- (b) if the request is made personally, it may only be requested between the hours of 8am to 8pm on any day other than a Sunday or public holiday;
- (c) the consent in writing must be in form 7 and signed by the occupier;
- (d) the written document of consent is not to be presented to the occupier for signature with, or as part of, any other document (unless the other document, or the remainder of the other document, contains only the provisions of section 91 of the Code).

The value of these provisions is not that they absolutely prevent the lender from taking possession of goods in the above circumstances, but that a court order is required to do so. The borrower must be served with such an application and, if they attend the hearing, it may be a valuable time at which to attempt to negotiate some arrangement that allows the loan to remain on foot and the goods to remain with the borrower.

### ***After repossession***

Within 14 days after repossession the lender must give the debtor a written notice under section 94 of the Consumer Credit Code stating:

- the estimated value of the goods;
- the enforcement expenses that have and will accrue;
- a statement of rights and obligations as required under the Consumer Credit Regulations; and
- that the debtor has 21 days from the date of the notice to redeem the goods, after which they will be sold.

A section 94 notice must be in Form 8 of the Consumer Credit Regulations (see section 11.5 below for a sample **Form 8**).

### ***Compensation***

Your client may apply for compensation under section 98 of the Consumer Credit Code if the goods were sold for less than the best price reasonably obtainable. Section 98 (Compensation to mortgagor) provides that:

- (1) The Court, on application by a mortgagor, may order a credit provider to credit the mortgagor with a payment, fixed by the Court, exceeding the net proceeds of sale if it is not satisfied that the credit provider sold the goods as soon as reasonably practicable, or at a time agreed between the credit provider and the mortgagor, for the best price reasonably obtainable.
- (2) On application by a mortgagor, the mortgagee under any prior mortgage to which the goods are subject or the mortgagee under any subsequent mortgage of which the

credit provider has notice, the Court, if not satisfied that the credit provider exercised its power of sale in accordance with this Division, may make an order requiring the credit provider to compensate the mortgagor or the relevant mortgagee for any loss suffered as a result.

- (3) The onus of proving that a power of sale was exercised in accordance with this Division is on the credit provider that exercised it.

However, note that, particularly in the case of motor vehicles, lenders will be entitled to sell goods at auctions at wholesale prices, which will be far less than retail price. So while a client may be outraged at the low price obtained for the vehicle when sold at auction, it will rarely be grounds for claiming compensation.

You can check average prices of motor vehicles at <http://www.redbook.com.au>.

### ***Unreasonable enforcement expenses***

If your client falls into default of payment under a loan, then enforcement expenses and default interest will usually increase the balance of the loan. Sometimes enforcement expenses can be very considerable. They can include the cost of hiring a repossession agent or debt collector to visit the borrower's home or make phone calls to the borrower, or the cost of hiring a tow truck driver to assist in repossessing a vehicle

In certain circumstances, enforcement expenses charged to your client may be unreasonable and excessive. For example, if an agent has made a number of fruitless visits to an address that your client had disclosed on the contract, then each of those visits will be charged to the contract. If it can be proved that your client advised the lender of a new residence and the lender was incorrect in sending the agent to the old address, then all expenses associated with the visits to the old address may be unreasonably incurred.

Conversely, if the fruitless visits were the result of your client failing to advise of a new address, then the expenses may be recoverable lawfully.

If unreasonable enforcement expenses have been charged to your client, then your client can apply to the Credit List of VCAT under section 99 of the Consumer Credit Code asking for a determination of their liability or a refund of amounts already paid (see *St George Bank v McCormack* [2008] SASC 8).

## **2.7 Mortgage minimisation**

### ***Is refinancing necessary to get a 'better' loan product?***

Some of your clients may mention that they are looking into the refinancing option. However, refinancing might not necessarily benefit your client.

Refinancing ensures that a mortgage minimisation business can take its fee (from the proceeds of the loan) and will also earn the broker a commission. Your client should be wary of any broker or business that tells them (or somehow suggests) that it is necessary for them to refinance their home loan to achieve significant savings. Furthermore, the broker or business might be engaging in misleading and deceptive conduct and so be breaching the *Trade Practices Act 1974* (Cth).

### ***Analysing the mortgage minimisation plan***

Mortgage minimisation plans can be very confusing (and sometimes this confusion is deliberate!). If your client has been given a plan, then try to analyse where the 'savings' are coming from.

If the home loan is the only debt refinanced, then:

- identify the monthly amount allocated in the plan to pay the home loan (most of these plans do not specify what this amount is so you might need to work it out by deducting the estimated monthly expenses from the stated monthly income);
- using this amount as the home loan payment, calculate the time in which the current home loan will be repaid if this amount were paid to your client's current loan (you can do this with a home loan calculator such as [http://www.commbank.com.au/personal/other/useful\\_tools.asp](http://www.commbank.com.au/personal/other/useful_tools.asp); or <http://www.yourmortgage.com.au/calculators/>);
- compare these results to the 'savings' offered in the 'new' plan and check to see if there is any difference.

If the plan includes refinancing (consolidation) of other debts as well as the home loan, then:

- identify the monthly amount allocated to home loan and debt payments in the plan (deduct the estimated monthly expenses estimate from the monthly income);
- using spreadsheet software such as Excel, allocate that monthly amount across all debts, calculating when each debt will be finalised and then allocating the 'spare' funds to another debt such as the home loan; and
- compare how long it will take to finalise debts against the proposed debt reduction program.

In both cases, your client will usually be better off without refinancing due to the costs in obtaining the new loan, paying out the current home loan and paying fees to the debt reduction firm. However, you are not a financial adviser and you should encourage your client to obtain financial advice or financial counselling.

## **2.8 Credit card debt problems**

Over commitment on credit cards is a common problem that can arise through sudden loss of income (but also through irresponsible marketing of credit cards and continued offers to increase credit limits). Often clients accumulate a credit card debt they can't pay or they continue to accept increased credit limits. Frequently, legal action may have been threatened by the lender for non-payment.

### ***Should your client pay the credit card debt?***

Before you give advice, obtain instructions about your client's personal circumstances.

#### **1. Client is a Centrelink recipient with no assets**

If your client's sole source of income is a Centrelink pension and they have no assets other than normal household goods (that is, they do not own a home or a car worth more than \$6000), then they can choose not to pay because even if a lender

were to sue them for the debt, and get a court order, a court will not order that they repay the lender from their pension (in essence, the client is 'judgment proof').

If a debt collector requests payment, then you should write a simple letter (that does not acknowledge the debt is owed) stating that:

- your client is a Centrelink recipient with no assets;
- any court action to recover the debt will therefore be unsuccessful; and
- therefore no further contact should be made.

However, the debt does not go away; it continues to grow. This is not an issue for someone who has no expectations of earning an income or acquiring significant assets in the future. But you must advise your client that if they return to the workforce, then the lender may obtain an order for instalments from salary, or an order to sell any goods acquired that are not normal household items (see further at section 9 below).

Your client cannot be jailed for not paying a debt. However, if the debt is not paid (or even if it is paid late), then the lender may list a default on your client's credit report. See further at section 6 below.

## **2. Client has a mental illness or drug or alcohol addiction issues**

If your client has a mental illness or problems with drugs or alcohol, then they may have rights under the Consumer Credit Code to challenge the credit card contract that they entered into. However, this option could be expensive and time consuming and the client may lose.

Another avenue is to approach the hardship committee at the credit card company suggesting either that the company quash the debt or install a very generous payment plan. You will require your client's reports from case workers, family members and a psychiatrist to create a history.

Once you have obtained the necessary details from your client, draft a letter to the credit card company outlining your client's circumstances. Explain that your client has no money, is suffering from a mental illness and, if applicable, that your client instructs you that they received the card in circumstances where they were under the influence of a substance or in some way affected by their mental illness. If you have not obtained all relevant reports, then inform the credit card company that you are currently gathering reports from case workers, family members and a psychiatrist for the hardship committee's consideration of the matter.

See section 11.4 below for the sample **letter to credit card company**.

## **3 Client has a low income or minimal assets**

If your client has an income other than a Centrelink pension, then once the lender has a court order for payment of the debt the lender can get an order that the debt be repaid from your client's wages or, if your client has assets other than normal household items, an order to seize and sell those goods.

You should keep in mind that some debts are not legally enforceable and, even if they are, there may be good reasons for a lender to accept a lower amount to settle the matter.

Bankruptcy is also an option to be considered. While it will not protect goods other than normal household items, it will protect a low or moderate income. A single bankrupt with no dependants can earn up to about \$39,000 a year net, before any money must be made available to pay lenders. Remember that bankruptcy lasts for three years only, so if a greater income is earned after that period, then it is irrelevant because the debt is cleared at the end of that time.

### ***What if the lender has been irresponsible?***

Unfortunately, there is little to stop lenders from providing credit irresponsibly.

However, if a lender has lent more than your client can afford to pay, then a complaint to the Banking and Financial Services Ombudsman (**BFSO**) may help. If a lender has lent outside its own guidelines (that is, more than they are supposed to, based on income), then the BFSO can require the bank to remove some of the interest.

A complaint may also be resolved by a reduction in the amount owing and an agreement to a lower repayment. However, if the borrower cannot pay anything, then this may not solve the problem.

To access a BFSO Online Dispute Form, see

<http://www.bfso.org.au/ABIOWeb/ABIOWebsite.nsf/CComplaints?openform>.

## **3. Disputes with Utility Companies**

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Your client may have a debt arising from the supply of water or energy to their property (see section 3.1) or with a telephone company (see section 3.2).

### **3.1 Water and energy debt**

If your client has an issue that is related to a **water debt**, then before you take any steps consider your client's rights under the Water Customer Service Code, found at:

[http://www.esc.vic.gov.au/NR/rdonlyres/2754B50B-4C87-4F99-BE27-DEC98420F655/0/CODCustomerServiceCodeforMetropolitanRetailandRegionalWaterBusinesses\\_20070704.pdf](http://www.esc.vic.gov.au/NR/rdonlyres/2754B50B-4C87-4F99-BE27-DEC98420F655/0/CODCustomerServiceCodeforMetropolitanRetailandRegionalWaterBusinesses_20070704.pdf).

For an **energy related debt**, your client has rights under the Energy Retail Code and other consumer protections. See <http://www.esc.vic.gov.au/NR/rdonlyres/638A442B-14B2-45D8-9AFD>

[041616E521EC/0/October2007EnergyRetailCodeVersion420071018.pdf](http://www.esc.vic.gov.au/NR/rdonlyres/638A442B-14B2-45D8-9AFD041616E521EC/0/October2007EnergyRetailCodeVersion420071018.pdf).

