DEBT COLLECTION HARASSMENT IN AUSTRALIA

(Part 2)

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III LEGISLATIVE CONTROL OF DEBT COLLECTION ACTIVITIES

Part II showed that the general civil and criminal law of Australia is an inadequate response to the problems of harassing debt collection. The general law suffers by its generality, leaving gaps which debt collectors are able to exploit.

This part analyses statutory control over debt collection activities to see whether specific debt-related legislation is more effective in controlling collection harassment than the general law. While the primary focus is on Australian law, this part includes detailed discussion of English and American legislation. The foreign law is included for comparative purposes and to show the possible future direction of Australian anti-harassment laws.

1. Australian Law

The primary Australian statutory device to control debt collectors is the licensing system. Less important controls are the *Trade Practices Act*, 1974 (Cth.), statutes forbidding specific types of harassment and, in New South Wales alone, the Privacy Committee.

A. LICENSING

1. The Law. Debt collectors (called "commercial agents" in statutory language) must be licensed in all Australian jurisdictions except the A.C.T. and the Northern Territory.[1] In New South Wales, collectors must be licensed under the *Commercial Agents and Private Inquiry Agents Act*, 1963. The Act requires any person who collects debts "on behalf of any

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1 D. St. L. Kelly, *Debt Recovery in Australia* (1977) p. 131; New South Wales Department of Technical Education, *Mercantile Agents Course* (undated), Introduction, pp. 7-8 ("Mercantile Agents Course"). Other than in New South Wales the legislation is: Qld: *Auctioneers and Agents Act*, 1971-76; S.A.: *Commercial and Private Agents Act*, 1972; Tas.: *Commercial and Enquiry Agents Act*, 1974-76; Vic.: *Private Agents Act*, 1966; W.A.: *Debt Collectors Licensing Act*, 1964.

other person" (section 4) to be licensed, although government employees, solicitors and accountants, and insurance and bank workers are exempt (section 5(1)). An important exemption is that the creditor's employees need not be licensed unless they repossess goods (section 5(3)). The same scheme is followed by the other states.[2]

The New South Wales police are obliged to enquire whether there are objections to a licence being granted (section 10(5)), objections including bad fame or character, not being a "fit and proper" person, lack of age or experience, being already disqualified and having been convicted of an indictable criminal offence (section 10(10)(a)).[3] A person is not "fit and proper" (and therefore cannot obtain a licence) if he has harassed someone (section 10(10)(c)). Harassment is not defined, but, it specifically includes the use and threatened use of publicity vans (vans parked outside the debtor's house advertising the debt's existence) and unreasonably frequent telephone calls (section 10(7)).[4]

Equally important are the cancellation and suspension provisions. On the complaint of the police, a licence holder who has been convicted of an offence against the Act or who is guilty of harassment, may be summonsed before a Court of Petty Sessions to show cause why his licence should not be temporarily or permanently suspended (section 11(1)). Collectors guilty of harassment must have their licences cancelled (section 11(2)), there being no discretion in magistrates once harassment has been found as a fact.[5] The other states follow a similar pattern.[6]

2. Evaluation of Licensing. The licensing provisions offer an apparent solution to harassment. Collectors guilty of harassment lose their licences and hence their livelihood, an apparently powerful sanction. Government

[2] Qld: ibid. ss. 46-53; S.A.: ibid. Pt. III; Tas.: ibid. Pt. II; Vic.: ibid. Pt. II; W.A.: ibid. ss. 5-9. It is also widely used in other common law jurisdictions: England: K. E. Lindgren, "The English *Consumer Credit Act*, 1974" (1975) 3 *Australian Business L. Rev.* 134, 137; R. M. Goode, *Consumer Credit Act 1974* (1974) par. 5.5. The United States: J. M. Connolly, "Recent Statutes Regulating Debt Collection" (1973) 14 *Boston College Industrial and Commercial L. Rev.* 1274, 1277-8; T. C. Homburger, "Harassment of Borrowers by Licensed Lenders" (1965) 1 *Columbia Jnl. of Law and Social Problems* 39, 47. Cases on U.S. licensing statutes are collected in "Collection Agencies and Practice" (1974) 1 *C.C.H. Poverty L. Reporter* 3700.

[3] The other states' provisions are very similar: Qld: ibid. s. 46; S.A.: ibid. ss.15, 16; Tas.: ibid. s. 4; Vic.: ibid. ss. 8-13; W.A.: ibid. ss. 8-9.

[4] Kelly, op. cit. pp. 132-3 criticises the New South Wales Act for vagueness, preferring the more specific South Australian and Victorian definitions. See S.A.: ibid. s. 5; Tas.: ibid. s. 4(8); Vic.: ibid. s. 3.

[5] *Wood* v. *Reason*, [1977] 1 N.S.W.L.R. 631, 644 per Yeldham J.: the licence holder had been convicted of an offence and it was held that "may" in s. 11(2) is mandatory.

[6] Qld: *Auctioneers and Agents Act*, ss. 22-3; S.A.: *Commercial etc. Agents Act*, ss. 39-46; Tas.: *Commercial etc. Agents Act*, s. 9; Vic.: *Private Agents Act*, s. 18; W.A.: *Debt Collectors Licensing Act*, s. 10.

reports and commentators frequently commend licensing as the optimal controlling system.[7]

In theory, the licensing Act requires a vigorous screening of prospective licensees by the New South Wales Police to ensure that only those of good character may obtain a licence. In practice, the section 10 enquiries by the police are mere formalities. The New South Wales Licensing Police administer the Act and an ex-collector told the author that applications for licences are conducted in an informal "clubby" atmosphere. The police and the licensees are often of the same social background and the formalities are quickly dealt with.[8] Willis has described the same atmosphere in Victorian process server licensing. He found that background checks were restricted to checking on prior convictions; that there was never an enquiry as to a prospective licensee's knowledge; that even where police do object they are usually over-ruled by the magistrate; and that there is virtually no difficulty in obtaining a licence. In short he felt that the licensing system provided work for the police but virtually no control over licensees.[9] The same complaints have been made about similar United States legislation.[10]

When a licence is issued, control over the licensee is virtually non-existent. Under sections 11 and 12, complaints about an agent leading to a hearing as to whether his licence ought to be revoked may be brought only by a police officer above the rank of sergeant or by a court. Mr Greenleaf, a research officer of the New South Wales Privacy Committee, argued that the licensing system is incapable of working adequately.[11] A court can initiate an inquiry only if it incidentally obtains evidence that casts doubt on a licensee. Otherwise, complaints must be brought by the police. Mr Greenleaf argues that the latter provision is of little use, since there is no identifiable body for a debtor to complain to. Sergeant Williams of the New South Wales Licensing Police (who felt strongly that the system works well), said that complaints can be made to a debtor's "local member or government departments".[12] In fact all

[7] Lindgren, op. cit. p. 136; J. M. White, *Fair Dealing with Consumers* (1975) par. 18.2.2; C. Turner, "Fair Dealing with Consumers in South Australia" (1976) 2 *Legal Service Bulletin* 38, 42; Committee of the Law Council of Australia, *Report on Fair Consumer Credit Laws* (1972) pars. 10.2.2, 10.2.5 ("Molomby Report"); M. E. Calkins, "The Debtor v. Creditor Dilemma" (1974) 10 *Tulsa L. Jnl.* 231, 241; "Chicago Collection Agency Cited on Misrepresentations" (1956) 22 *Unauthorised Practice News* 61, 62; Great Britain, *Report of the Committee on Privacy* (1972) Cmnd. 5012 pars. 451 ff. ("Younger Report") recommends licensing of private detectives (passage extracted in M. Jones (ed.), *Privacy* (1974) p. 145); Great Britain, *Report of the Committee on Consumer Credit* (1971) Cmnd. 4596 par. 7.2 ("Crowther Report").

[8] Interview 1st June, 1977 Mr A. Asher, ex-employee of Dun and Bradstreet, now employed by the Australian Consumer Association.

[9] J. Willis, "Of Process Servers, Default Summonses and the Judicial Process" (1975) 10 *Melbourne Univ. L. Rev.* 225, 230-1.

[10] "Harassing the Debtor", (1973) *Consumer Reports* 136, 137.

[11] Personal interview, 2nd June, 1977.

