

Friday, 9 December 2022

By email: RRC.enquiries@royalcommission.gov.au

Commissioner Catherine Holmes AC SC
Royal Commission into the Robodebt Scheme
GPO Box 546
BRISBANE QLD 4001

Dear Commissioner Holmes

Request for referral of debt collection misconduct to the ACCC

We write to request that the Royal Commission into the Robodebt Scheme (the **Royal Commission**) consider a formal referral of Illion Australia Pty Ltd (trading as Milton Graham) (**Milton Graham**) and ARL Collect Pty Ltd (**ARL**, a subsidiary of Panthera Group) (together, **the debt collection entities**) to the Australian Competition and Consumer Commission for investigation as to whether they have breached the Australian Consumer Law (**ACL**).¹

We consider that the evidence provided to the Royal Commission, both in witness evidence and exhibits, demonstrate that the debt collection entities engaged in misleading and deceptive conduct,² unconscionable conduct,³ and also conduct that breached the prohibition against coercion and undue harassment.⁴ In particular, we consider the representations made by the debt collection entities about the consequences of non-payment of amounts sought from people who had received income support payments, were misleading and deceptive, unconscionable, and coerced people to pay debt in circumstances where it was not reasonable to pay.

This submission sets out:

1. Our view that the Australian Consumer Law applies to the debt collection entities;

¹ Schedule 1 of the *Competition & Consumer Act 2010* (Cth).

² Section 18, ACL

³ Section 21, ACL

⁴ Section 50, ACL.

2. Explanation of the relevant law relating to representations of the consequences of non-payment of debt; and
3. The representations that we consider amount to breaches of the ACL.

This submission also makes brief recommendations about reforms to the rules that apply to debt collection conduct by Australian Government instrumentalities.

Application of Australian Consumer Law

The ACL applies to the debt collection entities.

The *Competition and Consumer Act 2010* (Cth), of which the ACL is a schedule, only applies to the Commonwealth to the extent it is 'carrying on a business'.⁵ Given the Department of Human Services or Centrelink are not carrying on a business, the conduct of these entities is arguably excluded from the remit of the Australian Consumer Law.

However, the debt collection entities themselves are not excluded. Given they receive payment for services, they are acting in 'trade and commerce' as required by the prohibition on misleading and deceptive conduct in section 18 of the ACL. Furthermore, a person may breach the prohibition on unconscionable conduct and on harassment and coercion if they are acting 'in connection with the supply or possible supply of goods and services'. The debt collection entities were delivering services pursuant to contracts with the Department of Human Services.⁶

We note that a breach of section 18 of the ACL does not give rise to a pecuniary penalty. However, a court can still make injunctions,⁷ adverse publicity orders,⁸ non-punitive community service orders⁹ and orders to redress loss or damage suffered by non-party customers.¹⁰ Breach of the prohibition on unconscionable conduct, and on harassment and coercion can give rise to a pecuniary penalty.¹¹

ACCC/ASIC Debt Collection Guidelines

The ACCC/ASIC Debt Collection Guidelines (the **Guidelines**) usefully describe the standards expected by creditors and debt collectors when collecting debt, including in relation to the prohibition on misleading and deceptive conduct, the prohibition on unconscionable conduct, and the prohibition on harassment and coercion.

Clause 19 of the Guideline is titled "Representations about the consequences of non-payment". It states:

⁵ Section 2B.

⁶ Exhibit ARL.9999.0001.008_2; Exhibit MRF.0001.0001.0052

⁷ Section 232, ACL

⁸ Section 247, ACL

⁹ Section 246, ACL

¹⁰ Section 239, ACL

¹¹ Section 224, ACL

*You are entitled to accurately explain the consequences of non-payment of a debt, but must not misrepresent those consequences.¹² ... **You must not threaten legal action if the start of proceedings is not possible, not intended, or not under consideration, or you do not have instructions to start proceedings.** (emphasis added).*

The case of *ACCC v ACM Group Ltd* [2018] FCA 115 is relevant. In that case, the debt collector made empty threats to litigate against two customers—a care facility resident who had difficulty communicating after suffering multiple strokes, and a Centrelink recipient—despite being aware that they had no means, or only limited means, to repay. The company issued letters to the customers containing threats of legal action in circumstances where the persons who made those threats did not have instructions or authority to commence legal proceedings. This conduct was found to be misleading and deceptive, unconscionable, and a breach of the prohibition against coercion and harassment.

Representations made by the debt collection entities

The representations about which we hold concerns are set out in various exhibits tendered to the Royal Commission.

Exhibit MGR.0004.0001.0339 is a letter from Milton Graham to an individual seeking repayment of \$1,274.99 as a debt to the Commonwealth. The letter states:

*The payment of \$1,274.99 is required to be received by this office **immediately**. If the amounts remain outstanding and no arrangements have been put in place to finalise the account, it may result in the Department of Human Services taking further action. The Department may:*

- *Add an interest charge to your debt;*
- *Use your tax refund to repay your debt;*
- *Recover the amount from your wages, other income, assets and money you may hold in bank accounts;*
- *Issue a departure order to stop you from travelling overseas;*
- *Refer your case to the department's solicitors for legal action.*

Exhibit ARL.999.001.009_R includes sample letters from ARL. At page 0017, a representation is made as follows:

Fail to Act

¹² Apart from constituting misleading or deceptive conduct under the ACL, misrepresenting the consequences of nonpayment of a debt may also be prohibited in Victoria under s. 45(2(k) of the *Australian Consumer Law and Fair Trading Act 2012* (Vic)

You should be aware that the Department of Human Services may garnishee your wages, tax refund or other assets and income (including bank account) or refer this matter to their solicitors for Legal Action. They may also issue a Departure Prohibition Order preventing you from travelling overseas.