Once you have checked out these rights, then you should take the following steps:

## 1. Ask for information

- Tell your client's company/supplier that your client is having payment difficulties (see section 11.6 below for sample **letter offering lower repayment** and section 11.7 for sample **letter offering nil or token payment**).
- The company/supplier must then provide your client with information about concessions and utility relief grants.
- For an energy dispute, the company should also provide you with information on energy efficiency and the availability of financial counsellors in the client's geographical area.
- For a water dispute, the supplier should refer your client to a free and independent financial counsellor in their area.

## 2. Ask for a payment plan that your client can afford

- The company/supplier should offer your client a plan by which your client can pay what they owe in instalments. Check if your client has already been on two or more instalment plans in the last year. If your client did not stick to them, then it is unlikely that a supplier will consent to a further payment plan. If it is for an energy debt, then (unless they have already been on two or more instalment plans in the last year and did not stick to them) your client has the right to such a plan.
- The company/supplier should take into account your client's capacity to pay (that is, what they can afford to pay each week or fortnight), not just what they want your client to pay.
- If the company/supplier won't offer your client a plan that your client can afford, ask to see their calculations about what they think your client can afford so that you can check that the calculations are correct.

## 3. Ask about the water company's hardship policy

- Your client may have rights under the company/supplier's hardship policy.
- All hardship policies for **water debt** are available on water company's websites. See, for example:
  - <http://www.citywestwater.com.au/search.aspx?searchText=hardship>;
  - [http://www.gywater.vic.gov.au/my\\_account/assistance/Hardship.asp](http://www.gywater.vic.gov.au/my_account/assistance/Hardship.asp);
  - <http://www.nerwa.vic.gov.au/customer/hardship.htm>; and
  - [http://www.southeastwater.com.au/SiteCollectionDocuments/My%20account%20docs/Financial\\_Hardship\\_Guideline.pdf](http://www.southeastwater.com.au/SiteCollectionDocuments/My%20account%20docs/Financial_Hardship_Guideline.pdf).
- All **energy** companies are required to have a financial hardship policy that is available on their websites. See, for example:  
<http://www.esc.vic.gov.au/NR/rdonlyres/947C7BEC-B451-416F-ADB9-353DCA47F6E9/0/OTHApprovalOfHardshipPoliciesforwebsite20070723.pdf>
- Financial hardship policies must include flexible options for paying bills, provisions for auditing customers' usage, flexible options for purchasing

replacement energy appliances (for energy companies) and processes for early responses to payment difficulties.

- Your client cannot be restricted from supply if they are complying with a hardship policy.

#### **4. Get your client some advice and/or financial assistance**

- Your client may be entitled to a concession on their bills if they hold a Pensioner or Health Care Card. Ask the company how to apply for a concession.
- Your client may want to apply for a once-off utility relief grant (**URG**) to help pay their current bill. Ask the company/supplier how to apply for a URG. The company/supplier must not restrict supply if your client has applied for a URG and is waiting for a decision.
- Tell your client to see a financial counsellor if they need help with arranging their finances.

#### **5. Contact the Energy and Water Ombudsman Victoria (EWOV) if your client cannot resolve the problem with the company**

- EWOV can help your client resolve a problem with the company/supplier, including if they are finding it hard to pay a bill or the company/supplier will not offer a payment plan that they can afford. EWOV will help free of charge. The company/supplier must not restrict the water supply if your client has made a complaint to EWOV and the complaint has not yet been resolved.
- Your client must try to resolve their problem with the company before EWOV can help. You should call the company more than once. Call EWOV again if the company still will not help.

#### ***Your client's rights to water and energy***

- **Credit history**

A water supplier or energy company cannot refuse to connect your client because of their credit history.

- **Refundable advances**

A **water supplier** cannot demand that your client pay a refundable advance (that is, an amount paid before the client gets a bill, as security in case they do not pay).

However, an **energy company** can ask your client to pay a refundable advance in some circumstances. This is an amount that the company asks customers to pay before they get a bill, as security in case they do not pay.

The **energy company** can ask your client to pay only up to 37.5% of the amount they were billed for electricity or gas over the last year, or 25% if they are on a dual fuel contract. (If the company does not know how much the client was billed, then it can ask them to pay up to the relevant proportion of the average amount the company billed domestic customers over the last year.)

If the **energy company** asks your client to pay a refundable advance, then you should ask why. If your client cannot afford to pay this amount, then they should get

help straight away. The energy company may not be entitled to ask them to pay this amount or there may be other ways to deal with the company, including accepting an instalment payment plan instead.

- **Restriction of water supply**

Your client's water supply can be restricted for not paying a bill.

However, the water supplier can restrict the water supply only if it has taken several steps first. For example, the water supplier must send your client a reminder and then a warning that they may be restricted. It must also offer an instalment payment plan to your client.

The supplier must not restrict the water supply if:

- it is a Friday, Saturday, Sunday, public holiday, the day before a public holiday or after 3.00pm on any other day;
- the amount owed is less than \$120;
- your client is on their first instalment plan;
- your client has made a complaint to EWOV and it has not yet been resolved;
- your client has applied for an URG and the application has not yet been decided;
- your client is renting and the amount owed to the company is owed by their landlord, not them; or
- they are registered as a special needs customer (that is, they need water for a life support machine).

If the water supply is going to be restricted, or if it has been restricted, then your client should get help straight away.

- **Disconnection of energy (electricity and gas) supply**

Your client can be disconnected for not paying an energy bill or for not paying a refundable advance.

However, the energy company can only disconnect your client if it has taken several steps first. For example, the company must send them a disconnection notice warning that they will be disconnected. It should also offer an instalment payment plan.

The company must not disconnect your client if:

- it is a Friday, Saturday, Sunday, public holiday, the day before a public holiday or after 2.00pm on any other day;
- the amount owed is less than a certain amount;
- they are on their first instalment plan;
- they have made a complaint to EWOV and it has not yet been resolved;
- they have applied for a URG and the application has not yet been decided;
- they are renting and the amount owed to the company is owed by the landlord;

- for **electricity**, their address is registered with the company as a life support machine supply address (that is, they need electricity to run a life support machine); or
- for **gas**, their address is registered with the company as a medical exemption supply address (that is, they need gas for medical reasons — for example, to power a heart machine).

If your client is going to be disconnected, or if they have been disconnected, then they should get help straight away.

As from 1 January 2005 your client may be eligible for a wrongful disconnection payment if they have been disconnected contrary to the provisions of the Energy Retail Code.

If you believe your client has been wrongfully disconnected, then you should first approach the retailer. If this is unsuccessful, then you can make a complaint to EWOV. If EWOV is unable to resolve the claim with the agreement of both your client and the retailer, then it will refer it to the Essential Services Commission which will then make a decision.

- **Removal of water restriction**

If the water supply is restricted for failure to pay a bill, then the water supplier must remove the restriction within 24 hours if the bill is paid.

- **Reconnection to energy**

If your client is disconnected because they did not pay a bill, then the company must reconnect them if, within 10 days, they pay the bill or agree on how the bill will be paid.

If your client is disconnected because they did not pay a refundable advance, then the company must reconnect them if, within 10 days, they pay the refundable advance.

- **Caravan park residents and rooming house/ boarding house residents**

Your client may not have all the rights described above if they are a **caravan park resident** and are billed for electricity, gas or water directly by the property owner or manager, and not by the electricity/gas company or water supplier. However, your client must not be charged more than the utility company charged for their use of electricity, gas or water.

If your client is a **rooming house resident**, then the rooming house owner cannot charge them for electricity, gas or water consumed in their room if they live in a shared room or if the room is not separately metered. If the room is separately metered, then the rooming house owner can charge for electricity, gas or water used in their room. However, your client must not be charged more than the utility company charged for their use of electricity, gas or water.

If you are not sure of your client's rights, then you should contact the Tenants Union of Victoria (tel: (03) 9416 2577).

### 3.2 Telephone or mobile debt

If a telephone company claims that your client owes a debt, then the onus is on the company to prove that your client owes it.

If your client cannot afford to pay their mobile phone bill by the due date, then contact the telephone company straight away on their behalf and negotiate a repayment plan. See the two sample **letters offering repayment plan** in section 11.8 and 11.9 below.

If you have difficulties in negotiating an affordable repayment plan for your client, then contact the Telecommunications Industry Ombudsman (**TIO**). See section 10 below for contact details.

If the bill is not paid by the due date, then your client may be barred from making calls on their telephone, their contract may be cancelled (sometimes requiring them to pay a hefty cancellation fee) and a default listing may be made on your client's credit file. See section 6 below for information about credit reporting.

#### ***Debt due to hardship***

If your client is suffering hardship, then you could also argue that the TIO's policy on financial hardship requires the telephone company to put in place fair and affordable repayment arrangements in circumstances of financial hardship. See <http://www.tio.com.au/policies/Credit%20Management/Hardship.htm#hardship>.

#### ***Telstra debts***

If your client has a dispute with Alliance or Baycorp about the collection and credit report listing of Telstra debts, then call the Alliance Hotline on tel 1300 782 607.

Even if you have had problems dealing with Alliance, our experience so far suggests that the Hotline provides a reasonable service once you make the contact. If you call Alliance on any other number, you may have a great deal of difficulty receiving reasonable service.

If your client disputes or queries the claim against them, then insist that Alliance provide copies of documentation supporting its claim. Alliance should do this without sending you back to Telstra. Generally, you should insist on receiving this documentation from Alliance before you provide any documentation to them. You might point out (if legal action has been threatened against your client) that your client will not be able to be sued successfully without such documentation.

#### ***What if your client is unwilling to settle a mobile bill due to inadequate services?***

If your client is unwilling to settle a mobile bill due to inadequate services, then you should:

- obtain clear instructions from your client about the inadequate services; and
- write to the telephone company, raise the issues and offer a settlement sum if your client is willing to settle the matter in some way.

## **Example**

### **Unexpected high bill and door-to-door sales**

Christine is a young consumer on a low-income. She entered into a two-year mobile phone contract when a door-to-door salesperson came to her flat. The contract included a phone and a cost of \$40 per month plus call charges. Christine was not provided with a written contract or any notice of the cooling-off period that applies under the *Fair Trading Act 1999* (Vic).