[12] Interview 1st June, 1977.

complaints made to government departments (and probably to members of parliament) are channelled through the Privacy Committee, and that Committee has not referred a complaint to the Licensing Police since its establishment in 1975.[13]

Willis makes the same complaints about the Victorian process servers licensing system: there is no regular system of inspection and very few official complaints are made.[14] The same criticisms have been made of the licensing provisions of the English *Consumer Credit Act*, 1974, since that Act is based, like its Australian counterparts, on complaints rather than investigations. The result is that few complaints are made and the Act's licensing system remains virtually unenforced.[15]

While some American licensing systems are occasionally enforced,[16] most commentators complain that there is virtually no enforcement there either. As in Australia and England, American licensing enforcement is based on complaints, and debtors have no reason of self-interest for making complaints.[17] One commentator argues that debtors should be able to petition for licence revocation.[18] That proposal would meet the same problem of lack of self-interest: a debtor would have to be particularly public spirited to launch what is in effect a prosecution with no chance of financial gain.

The one Australian jurisdiction to attempt to overcome these problems is South Australia. In that state, enforcement is by a Registrar who may make enquiries of his own accord, rather than waiting for complaints: *Commercial and Private Agents Act*, 1972, section 39(1).

Once in court, the mandatory nature of licence cancellation in New South Wales leaves no legal discretion to the magistrate. There is a *de facto* discretion though: before a licence is cancelled, the magistrate must find that the licensee has "unduly harassed" a person. As noted above, that term is not defined except in regard to vans and notices advertising the debt and telephone calls of "unreasonable frequency". The magistrate must decide what activities are "harassment", a concept which was found

[13] Greenleaf interview. The author wrote to the Commissioner of Police in N.S.W. seeking information on the number of licences suspended and revoked and the number of applications rejected. The reply (from J. H. Travis, Officer in Charge, N.S.W. Police Public Relations Branch, 24th June, 1977) stated that statistical records on the number of revocations, suspensions and rejections are not kept.

[14] Willis, op. cit. p. 231. Willis concludes that "the aims stated in Parliament for licensing are not being achieved", ibid.

[15] McManus, "The Consumer Credit Act, 1974" (1975) 2 *British Jnl. of Law and Society* 66, 74.

[16] Willis, op. cit. p. 231; "New Developments" (1972-74) 1 *C.C.H. Poverty Law Reporter* 20095.

[17] Connolly, op. cit. p. 1276; "Abuse of Process: Sewer Service" (1967) 3 *Columbia Jnl. of Law and Social Problems* 17, 28; Homburger, op. cit. pp. 47-8; S. D. Shenfield, "Debt Collection Practices" (1968-69) 10 *Boston College Industrial and Commercial L. Rev.* 698, pp. 702, 708.

[18] R. E. Scott and D. M. Strickland, "Abusive Debt Collection" (1974) 15 *William and Mary L. Rev.* 566, pp. 590, 593.

in Part I[19] to be subjective. In making that decision, he effectively has as wide a discretion (subject to review by the District Court (section 14)) as if the cancellation itself was at his discretion.

Even if a licence is cancelled, the deterrent effect of cancellation is dubious. Loss of a licence falls between a civil and a criminal action and loses the benefits of each. Civil actions allow recovery by wronged debtors and that fact provides an incentive for action to be taken.[20] Criminal actions deter by the threat of a fine or imprisonment. The loss of a licence will deter genuine agents, but will be no deterrent to agents who want to make as much money as possible before quickly retreating.[21] For that reason, the licensing provisions in New South Wales are reinforced by a $5,000 bond which may be forfeited on proof of misconduct (section 35). However, fly-by-night collectors may not even be deterred by what is, in effect, a $5,000 fine. Victoria's $12,000 bond for individuals[22] may be more effective.

The existence of fly-by-night collectors is a matter of speculation. The number of licensed agents in New South Wales fluctuates quite rapidly: in March, 1975 there were 782 licensed commercial agents, rising to 834 in March, 1976 and falling to 808 in March, 1977.[23] The net gain of 52 in one year followed by a net loss of 26 in the next, is not decisive. It may be that a great many more agents entered and left the industry in those years. It is possible, for example that in 1976-77 100 agents received new licenses while 126 licenses lapsed. These statistics are the only figures offered by the New South Wales Police, and offer little insight into the industry.

Even if the licensing system was an effective deterrent against harassment by licensed agents, the problem of harassment would only be 40 per cent solved. Many retail stores have bogus collection agencies to avoid licensing controls. Since the employees of creditors need not be licensed unless they repossess goods (section 5(3)), some firms have obtained the appearance of independence plus freedom from licensing by using the name of an independent collection agency for their own collection departments.[24] Those "agencies" and other creditors doing their own collection account for 60 per cent of all debts collected in New South

19 Under "The Meaning of Harassment" (1978) 5 *Mon.L.R.* 87.
20 Connolly, op. cit. pp. 1276-8.
21 "Abuse of Process", op. cit. p. 28.
22 *Private Agents Act*, s. 31(2). For the other states, see S.A.: *Commercial etc. Agents Act*, s. 19; Tas.: *Commercial etc. Agents Act*, s. 26; W.A.: *Debt Collectors Licensing Act*, s. 20; Queensland has a fidelity fund instead of a bond: *Auctioneers etc. Act*, ss. 93, 98. In addition, some states provide for fines of between $100 and $1,000: Qld: ibid. s. 12(3) and *Invasion of Privacy Act* 1971-76, s. 25; S.A.: ibid. ss. 41, 47(b); W.A.: ibid. reg. 15.
23 Travis letter, op. cit.
24 Kelly, op. cit. p. 132.

Wales.[25] This massive loophole (which has been strongly criticised[26]) allows the majority of debts to be collected in an uncontrollable fashion. Only South Australia has attempted to control the problem: section 47b of the *Commercial and Private Agents Act* 1972-78 prohibits the use of names which falsely induce debtors to believe they are dealing with an agent of the creditor rather than the creditor himself. The other states duplicate the N.S.W. pattern.[27]

In summary, the New South Wales licensing statute provides poor control over harassment. Pre-licence checking is weak, and the system is based on complaints to the Licensing Police, a body of which few debtors would be aware. There is no regular system of inspection and no advertising of a complaints service. Worse still, licensing is a dubious deterrent and is no deterrent at all to creditors who collect 60 per cent of the state's debts.

This conclusion reflects the limited aim of licensing statutes. They are based on the common belief that only a minority of collectors cause trouble and that the most extra-judicial collection is justifiable and should not be inhibited.[28] The Victorian Act for example, aimed only to "cull out the worst elements in this occupation".[29] "Reputable" collectors have no difficulty in obtaining licences and are in fact benefited by the licensing system: the industry's esteem will be increased if "fly-by-night" operators are culled out.[30] This comfortable result for the established industry is no surprise: the *Commercial Agents Act* (N.S.W.) was introduced after careful consultation with industry.[31]

Close industry consultation has been praised by some and criticised by others. Lindgren attributed the "excellent quality" of the English *Consumer Credit Act*, 1974 (which licences collectors and credit providers) to close consultation.[32] Others see the result of industry consultation as anything but excellent. McManus[33] claimed that any protection to consumers in the English Act is incidental to its real function: to satisfy the trade's desire

[25] Asher interview, 9th December, 1977.
[26] Kelly, op. cit. p. 132. At the same place Kelly notes that there are allegations that some bogus agencies use harassing tactics which, if used by licensed agencies, would result in loss of licence.
[27] Ibid.; Qld: *Auctioneers and Agents Act*, s. 5; S.A.: Tas.: *Commercial etc. Agents Act*, s. 2; Vic.: *Private Agents Act*, s. 3; W.A.: *Debt Collectors Licensing Act*, s. 4(g). The same exemption applies generally in the United States: Connolly, op. cit. p. 1278; "Harassing the Debtor", op. cit. p. 137; "Collection Agencies and Practice", op. cit. par. 3700. In Oregon, a creditor who buys a form letter from a collection agency and sends it out himself (a common N.S.W. practice), brings himself under licensing controls: "New Developments", op. cit. par. 16207.
[28] "Instalment Sales: Plight of the Low Income Buyer" (1966) 2 *Columbia Jnl. of Law and Social Problems* 1, 16; Homburger, op. cit. p. 55.
[29] Willis, op. cit.
[30] Maxwell, "Latest Developments in Collection Agencies—Bar Relationships" (1964) 69 *Commercial L. Jnl.* 35.
[31] Mercantile Agents Course, op. cit. "Commercial Agents etc. Act" chapter, p. 1.
[32] Lindgren, op. cit. p. 137.
[33] McManus, op. cit. p. 75.

for rationalisation.[34] McManus argued that consumer groups and large financiers had a common interest in culling out small traders, both seeing the basic industry as legitimate.[35] The large traders gained respectability by being granted a government licence[36] and by having disreputable members of their industry wiped out.[37] Due to close consultation and a belief that the industry is basically valid, any control by industry is done by its larger members over their smaller competitors. As a result, the general functions of the larger industry members are legitimised. Whether licensing Acts are "excellent" or cosmetic devices calculated to make the problems of the industry appear to be under control, depends on the viewpoint and aims of the observer. Whichever judgment is made about the overall merits of licensing legislation, it must be accepted that one major aim of the legislation, the effective control of harassment in debt collection, has not been achieved.

