

Residential Tenancies Practice Note 11-04

Prohibited debt collection practices and tenancy law

Background

From 1 January 2011 the *Fair Trading Act 1999* (the FTA) contains provisions dealing with “prohibited debt collection practices”. The provisions set out what practices are prohibited, make it an offence to engage in such practices and allow a person to claim compensation for humiliation or distress where they have been subject to more than one incident of such practices.

These provisions may assist our clients in a range of circumstances. This practice note sets out the relevant provisions, and considers some uses that advocates and tenants might make of the provisions.

What are the provisions?

Prohibited debt collection practices under the FTA

Section 162AA of the FTA makes it an offence in trade or commerce to engage in a “prohibited debt collection practice”. A penalty of 240 penalty units for a person or 1200 penalty units for a corporation applies. The practice must occur whilst collecting or attempting to collect a debt (which includes an alleged debt), or repossessing or attempting to repossess goods.

The section sets out a number of activities as “prohibited debt collection practices”, including:

- Entering or threatening to enter a private residence without lawful authority, or using threats or deception to obtain consent to enter;
- Attempting to take possession of, or threatening to take possession of any property to which the person is not entitled to possession;
- Refusing to leave a private residence or a workplace when requested to do so;
- Using physical force or undue harassment or coercion;
- Doing or threatening to do acts that intimidate a person or a member of their family;
- Doing or threatening to do an act that may expose a person to ridicule a person or their family;
- Using documents that are not official but resemble or purport to resemble an official document (such as a court document);
- Disclosing or threatening to disclose debtor information, without consent, to any other person who does not have a clear and legitimate interest in the information;
- Contacting a person by a method that the person has asked not to be used, unless there is no other method available;

- Contacting a person about a debt after that person has requested that any further contact be by way of an action issued through a court, or the threat of an action that person intends to take;
- Communicating with a person under 18 years who is not the person owing the debt;
- Demanding payment without a reasonable basis for believing that the person is liable;
- Communicating with a person in a manner that is unreasonable in its frequency, nature or content;
- making a false or misleading representation in connection with the nature or extent of the debt, the consequences of not paying the debt, or the method of recovering the debt.

Although the practices which are prohibited are broadly worded, in order to constitute a breach they must occur whilst a person is attempting to collect a debt or attempting to repossess goods. A debt or alleged debt would include any payment a party claims is due under a contract, or as a result of a breach of that contract.

Also the conduct must occur 'in trade or commerce'. This expression has a technical legal meaning under consumer protection legislation, and legal advice should be sought.

Examples in a tenancy context

Some examples of tenancy-related conduct that may contravene the section include:

- Demands for payment of rent coupled with a threat to evict without following the procedures under the *Residential Tenancies Act 1997*;
- Ongoing harassment by a landlord or an agent for payment of rent may become unreasonable in its frequency, nature or content;
- Physical force or threats of force, intimidation and undue harassment of a tenant by an agent or landlord in relation to rent or some other request for payment;
- Landlord or agents entering the tenant's property without giving proper notice for the purpose of collecting debts;
- Threats by agents or landlords to disclose debt information for the purpose of collecting the debt;
- Making demands for payments where there is a dispute without initiating proceedings, where a tenant has advised that they dispute their liability and request that the landlord initiate those proceedings.

This conduct would breach the section only where it is coupled with a demand for payment.

These provisions also apply to rooming house and caravan park residents and site tenants.

Claiming compensation

Section 162AB of the FTA allows a claim for compensation for humiliation or distress of up to \$10,000 for certain contraventions of s 162AA.

First there must have been a 'course of conduct' by the debt collector. This is defined in s 162AB (2) as conduct which occurs on at least two occasions.

Second the contravention must be with respect to a 'consumer debt' – a debt incurred by a person wholly or predominantly in connection with personal, domestic or household purposes.

A person seeking to claim compensation should be referred to a community legal centre, Consumer Action Law Centre or a private lawyer, for further advice.

What can you do if a landlord/agent engages in prohibited debt collection practices?



1. Write to the landlord or agent threatening further action

Write a letter requesting that the landlord and/or agent cease breaching the FTA and advising that either a complaint to Consumer Affairs Victoria or a compensation claim may be made should the breach occur again.

The letter should note the penalty units for a breach, and the possibility of a claim for up to \$10,000 for distress or humiliation if a second breach occurs.

It is a breach of the Legal Professional Rules for a solicitor to threaten the institution of criminal or disciplinary proceedings against another person because that person has failed to satisfy a civil liability that is due to a client.

As our client in this instance is not making a claim for payment, we are able to write to the landlord or agent threatening to report them to Consumer Affairs Victoria for prosecution if they continue with prohibited debt collection practices. It would also be reasonable to advise them that they run the risk of prosecution if they do not cease.

You can also write to the landlord or agent to take advantage of one of the provisions that in effect create a right to:

- Request that a landlord or agent cease contacting them by a particular method about the debt, and provide to the landlord a method that the client is happy with, for example via email (s.262AA (2)(l))
- Requesting in writing that the landlord cease contacting the client about the debt until they have initiated action at VCAT (s.262AA (2)(m))

2. Make a complaint about the landlord or agent to Consumer Affairs Victoria or to the Estate Agents Resolution Service

These complaints can be made in the usual way citing the alleged breaches of the FTA. Whether or not any action is taken will be largely dependent on the current compliance priorities of CAV and EARS.

3. Initiate proceedings at VCAT

There are a number of possible applications that could be made at VCAT depending on the circumstances. For example, applications include:



- an application for an injunction under s 108 of the FTA;
- an application for compensation under s 159 for a breach of the FTA. See *Fewster v Dun & Bradsteet (Australia) Group Pty Ltd* [2010] VCAT 1682 for an example of compensation being awarded in similar circumstances;
- an application for compensation for humiliation or distress under s. 162AB (1) where there has been more than one instance of the landlord or agent engaging in prohibited debt collection practices.

These provisions of the FTA allow a claim to be made against the person engaged in the prohibited debt collection practice. This may allow a claim against both the real estate agent and the landlord, however as the legislation is new this has not been determined by VCAT.

Where the claim is for compensation, 'person involved' is given the definition contained in s.145 of the FTA, which is very broad. It seems that a claim for compensation could be made against a real estate agent.

These provisions do not apply to a sheriff, police officer, bailiff or government employee acting in an official capacity.

This Practice Note is a guide only and should not be used as a substitute for professional legal advice. If you have a question about this Practice Note or a specific matter and you require advice you should contact the Tenants Union Legal Service on **9411 1444**.

Tenants Union Legal Service

References:

Fewster v Dun & Bradsteet (Australia) Group Pty Ltd [2010] VCAT 1682

Fair Trading Act 1999

Residential Tenancies Act 1997