Christine used the phone to make calls to a friend who was travelling overseas and her first bill was over \$800. She contacted the mobile phone company to try to negotiate a payment plan. She was told that she would have to pay \$100 a week and that she would be disconnected from the service if she did not pay on time. Christine would then be liable for all of the remaining monthly payments under the contract immediately.

Christine cannot afford to pay \$100 per week.

### **What can you do to help Christine?**

If Christine wants to keep the phone, then you could try to negotiate directly with the company to put in place an affordable repayment plan for the unexpectedly high bill, while Christine remains connected to the service.

You could argue that the TIO's policy on financial hardship (see <http://www.tio.com.au/policies/Credit%20Management/Hardship.htm#hardship>) requires telecommunications companies to put in place fair and affordable repayment arrangements where there is financial hardship.

### **What if Christine wants to get out of the contract?**

If Christine wants to cancel the contract, then she may have the right to cancel within six months of entering it because the company failed to provide a written contract or a notice of the cooling-off period, in breach of section 61 of the *Fair Trading Act 1999* (Vic).

To do this, Christine must cancel the contract in writing and return the phone.

If the company won't agree to cancel the contract, then Christine could complain to the TIO or make an application to the Civil Claims List at VCAT.

For a claim form relating to a credit dispute arising out of the Consumer Credit Code, see [http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/credit\\_list/\\$file/form2-credit.pdf](http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/credit_list/$file/form2-credit.pdf).

### **What if the company won't resolve the matter fairly?**

Make a complaint to the TIO. See section 10 below for contact details.

## 4. Managing Debt

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### 4.1 What you can do to help a client struggling with debt

If your client is struggling with debt, then you can assist them yourself or make an appointment with a financial counsellor, who will assist with the steps below:

#### 1. Explain the basics to your client

- Explain that you understand it may be difficult for your client to discuss financial difficulties but it is only when you have a full picture of the situation that you can effectively help.
- Once your client is clear about what information you expect as well as what you can be expected to do for them, and is comfortable, then talk through the client's financial situation and their options. If your client has not brought all relevant documentation, then you may need to arrange another appointment for the client to bring in all the relevant papers.

#### 2. Work out what your client's financial situation is

- Check to ensure your client is receiving all funding, social security benefits etc, to which they are entitled.
- Assuming you have all the documentation, work out what your client owes and to whom, using the **statement of finances** in section 11.10 below.
- Write down all of the client's income (after tax), either weekly, fortnightly or monthly; then work out their costs over that same time. Include regular bills such as electricity, gas and telephone.
- Write down all unpaid bills in the **creditor listing** table (in section 11.11 below):
  - Remember to list all your client's debts and potential debts.
  - Note that if your client is a small business operator and has not formed a company, then your client is responsible for the business debts as well as personal debts.
  - If your client has a business partner, then your client will be jointly and severally liable for the debts of the business.
  - If your client was running a company, then you need to work out which debts are owed by the company and which by your client personally (for example, your client may have stood as guarantor for the company's debts).
- You also need to consider what assets your client has, such as a car or superannuation entitlements (if any). You may need to get advice on which assets to try to protect and which can be sold or converted into cash to pay your client's debts.

#### 3. Make a plan or budget

- Draw up a plan or budget with your client. Discuss any ways in which the client could reduce their expenditure.

- Consider whether your client can have any of their debts waived or reduced.
- Clarify the priority debts and help your client, as far as is possible, to ascertain how to meet those payments. Explain to your client that while the greatest temptation is to pay the creditors who hassle them the most, it is better to deal with all their debts in a planned way.
- If your client cannot pay all bills when they are due, but you think your client could pay them if they were given more time, then try to work out a realistic plan to put to your client's creditors.
- Work out, from looking at your client's budget, how much the client can realistically afford to offer each or some of the creditors.
- In preparing the plan, keep in mind the steps your client's creditors may have taken to protect the money they lent to your client. For example, has your client given a mortgage over their house or vehicle? If they have, then work out how much equity they have in that property. Their equity is the value of the property less the amount owed to the creditor who has the mortgage. If they have a lot of equity, then the creditors may give them more time to pay or may accept lower payments for a time. This is because the value of the debt can still be recovered from the property. If your client has little or no equity, then the creditors might be less likely to give them time.
- Check to see if anyone else has said they will pay your client's debt if they cannot. If they have, and have not paid what is owing, then the creditor will probably demand payment from the 'guarantor'. If the guarantor gave a mortgage over their house, then the creditor could sell the house if the guarantor cannot pay what your client owes. If the guarantor is involved in the repayment plan and the creditor believes the debt is adequately secured by your client or the guarantor, then the creditor may agree to the plan.
- Explain how your client can negotiate with all creditors and try to get the creditors to suspend legal action, freeze interest if this is being charged and accept realistic payments, so that your client is either equipped to do this or, if the client prefers, you can negotiate on the client's behalf.

#### 4.2 What if the creditors reject your client's payment plan?

You cannot force creditors to accept a plan. If they reject it, then they will need to take action to recover the money owed.

**Secured creditors** who are not prepared to give your client more time will probably take steps to enforce their security (for example, by seizing and selling the asset over which they have security).

**Unsecured creditors** (that is, creditors who do not hold security or a mortgage over property) might go to court and ask for an order that says your client has to pay them.

#### 4.3 Watch out for dubious offers of help

See also section 2.7 above. Your client should be careful of uninvited offers of help. Some organisations may offer to negotiate with creditors and to restructure debts for a fee. They usually make contact after the client has been sued.

Some of these organisations may be responsible and trustworthy but others are not. Encourage your client to check an organisation's background before using it. Your clients can check with Consumer Affairs Victoria to see if there have been adverse reports about any organisation (tel: 1300 55 81 81).

Government-funded financial counselling services give free assistance to people who are in financial difficulty. The counsellor can look at your client's financial situation, their options and the likely outcomes.

For a list of various government-funded financial counselling services, see [http://www.facsia.gov.au/internet/facsinternet.nsf/family/cfcp-commonwealth\\_financial\\_counselling\\_program.htm](http://www.facsia.gov.au/internet/facsinternet.nsf/family/cfcp-commonwealth_financial_counselling_program.htm).

See also section 11.10, 11.11 and 11.12 below for a sample **statement of finances**, sample **creditor listing** and sample **asset listing**, all of which you can discuss with your client.

### 5. Does Your Client Have to Pay an Old Debt? Is It Statute-barred?

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If your client comes to you with a debt that is more than six years old, then first check to see if the debt is statute-barred.

#### 5.1 Simple contract debts

Under the *Limitation of Actions Act 1958* (Vic), a creditor gets only a limited amount of time to sue a debtor for a **simple contract**. Most client debts arise from simple contracts. If a creditor does not bring court action against your client within the relevant time limit, then the debt is **statute-barred** and your client has a complete defence to any court action brought against them.

So unless the creditor can provide evidence to show why the debt is not statute-barred, your client will not have to pay the debt. Remember, it is up to your client to raise the defence. If they do nothing, then the creditor may get a court judgment and your client must then repay the debt.

Time under the *Limitation of Actions Act* starts to run from the date your client:

- should have made a payment;
- last made a payment; or
- your client's representative acknowledged in writing (an **admission**) that your client owes the debt.

If **six years** has expired since the most recent of these events, then the debt is statute-barred. While this does not mean that the creditor cannot ask your client to pay the debt, it does mean that if the creditor seeks to sue your client in court for payment, then your client will have a complete defence.

## 5.2 What if a creditor or debt collector contacts your client about an old debt?

If a creditor or debt collector contacts your client about an old debt, then you should do the following:

### 1. Ascertain the details of the debt

If your client thinks it might be more than six years since they last made a payment on the debt, or acknowledged the debt in writing, and they are not aware that any court judgment has been made, then advise them:

- *not* to make a repayment;
- *not* to agree that they owe the debt; and
- to ask the debt collector or lender to provide copies of the loan contract and the account statements.

### 2. Confirm whether the debt is statute-barred

Confirm that your client's debt is statute-barred by reviewing the contract between your client and the creditor and any account statements.

### 3. Advise the creditor or debt collector

If your client's debt is statute-barred, then advise your client to tell the creditor or debt collector of this so that your client will no longer be contacted about the matter. See also section 11.13 and 11.14 below for sample **letters regarding statute-barring**.

### 4. Consider whether there has been misleading and deceptive conduct or unconscionable conduct

Advise your client that where a creditor or debt collector represents that legal action will or may be taken in relation to a statute-barred debt, when the debtor has not had the opportunity to obtain legal advice, then the creditor or debt collector may be engaging in misleading and deceptive or unconscionable conduct.

In *Collection House Limited v Taylor* [2004] VSC 49 a debt collector was held to have engaged in unconscionable conduct in breach of section 7 of the *Fair Trading Act 1999* (Vic) when pursuing a statute-barred debt. At the time of accepting the \$5000, the debt collector knew or at least suspected that the debtor was ignorant of the limitation period, impecunious and suffering from emotional difficulties. This entitled the debtor to be repaid \$5000 that she had paid to the debt collector using her credit card to settle the debt.

## 5.3 Other tips

Preserve all the relevant evidence. Advise your client to keep:

- notes of all telephone conversations they had with the debt collector or lender about an old debt;
- any letters, emails or notices from the creditor or debt collector;
- copies of any letters or emails sent to the creditor or debt collector.

Also inform your client that a credit provider cannot make a default listing in relation to a statute-barred debt (paragraph 2.4 of the Credit Reporting Code of Conduct, which is a legally binding code issued by the Privacy Commissioner — see further below).

### **Credit Reporting Code of Conduct**

A credit provider must not give to a credit reporting agency information about an individual being overdue in making a payment where recovery of the debt by the credit provider is barred by the statute of limitations.

## **5.4 Judgment debts**

After a court order or judgment is made, a creditor has 15 years to recover, enforce or carry out the debt. However, after 15 years has passed, leave is required before the creditor can take any action to enforce the judgement (*Dennehy v Reasonable Endeavours Pty Ltd* [2003] FCAFC 158).

You can find out if a court judgment has been entered against your client in the Magistrates' Court of Victoria by:

- contacting the Magistrates' Court Melbourne (tel: 03 9628 7777 or email [info@magistratescourt.vic.gov.au](mailto:info@magistratescourt.vic.gov.au)). Remember it is possible that judgment might have been entered in another court or interstate;
- asking the debt collector or lender for the court judgment number and checking that with the court; or
- getting your client's credit report and checking if a judgment is recorded.

Don't accept a debt collector's word that judgment has been entered against your client. If a judgment has been entered, then your client should have received court documents informing them that the debt collector or lender had commenced legal proceedings and a copy of the judgment.