B. THE PRIVACY COMMITTEE OF NEW SOUTH WALES

The Privacy Committee of New South Wales is unique to that state and was established by the *Privacy Committee Act*, 1975.[38] The Committee is a continuing body but has no power to enforce its recommendations.[39] It does though, have the powers of a Royal Commission to obtain information.[40] It was established in the belief that a continuing body was needed to monitor invasions of privacy, to deal in a conciliatory fashion with complaints and to make recommendations. Its establishment was seen as an alternative to a statutory right to privacy.[41] It has a sub-committee to deal specifically with complaints about credit.[42]

The general approach of the Privacy Committee is to make voluntary agreements and establish guidelines to conduct.[43] The Committee believes that self regulation creates a moral obligation without the need of a rigid

[34] United States licensing provisions have also been criticised for restricting competition: D. Caplovitz, "Consumer Credit in the Affluent Society" (1968) 33 *Law and Contemporary Problems* 641, 654.
[35] McManus, op. cit. p. 70.
[36] Section 7 of the (N.S.W.) *Commercial Agents etc. Act* provides that the grant of a licence does not give the licensee extra powers. It apparently gives him added respectability though.
[37] McManus, op. cit. p. 73.
[38] It was established on the recommendation of Morison's *Report on the Law of Privacy* (1973) ("Morison Report"): New South Wales Privacy Committee *Annual Report 1975* par. 1.1.
[39] M. D. Kirby, "Eight Years to 1984—Privacy and Law Reform" (1976) 1 *Legal Service Bulletin* 351, 353.
[40] *Privacy Committee Act*, 1975 (N.S.W.), s. 16(2); J. Disney, "A Report on Privacy" (1976) 2 *Legal Service Bulletin* 55, 55.
[41] "Law Reform Commission's Wide Mandate", op. cit. p. 203; J. Swanton, "Protection of Privacy" (1974) 48 *A.L.J.* 91, 103.
[42] Disney, op. cit. p. 55; Kirby, op. cit. p. 353.
[43] Greenleaf interview; New South Wales Privacy Committee *Annual Report 1976* pp. 10-11; New South Wales Privacy Committee *Background Paper: Problems in Consumer Credit Reporting* (1976), p. 8.

bureaucracy. If the voluntary approach fails on any subject, the Committee warns that it will recommend legislation.[44]

The Committee's voluntary approach has been applied to debt collection letters. In 1976 the Committee established guidelines[45] over those letters after receiving complaints about letters threatening debtors' credit ratings. The guidelines provide that letters threatening credit ratings must be truthful warnings of actually possible consequences and that the debt in issue must not be disputed by the debtor.[46] In the latter case, the proper course is to warn of possible legal proceedings.

The guidelines show that the Committee is concerned only with extreme cases. They make several dubious assumptions, including that a debtor will always inform his creditor of disputes and that a debtor will know that he has a legal defence. They also accept that it is the legitimate task of the creditor, rather than an independent official, to warn of possible credit rating damage and warn that legal action might be taken. In short, they accept that extra-judicial coercion is legitimate.

The guidelines have, in all but one case, been accepted by collectors when told that their present letters breach them. In the exceptional case, the creditor drastically altered his letters until they almost fitted within the guidelines and the Privacy Committee compromised the rest of the way.[47] The same basic procedure will be adopted by the Committee over employer contact and the recent practice of issuing summonses without a prior adequate check that the correct person is receiving process.[48]

The Privacy Committee has similar problems to those faced by licensing provisions. Favouring a voluntary approach (although backed by threats of legislation) it only goes as far as suits the majority of industry. The Committee's partial acceptance of the use of threats to a debtor's credit rating contrasts poorly with section 25 of the *Invasion of Privacy Act*, 1971, (Qld.) which provides for a year's imprisonment or a fine of $1,000 for the use of such threats.

The fear that the Committee might perform more a cosmetic function than a true regulatory one,[49] grows when its enforcement scheme is examined. Like the licensing system, the Privacy Committee relies on complaints rather than on an active investigative role. There is no reason of self-interest for a consumer to complain to the Committee, especially

[44] *Annual Report 1975* op. cit. par. 5.3. The only sanctions possibly available to the Committee are the threat to recommend legislation and the naming of individuals in Annual Reports.

[45] Announced in March, 1976 News Release: *Debt Collection Letters Threatening Credit Ratings*; described in *Annual Report 1976*, op. cit. pp. 38-9; and in Privacy Committee *Information Bulletin: Guidelines for the Use of Debt Collection: Letters Referring to People's Credit Ratings* (1977).

[46] News Release, ibid. pp. 2-3; *Information Bulletin* ibid.

[47] Greenleaf interview.

[48] Ibid.; New South Wales Privacy Committee, *Privacy Aspects of Debt Collection* (1978), pp. (iv)-(v).

[49] Disney, op. cit. p. 57.

since his problem is, *ex hypothesi*, an invasion of privacy. He might not want to broadcast that he is a defaulting debtor.

He must also know that the Privacy Committee handles debt collection cases before he can make a complaint to it. It does not immediately spring to mind that collection harassment, such as a threat of improper legal action, is a privacy issue. The Committee should advertise its existence more widely and should particularly mention that its acts on collection complaints. At present it receives only twenty complaints per year about collection;[50] by contrast there are at least twelve prosecutions per year for just one form of abusive collection, simulated legal process.[51] That so many prosecutions can occur for one form of harassment after the establishment of the Privacy Committee, must throw doubt on its effectiveness and on debtor's willingness to report harassment to the Committee.

Until the Committee publicises its existence and willingness to deal with debt matters, it will have little impact on collection harassment. The lack of serious sanctions is disturbing: no collector contemplating the use of harassment would be deterred by the possibility of breaching a voluntary guideline. The one sanction open to the Committee, the publication of the names of privacy invaders, has rarely been applied. In any case, since the agencies do not rely on public goodwill but only on their reputation for toughness, the deterrent value of that sanction is doubtful.

C. *Unauthorised Documents Act*, 1922 (N.S.W.)

It is an offence under the *Unauthorised Documents Act*, 1922 to use a collection letter which is "likely or intended to convey the impression that" it is a court document: section 4. The use of such a document is punishable as a contempt of the Supreme Court or by a fine of $100.[52] The provision is designed to deal with "blue frighteners", documents which resemble court summonses. The leading case on section 4 is *Ex-parte Attorney General; Re Goulburn Produce Co. Pty Ltd*, which held that a document contravenes the section even if it would not mislead a sophisticated person.[53] Similar legislation exists in the other states, New Zealand and the United States.[54]

Despite the statute having been in force for fifty years, "blue frighteners" are still in use: the author has a copy of one issued in 1976; a national

[50] Greenleaf interview.

[51] The prosecutions referring to are for false summonses, discussed below.

[52] The New South Wales Government has announced its intention to increase the fine to $1,000: "Shylock Schemes Outlawed", *Daily Telegraph* (Sydney) 2nd March, 1978 p. 2.

[53] 65 W.N. (N.S.W.) 23, 25.

