



## Financial Counselling How To Guide

### How to obtain a waiver of a debt for your client

November 2011

It's a familiar story. In spite of their best efforts (and yours), your client cannot and will never be able to repay their debt. We know it, the client knows it, Centrelink knows it – it's blindingly obvious to everyone except for the one person that matters: the creditor. So what can you do when the only sensible option is for the creditor to give up and forgive the debt entirely, but the creditor refuses?

This situation is one that we at Redfern Legal Centre face regularly with our clients, and we're sure you do too. No doubt you have your own tips and tricks to get your client back on track, but we thought we'd share some of ours with you.

**First step:** Check whether your client is eligible for the National Bulk Debt Project, which is run by Legal Aid and the West Heidelberg Legal Centre. The project collects debts and negotiates for them to be waived. Go to <https://www.bulkdebt.org> for more information.

### Tip 1 – Pester Power

In our experience, correspondence sent to a creditor or debt-collector often gets lost or mislaid, or the person to whom you sent the correspondence has left the office or gone on leave. Don't give up or be put off! Unfortunately, it seems that you do not often get the outcome you want without numerous follow-ups with the creditor by phone, email, fax or mail.

We know that this can be extremely inefficient and frustrating, particularly when you could be putting your precious resources to better use than chasing debt-collectors and creditors. But on the bright side, sometimes it can be nice to turn the tables, and make the debt-collectors and creditors take a little pressure for a change. And if you can't seem to get a response no matter how much you call/fax/email/write, remember that a creditor's failure to respond to a complaint is sufficient grounds to lodge a complaint in EDR.

## **Tip 2 – Escalate**

If you suspect that the person you're speaking with on the phone is simply reading off a script (you can usually tell because when you throw them a curve ball question they start to panic), ask to speak to their supervisor. Often the person you speak to at first instance won't have authority to make significant decisions about waiving debts, and negotiating with them is a waste of time. Insist that you be put through to a supervisor, or if the supervisor is "in a meeting" (as they often are when you ask to speak to them), request that they call you back. Escalating the matter is a good way to ensure you get someone sensible on the phone eventually.

## **Tip 3 – Point out the commercial reality of the situation**

Explain to the creditor that due to your client's inability to pay, attempting to enforce the debt will cost them more than they will be able to recover. If your client is approaching retirement age, has been unemployed for an extended period of time or is unable to work, you can also point out that your client is in permanent severe financial hardship and that their financial situation is unlikely to ever improve.

## **Tip 4 – Ask for a waiver on compassionate grounds**

If your client suffers from a medical condition, has recently undergone a traumatic event or there are other personal circumstances that might warrant a waiver on compassionate grounds, there is no harm in asking. Often you simply need to convince the person on the phone to exercise their discretion to waive the debt.

## **Tip 5 – Play the man (or woman) and not the ball**

This tip relates to Tip 4. If you happen to land a particularly uncompassionate person on the phone, see if you can call back later to speak to someone else. You might get someone a little more sympathetic to your client's plight.

## **Tip 6 – See you in EDR!**

Where a creditor has failed to comply with one of its obligations under the National Consumer Law (**NCL**), or has acted inappropriately in dealing with your client's matter, this can be a great weapon in your arsenal. Any breach of conduct or misdemeanour on the part of the creditor can form the basis of a complaint to External Dispute Resolution (**EDR**), ranging from breaches that seem relatively minor (such as the creditor called the client instead of contacting you) to breaches that are extremely inappropriate (such as the debt collector falsely making correspondence look like a court document with the intention to mislead your client into paying).

Lodging the complaint with EDR usually means that your client's matter will be transferred to a dispute resolution department within the creditor. If this happens, you will then be dealing with a person who can review the matter afresh, and who often has more discretion in resolving the matter for your client. The creditor will also be mindful of the costs of the EDR scheme should the matter escalate even further, and be more amenable to resolving at the dispute at this stage. Most

creditors don't like spending extra time and money on a debt that even they know they won't be able to recover.

If you think that the NCL or a code of conduct may have been breached, you can always call us on 9698 7277 to check.

### **Tip 7 – Waiver or write off?**

Always ask for a waiver! In accounting terms, a write-off may simply mean that the debt has been put to rest for a while, but that it can be re-visited later to see if your client's position has improved. A waiver means the debt disappears and your client won't be pursued for it. See if you can get confirmation in writing of the waiver. If the creditor refuses, this may be grounds for a complaint to EDR. You should carefully file note all conversations relating to the waiver, in case they renege later.

### **Is my client “judgment proof”?**

If your client lives in NSW, then the short answer is no. As a result of National Bulk Debt Project between Legal Aid NSW, Legal Aid Victoria and the West Heidelberg Community Legal Centre (Victoria), there has been a lot of talk about negotiating waivers on the basis that an individual's Centrelink payments are protected under law and cannot be garnisheed. Unfortunately, this is not the case in NSW. In Victoria, there is legislation that provides for the protection of Centrelink payments, but NSW debtors are not so lucky.

The Social Security (Administration) Act (Cth) does provide for the protection of savings made from Centrelink payments. The below description, which is available on the FAHCSIA website, sets out quite clearly how garnishee orders operate in relation to Centrelink recipient's accounts:

*Once a social security payment has been paid into a recipient's bank account it is no longer a social security payment under the Act. It becomes part of the recipient's funds. A garnishee order on the account, equal to the amount of the recipient's payment, is NOT affected by the inalienability provisions. The Act, however, provides for a saved amount to which the garnishee order CANNOT apply. The saved amount is equal to the following:*

- *the total amount of the recipient's payment, including advances, paid into the account in the 4 week period immediately before the order, MINUS*
- *the total amount withdrawn from the account in the same period.*

In practice, many creditors appear to accept that Centrelink payments should not be garnisheed. However, legally, it is possible to do so. See [section 62](#) of the Social Security Administration Act (Cth) for the relevant legislation.

### **Call for case studies**

At Redfern Legal Centre, we are currently looking for case studies relating to Centrelink recipients who have had their payments subjected to a garnishee order.

If you have any such case studies, please contact us to let us know (provided your client consents, of course).

## **Referrals**

Redfern Legal Centre is currently accepting referrals of clients who have had or about to have their Centrelink payments garnisheed.

We are also accepting referrals of clients seeking advice in relation to contracts that fall under the new credit laws (i.e. consumer credit contracts entered into after 1 July 2010).

If you would like to make a referral, please contact Michelle or Ingrid on (02) 9698 7277.

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Prepared by: Michelle Schonstein, Credit & Debt Solicitor in November 2011.

Please note this information is not a substitute for legal advice in relation to individual circumstances.

**For further information:** contact Michelle Schonstein or Ingrid van Tongeren on (02) 9698 7277, or email [michelle@rlc.org.au](mailto:michelle@rlc.org.au).

If you wish to be removed from the mailing list please reply to his email and let us know you wish to be taken off the list.