## **5.5 Mortgage debt**

If the debt relates to a mortgage over a property, then a 15-year limitation period applies.

# **6. Credit Rating or Reporting**

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## **6.1 What is a credit report/rating or a credit reporting agency?**

Individuals in Australia do not have a formal credit rating. However, information about borrowing and credit history is collected by a number of agencies. These agencies are called **credit reporting agencies**. They are private, non-government companies.

The most common credit reporting agencies used by financial institutions are Veda Advantage/ Baycorp Advantage Limited and Dun & Bradstreet.

## **6.2 What is a credit report?**

A credit report or, more technically, a credit information file, is information held by a credit reporting agency about an individual's or company's credit history. This credit history will encompass:

- identifying information — such as name, address(es) on record, date of birth and driver's licence number;
- details of any applications made for credit, even if these did not go ahead. These could include applications for loans, credit cards, mobile phones and interest-free purchases (too many applications for credit is a reason used by some credit providers to refuse you credit);
- details of some current credit accounts;
- any overdue or bad debts (being debts more than 60 days overdue) reported to the agency by its members and subscribers (mostly credit providers). If the debt is paid after being reported, then the creditor must report this;
- serious credit infringements (noted as **clearout**);
- defaults. Default listing can be made if:
  - the consumer is 60 days or more in arrears;
  - the creditor has demanded the amount outstanding; and
  - the contract or other document has warned the creditor that they will be listed if in default for more than 60 days (this notification is often contained in the original terms and conditions of the contract with the credit provider or separately) or if your client dishonours the same cheque for not less than \$100 twice. See section 18E of the *Privacy Act 1988* (Cth).
- Court orders or judgments against your client in the last five years and any bankruptcy records for the last seven years.

Any potentially discriminatory information about income, criminal records, medical history, disabilities, race or ethnicity, sexual preferences, lifestyle, character, reputation or political, social or religious beliefs should not be included on a credit report.

### 6.3 Who looks at a credit report?

Credit information files are usually checked by lenders when assessing applications for credit. For example, if your client applies for a loan or credit card, then most financial institutions will run a **credit check** on your client by accessing your client's credit file. If default listings are on their report, then it may become harder for your client to obtain credit in the future (lenders will also give information to a credit reporting agency to include upon a credit information file.)

Your client's credit report can be looked at only by a credit provider and *only with your client's agreement*. Your client can refuse to agree to a credit check when applying for credit, but then they will be unlikely to get any credit.

### 6.4 Relevant legislation and code

The relevant legislation and code are:

- the *Privacy Act 1988* (Cth), Part IIIA; and
- the Credit Reporting Code of Conduct.

### **6.5 Can your client get a copy of their credit report?**

An individual can get a copy of their file free of charge by writing to Veda Advantage/ Baycorp Advantage or Dun & Bradstreet (see section 10 below for contact details).

### **6.6 Can your client correct wrong information?**

Your client can correct information if it is wrong or no longer current.

Be aware that the agency will update its records from the information supplied in your client's application to amend the credit report and that your client's new address and other information will then be available to other subscriber members.

See section 11.15 below for sample **letter — wrong information**.

### **6.7 Complaints about credit reporting**

Complaints about credit reporting should be raised with Baycorp Advantage and with the creditor in question.

The federal Privacy Commissioner provides a forum for dispute resolution if the matter is unresolved (see section 10 below for contact details).

### **6.8 Avoiding a default listing**

It is important to note that lodgment of a default listing on your client's credit report is not part of the court process for recovery of a debt. This means that a credit provider does not have to automatically lodge a default listing even if it has the right to do so. If your client contacts a credit provider when they have failed to pay a debt, then they may be able to avoid having a default listing lodged if they enter into an arrangement to repay the debt.

However, once a default listing is lodged, then the only way to get it deleted from the credit report is to prove to the credit reporting agency that the credit provider did not validly list your client under section 18E of the *Privacy Act* or that the debt was statute-barred at the time it was listed.

If this cannot be done, then the best you can do is get a note attached to the credit report saying that your client has paid off the debt. A default listing cannot be removed just because the debt has subsequently been paid. Default listings stay on the credit report for five years from the date of listing, unless the default is classified as a 'serious credit infringement', in which case the listing will remain for seven years. The most common instance of such a classification is termed a **clearout**, where the debtor has moved house without notifying the creditor, who is thus unable to contact the debtor.

## 7. What if Your Client Has Been Sued for a Debt?

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### 7.1 Can a creditor take your client to court?

If your client has overdue debts, then creditors may believe that the best way of getting their money is to take the client to court and to get a court order. This gives the creditor further options to get the money back. For example, they can try to have money taken from your client's wages, take their goods or make them bankrupt.

A court action can be costly. If a court makes an order against your client, then your client will most likely have to pay the debt, the creditor's legal costs and interest on the debt.

### 7.2 Should your client get a warning before being sued?

Your client will not necessarily get a warning before being sued. Creditors will generally send a letter of demand to the client's last known address. The letter will ask them to pay the debts and tell them the creditor will sue if they do not pay. It is your client's responsibility to tell creditors of any change of address.

A letter of demand is not a court document. However, if your client does not pay the debt, or if other arrangements are not made, then the creditor may start court proceedings.

### 7.3 Court documents — complaints and writs

In the Magistrates' Court creditors start the legal process by issuing a complaint Form 4A (previously known as a default summons). The Magistrates' Court hears claims of up to \$100,000. If the claim is for a sum under \$10,000, then it will be arbitrated at the court.

In the County and Supreme Courts the document is known as a writ. The County Court hears claims up to \$200,000 and claims for \$200,000 and above are heard in the Supreme Court.

Regardless of which court is used, the document must show a court reference number, the court seal and the date the document was filed with the court. The court documents should also say what needs to be done to respond. (Beware of look-alike documents, which some creditors use to make client's think court action has been started when in fact it hasn't.)

### 7.4 How is a court document delivered?

Court documents can be delivered (that is, **served**) by an authorised person employed by the credit provider. The document can be delivered to your client almost anywhere. For example, it can be given in your client's house or at your client's work.

## 7.5 What should your client do if they get a court document?

If your client is served with a court document, then you and your client should read the document carefully and work out the time you have to respond.

Confirm that the document was properly issued and that it has a court number.

Check the court in which the claim is issued. The usual response times are as follows.

### ***Magistrates' Court***

You have 21 days from the date the complaint is served to enter a defence. If you do not enter a defence, then the creditor can apply to the court for judgment (that is, an order for the amount claimed) plus the costs of the complaint and interest.

### ***County Court or Supreme Court***

- **Appearance** — you have 10 days from the date the writ is delivered to file an appearance. This means you are telling the court you have their paperwork and you are doing something about it. If you do not file an appearance, then you will not be able to file a defence. Judgment may be entered against your client.
- **Defence** — once the appearance is lodged you have 30 days to file a defence. If you decide not to file a defence, then the creditor can apply for an order for the total claim, costs and interest. The court will then make the orders without a hearing.

## 7.6 Does your client have a defence?

Your client may have a defence if, for example:

- they did not receive the goods or services;
- they have already paid the debt;
- they were misled about what they were signing;
- the circumstances under which they signed the contract were unjust;
- the loan contract or 'guarantee' does not comply with legislation;
- they are not named in the loan contract or the guarantee or there is a case of mistaken identity;
- they are under 18 years old;
- they were a minor when the debt was created (see further at section 7.7 below);
- they did not have the mental capacity at the time the debt was created to enter into a debt (see further at section 7.8 below);
- the amount stated as owing is incorrect (bearing in mind that the court will allow the creditor to amend the amount if there is an accidental error);
- the court action against your client has been started outside the time limit allowed to the creditor to take action, that is:
  - actions founded on contract and tort may not be brought after the expiration of six years from the date on which the cause of action accrued (section 5 of the *Limitation of Actions Act 1958* (Vic));

- actions to recover debts secured over either real or personal property have a statutory limitation of 15 years (section 20 of the *Limitation of Actions Act 1958*); and
- if a court order has been made, then the time period is 15 years from the date of the order (section 5 of the *Limitation of Actions Act 1958*).

### 7.7 Contract with a minor

The common law rule is that a **minor** (a person under the age of 18 years) is not bound by a contract. However, this rule does not apply where the contract is for the supply of **necessaries** (that is, necessary goods or services).

In Victoria a creditor can recover from a minor the value of the necessaries supplied to them even though the minor lacks capacity to contract. Therefore minors may bind themselves to pay for necessary meat, drinks, apparel, necessary medicine and other such necessary goods, and likewise for their teaching or instruction.

Section 49 of the *Supreme Court Act 1986* (Vic) provides that contracts for the payment of goods supplied or to be supplied to minors, other than contracts for necessaries, are void.

### 7.8 Mental capacity

At common law a person will be able to avoid their liabilities under a contract if they can show that:

- they were suffering from such a degree of mental disability or intoxication at the time of making the contract that they were incapable of understanding that contract; and
- the other party to the contract was aware, or ought to have been aware, of this.

### 7.9 What if your client wants to admit the claim?

If your client agrees that the debt is owing, then you should:

- try to enter into a written agreement with the creditor to pay by instalments; and
- ensure that the creditor files a notice of discontinuance with the court, which will stop the court action against your client.

### 7.10 Entering a defence

If your client does not agree to the debt, or part of it, then you should file a defence. This should happen even if you are discussing settlement with the creditor/plaintiff.

If your client enters a defence, then the court will usually set a time for a mediation or a pre-hearing conference.

If the matter is still not resolved at the mediation or pre-hearing conference, then your client must go to court for a hearing.

Very small claims (under \$10,000) in the Magistrates' Court may be sent directly to arbitration, where a decision will be made straight after hearing the evidence. The arbitration decision is binding on the parties.

### 7.11 What if your client does not enter a defence?

If your client has been served with a complaint or writ and does not enter a defence, then the creditor may apply to the court for a judgment to be made against your client.

The application will be for the amount of the debt, plus contractual interest, interest starting from the date of the court proceedings and costs calculated on a court scale (unless otherwise provided for in the contract).

There will be no hearing. Court officers will handle the application and the judgment will be entered into the court records. Your client will not be told about the judgment by the court or the creditor/plaintiff's lawyers.

### 7.12 Can your client get a court order or judgment set aside?

If your client did not file a notice of defence or attend court on the day of the hearing, then they may be able to apply to the court to set aside the order and to rehear the case.