[54] Qld: *Unauthorised Documents Act* 1953; S.A.: *Unauthorised Documents Act* 1916; Vic.: *Unauthorised Documents Act* 1958; W.A.: *Unauthorised Documents Act* 1961; N.T.: *Unauthorised Documents Ordinance* 1969. See Kelly, op. cit. p. 137; Willis, op. cit. p. 241. New Zealand: *Police Offences Act* 1927; United States: see Beckman and Foster *Credits and Collections* (1969) p. 559.

retailer has used a dubious document;[55] and the Kelly Report reproduces four other examples.[56] The legislation is not a dead-letter, since the Fraud Squad alone launches twelve prosecutions per year and other police branches also prosecute offences under the section.[57] While prosecutions do take place, debt collectors are not apparently aware of the existence of the Act: two experienced collectors the author spoke to had not heard of it.[58] Like other non-civil remedies, debtors have no financial interest in making complaints about offences, and the enforcement of the provisions must be consequently weakened. Furthermore, the statute covers only one of hundreds of possible harassment solutions.

D. *Trade Practices Act*, 1974 (CTH.)

Sections 52, 53 and 60 of the *Trade Practices Act* (Cth.) might assist harassed debtors.[59]

Section 60 prohibits corporations using

> "at a place of residence, physical force, undue harassment or coercion in connexion with . . . the payment for goods and services by a consumer."

The *Swanson Report* recommended against widening the term "undue harassment".[60] There are criminal (section 79), civil (section 82) and injunctive (section 80) remedies available to relieve against breaches. Imprisonment for criminal breaches was recently abolished.[61]

By its terms, section 60 is limited to corporations and their agents and to actions at a place of residence. Letters, telephone calls and harassment away from a residence are all excluded.

More seriously, section 60 has remained unused since its enactment: there have only been four complaints to the Commission about possible breaches (all concerned "a large retail organisation" which allegedly harassed "consumers over the payment of monies following the supply of goods"). None has led to a prosecution and investigations are continuing.[62]

The newly enacted section 53(g) prohibits false or misleading statements about the existence, exclusion or effect of any right or remedy. The same

[55] Broadmeadows Legal Service, *Waltons Survival Kit* (undated) p. 106.
[56] Kelly, op. cit. pp. 138-41.
[57] Interview, Detective Carter, N.S.W. Police Fraud Squad, 1st June, 1977.
[58] Asher interview; interview Ms M. Turner, Collection Manager, College Mercantile Agency, 3rd June, 1977.
[59] White, op. cit. par. 14.11.2. Credit reporting and blacklisting may also contravene s. 45: M. Blakeney, "The Impact Upon Trade Associations of s. 45" (1976) 50 *A.L.J.* 57, 65.
[60] Australia, *Trade Practices Review Committee Report* (1976) par. 9.93 ("Swanson Report").
[61] The abolition has been criticised: Harland, "Trade Practices Review" (1976) *A.F.C.O. Quarterly* No. 6, p. 9; J. Goldring, "The *Trade Practices Act* and Consumer Protection" (1976) 2 *Legal Service Bulletin* 153, 154.
[62] Letter to author from P. M. Holt, Assistant Commissioner, Trade Practices Commission, 9th September, 1977. Mr Holt advised that, under similar state legislation, there have been: "hundreds" of complaints in S.A.; 1 in W.A.; 12 in Victoria; several in Qld. and none in Tas. Tasmania, says Mr Holt, is considering the introduction of unfair trading legislation.

remedies are available as under section 60. Section 53(g) could be used where a collector threatens to use a remedy (such as imprisonment) which is in fact unavailable to him.

Section 52 is far more general: it prohibits conduct which is misleading or deceptive or is likely to be so. The sole remedy is an injunction (which may be initiated by the debtor) under section 80. The section only covers deception, one of the four types of harassment commonly used.

The *Trade Practices Act* is potentially very useful. It has a range of civil, criminal and injunctive remedies (although not class actions[63] or minimum damages) and there is potential for the Trade Practices Commission to issue guidelines to conduct as does its American counterpart, the Federal Trade Commission.

At present the number of Trade Practices Commission staff is apparently inadequate and the Act is said to be suffering from lack of enforcement.[64] Its enforcement appears to be passive, based on consumer complaints, rather than active. That there have been only four complaints about section 60 offences shows that the Act cannot be expected to eliminate abusive collection. The same conclusion has been reached in the United States, where similar legislation has been supplemented by specific collection legislation. Specific legislation clearly sets down what type of collection is illegal and is therefore a much more effective deterrent than general prohibitions such as section 52.[65]

E. CONCLUSION — AUSTRALIAN LEGISLATION

Just as the general law was found to be an inadequate response to harassment, Australian statutes designed to specifically respond to debt collection problems are unsuccessful. The licensing system is unenforced. There is no difficulty in obtaining a licence and no regular supervision of licensees. The Privacy Committee of New South Wales uses a novel voluntary approach, but is only concerned with most extreme activities, and also suffers from a lack of enforcement. Mock summons legislation is enforced, but covers only one of hundreds of harassing tactics. The Commonwealth *Trade Practices Act* is potentially very useful, but is once more poorly enforced.

[63] The absence has been noted by Swanson Report, op. cit. pars. 9.146-9.149; Harland, op. cit. p. 9; Goldring, op. cit. p. 154.

[64] Goldring, ibid.

[65] There is a further miscellany of Australian legislation: civil actions by debtors can be assisted by the N.S.W. Commissioner of Consumer Affairs. Division 3A of the *Consumer Protection Act*, 1969 (N.S.W.) empowers the Commissioner to assist consumer's civil actions. The provision allows the Commission to take test cases without the possibility of being "bought off" by high settlement offers. Assistance requires ministerial consent (s. 16H(1)(d)) and the Premier admitted at its introduction that it would be rarely used: K. E. Lindgren and W. J. Neill, "Consumer Dealings" (1976) 4 *Australian Business L. Rev.* 240, 241; J. Goldring, "Consumer Protection in N.S.W." (1976) 1 *Legal Service Bulletin* 374, 374. Harsh contractual collection provisions might also breach harsh and unconscionable contracts legislation being considered by the N.S.W. government in response to Peden's *Report on Harsh and Unconscionable Contracts* (1976).

The harassment problem was recognised by Kelly and White, each of whose reports proposed statutory solutions. Kelly suggests that there should be a list of prohibited debt collection practices with a civil remedy for serious loss caused by an unfair or abusive practice. His legislation would not be restricted to collectors, but would apply to creditors as well.[66] He makes the useful suggestion that collection letters should be subject to prior approval by a licensing authority, non-approved letters being prohibited.[67]

White proposes an inquiry into debt collection.[68] More generally, he favours a state unfair trade practices Act to cover gaps in the federal system. Loopholes would be closed by an administrator's power to make rules. The administrator would also have power to issue "cease and desist" orders, supported by injunctions, civil penalties and class actions.[69]

The merit of these proposals can be examined by looking at American experience with the broad range of legislation on which the Kelly and White proposals are based. At the same time, the American experience might further confirm the conclusions that licensing, general definitions of harassment and general trade practices legislation are inadequate responses to harassment.

2. *English and American Law*

A. ENGLAND

There are two English statutory responses to debt collection harassment, licensing and the crime of collection harassment. The English licensing system (*Consumer Credit Act*, 1974, section 147) has already been mentioned. Like the Australian system, the English provisions are based on complaints rather than investigations. As a consequence, the English system apparently suffers from a lack of enforcement.[70]

The other major legislative measure is the *Administration of Justice Act*, 1970, based on the *Report of the Committee on the Enforcement of Judgment Debts*.[71] The Act has been strongly criticised for its rejection of the Committee's Enforcement Office proposal and its crude substitution of attachment (garnishment) for imprisonment.[72]

Section 40 of the Act followed the Payne Report's proposal[73] that there should be a criminal offence of harassment but no statutory tort action. Harassment is defined very briefly in four paragraphs. By section 40(3) "reasonable" actions to secure payment are not an offence. The offence is punishable by a fine, not imprisonment (subsection (4)).

66 Kelly, op. cit. p. 31.
67 Ibid. pp. 137, 143.
68 White, op. cit. par. 14.11.3.
69 Ibid. p. 10; Turner, op. cit. p. 39.
70 McManus, op. cit. p. 74.
71 Great Britain, *Report of the Committee on the Enforcement of Judgment Debts* (1969) ("Payne Report").
72 C. Glasser, "*Administration of Justice Act* 1970: Enforcement of Debt Provisions" (1971) 34 *Modern L. Rev.* 61, 69-70.
73 Payne Report, op. cit. pars. 1238-1243.

