



AUSTRALIAN COLLECTORS &
DEBT BUYERS ASSOCIATION

12 August 2009

Ms Carolyn Morris
Senior Lawyer
Strategic Policy
Australian Securities and Investment Commission
GPO Box 9827
MELBOURNE VIC 3001

By email: policy.submission@asic.gov.au

Dear Ms Morris

**Submission to ASIC Consultation Paper 111:
Compensation and financial resources arrangements for credit licensees**

The Australian Collectors & Debt Buyers Association (ACDBA) appreciates the opportunity to provide comment on the ASIC Consultation Paper 111: *Compensation and financial resources arrangements for credit licensees*.

We are strongly of the view that both contingent collectors and debt purchasers should be exempt from the National Consumer Credit Protection (NCCP) legislation and expect our 12 month exemption will become a permanent one.

Our members are not party to the initiation or execution of the transaction between the two originating parties (the credit provider and the consumer). Members' responsibility to the consumer relates specifically to their conduct in relation to the interactions they have to recover a debt. It has nothing to do with the legitimacy of the debt, or the conduct of the credit provider during the term of its relationship with the debtor.

The ACDBA welcomes harmonised and fair regulation to ensure the activity of debt collection (whether as an agent or other) should be managed to community standards. We believe that the National Consumer Credit Protection Bill is not the appropriate vehicle to bring about a national regime to manage our industry.

Regardless, we wish to comment on ASIC's Consultation Paper 111 so our industry perspective is considered in its development and included should we later find ourselves obliged to comply with the NCCP regime. Should our efforts to exempt the industry from the legislation not be supported then we seek to ensure that the regulations clearly acknowledge the unique nature of the debt management industry and exempt its participants from responsibility for any components that are not directly related to our members' activities.

In understanding our perspective, it is important ASIC appreciates compensation and financial resource arrangements in the debt collection context would provide 'protection' to the commercial entities involved, as consumers are not at risk of suffering any loss. ASIC's Regulatory Guides RG126 *Compensation and insurance arrangements for AFS licensees* and RG166: *Licensing: Financial Requirements* are premised on consumer loss, which does not apply in the credit transaction and even less in the collections context.

In the credit transaction, it is the credit provider whose funds are at risk, not those of the consumer. Consumers have already received the benefit of a loan so only payments made through a debt collection agency can be at risk. Under the contractual arrangements between a credit provider and the debt collection agency, the debt collection agency is liable to the credit provider for any payments made by consumers but not transferred to the credit provider. Regardless, the payment made to the debt collection agency must be credited to the consumer's account.

Clearly, little, if any, consumer financial detriment arises from debt recovery conduct whether in the context of contingent collectors or debt purchasers so compensation in the debt recovery context is misplaced. Where the consumer has suffered loss or detriment in the original credit transaction, the debts are generally returned to the originating credit provider for resolution – in the case of contingent collectors this is based on the "principal and agent" relationship, whereas in the case of debt purchasers based upon the assignment agreements entered into between the debt purchasers and the original credit providers. In both situations, this places the responsibility for resolving contentious issues in the most appropriate place – with the parties involved in the conduct in question. And that is the approach that should be taken in relation to compensation arrangements. The consumer should be referred to the business responsible for the loss in question.

Our approach is entirely consistent with the theme of RG104, at pp 30 & 31, which makes it clear to each licensee 'you can outsource functions, but not your responsibility as a licensee'. Debt collection, however undertaken, is essentially an outsourced function of credit licensees. If there is a problem with the making or management of the contract, or a compliance requirement to perform, the responsibility for that comes back to the credit licensee. As noted earlier, this responsibility is, and will be, managed by contractual obligations and commitments between credit licensees and those who provide debt collection services, whether as agent or purchaser.

In relation to financial resource adequacy, the only entity at risk is the collections or debt purchase business itself, not the consumer or the originating credit provider. This is simply because the debts outsourced for contingent debt collection reverts to the originating credit provider should the debt collection agency cease business for any reason. In the debt purchase situation, the debt buyer owns the debts, so financial failure impacts on that business only. There is no consumer detriment.

In addition, corporations already have obligations under other legislation not to trade while insolvent. It is redundant for ASIC to include such requirements under licensee obligations for the debt collection sector, particularly when the NCCP regime is premised on consumer, not commercial, protection. Given the significant contractual obligations that exist between credit providers and debt collectors and debt buyers, and the commercial consequences of non-compliance, the commercial relationships more than adequately address the issues of compensation and financial adequacy.

Currently, our members are separately licensed at the individual and corporate levels across almost all states and territories. Professional indemnity (PI) insurance is generally a part of the licensing regime and, regardless, would be a standard business practice for our members. In determining the appropriate amount and extent of PI coverage, ASIC must bear in mind its role under the NCCP regime is to protect the consumer interest, not that of the commercial entities involved. Any assessment of the PI cover needs to be based on a sound appreciation of where the risks lie.

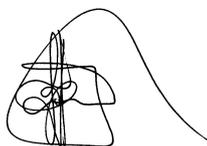
In our view, it is not appropriate for ASIC to attempt to rework regulatory guidances which are aimed at protecting the consumer interest to apply to narrow business functions, such as debt collection, where the risk is between the business entities involved and managed by contractual arrangements. We appreciate the difficulties ASIC has in balancing the competing interests of stakeholders potentially caught in a regime based on consumer protection but which does not reflect the commercial reality of the service providers involved. Regardless, it needs to ensure it does not contribute to imposing an increased regulatory burden on our members who are already inconsistently regulated across all States and Territories except the Australian Capital Territory.

We recommend ASIC recognise in RG126 and RG166 the limited application of most requirements to narrowly focused service providers, such as the debt collection industry, and significantly scale back its compliance expectations. The Regulatory Guides should clearly state the limitations on their application.

Alternatively, we would appreciate the opportunity to work with ASIC to develop a guidance specifically for the debt collection and debt purchase sectors that provides clarity around its compliance expectations for an industry already burdened with inconsistent regulatory regimes should our exemption be revoked.

We thank you for the opportunity to present our view and look to the opportunity to participate in further discussion.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'Alan Harries', with a long, sweeping underline that extends to the right.

Alan Harries
CEO

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