#### ***Magistrates' Court***

An application for a rehearing is an application heard before a Magistrate to set aside the final order made against your client in their absence. It is not a hearing of the proceeding itself. If your client's application is successful, then the final order will be removed, allowing the proceeding to go on to hearing at a later stage.

If your client's name is on a credit reference list due to a judgment entered against them, then, even though they have paid the debt in full, the only means of removing the credit reference is to remove the final order from the court record. That is, your client must bring an application for rehearing and convince a Magistrate that the final order should not have been made.

Applications must be filed at the court where the original order was made. You will need to:

- prepare a sworn statement (that is, an **affidavit**) that shows that your client has a defence;
- include in the affidavit an explanation about why your client did not enter a defence or attend court and why it has taken until now to apply to the court; and
- show that the creditor will not be disadvantaged (that is, **prejudiced**) by having the first court order set aside.

Usually your client will have to pay the creditor's expenses in trying to enforce the order.

At least 14 days before the day specified in the application, a copy of the application and of any affidavit in support upon which the applicant intends to rely must be served on the other party or parties at their address for service in the complaint or notice of defence (as the case may be) unless the court otherwise orders.

You can find the Magistrates' Court **Form 30A — Application for Rehearing Precedent** at

<http://www.magistratescourt.vic.gov.au/CA256CD30010D864/page/Practice+%26+Procedure-Court+Forms?OpenDocument&1=15-Practice+%26+Procedure~&2=20-Court+Forms~&3=~>.

## 8. Debt Collectors

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Many creditors refer overdue or bad debts to a debt collection agency.

If your client is contacted by a debt collector, then you should confirm whether your client owes a creditor money.

If your client does owe money, then you should consider whether they have been appropriately approached by the debt collector. If your client has been subjected to harassment, then:

- advise your client to write down what is said to them, the name of the person, date and time;
- write a letter to the debt collection agency setting out that the contact is not acceptable and that any further communication must be in writing; and
- keep a copy of the letter.

If this does not work, then raise your client's concerns with the Australian Securities and Investments Commission (**ASIC**), the Australian Competition and Consumer Commission (**ACCC**), the BFSO or the CUDRC.

### 8.1 Debt Collection Guideline

As a guide to appropriate debt collection practices, see the *Debt Collection Guideline for Collectors & Creditors (the Guideline)* developed by the ACCC and ASIC in 2005 (at <http://www.accc.gov.au/content/index.phtml/itemId/733222>).

While the Guideline is not legally enforceable, it is a guide to industry about what the regulators consider to be fair debt collection practice and a guide to avoiding behaviour that might constitute harassment or misleading and deceptive conduct under the law.

The Guideline is also taken into account by external dispute resolution schemes when considering disputes about debt collection matters. Chapter 12 of Part 2 of the Guideline specifically outlines how a debt collector should behave if a debt is disputed.

### 8.2 Harassment is not permitted

Your client does not have to accept harassment from creditors or debt collectors (see section 60 of the *Trade Practices Act 1974* (Cth); *ACCC v McCaskey* [2000] FCA 1037 and *ACCC v Esanda* [2003] FCA 1225). Consumer Affairs Victoria has produced Debt Collection Guidelines in accordance with the *Fair Trading Act 1999* (Vic).

The following unacceptable tactics and conduct may constitute undue harassment and coercion by a debt collector:

- telephone calls, day and night, at work and home (for example, making more than three unsolicited telephone calls per week to a debtor);
- calls to the debtor's employer, family or a third party, revealing details the debtor might consider private and personal;
- calls to family members or friends, often suggesting that someone not responsible for the debt should pay it;

- intimidation and threats, including using abusive, threatening, offensive, obscene or discriminatory language and using, or threatening to use, violence or physical force;
- misleading and untrue statements about what might happen to the debtor if they do not pay;
- entering the debtor's home without permission and refusing to leave when asked;
- taking the debtor's household goods (unless it has a court order);
- communication with the debtor outside the hours of 7.30am to 9.00pm;
- visiting the debtor's place of work; and
- communicating directly with the debtor after being advised that the debtor's representative is acting in the matter.

See section 11.16 and 11.17 below for two sample **letters to debt collector** to explain a client's financial situation.

## 9. How Can a Creditor Recover Money Owed to It?

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### 9.1 Judgment debt recovery

If a court order is made in the Magistrates' Court, then a creditor may take further action to enforce the judgment debt. Interest on the debt will accrue from the date of the judgment under the *Penalty Interest Rates Act 1983* (Vic). The current penalty interest rate with effect on and from 1 October 2006 is 12% (as at 8 July 2008).

### 9.2 Secured creditor specifically

The secured creditor usually has to take steps to sell or realise the security first. If there is still an amount owing, then the secured creditor can also use remedies available to unsecured creditors (which are listed below), but only after the security has been sold and only for the amount still owing (if any) once the security has been sold.

### 9.3 Warrant to seize property

A warrant to seize property (under Rule 27.09 of the *Magistrates' Court Rules*) is an order by the court to the sheriff to seize and sell goods (non-secure items) belonging to the debtor unless the debtor pays the amount stated in the warrant. A debtor is entitled to refuse entry to the sheriff. The sheriff cannot seize any property that could not be taken from a bankrupt (see section 116 of the *Bankruptcy Act 1966* (Cth)). This protects necessary household items and a car worth less than \$6150 (this amount is indexed annually).

This is the most common form and least complicated enforcement procedure. The sheriff is directed to attend at the premises where the debtor has assets. If payment is not made, then the sheriff can seize assets belonging to the debtor sufficient to satisfy the debt. The sheriff will advise of the assets that can be seized.

To access the Magistrates Court **Form 27B — Warrant to Seize Property Precedent**, go to

<http://www.magistratescourt.vic.gov.au/CA256CD30010D864/page/Practice+%26+Proce>

<http://www.magistratescourt.vic.gov.au/CA256CD30010D864/page/Practice+%26+Procedure~&2=20-Court+Forms~&3=~>.

#### 9.4 Instalment orders

A judgment creditor or judgment debtor may apply to the court for an order to pay a judgment debt by instalments (see sections 5 to 12 of the *Judgment Debt Recovery Act 1984* (Vic)). Such an order will be made ex parte in chambers but may be subject to an objection by either party.

While not subject to any formal policy, an order will usually not be made unless the debt (if it is less than \$10,000) will be paid off within three years. Penalty interest on the debt will continue to accrue while the instalment order is in place.

If an instalment order is in place and is being complied with, or if a copy of an application for an instalment order has been served upon the judgment creditor, then all other methods of enforcement of the judgment are blocked.

An instalment order will not be made without the consent of the judgment debtor if they are a recipient of social security benefits (section 12 of the *Judgment Debt Recovery Act 1984*).

To access the Magistrates' Court **Form 28A — Application for Instalment Order Precedent**, go to

<http://www.magistratescourt.vic.gov.au/CA256CD30010D864/page/Practice+%26+Procedure~&2=20-Court+Forms~&3=~>.

#### 9.5 Attachment of earnings

A judgment creditor may apply to the court for an order compelling a debtor's employer to deduct instalments from the debtor's salary and pay them to the creditor (see Rule 27.13 of the *Magistrates' Court Rules*). This is called **attachment**.

Income received as a social security payment cannot be subject to attachment.

It is an offence for an employer to dismiss or alter an employee's position due to an attachment of earnings order (section 111 of the *Magistrates' Court Act 1989*).

To access the Magistrates' Court **Form 28A — Attachment of Earnings Summons Precedent**, go to

<http://www.magistratescourt.vic.gov.au/CA256CD30010D864/page/Practice+%26+Procedure~&2=20-Court+Forms~&3=~>.

#### 9.6 Attachment of debt

A judgment creditor may apply to the court for an order that a debt owed to the judgment debtor by a third party be paid directly to the creditor in satisfaction of the judgment debt (Rule 27.27 of the *Magistrates' Court Rules*).

An attachment of debt can be made against a bank account. An order for attachment of debt is known as a **garnishee order**.

## 9.7 Petition for bankruptcy

In brief, a creditor or group of creditors can request a court order (**petition**) for your client's bankruptcy. If the order is made, then your client must give control of their financial affairs to a bankruptcy trustee. The trustee is responsible for working out if, and how much, creditors can be paid.

Creditors will probably take this action if they believe your client has assets or that your client is avoiding paying a debt they are able to pay. Some creditors may see such action as punishment.

## 9.8 Oral examination

If the creditor is unsure about whether your client is employed or what assets they, then the registrar at the Magistrates' Court can issue a summons that directs your client to attend the court and provide details about their current financial situation (that is, their income, expenses, assets and liabilities). See Rule 27.12.1 of the *Magistrates' Court Rules* and sections 13 to 16 of the *Judgment Debt Recovery Act 1984*.

The summons will be accompanied by a series of questions set out in Form 27CC under the *Magistrates' Court Rules*. These questions should be completed before attending the examination, which will be conducted by the registrar, sometimes in the presence of the judgment creditor.

To access the Magistrates' Court **Form 27CA — Summons to Attend for Oral Examination Precedent** and **Form 27 CC — Examination of a Judgment Debtor Precedent**, go to

<http://www.magistratescourt.vic.gov.au/CA256CD30010D864/page/Practice+%26+Procedure-Court+Forms?OpenDocument&1=15-Practice+%26+Procedure~&2=20-Court+Forms~&3=~>.

## 9.9 Can a creditor send your client to jail for non-payment of a debt?

A creditor cannot send a debtor to jail simply because they owe the creditor a debt.

However, it is possible for a debtor to be sent to jail if the debtor ignores a specific direction or order of the court. This is the most common form and least complicated enforcement procedure.