The remedy is extremely limited. The Payne Report rejected a civil remedy with virtually no argument.[74] Only the most extreme cases of harassment would attract a criminal sanction under section 40, leading Kelly to respond by suggesting a civil action for less extreme cases.[75]

Even extreme cases will not attract action unless the Act is properly enforced, a problem the Payne Report did not refer to. The (English) National Council for Civil Liberties criticised the enforcement provisions because they are based on debtor complaints. The Council pointed out that consumers might be unaware of the legislation and might not want to attract publicity to themselves as defaulting debtors.[76] They have no reason of self-interest to make complaints.

Section 40 does not cover all forms of harassment; it has enforcement problems; and it does not provide for civil recovery by harassed debtors. It is a good model of legislation to be avoided in Australia, since its protection is likely to be far more apparent than real. It is a useful basis for comparison with United States legislation.

B. THE UNITED STATES

The problem of collection harassment has been more thoroughly examined in the United States than in other common law jurisdictions. American controls range from simple self-regulation schemes to sophisticated combinations of civil and criminal law designed specifically to deter harassment by collectors.

The weakest United States solution is self-regulation. A national conference of lawyers and collection agencies was established in 1962 to receive and pass on complaints about collection activities.[77] The solution has blatant weaknesses: it is voluntary and will therefore only go as far as the industry wants it to; it covers only collection agents and only those who are willing to be "regulated"; and it will only cover matters which are publicly visible, so as to calm dissenters. The conference seemed to be politically motivated to provide an apparent solution to collection problems and so avoid the enactment of legislation. If that was the aim, it failed. State legislation has been widely introduced, as discussed below.

1. Federal Legislation. The first important federal statute is the *Federal Trade Commission Act*.[78] Section 5 of that Act is drafted in similar terms to section 52 of the Australian *Trade Practices Act*. There are three important remedies used by the Federal Trade Commission: cease and desist orders, injunctions and guidelines.

[74] Ibid. par. 1242.
[75] Kelly, op. cit. p. 133.
[76] Jones, op. cit. p. 159; Glasser, op. cit. p. 69 also notes the enforcement problems of s. 40.
[77] Maxwell, "National Conference of Lawyers and Collection Agencies—A Progress Report" (1964) 69 *Commercial L. Jnl.* 242; Maxwell, "The Bar-Collection Agency Conference" (1963) 68 *Commercial L. Jnl.* 6; Maxwell, "Latest Developments in Collection Agencies—Bar Relationships" (1964) 69 *Commercial L. Jnl.* 35.
[78] 15 *U.S.C.* 45.

The Federal Trade Commission has issued a guide against debt collection deception which, among other things, requires an affirmative disclosure that a debt is being collected.[79] The guide deals only with deception, one of several types of harassment, and has been criticised for its lack of a sanction.[80] The guide is aimed to help collectors ensure that their methods are legitimate.[81] Although there are constitutional limitations on the Federal Trade Commission, it has been suggested that it should make declarations that certain practices are illegal and so develop national collection standards.[82]

Where it feels that a collection practice is deceptive, the Federal Trade Commission has power to issue cease and desist orders. Those orders become final if the person against whom they are issued does not appeal to the courts. There is a civil penalty (a fine) for breaching a final order.[83] Cease and desist orders have been issued against bogus agencies, deceptive letters, misrepresentation as a retailer organisation and other misleading collection practices.[84] The Federal Trade Commission takes a conservative line: it does not prohibit a collector contacting a debtor's employer despite the objectionable nature of that practice.[85] Where a cease and desist order is not desirable or not available, the Federal Trade Commission may also apply for an injunction: it has done so to enjoin mock summonses.[86]

A Commissioner of the Federal Trade Commission has complained that the Commission is so busy that it can only deal with most blatant violations and those most easily corrected. She also claimed that there is a need for class action powers and for debtors to be able to seek individual relief.[87] Nader, disillusioned with Federal Trade Commission delays, favours allowing consumers to provoke the Commission into action.[88]

The Federal Trade Commission has not been able to adequately control collection harassment. It is only able to deal with a few cases and has therefore been supplemented by other federal and state legislation. For example, although it primarily leaves extra-judicial collection to the

[79] F. W. Kintner, *A Primer on the Law of Deceptive Practices* (1971) p. 345; the Guide was originally published at (1965) 16 *C.F.R.* 237; see also B. Clark and J. R. Fonseca, *Handling Consumer Credit Cases* (1972) p. 118.

[80] "Harassing the Debtor", op. cit. p. 138.

[81] "Collection Agencies and Practice", op. cit. par. 3720.

[82] Jones in "Summary of Hearings on Debt Collection Practices" (1971) 88 *Banking L. Jnl.* 291, 326; Schick in ibid. p. 325; "Collection Capers: Liability for Debt Collection Practices" (1957) 24 *Univ. Chicago L. Rev.* 572, 576-7.

[83] "Remedies and Enforcement Procedures" (1974) 1 *C.C.H. Poverty L. Reporter* pars. 3510 and 3530.

[84] Beckman and Foster, op. cit. p. 538; Greenfield, "Coercive Collection Tactics—An Analysis of the Interests and the Remedies" [1972] *Washington Univ. L. Qtly.* 1, 49; "Chicago Collection Agency Cited", op. cit. p. 61; "New Developments", op. cit. par. 18231.

[85] K. M. Block, "Creditor's Pre-Judgment Communication to Debtor's Employer. An Evaluation" (1969-70) 36 *Brooklyn L. Rev.* 95, 111.

[86] In, *In re Tuseck Enterprises Inc.* 3 *Trade Reg. Rep.* Docket Bill 8117 at 25470; discussed in Maxwell, "National Conference". op. cit. p. 242.

[87] Jones in "Summary of Hearings", op. cit. pp. 324-5.

[88] Nader in ibid. p. 304.

Federal Trade Commission,[89] the federal *Consumer Credit Protection Act* prohibits extortionate collection (Title II). Other federal legislation prohibits: the sending of mail imputing a bad credit record on its face; the use of telephones for harassment; and the use of words implying that the sender is a government agency.[90]

The weakness of the Federal Trade Commission and federal legislation was recognised by state legislatures, which enacted a variety of statutes. The federal Congress attempted to follow suit in 1976.

In that year a Bill was passed by the federal House of Representatives but not enacted, which followed the "state of the art" in state legislation. It listed prohibited practices and provided for class actions, criminal penalties and civil recovery of actual damages with a minimum damages clause.[91] In the absence of that legislation, the primary federal control over harassment remains the Federal Trade Commission and the *Federal Trade Commission Act*. State legislation thus provides the primary control over debt collection harassment in the United States.

2. State Legislation

(a) The Early Acts. There were two early forms of state controlling legislation: unfair trade practices Acts and licensing regulations. Licensing is the most frequently used collection legislation in the United States,[92] but (as noted above) has been found to be most ineffective because of enforcement problems. Some licensing authorities are composed of industry representatives and others fall captive to industry interests. Enforcement is passive rather than active, even in those states where harassment is penalised by a fine as well as a loss of licence.[93]

Fair trade Acts, the other type of early legislation, have been widely enacted among the states, and usually prohibit "unfair and deceptive" trade practices. Enforcement authorities have given dozens of persuasive statements that various collection activities are "unfair and deceptive".[94]

The most common remedy in this type of legislation is a right given to an administrator to seek an injunction against unfair and deceptive practices. Some states allow members of the public to seek injunctions,[95] while other states give rule-making power to the administrator. The best

[89] Block, op. cit. p. 110.
[90] Discussed in "Collection Capers", op. cit. p. 577; Scott and Strickland, op. cit. p. 574; "New Developments" op. cit. par. 15436, 17924; and "Remedies and Enforcement Procedures" op. cit. par. 3720.921.
[91] Bill No. H.R. 13720. Reported at (1976) *Congressional Qtly. Weekly Report* pp. 1956 and 2081.
[92] Connolly, op. cit. pp. 1277-8; Homburger, op. cit. p. 47; Maxwell, "Latest Developments", op. cit. p. 35; Greenfield, op. cit. pp. 39-40 lists the legislation in force in 1972; the licensing cases are discussed in "Collection Agencies and Practice", op. cit. par. 3700.
[93] Licensing problems are summarised by S. D. Shenfield, op. cit. pp. 705-10.
[94] B. Schick, "A Primer on the General Law Applicable to Abusive, Unfair and Harassing Collection Practices" (1972) 6 *Clearinghouse Review* 145, 147.
[95] "Remedies and Enforcement Procedures", op. cit. par. 3510.

known-use of the latter power is a New York City Department of Consumer Affairs rule that it is an unconscionable trade practice to contact or to threaten to contact a debtor's employer except within fixed limits.[96]

Like licensing statutes, enforcement of unfair trade practices provisions is a problem. Generally, the Acts do not give a right of civil action to consumers,[97] although some give that right and some even create minimum damages provisions.[98] Minimum damages, usually of about $200, are awarded to consumers on proof that an unfair or deceptive practice has been used against them. Consumers need not have suffered actual damage to qualify. Damages are awarded as a penalty, not as compensation for harm suffered. Consumers are thus encouraged to take action, unlike complaint procedures where there is no reason of self-interest for consumers to complain. Legislation thus becomes self-enforcing through the use of "private attorneys-general". Administrator inaction is therefore supplemented by private actions.