We understand that these representations were made thousands of times over the course of the Robodebt scheme.

Why the representations are misleading and deceptive

Referral to legal action

We consider that the above representations relating to legal action may be misleading and deceptive, as the debt collection entities knew or ought to have known that legal action was not possible, intended, or under consideration. Furthermore, we consider that this breach was systemic as the representations threatening legal action were included in template correspondence.

We acknowledge that the Commonwealth can, as a creditor, take civil legal action for the recovery of a debt. Indeed, various versions of 'Civil procedures to recover Centrelink debt' were tendered to the Royal Commission.¹³ That procedure states:

Civil recovery action is generally only considered for customers with outstanding debts greater than \$10,000 and an identified capacity to repay their debt/s. A capacity to pay is usually demonstrated if the customer has significant income, property and savings.

The procedure also describes the branch that is responsible for initiating civil proceedings, that referrals can only be made by officers with a certain departmental ranking, and that an external legal service provider would be engaged to conduct the proceedings.

This procedure indicates that civil recovery action will only be intended or contemplated in very rare circumstances, including where outstanding debts are greater than \$10,000. By contrast the letters of demand made the representation that debts would be referred for legal action as a matter of course, even for debts below this threshold. We note that debts were referred to external debt collectors where the amount owing was as little as \$20.¹⁴

Given this, we consider that the debt collection entities engaged in misleading conduct by representing that legal action may be taken where it was not possible to be taken in many circumstances.

We also consider this conduct to:

- be a breach of the prohibition on unconscionable conduct, because it is outside the accepted norms of business conduct. Indeed, both debt collection entities had agreed by virtue of their agreements with the

¹³ See CTH.3719.001.5835

¹⁴ Transcript, Day 7, 4 November 2022, P-490.

Department of Human Services to comply with the Guidelines, which have thus been acknowledged to amount to contain accepted norms of business conduct;¹⁵

- constitute coercion or undue harassment. This is particularly the case as the representations were repeated throughout the collection process, thereby amounting to undue harassment because they were 'calculated to intimidate or demoralise, tire out or exhaust a debtor rather than convey the demand and an associated legitimate threat of proceedings'.¹⁶ The conduct was also designed to be coercive given there was no basis for the collection of the debt.

Garnishee action

We consider that the threats regarding garnisheeing similarly breached the ACL. This is because there were limitations on garnishee action, which were not made clear in the correspondence.

For example, the Social Security Guide states: "[g]arnishee action can generally only be pursued if [other] recovery methods have failed and the debtor refused to enter into a reasonable repayment arrangement, or broke an earlier arrangement to repay their debt."

Recovery from financial institutions

We also consider the threats regarding recovery of amounts from a bank account to breach the ACL. This is because the provision of the *Social Security Act 1991* (Cth) that allows for the recovery from a financial institution is limited, which was not made clear by the representations.

Section 12234AA of the *Social Security Act 1991* (Cth) limits this type of recovery to where "the payments were intended for someone other than the person in whose name the account was kept" or where "the intended recipient of the payments died before the payments were made".

Departure prohibition orders

We consider threats regarding departure prohibition orders may also breach the ACL, particularly in circumstances where such orders are not intended or under consideration. Our review of the Annual Reports¹⁷ of the Departments of Human Services and Services Australia indicate that while such orders are regularly used in relation to child support debt, they have not been used in relation to broader social security debt. This suggests that the representations were made primarily as a threat and were not genuine.

Recommendations relating to debt collection

We ask that the Royal Commission also consider the following policy recommendations regarding debt collection by Australian government instrumentalities:

¹⁵ e.g., ARL.9999.0001.008_0039

¹⁶ *ACCC v McCaskey* (2000) 104 FCR 8 at 27.

¹⁷ See: <https://www.servicesaustralia.gov.au/annual-reports?context=1>

- Amend relevant laws so that the Australian Consumer Law clearly applies to debt collection conduct by government and its instrumentalities in its entirety—there is no reason that government should not be subject to the same standards as private debt collectors.
- Ensure that the ACCC or an effective regulator has power to enforce compliance with the Australian Consumer Law with the respect of government-initiated debt collection, including where conducted by third parties.
- Prohibit government from entering into arrangements with external debt collecting agencies where those agencies are remunerated on a commission-basis—as stated by the Commissioner, this creates “a financial imperative to recover as much as possible as fast as possible”. We consider such an incentive to be unreasonable in the context of government debt collection.¹⁸
- Amend section 18 of the ACL so that pecuniary penalties apply for breach, or amend section 29 regarding false and misleading representations (which is already subject to a pecuniary penalty) so that it includes representations relating to the consequences of not paying debt. Misleading conduct relating to the consequences of non-payment of debt has a serious impact on consumers, and there is no reason that it should not attract a pecuniary penalty. The full range of enforcement mechanisms should be available in order to promote the norm of conduct set by Parliament.

Please contact us on 03 9670 5088 or at info@consumeraction.org.au should further information be helpful for the Royal Commission’s work

Yours faithfully,

Gerard Brody, Chief Executive Officer
CONSUMER ACTION LAW CENTRE

Fiona Guthrie, Chief Executive Officer
FINANCIAL COUNSELLING AUSTRALIA

Leanne Ho, Chief Executive Officer
ECONOMIC JUSTICE AUSTRALIA

¹⁸ Transcript, Day 7, 4 November 2023, P-493.