## 10. Contacts

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### 10.1 Complaints and Dispute Resolution

#### **Banking and Financial Services Ombudsman**

GPO Box 3

Melbourne VIC 3001

Tel: 1300 78 08 08

Fax: (03) 9613 7345

Website: <http://www.abio.org.au>

**Financial Co-operative Dispute Resolution Scheme**

PO Box 372  
Clayfield QLD 4011  
Tel: 1300 139 220  
Email: [ombudsman@fcdrs.org.au](mailto:ombudsman@fcdrs.org.au)  
Website: <http://www.fcdrs.org.au>

**Telecommunications Industry Ombudsman**

Level 15, 114 William Street  
Melbourne 3000  
Tel: 1800 062 058  
Email: [tio@tio.com.au](mailto:tio@tio.com.au)  
Website: <http://www.tio.com.au>

**Energy and Water Ombudsman (Victoria) Ltd**

GPO Box 469  
Melbourne VIC 3001  
Freephone: 1800 500 509  
Freefax: 1800 500 549  
Interpreter: 131 450  
NRS: 133 677  
Email: [ewovinfo@ewov.com.au](mailto:ewovinfo@ewov.com.au)  
Website: <http://www.ewov.com.au/index.htm>

**Credit Union Dispute Resolution Centre**

GPO Box 3A  
Melbourne VIC 3001  
Tel: 1300 78 08 08 (shared call centre with the BFSO and FICS)  
Fax: (03) 9620 4446  
Email: [info@cudrc.com.au](mailto:info@ cudrc.com.au)  
Website: [www.cudrc.com.au](http://www.cudrc.com.au)

**The Ombudsman****Financial Co-operative Dispute Resolution Scheme**

PO Box 372  
Clayfield QLD 4011  
Tel: 1300 139 220  
Email: [ombudsman@fcdrs.org.au](mailto:ombudsman@fcdrs.org.au)  
Website: <http://www.fcdrs.org.au> (you can download complaint forms)  
(FCDRS also has building societies as members)

**Office of the Federal Privacy Commissioner**

GPO Box 5218  
Sydney NSW 2001  
Tel: 1300 363 992 (Privacy Hotline)  
Website: <http://www.privacy.gov.au>

## 10.2 Inquiries and assistance

### **PILCH Homeless Persons' Legal Clinic**

Tel: (03) 9225 6684

Website: <http://www.pilch.org.au>

### **Consumer Action Law Centre**

Tel: (03) 9670 5088

Legal Advice Line: (03) 9629 6300 or (03) 1300 881 020

Website: <http://consumeraction.org.au>

### **Financial and Consumer Rights Council**

Tel: (03) 9663 2000

1800 134 139 for country callers

Website: <http://www.vicnet.net.au/~fcrc>

### **Consumer Affairs Victoria**

Tel: (03) 9627 6454

Website: <http://www.consumer.vic.gov.au>

### **Insolvency & Trustee Service of Australia**

Tel: (03) 9272 4800

Website: <http://www.itsa.gov.au>

### **Telecommunications Industry Ombudsman**

Level 15, 114 William Street

Melbourne 3000

Tel: 1800 062 058

Email: [tio@tio.com.au](mailto:tio@tio.com.au)

Website: <http://www.tio.com.au> (you can also lodge complaints online)

## 10.3 Water related inquiries

### **Water Customer Service Code**

[http://www.esc.vic.gov.au/NR/rdonlyres/2754B50B-4C87-4F99-BE27-DEC98420F655/0/CODCustomerServiceCodeforMetropolitanRetailandRegionalWaterBusinesses\\_20070704.pdf](http://www.esc.vic.gov.au/NR/rdonlyres/2754B50B-4C87-4F99-BE27-DEC98420F655/0/CODCustomerServiceCodeforMetropolitanRetailandRegionalWaterBusinesses_20070704.pdf)

### **City West Water**

Website: <http://www.citywestwater.com.au>

### **Goulburn Valley Water**

Website: <http://www.gvwater.vic.gov.au/>

### **North East Water**

Website: <http://www.nerwa.vic.gov.au>

### **South East Water**

Website: <http://www.southeastwater.com.au>

#### **10.4 Energy related inquiries**

##### **Energy Retail Code**

<http://www.esc.vic.gov.au/NR/rdonlyres/638A442B-14B2-45D8-9AFD-041616E521EC/0/October2007EnergyRetailCodeVersion420071018.pdf>

#### **10.5 Debt collection**

##### **Debt Collection Guideline for Collectors & Creditors**

<http://www.accc.gov.au/content/index.phtml/itemId/733222>

##### **Alliance**

Complaints Hotline: 1300 782 607.

##### **Public Access Division**

##### **Baycorp Advantage**

PO Box 964

North Sydney NSW 2059

Tel: (02) 9464 6000

Website: <http://www.baycorpadvantage.com.au>

##### **Attention to: Complaints Handling Council**

##### **Company: Dun & Bradstreet Australia**

PO Box 7405

St Kilda Rd

Melbourne VIC 3004

Fax: (03) 9828 3447

##### **Veda Advantage Public Enquiries**

PO Box 964

North Sydney NSW 2059

Fax: (02) 9951 7880

##### **Office of the Federal Privacy Commissioner**

GPO Box 5218

Sydney NSW 2001

Tel: 1300 363 992 (Privacy Hotline)

Website: <http://www.privacy.gov.au>

#### **10.6 Other**

##### **Home loan calculators**

[http://www.commbank.com.au/personal/other/useful\\_tools.asp](http://www.commbank.com.au/personal/other/useful_tools.asp)

<http://www.yourmortgage.com.au/calculators/>

##### **Motor Vehicle Prices**

[www.redbook.com.au](http://www.redbook.com.au)

## 11. Precedents

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Set out below are a range of precedent letters that may be useful in helping your clients deal with credit and debt issues. These letters are merely examples, and contain options, depending on clients' circumstances. Use these letters with care and attention (ensuring that you delete options that don't apply to your client) and read through them carefully before sending them on your client's behalf.

### 11.1 Sample letter to request for information

Dear Sir/Madam

Date

Client Name:

Account details:

We are authorised to act for **[client name]**: We attach a copy of the letter of authority for your attention/records.

Please provide the following information about the above account:

1. Copies of all documents relating to the above account pursuant to section 163(1) of the Consumer Credit Code ("the Code") including:
  - the credit contract, mortgage or guarantee
  - any credit-related insurance contract in your possession
  - any notices you have sent to the client
2. A statement of amount owing in accordance with section 34(1)(a) - (d) of the Code setting out:
  - the current balance of the account;
  - any amounts credited or debited during the period (state period - this might be the entire period, ie "from the date the contract was entered to the date of this letter");
  - any amounts overdue and when each such amount became due;
  - any amount payable and the date it became due;
3. A statement of the pay out figure as at (insert the date you want) with details of items which make up that amount in accordance with section 76 of the Code.

I look forward to receiving the above information and documentation within the time limits specified in the Code.

*[If a default notice has been served or other enforcement action has been commenced, insert the following paragraph:].*

I/We request that you hold any action in relation to the subject account until at least [14] days after the documentation requested has been received to allow our client time to seek advice. If you are unable to agree to this request kindly advise immediately and I/we will take steps to protect my/our client's position.

Please note that in requesting the above documents, I/we am/are not acknowledging liability for any amount alleged to be outstanding on the loan.

## **11.2 Hardship variation sample letter**

Dear Sir/Madam

Loan Contract No: Date:

I am applying to you for a variation to the above loan contract under section 66 of the Consumer Credit Code. I seek to change the terms of the above contract under s66(2) by: *(specify which of the changes set out in s66(2) you are requesting. You can ask for ONE of the following changes):*

- extending the period of the contract for (XXX months) and having the amount of each payment reduced accordingly to (\$XXX a financial counsellor might need to calculate this figure) without a change to the annual percentage rate.
- OR postponing the payment due on (specify date) so that it will now be due on *(specify new date and continue this for each payment you wish to be postponed)* without a change to the annual percentage rate.
- OR extending the period of the contract to (specify date) and changing the due dates of payment without a change being made to the annual percentage rate as follows:

List old dates and then new dates e.g. payment due on 1 August 2007 postponed so that it is due on 1 January 2008 2007, etc.

In support of my application I note that: *(Give details of illness, unemployment or "other reasonable cause".)* For example:

1. At the time of signing the contract I was employed full time as a process worker with XXX.
2. Soon after signing the contract I lost this job.
3. After being unemployed for approximately two months I commenced work as a XXX at XXX where I am currently employed.

Give details of income and expenditure to demonstrate that you will be able to meet your obligations under the varied contract e.g.: My current income is \$XXX per week, consisting of: list income, e.g. salary, maintenance, board etc My current expenses are:

As you can see I will be able to discharge my obligations under the contract if the changes sought above are made. Unless you respond to this letter by (put a date in here, i.e. 24 hours after you have faxed the application if the matter is urgent, or 14 days from the date on the letter if the matter is not so urgent.) I will bring an application in the Victorian Civil & Administrative Tribunal without further notice.

Yours faithfully

### **11.3 Sample letter of advice to client**

Dear client

Credit Card with **[company]**, Account No. **[insert]**

Further to our previous telephone correspondence, I now write to you in order to outline the instructions I have received from you to date, and the options that you have in relation to your credit card debt with **[company]**.

You have given me the following instructions:

1. You are happy for me to liaise with your caseworker in relation to this matter.
2. You would like to enter into a payment plan to re-pay your debt with **[the credit card company]**.
3. The circumstances in which you applied for the credit card with **[the credit card company]** were that ... .

I understand that you would like to enter into a payment plan, however your case worker has informed me that this would create great strain on your finances, given your only income is a disability pension. I would now like to outline some of your options in relation to this matter.

#### ***Option 1***

The credit card company has certain duties under the Consumer Credit Code to ensure that the contract at the time it is entered into, is not unjust. An application can be made to the court to have the contract considered under the Consumer Credit Code, within 2 years from the end of the contract with the credit card company (it is unclear if or when the contract has ended, as I do not have enough information from you at this stage). If the court finds a contract to be unjust, the court may relieve you either wholly or in part, from

repaying the debt. However, to pursue this course of action will be costly, time consuming, involve court appearances, and be quite stressful for you, and you may lose.

### ***Option 2***

[The credit card company] has a Hardship Committee which considers matters such as yours on a case-by-case basis. We will need to provide the Hardship Committee with material such as a balance sheet which outlines your income and your expenses, reports from your caseworker, a Psych Report, reports from your doctor and if available, written support from your family, in order to give [the credit card company] Hardship Committee the best overall understanding of your situation now and as it then was when you entered into the contract with them for the credit card.

I believe that Option 2 is your best option to pursue, as we can negotiate with [the credit card company] for relief from you paying the debt entirely, or if that is rejected, a very generous payment plan in your favour.

Please give me instructions as to which option you would like to pursue. Also, please sign the 'Consent to Act' form attached to this letter.

Yours sincerely,

#### **11.4 Sample letter to credit card company**

Dear Sir

[Name of client]: Credit Card Account No. [Insert account number]

We act for [client name] on a pro bono basis and write to you to inform you of our involvement in this matter.