The combination of minimum damages and official enforcement apparently creates as thorough an enforcement procedure as is possible. However, not all enforcement problems are solved by that combination and further encouragement of debtor action must be considered. Even minimum damages will not necessarily ensure action by non-aggressive consumers. The creation of shopping centre small claims tribunals would help to overcome the fear of litigation. Even then, there might be a residual fear of institutions. In those cases, official enforcement is essential.

The specificity of legislative proscriptions also affects enforcement. The state fair trade Acts do not specifically mention debt collection, and courts and administrators are reluctant to apply the provisions to debt collection. The lack of a specific rule gives flexibility to its administration, but also gives a discretion to conservative administrators and judges to narrowly construe the legislative intention. Thus the breadth of the fair trade Acts is a weakness.[99]

(b) The U.C.C. and U.3C. The *Uniform Commercial Code*, adopted by most states, provides as a defence to judicial collection that the creditor used an unconscionable contract or unconscionable collection efforts.[100]

[96] Ibid. 3720.552; S. L. Dreyfuss, "Due Process Denied: Consumer Default Judgments in New York City" (1974) 10 *Columbia Jnl. of Law and Social Problems* 370, 412; "New Developments", op. cit. par. 15504; Cooper et al., *Law and Poverty—Cases and Materials* (1973) p. 1094.

[97] Schick, op. cit. p. 147.

[98] Connolly, op. cit. p. 1279.

[99] "Harassing the Debtor", op. cit. pp. 137-8; Connolly ibid. p. 1279; Armstrong and Delaney, "Focus on Debtors' Rights—Making the Bill Collector Pay" (1975) 23 *Kansas L. Rev.* 681, 696.

[100] M. M. Sheinfeld, "Current Trends in the Restriction of Creditors' Collection Activities" (1972) 9 *Houston L. Rev.* 615. The U.C.C. and the U.3C. are draft codes without legislative force. They are suggested model Acts which are adopted by American state legislatures, often with minor changes, as state statutes.

Not surprisingly, the *Uniform Commercial Code* provision has been found to be an inadequate remedy for harassment.[101] There is no encouragement for enforcement: it is a defence only and it totally lacks specificity.

The *Uniform Consumer Credit Code (U.3C.)* was drafted partly as a reaction to criticism of the *Uniform Commercial Code*. It creates a government enforcement agency, requires truthful disclosure of credit terms, places a ceiling on interest rates, restricts garnishment and abolishes deficiency judgments on loans under $1,000.[102] The first draft of the *U.3C.* had inadequate protection against harassment. It provided that the administrator could bring a civil action to enjoin creditors from fraudulent or unconscionable debt collection practices (*U.3C.* paragraph 6.111(1)(c)). Although breaches of specific provisions of the *U.3C.* could be subject to cease and desist orders, there were no specific debt collection rules and the catchall "fraudulent/unconscionable" provisions could only be enforced by an administrator bringing action for an injunction. The administrator and the courts thus both had discretion to reject claims that a particular collection action was unconscionable. The administrator could also seek assurances of discontinuance, the breach of which was a *prima facie* breach of the Code. In the first draft there was no power given to consumers to seek damages or injunctions.[103]

While the *U.3C.* was considered to be an improvement on the *Uniform Commercial Code*,[104] action on harassment under the new Code depended entirely on administrator discretion. Administrators were widely criticised for their inaction on harassment matters, caused by lack of funding and conservatism. The Code's admirable flexibility often gave conservative administrators an opportunity to declare trader activities not to be "unconscionable".[105] Most administrators, for example, felt that employer contact by collectors was not "unconscionable",[106] despite the obvious detrimental effects of that practice on debtor-employees.

The result was that only extreme cases were usually acted on, leaving the majority of abusive collection efforts untouched. As found elsewhere, administration was passive rather than active, with no incentive for debtor

101 J. J. Vichich, "The Problem of Debt Collection in Pennsylvania" (1973) 12 *Duquesne L. Rev.* 69, 75. The proposed N.S.W. harsh and unconscionable contracts legislation, mentioned at n. 65 above, presumably would suffer the same defects.

102 Caplovitz, "Affluent Society", op. cit. pp. 653-4; and K. E. Wenk and J. E. Moye "Debtor-Creditor Remedies: a New Proposal" (1969) 54 *Cornell L. Rev.* 249, 258-62 discuss the code.

103 This limitation was commented upon by: Connolly, op. cit. p. 1280; Nader in "Summary of Hearings", op. cit. p. 299; Clark and Fonseca, op. cit. p. 118; Block, op. cit. p. 111; Scott and Strickland, op. cit. p. 577; B. A. Curran, "Administration and Enforcement under the U.C.C.C." (1968) 33 *Law and Contemporary Problems* 737.

104 Vichich, op. cit. p. 76.

105 Caplovitz, "Affluent Society", op. cit. p. 649; Nader in "Summary of Hearings", op. cit. p. 299; Scott and Strickland, op. cit. p. 577; Armstrong and Delaney, op. cit. p. 697.

106 Block, op. cit. p. 111.

complaints.[107] Consequently the anti-harassment provisions of the *U.3C.* were generally considered a failure.[108] As a result, there was a wide call for a right to be given to debtors to seek damages and injunctions,[109] and so improve the U.3C.'s enforcement.

In 1974 the *U.3C.* was redrafted to deal with these criticisms. The new draft made expressly clear that collection activities can be unconscionable and gave a list of factors (examples of harassment) to be taken into account in deciding whether an action is unconscionable. Equally importantly, debtors were given a statutory right to sue for damages or seek an injunction.[110]

The new draft still suffers from a number of limitations; it does not provide specifically that emotional injury is sufficient for civil recovery[111] and there is no provision for punitive[112] or minimum[113] damages and hence little incentive for debtor action. "Unconscionability" is still a question of law, the courts being guided but not bound by the listed factors. That is, there is no list of actions which are *per se* violations of the Code.[114] The Code, in short, seeks to deal only with extreme cases, leaving the majority of dubious collection tactics unregulated.[115] The result is that the *U.3C.* is of limited deterrent value.[116]

(c) The National Consumer Act and its Progeny. The limits of the *U.3C.* prompted the National Consumer Law Centre to draft an alternative model Act, the *National Consumer Act*.[117] By 1975, seven states had adopted legislation based on the *National Consumer Act*, the most thorough collection statutes to date.[118] All the statutes have a list of specifically

107 Armstrong and Delaney, op. cit. p. 697.
108 M. E. Calkins, "The Debtor v. Creditor Dilemma" (1974) 10 *Tulsa L. Jnl.* 231, 242; Armstrong and Delaney, ibid. p. 698.
109 Nader in "Summary of Hearings", op. cit. p. 299; Julavitz and C. A. Stuntebeck, "Effectively Regulating the Extra-judicial Collection of Debts" (1968) 20 *Maine L. Rev.* 261, 282; Calkins, ibid. p. 240; Armstrong and Delaney, ibid. p. 697; Caplovitz, "Affluent Society", op. cit. p. 654 called for class actions under the U.3C.
110 Armstrong and Delaney, ibid. p. 701; the Australian Government Commission of Inquiry into Poverty, *Law and Poverty in Australia: Second Main Report* (1975) ("Sackville Report") at pp. 117-8 was impressed by the provision that reckless credit extension is listed as unconscionable and recommended adoption of the same principle in Australia.
111 Armstrong and Delaney, ibid. p. 706.
112 Ibid.
113 Ibid. pp. 702-3.
114 Ibid. pp. 702, 703, 706.
115 Ibid. pp. 704, 706. At p. 706 Armstrong and Delaney argue that the majority of cases should remain unaffected, since interference with a large number of cases will increase collection costs. The authors apparently fail to see the hidden "costs" to debtors of unregulated collection.
116 Ibid. pp. 703-4. Another serious limitation of the *U.3C.* is that it does not cover the collection of non-instalment, non-interest debts such as medical bills: ibid. p. 702.
117 Ibid. p. 698; Connolly, op. cit. p. 1281.
118 Armstrong and Delaney, ibid. p. 698.