Our client has been referred to us as he has not been able to make the minimum payments due in relation to this account for some time. The relevant facts I have at this time are as follows:

1. Our client has been homeless for some time and relies on public emergency accommodation.
2. Our client suffers from a mental illness and has a history of substance abuse.
3. We received instructions from our client that he was approached in [venue] by a representative of [credit card company] who encouraged him to apply for a credit card. Our client instructed us that he was intoxicated at the time and had just attended the bottle shop to purchase more alcohol.

We are in the process of gathering our client's Psychological Report and other materials from his medical practitioners and caseworker in relation to finances, for the Hardship

Committee's future consideration of the matter. Although we hope to resolve this matter as soon as possible, due to our client's circumstances, communication is quite difficult.

In the meantime, we request that if you intend to take any action against our client, that you direct all correspondence to us. If you would like to discuss any matter raised in this letter, please do not hesitate to contact me on [your telephone number].

Yours sincerely,

**11.5 Form 8 example**

**FORM 8**

section 94(1)(c) of the Code  
section 25 of the regulation

**NOTICE AFTER TAKING POSSESSION OF  
MORTGAGED GOODS**

.....  
Date

TO: .....

(name of mortgagor)

.....(address

of mortgagor)

.....

FROM: .....

(name of credit provider)

.....

(address of credit provider)

.....

(name, telephone number and address)

This information tells you some of your rights and obligations and some of the options open to you.

**DETAILS YOU SHOULD KNOW**

Description of the goods:.....

Date the goods were taken:.....

The goods were taken because:.....

.....

The cost of enforcing the mortgage up to the date the goods were taken is

\$.....

The cost of the goods remaining in the credit provider’s possession is

\$..... per .....\*

The credit provider’s estimate of the value of the goods is

\$.....

**HOW TO GET THE GOODS BACK**

IF YOU WANT THE GOODS BACK YOU MUST DO ONE OF THE THINGS LISTED BELOW AS SOON AS POSSIBLE. IF YOU DO NOT ACT WITHIN 21 DAYS AFTER THE DATE OF THIS NOTICE, THE CREDIT PROVIDER MAY SELL THE GOODS. IT IS ALSO POSSIBLE THAT THE GOODS MIGHT BE SOLD EARLIER IF THE CREDIT PROVIDER GETS A COURT ORDER.

**EITHER**

You can get the goods back if you pay \$..... and there is no repetition of the default that caused the goods to be taken. This amount of \$..... is calculated as follows—

Arrears ..... \$

Enforcement expenses ..... \$

**TOTAL** ..... \$

**OR**

You can pay out the credit contract. If you do this you can get the goods back and you do not have any further obligations.

To give you an idea of what the amount required to pay out the credit contract may be, 2 figures are given below. The first is the amount required to pay out the contract at the date of this notice.

The second is the amount required calculated 21 days from that date. Any difference is the result of further payments or charges that fall due between the 2 dates.

1. Amount required to pay out the credit contract on // \$
2. Amount required to pay out the credit contract on // \$

### **IF YOU DO NOTHING, YOU WILL LOSE THE GOODS.**

#### **SALE OF GOODS**

The law says that the credit provider must get the best price reasonably obtainable for the goods.

If you want to, you can introduce a buyer to the credit provider. This has to be done in writing within 21 days after the date of the notice you receive and the buyer must be willing to pay the credit provider's estimate of the value of the goods or any greater amount for which the credit provider has obtained a written offer to buy the goods.

The credit provider must offer to sell the goods to the buyer you have introduced.

Your letter introducing the buyer has to reach the credit provider before the goods are sold. If you post the letter, it is best to send it by certified or registered mail then you can check that it was delivered. If you take it to the credit provider's office, you should get an employee to sign and date something to say that your letter has been received. Make sure you keep anything that was signed by the employee.

Once the 21 day period has expired, the credit provider must sell the goods as soon as reasonably practicable unless—

- you and the credit provider agree on some other time for sale; or
- legal proceedings have been taken which prevent the sale.

As mentioned above, the goods must be sold for the best price reasonably obtainable.

#### **FINALISING THE CONTRACT**

As soon as the goods are sold, the total amount payable under the contract becomes due. However, the credit provider will have to deduct from what you owe any amount the credit provider gets for the goods less—

- the amount owing under your mortgage (which cannot be more
- than the amount owing under the contract); and
- any amount owing under a prior mortgage of the goods; and

- any amount owing under a subsequent mortgage of the goods
- which the credit provider knows about; and
- the credit provider's reasonable expenses of enforcing the
- mortgage.

After the goods are sold, the credit provider must give you a notice setting out certain information including—

- what the sale price was; and
- the net proceeds of the sale after the amounts referred to above
- have been deducted; and
- the amount due under the credit contract or the amount of any
- surplus due to you; and
- details of any further recovery action that might be taken against
- you under the credit contract if you are the debtor.

### GENERAL

You should discuss this matter with the credit provider as soon as possible. You should know that after the goods have been sold, you will still have to pay the credit provider any amount still outstanding. You may be able to work out some alternative arrangement about the contract and mortgage. For example, if you are the debtor, you could ask the credit provider—

- to extend the term of the contract and either reduce the amount of each payment accordingly or defer payments for a specified period; or
- to simply defer payments for a specified period.

The name, telephone number and address of the person to contact is on the front of this form.

If you cannot come to a suitable arrangement with the credit provider, contact the Government Consumer Agency immediately. If you are the debtor and have been **unemployed, sick** or there is another **good reason** why you are having problems with your contract, then your contract may be able to be varied under the law to meet your situation.

There are other people, such as financial counsellors, who may be able to help.

**IF YOU HAVE ANY DOUBTS, OR YOU WANT MORE  
INFORMATION, CONTACT THE GOVERNMENT  
CONSUMER AGENCY OR GET LEGAL ADVICE.**

.....  
(signature of credit provider or person signing on behalf of credit provider)

.....  
(name of person signing)

.....  
(position of person signing)

*\* Indicate the daily, monthly or other rate at which enforcement expenses accrue.*

**11.6 Sample letter offering lower repayment**

Dear Sir/Madam

I act for [client].

I am writing to advise you that I am instructed that my client is currently in financial difficulty and is unable to keep to the repayment arrangements agreed with yourselves. My client is experiencing financial problems because: *[EXPLAIN CLIENT'S CIRCUMSTANCES IN AS MUCH DETAIL AS POSSIBLE]*.

I have enclosed a financial statement of my client and you can see that after meeting essential expenditure, my client has some limited available income to offer creditors on a pro-rata basis. I am therefore instructed to offer to pay you X per month.

Please let me know if you accept this offer by [date]. in the interests of ensuring that payments my client makes will reduce the debt, please stop the interest accruing on my client's account.

If my client's circumstances improve I will contact you again.

If my client's offer is not acceptable to you, please confirm in writing your reasons and what action you intend to take against my client.

Yours faithfully

### **11.7 Sample letter of nil or token payment**

Dear Sir/Madam

I act for [client].

I am writing to advise you that my client is currently in financial difficulty and is unable to keep to the repayment arrangements agreed with yourselves.

My client is experiencing financial problems because [EXPLAIN CLIENT'S CIRCUMSTANCES IN AS MUCH DETAILS AS POSSIBLE].

I have enclosed my client's financial statement and you can see that after meeting essential expenditure, my client has no available income to make an offer on a pro-rata basis.

*EITHER:*

However, my client would like to offer to make a token payment of \$10 per month.

*OR:*

Please consider freezing my client's repayments on the account for six months in order for his/her financial circumstances to improve and to allow him/her to pay off the debt.

Please let me know if you accept this offer by [date]. In the interests of ensuring that payments my client makes will reduce the debt, please stop the interest accruing on my client's account.

If my client's circumstances improve I will contact you again.

If my client's offer is not acceptable to you, please confirm in writing your reasons and what action you intend to take against my client.

Yours faithfully

### **11.8 Sample letter offering repayment plan**

*Dear Sir/Madam*

I act for [client]. I am authorised to write to you on his/her behalf.

I refer to the invoice sent to my client for the sum of [insert].

I am writing to advise you that my client is currently in financial difficulty and is unable to make immediate payment of the full amount outstanding. My client is experiencing financial problems because: [EXPLAIN CLIENT'S CIRCUMSTANCES IN AS MUCH DETAIL AS POSSIBLE].

I have enclosed a financial statement of my client and you can see that after meeting essential expenditure, my client has some limited available income to offer you. I am therefore instructed to offer to pay you X per month.

Please let me know if you accept this offer by [date]. in the interests of ensuring that payments my client makes will reduce the debt, please stop the interest accruing on my client's account.

If my client's circumstances improve I will contact you again.

If my client's offer is not acceptable to you, please confirm in writing your reasons and what action you intend to take against my client.

Yours faithfully

### **11.9 Sample letter offering repayment plan**

Collections Team, [**Mobile company**]

cc:

Telecommunications Industry Ombudsman

Cc:

Operations Manager, [**Debt Recovery company**]

Sir/Madam

Re: Mobile Account of [**client**], Account Number:

TIO Reference:

Debt Recovery Reference:

I act for [**client**]. I refer to the recent correspondence regarding my client's outstanding account in the sum of \$[**insert**].

My client was unable to respond sooner and/or pay this account earlier.

My client's non compliance with original terms of payment of the abovenamed account initially occurred due to my client's overall disappointment with the mobile service, telephone assistance, failure to render true and correct bills and failure to amend accounts once agreement of the overcharges was settled.

By way of background and further explanation of my client's delay in payment of the abovenamed account is as follows: [Insert background such as problems encountered by the client, correspondence between the mobile company and your client and telephone discussions between the mobile company and your client].

My client's invoices initially were all within or close to the base cap plan. However, each month my client's bills increased without a noticeable change in my client's call frequency. My client has since kept tabs on his/her call register and prepared a call log. My client has compared his/her records against your itemised bill. My client insists that a large number of the phone calls detailed on my client's bills by your company were incorrect. My client has attempted to raise this issue with your customer service but his/her complaints have been rebuffed or gone unanswered. My client is very disappointed in the treatment received from the customer service of your company.

Nevertheless, in the interest of resolving this matter amicably, without any admission as to my client's liability to pay for the outstanding sum, my client has instructed me to offer to pay you the sum of \$[insert].

Please advise if your company will accept this sum in full and final settlement of this matter.

I await your reply.