prohibited practices and all allow a debtor to take civil action. The terms apply to all creditors and collectors.[119]

Article 7 of the *National Consumer Act* defines a list of prohibited practices and gives power to the administrator to make rules establishing further prohibited practices.[120] Employer contact is prohibited except to verify job status.[121] The civil remedy provided is that a debtor may seek damages (excluding punitive damages, which are at the discretion of the Court, and recovery for non-physical injury).[122] There is also a minimum damages-type provision, in that a debtor against whom a prohibited practice is used may set up the use of that practice, without proof of damage, as a complete defence to a creditor's action on the debt.[123]

The states adopting the *National Consumer Act* have each done so with some modification. All have listed undesirable practices and some have added a general catch-all clause for flexibility in covering future changes in collection methods: in Wisconsin, once a practice has been enjoined or restrained by a court, further use of it by anyone is a violation *per se* of the Act; and in Washington, any action declared unfair or deceptive by the Federal Trade Commission automatically becomes a prohibited collection practice.[124] All states provide for civil recovery.[125] A majority provide for minimum damages, ranging from $25 in Massachusetts to $500 in Florida.[126] Furthermore, a number of states provide for discretionary triple damages,[127] leaving the Judge to decide whether to triple actual damages in cases of extreme collector abuse. Thus, recovery under the state Acts is even more liberal than under the original model Act.

The *National Consumer Act* and its progeny have struck a raw nerve with some commentators. Some complain that the Wisconsin Act has "harsh" debtor remedies[128] and others that the *National Consumer Act* limits extra-judicial dispute settlement.[129]

119 Ibid. pp. 698, 703; Clark and Fonseca, op. cit. p. 119; Connolly, op. cit. p. 1281. A less powerful alternative code, the *Model Consumer Credit Act*, has also been drafted: Scott and Strickland, op. cit. p. 577.
120 Clark and Fonseca, ibid. pp. 119-20.
121 Armstrong and Delaney, op. cit. p. 700.
122 Clark and Fonseca, op. cit. p. 120.
123 Ibid.; Connolly, op. cit. p. 1282; Armstrong and Delaney, op. cit. p. 703.
124 Howard and Eisenberg, "Warning from Wisconsin: New Regulatory Laws for the Collection of Consumer Debts" (1972) 77 *Commercial L. Jnl.* 246, 247; Connolly, ibid. pp. 1285-6.
125 Armstrong and Delaney, op. cit. p. 700; Connolly, ibid. pp. 1275, 1282-3. The Wisconsin Act is discussed by a hostile Howard and Eisenberg, ibid. and the Act is reproduced by Speidel, Summers and White, *Teaching Materials on Commercial and Consumer Law* (2nd ed., 1974) at pp. 546-8. The Pennsylvania Act is discussed by Vichich, op. cit. p. 97. For notes of the Pennsylvania, Maryland and New Hampshire enactments, see "New Developments", op. cit. pars. 15510, 15749, 21308. For a description of the "laundry list" of prohibitions, see "Collection Agencies and Practice", op. cit. par. 3720.90.
126 Connolly, ibid. pp. 1276, 1283-5.
127 Ibid. p. 1285; Wisconsin *Consumer Act*, 1973, Ch. 427 par. 425.108.
128 Howard and Eisenberg, op. cit. p. 246.
129 Scott and Strickland, op. cit. p. 577.

The complaint that extra-judicial collection is limited by the Acts is significant. That complaint implies that the legislation is effective and assumes that most extra-judicial collection is either unobjectionable *or* undesirable but financially essential.

The first assumption, that non-judicial collection is unobjectionable, fails to see that all forms of non-judicial coercion deny debtors a chance to assert their defences to the claims made against them.

The second, that non-judicial collection is unfortunate but necessary, can also be met. Commentators argue that a restriction on extra-judicial collection will result in more judicial collection and thus higher collection costs and more crowded court lists.[130] This argument is one of values: is the debtor's freedom from arbitrary coercion to give way to society's need for uncrowded courts? It can be argued that any extra costs in "cleaning up" extra-judicial remedies are justifiable.[131] It might be concluded that, like pollution, harassment is sufficiently important to pay for the cost of its eradication.

The crowded courts argument against the abolition of harassment contains a further assumption: that creditors will automatically move to judicial collection. It is possible that once non-judicial coercion is restricted, creditors will prefer to communicate with debtors rather than judicially coerce them.[132]

There are several other complaints against the *National Consumer Act* and subsequent Acts. Connolly claims that debtors might prefer not to see extra-judicial collection restricted and a consequential move to judicial collection, since debtors are more likely to be harmed by the latter than the former.[133] If judicial collection is more harmful than extra-judicial coercion, that is an indictment of the judicial system. Rather than take the lesser of two evils, the evil in each should be removed. It is no answer to one unfair practice to say that another is worse, unless neither can be remedied.

Another complaint is that the catch-all provisions of the "new wave" Acts are too vague,[134] offering no guidance to collectors as to what practices are acceptable. In reply, the catch-all provisions could be abolished, so answering the objection at the expense of flexibility to deal with future collection tactics. Alternatively, flexibility could be retained together with the necessary degree of precision, by drafting a catch-all provision which allowed the courts or the Federal Trade Commission to declare certain activities to be unfair and in future punishable. The courts

130 Armstrong and Delaney, op. cit. pp. 703-4: the authors conclude that the *U.3C.* is to be preferred to the N.C.A. since fewer cases will be taken against abusive collectors: ibid. p. 706.
131 Connolly, op. cit. p. 1288.
132 Ibid. p. 1289.
133 Ibid. p. 1288.
134 Levine, *Proposed Federal Debt Collection Legislation* (1971) pp. 2, 3.6.

or F.T.C. would presumably be able to react to new facts more quickly than the legislature. A third alternative would be to create a list of allowed collection activities and prohibit all others. That alternative is discussed below.

A further complaint about the new Acts is that their minimum damages provisions would result in over-regulation of collection activities.[135] That is, it is argued that placing enforcement into private hands will result in a loss of informed, discretionary enforcement. Thus, the argument goes, insignificant breaches might be unfairly penalised.[136] In response, it can be stated that the problem of trivial actions is not new to the law and can be solved by judicial discretion as to costs and dismissal of frivolous claims. If the minimum damages were subject to a discretion to dismiss frivolous and vexatious proceedings, as it would be under present court rules, the judiciary would be on notice that only the most frivolous actions should be dismissed. Instead of the judiciary having a discretion to declare a practice harmful, it would have to declare that a claim is entirely without merit. The reversal of onus would be a significant attempt to overcome judicial conservatism.