Yours faithfully

#### 11.10 Statement of finances

<i>Statement of finances</i>			
<b>Living costs (weekly, fortnightly or monthly as per income after tax)</b>		<b>Income</b>	
Housing	Rent/Mortgage:	\$	Wages/pension/allowance: \$
	Council rates:	\$	Other income: \$
	Water rates:	\$	<b>Total income:</b> \$
	Insurance, house/contents:	\$	<b>- minus Total living costs:</b> \$
	Electricity:	\$	<b>Surplus or deficit:</b> \$
	Gas:	\$	* Do not include outstanding bills
	Other fuel costs:	\$	
	Maintenance, house/goods:	\$	
	Telephone:	\$	
Food	Groceries/meat:	\$	
	Milk/bread:	\$	

Statement of finances

Living costs (weekly, fortnightly or monthly as per income after tax)			Income	
	Lunches:	\$		
Outfit	Clothes:	\$		
	Shoes:	\$		
Personal	Personal insurance:	\$		
	Medical insurance:	\$		
	Doctor:	\$		
	Chemist/optical/dentist:	\$		
	Haircuts:	\$		
Children	School expenses:	\$		
	Childcare:	\$		
	Pocket money:	\$		
	Child maintenance payments:	\$		
Transport	Car registration/insurance:	\$		
	Petrol:	\$		
	Car maintenance:	\$		
	Fares/parking:	\$		
Recreation	Papers and books:	\$		
	Cigarettes/alcohol:	\$		
Miscellaneous	Gifts - Christmas/birthdays/other:	\$		
	Fines:	\$		
	Holidays:	\$		
	Other:	\$		
Housing	Rent/Mortgage:	\$	Wages/pension/allowance:	\$
	Council rates:	\$	Other income:	\$
	Water rates:	\$	<b>Total income:</b>	\$
	Insurance, house/contents:	\$	<b>- minus Total living costs:</b>	\$

Statement of finances

Living costs (weekly, fortnightly or monthly as per income after tax)		Income
	Electricity:	\$
	Gas:	\$
	Other fuel costs:	\$
	Maintenance, house/goods:	\$
	Telephone:	\$
Food	Groceries/meat:	\$
	Milk/bread:	\$
	Lunches:	\$
Outfit	Clothes:	\$
	Shoes:	\$
Personal	Personal insurance:	\$
	Medical insurance:	\$
	Doctor:	\$
	Chemist/optical/dentist:	\$
	Haircuts:	\$
Children	School expenses:	\$
	Childcare:	\$
	Pocket money:	\$
	Child maintenance payments:	\$
Transport	Car registration/insurance:	\$
	Petrol:	\$
	Car maintenance:	\$
	Fares/parking:	\$
Recreation	Papers and books:	\$
	Cigarettes/alcohol:	\$
Miscellaneous	Gifts - Christmas/birthdays/other:	\$

**Surplus or deficit: \$**

\* Do not include outstanding bills

*Statement of finances*

**Living costs (weekly, fortnightly or monthly as per income after tax)**

**Income**

Fines: \$

Holidays: \$

Other: \$

**Total living costs: \$**

**11.11 Creditor listing**

<b>CREDITOR LISTING</b>									
<b>FOR:                    ___ / ___ / 08</b>									
	<b>Creditor's name (Phone, finance company, bank)</b>	<b>Creditor's address</b>	<b>Account Number</b>	<b>Who owes the money? (Client, client &amp; partner, business)</b>	<b>Security (No, Car, guarantor)</b>	<b>Amount owing</b>	<b>Date last paid</b>	<b>Monthly payment(s)</b>	<b>Comment</b>
1									
2									
3									
4									
5									
						<b>Total: \$</b>			

## 11.12 Asset listing

### ASSET LISTING

	<b>Asset (example: car, house, furniture)</b>	<b>Who owns the asset? (Client, client &amp; partner, business)</b>	<b>Is there any security over the asset? (There usually is with houses and cars)</b>	<b>What equity do you have in the asset? (Amount \$)</b>
1				
2				
3				
4				
5				
Total				

### 11.13 Sample letter of statute-barring

Dear Sir/Madam

Re: Debt pursued

I act for [client]. I refer to your [letter/notice/telephone call] of [date].

I confirm that you have contacted my client in relation to an alleged debt which should have been repaid on [X date] [Make sure that the date is correct and that your client made no promises to pay the debt thereafter].

My client denies that he/she is liable for the amount demanded.

Nevertheless, I am instructed to advise you that the debt is now statute barred and you should stop pursuing my client for the repayment of the debt.

Please confirm that you have not proceeded to make any credit default listing in relation to this date after [X date].

Yours faithfully

### 11.14 Sample letter of statute-barring

Date

Your Client's Name & address

Name of lender or debt collector

Dear (if you do not have a name, try "Sir/Madam")

Re: Your claim for payment (put in their reference number if you have it.)

I act for [name of client].

I refer to (**our conversation on (insert date), or / your letter dated ...**) demanding payment from my client. My client does not acknowledge liability for the debt. Regardless, I note that the last payment made on this account was in (**give a date if you have one, or give estimation**).

Under section 5(1)(a) of the Limitations of Actions Act 1958 (Vic.) you are out of time to issue legal proceedings against my client for recovery of the debt as it is more than six years since your cause of action arose. As the debt is statute barred, you should not take any further action against my client.

If you commence any legal proceedings against my client for recovery of this debt I am instructed to defend this on statute barred grounds. I note that any statements or implications by you that you will take legal action against my client will be in breach of the ACCC & ASIC Debt Collection Guideline: for Collectors and Creditors, 2005.

Furthermore, any further attempts you make to contact my client in relation to this alleged debt will constitute undue harassment. If you do make any further demands, I am instructed to make a harassment complaint to the appropriate external dispute resolution scheme and/or regulatory authority.

Yours faithfully

(Your Name)

cc: insert name of the appropriate external dispute resolution scheme

#### **11.15 Sample letter — wrong information**

Date

Dear Sir/Madam

Complain about my Credit Report,  
Account No (if you are writing to a lender)

I act for **[name of client]**.

I recently obtained a copy of my client's credit report from you.

My client's details are as follows:

Full name:

Date of birth:

Sex:

Drivers Licence:

Current Address:

Previous Address:

(only include this if you have moved in the last 5 years)

Employer:

(Note that you will only need to include the above identity details if you are writing to a credit reporting agency.)

The following is listed as an overdue account on my client's credit report:

EG: ON 30/6/0X TelcoA advised that a Telecommunication Account reference number XXXX was overdue. They reported the amount overdue as \$XXX due to a payment default.

(Choose one or more of the paragraphs below if they apply to your situation.)

I was not informed (before, or at the time that, I entered into the agreement) that personal information might be provided to a credit-reporting agency. Therefore, this listing is in breach of section 18E(8)(c) of the Privacy Act 1988 and also in breach of the Credit Reporting Code of Conduct (see Commissioner's note 29).

\* I was not 60 days overdue in making a payment at the time the default was listed. Therefore, this listing is in breach of section 18E(1)(b)(vi)(A) of the Privacy Act 1988.

\* I did not receive a written notice advising me of the overdue payment and requesting payment of the debt prior to the listing. Therefore, this listing is in breach of Clause 2.7 of the Credit Reporting Code of Conduct. I note that I have not changed address/I have informed the creditor of all change of addresses.

\* The debt was statute barred at the time it was listed; therefore this listing is in breach of section the Credit Reporting Code of Conduct (clause 2.8) - (see Factsheet 2 for information about statute barred debts).

Please remove this listing from my credit report immediately.

Yours faithfully,

.....

*Copy to:*

*The Privacy Commissioner*

*GPO Box 5218, Sydney NSW 1042*

*Creditor (insert creditor's name and address here if you are writing to the credit reporting agency and not to the lender)*

#### **11.16 Sample letter to debt collector**

[Debt Collection Agency]

[Address]

Dear [Insert name]

[Name of client and description of the debt]

We act for [insert name of the client] on a pro bono basis.

We have been handed a copy of your letter to [insert name of the client] dated [insert date].

[Client] has been referred to us as she is no longer able to make the minimum payments due in relation to this account. The relevant facts are as follows:

- 1 [Client] is an 82 year old widow.
- 2 She receives a pension of \$A286.50 per fortnight.

3 [Client] does not own any property, motor vehicle or shares. She lives in a public housing and receives \$100 per fortnight in addition to her pension which covers the total rent payable.

4 Other than general household furniture, [client] does not own any assets or items of value.

5 [Client] has virtually no savings and relies on her pension to pay for all her necessary expenses.

We attach a statement of [client's] current financial situation. As you will see, her very limited income is barely enough to cover her necessary expenses, not including other expenses which often arise such as dental, medical and transport costs.

[Client] has attempted to repay her [credit card account] but, having exhausted all of her finances, we are now requesting that you cancel this debt. [Client] has informed us that she is no longer using the card and will not do so in the future. The situation is now causing her immense stress and as she is soon to undergo a major eye operation, we would like to get this matter resolved. We appreciate that there is no question that [client] has incurred these charges and that [? Bank] and [credit card company] expects their customers to pay their debts. However, in this case [client] does not have the capacity to pay nor will she ever have that capacity.

In the event of a bankruptcy, [client] has no assets or expected financial contributions which could assist in the repayment of this debt. Such action would, however, cause [client] a great deal of distress and exacerbate her already fragile state of health. Any form of reduced repayments will leave [client] without any spare finances which, in her current state of health, is an impractical situation.

This is obviously a very unhappy situation and one that [client] has been trying to avoid. However, in light of her current financial circumstances, we request that you give the situation special consideration.

We look forward to receiving your reply. In the meantime if you would like to discuss any matter raised in this letter, please do not hesitate to contact us.

Yours sincerely,

#### **11.17 Sample letter to debt collector**

Name of Regulator

Address of Regulator

Dear (EDR Scheme/Regulator)

Re: (Name of Debt Collector and Name of Lender)

I act for [client].

I am instructed to lodge a complaint regarding the debt collection practices of (name of debt collector/lender).

I consider the following actions used by (name of debt collector/lender) against my client to be undue harassment:

*List the actions or statements that you believe to be unfair/illegal. Include dates and the names of staff members if possible.*

These actions have caused my client considerable distress and embarrassment.

My client demands that you investigate these actions for breaches of the debt collection guidelines.

Regards,

## **12. Disclaimer**

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This Manual is intended to be used as a resource that introduces different areas of law and provides guidance on how an issue might be addressed. The Manual is not intended to be advice on any particular matter. Readers should not act on the basis of any material in the Manual without obtaining advice relevant to your own particular situations. The authors and publishers expressly disclaim any liability to any person in respect of any action taken or not taken in reliance on the contents of this Manual.

The law in this edition of the Manual is correct as at 30 June 2008.