(d) Other Proposed Collection Acts. The debate over the *National Consumer Act* and *U.3C.* provisions has resulted in a number of other proposed statutes. Some are concerned with the details of controlling specific problems, such as employer contact,[137] while one commentator appears satisfied with reforming tort remedies.[138] Others are concerned with the advantages of injunctions[139] and still others with class actions, even considering the problems of conservative interpretation of class action statutes.[140]

There have also been a number of proposals for collection statutes in terms as broad as the *National Consumer Act*. Levine has modelled a statute on the *National Consumer Act* but has criticised that Act for vagueness.[141] Levine's model statute excludes regulations and includes a precise "laundry list" of prohibited practices[142] (though truthful threats to

135 Connolly, op. cit. p. 1287.
136 Ibid. p. 1287.
137 Vichich, op. cit. p. 80; Block, op. cit. pp. 113-114; Scott and Strickland, op. cit. p. 589.
138 Greenfield, op .cit. pp. 78-9.
139 Molomby Report, op. cit. par. 10.4.1. For examples of the use of the injunction power see Speidel et al., op. cit. pp. 535, 546, 579; "New Developments" op. cit. par. 20972; M. Halloran, "Collection Practices (Garnishment, Deficiency Judgments etc.)" (1971) 26 *The Business Lawyer* 889, 895-6.
140 Jones in "Summary of Hearings", op. cit. p. 325; Caplovitz in "Summary of Hearings", ibid. p. 311; Turner, op. cit. p. 39; D. Davies, "Updating Civil Court Procedures for the 1980s" (1975) 49 *A.L.J.* 380, 385. For descriptions of the use and problems of class actions, see "Remedies and Enforcement Procedures", op. cit. par. 3450 at 3450.20 esp.; "New Developments", op. cit. par. 18039; Dreyfuss, op. cit. p. 392. For a discussion of the requirements of exemplary damages, see *Walker* v. *Sheldon* 179 N.E. 2d 497 in Speidel et al., op. cit. pp. 572 ff.
141 Levine, op. cit. pp. 1, 2.
142 Ibid. pp. 3, 6 ff.

credit ratings are not prohibited[143]). There is no catch-all clause. Actual and punitive damages would be available under Levine's Act though there is no provision for minimum damages, and good faith is a defence.[144] The lack of a catch-all phrase is a serious restriction on dealing with future practices. Wide coverage with precision is possible, as discussed above. The lack of a minimum damages clause would also seriously inhibit enforcement of Levine's model Act. Unlike the *National Consumer Act*, Levine also proposes criminal penalties of $5,000 or one year's imprisonment as a supplement to other remedies.[145]

Scott and Strickland have also drafted a model code with a "laundry list" of practices plus a catch-all clause,[146] which create a civil right of action including minimum damages.[147] Criminal penalties were considered but rejected because of enforcement problems and because the vagueness of their catch-all provision is not specific enough for a criminal statute.[148]

Scott and Strickland accept that many debtors will not use the minimum damages provisions because of lack of awareness of their rights, and shrug off that difficulty saying that all debtors can use the collection practices as a defence to legal claims against them.[149] The latter strangely ignores that the prohibited practices are designed to force payment without legal action and that even if judicial collection is used, debtors very frequently do not use defences they have. Thus under their Act, an ignorant debtor would have no protection against harassment. The gap left by Scott and Strickland could be filled by criminal/administrative action, even if criminal action was available only against the "laundry list" and not against the catch-all clause. Catch-all clause violations could then be dealt with by injunction.

In attempting to obtain precision plus coverage of future changes, one scheme considered and rejected, by Scott and Strickland was to list practices which may be used, and prohibit all others.[150] That approach was adopted by Julavits and Stuntebeck who argued that collectors should be limited to contact with the debtor, family contacts and a single tracing letter to the debtor's employer.[151] While the details of the allowed practices might be arguable, the approach has clear advantages. The rules of

143 Ibid. p. 14.
144 Ibid. pp. 19-20.
145 Levine, op. cit. p. 4. Consumers Union (the U.S. equivalent to the Australian Consumers' Association, "Choice") has also listed what it sees as essential prohibitions and remedies: "Harassing the Debtor", op. cit. p. 138; and Schick in "Summary of Hearings", op. cit. p. 328 has called for a laundry list plus civil and criminal remedies.
146 Scott and Strickland, op. cit. pp. 581-9.
147 Ibid. pp. 590-1.
148 Ibid.
149 Ibid. p. 592.
150 Ibid. p. 581.
151 Julavits and Stuntebeck, op. cit. pp. 278-80. The National Commission on Consumer Finance argues that letters should only be sent to the debtor, his family and his lawyer: "New Developments", op. cit. par. 16530.

collection are made clear and the ingenuity of the collection industry in finding further non-prohibited devices is cut off.

Scott and Strickland rejected this approach because it would be too effective in restricting creditor action. They argued that severe creditor restriction would force creditors to use judicial collection, and either raise the cost or lower the availability of credit.[152] This argument has been widely considered. Some are dubious about its validity,[153] others reject it out of hand[154] and others accept the argument but reply that a restriction of credit to poor payers is not necessarily disadvantageous: inadequacy of income would then be shown to be the main cause of indebtedness, and over-commitment would be limited.[155] Dreyfuss argues that the poor might be happy to be abused if it means that credit is made available to them.[156] While it is difficult to quantify the value of the loss of use of credit,[157] credit has obvious advantages and disadvantages: the lack of interest payments means that a consumer's real purchasing power is increased, however, he will not be able to afford the cost of money-saving durables and will lose the advantages of forced savings.[158]

Taking a wider view, Wallace argues that there is no evidence to show that the restriction of remedies would reduce the availability of credit. If it did, a decision about the overall merits of that reform would depend on value differences between observers.[159] Some would argue that it is paternalistic to restrict the availability of credit to the poor, while others would claim that the poor are presently misled and exploited by creditors. It is beyond the scope of this article to examine the merits of that debate.

IV. CONCLUSION

In part II of this article, it was found that the general Anglo-Australian and American laws of tort and crime provide inadequate remedies for harassment. Being general, those systems of law leave gaps which imaginative debt collectors are able to exploit with impunity. The general law also suffers from lack of enforcement.

Part III found that legislative control over debt collection has definite advantages not offered by the common law. Unlike the common law, statutes can be tailor-made to solve a specific problem. In doing so, the legislature can provide particular remedies (such as minimum damages

152 Scott and Strickland, op. cit. p. 581.
153 Nader in "Summary of Hearings", op. cit. p. 305; Jones in "Summary of Hearings", ibid. p. 324.
154 Baron in ibid. p. 139.
155 Nader in ibid. p. 303; Wenk and Moye, op. cit. pp. 268-9.
156 Dreyfuss, op. cit. p. 414.
157 Walker, Sauter and Ford, "The Potential Secondary Effects of Consumer Protection Legislation: A Conceptual Framework" (1974) 8 *Jnl. of Consumer Protection* 144, 154.
158 G. J. Wallace, "The Logic of Consumer Credit Reform" (1973) 82 *Yale L. Jnl.* 461, 477-8.
159 Ibid. p. 481.

provisions) which are unavailable to the common law, and can create administrative agencies to oversee and enforce the remedies provided.[160]

Australian legislatures have taken advantage of those opportunities by creating licensing systems, administrative agencies and specific criminal and civil actions. However, the Australian legislation has been found to be an inadequate response to the problem of harassing debt collection. There are serious doubts about the enforcement of Australian provisions and they all suffer, more or less, from a lack of specificity.

In the United States, there have been more serious attempts to stem harassment. The problems of lack of specificity and lack of enforcement have been recognised there.[161] The trend in the United States has been from the general to the specific. The "new generation" of *National Consumer Act* inspired legislation has been concerned to precisely define which actions are legitimate and which are not. At the same time, the problem of enforcement has been recognised and there has been a move from the early simple remedies to sophisticated combinations of criminal, civil and administrative remedies.

In deciding on the direction of future debt collection legislation, Australian and British legislatures and Law Reform Commissions should benefit by the American experience. In making those decisions, they will face one especially difficult choice: between a list of prohibited practices (plus a catch-all clause), all other activities being allowed; and a strict list of allowed practices, all other collection activities being prohibited. The political power of the debt collection and finance industries should not be underestimated. Those industries would strongly favour the first solution, since that solution allows some freedom in the methods of collection. However, the second solution would provide more certain control over harassment. Furthermore, if it is decided that all forms of non-judicial coercion are objectionable, the second alternative would be favoured. Collectors and creditors could then be restricted to reminder-letters, judicial coercion and a reliance on pre-credit checking to avoid default. Although it is beyond the scope of this article to decide whether the abolition of all forms of extra-judicial coercion is necessary, the second alternative shows that that task is possible.

[160] Armstrong and Delaney, op. cit. pp. 704-6.

[161] S. D. Shenfield, op. cit. pp. 705-6; Givens in "Summary of Hearings", op. cit. p. 296; Caplovitz "Affluent Society", op. cit. p. 649. Nader claims that U.S. collection legislation has been ineffective because of public hostility to defaulting debtors: "Summary of Hearings", op. cit. p. 299. The English Crowther Report (Great Britain, *Report of the Committee on Consumer Credit* (1971)) par. 6.11.9, pointed out the problem of enforcement of criminal legislation where there is no specific regulating authority. There have been enforcement problems in the U.S. even where regulating authorities exist.