



AUSTRALIAN COLLECTORS &
DEBT BUYERS ASSOCIATION

24 July 2009

Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Sir,

Australian Collectors & Debt Buyers Association Submission National Consumer Credit Protection Bill 2009

The Australian Collectors & Debt Buyers Association (ACDBA) thanks the Senate Economics Legislation Committee for this opportunity to provide comment on the National Consumer Credit Protection Bill 2009 (NCCP).

We are pleased to contribute to the consideration of a regime that will provide robust Consumer Protection, while allowing businesses operating in the credit market to function in a predictable, well regulated and competitive environment, promoting transparency and fair business practices.

As you may be aware, the ACDBA has been largely excluded from the preliminary consultation process with respect to this legislation. We note as highlighted in the attached Hansard extract that with respect to debt collection, concessions have been made acknowledging the differences and unique processes which apply to that sector and therefore restrict our response today to the impact the proposed legislation will have upon our members engaged in the purchase of distressed debts.

In its current form, the NCCP will impact those companies which purchase debts which arise from credit contracts entered into with licensed Credit Providers. These Debt Buyers are not involved in the credit assessment; credit granting; management of active credit facilities, in fact in any of the processes that might be generally regarded as "Credit Activities".

The Debt Buyer becomes the beneficiary of a potential asset as a result of a purchase from a Credit Provider only at the point when the debt becomes distressed and has been charged off by the Credit Provider. We suggest that debt buyers do not conduct credit activity, and are in fact simply undertaking the Debt Recovery function, which has otherwise been excluded from the impact of this Legislation. The responsibilities for compliance with the NCCP should remain with the originating Credit Provider and not transfer with the ownership of the debt to entities not otherwise participating in the broader provision of credit.

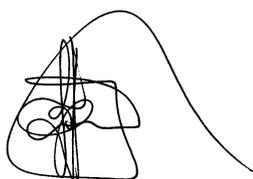
As an industry we have no reluctance to participate in Regulation, Licensing, Consumer Protection regimes or any form of appropriate regulation or legislation. It is however apparent that as tertiary participants in the credit transaction, we are unable to comply with many of the obligations and responsibilities which will flow to us upon the acquisition of a debt created as a result of credit activity by a Credit Provider.

The ACDBA is currently liaising with a number of State and Federal authorities, promoting and supporting national harmonisation of regulations impacting the debt collection sector on a National basis. Currently we are separately licensed at the individual and corporate levels across almost all states and territories. We support a universal set of rules and licensing which would include the activities of Debt Collection and Debt Buyers. We believe the harmonisation initiatives currently underway will provide an effective form of regulation, and therefore believe inclusion of Debt Buyers under the NCCP will impose a level of compliance and administration which is onerous, incongruous and inappropriate.

The recently released ASIC Consultation Papers regarding the obligations it will oversee as part of the NCCP continue the reference to "Credit Activity" at odds with the function of Debt Buyers, and we trust that this position can be addressed by removing this function/activity from the obligations of the NCCP, and linking the activity to the Debt Collection sector, with its separate and well established licensing regimes. However, in the event that this logical and reasonable approach is not accepted, we would request the Committee review the additional observations we have enclosed herewith on the NCCP and the Explanatory Memorandum.

We thank you for the opportunity to present this delayed response 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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Attachments:

1. Extract from Hansard
2. Addendum to ACDBA Submission

DRAFT HOUSE MINUTES

No. 106

THURSDAY, 25 JUNE 2009

3 NATIONAL CONSUMER CREDIT PROTECTION BILL 2009

Mr Bowen (Minister for Financial Services, Superannuation and Corporate Law), pursuant to notice, presented a Bill for an Act relating to credit, and for related purposes, 9:04:40 AM.

Document

Mr Bowen presented an explanatory memorandum to the bill, 9:04:43 AM.

Bill read a first time, 9:04:47 AM.

Mr Bowen moved—That the bill be now read a second time, 9:04:54 AM.

Debate adjourned (Mr Lindsay, 9:18:54 AM), and the resumption of the debate made an order of the day for the next sitting.

4 NATIONAL CONSUMER CREDIT PROTECTION (TRANSITIONAL AND CONSEQUENTIAL PROVISIONS) BILL 2009

Mr Bowen (Minister for Financial Services, Superannuation and Corporate Law), pursuant to notice, presented a Bill for an Act to deal with transitional and consequential matters in connection with *National Consumer Credit Protection Act 2009*, and for related purposes, 9:19:18 AM.

Document

Mr Bowen presented an explanatory memorandum to the bill, 9:19:22 AM.

Bill read a first time, 9:19:26 AM.

Mr Bowen moved—That the bill be now read a second time, 9:19:38 AM.

Debate adjourned (Mr Lindsay, 9:21:30 AM), and the resumption of the debate made an order of the day for the next sitting.

5 NATIONAL CONSUMER CREDIT PROTECTION (FEES) BILL 2009

Mr Bowen (Minister for Financial Services, Superannuation and Corporate Law) presented a Bill for an Act to impose, as taxes, fees for things done under the *National Consumer Credit Protection Act 2009* or the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*, and for related purposes, 9:21:51 AM.

Document

Mr Bowen presented an explanatory memorandum to the bill, 9:21:57 AM.

Bill read a first time, 9:21:59 AM.

Mr Bowen moved—That the bill be now read a second time, 9:22:15 AM.

Debate adjourned (Mr Lindsay, 9:23:28 AM), and the resumption of the debate made an order of the day for the next sitting.

NATIONAL CONSUMER CREDIT PROTECTION REFORM PACKAGE

The Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen MP, will today introduce the Rudd Government's national consumer credit laws into Parliament.

The regime will establish, for the first time in Australia, a single, standard, national law for the regulation of consumer credit.

"The new regime will provide better protection for all Australians and assist with market confidence for the ongoing stability of the consumer credit sector," Mr Bowen said.

"In introducing these reforms into the Parliament, I would like to acknowledge the outstanding work of Minister Sherry in carrying this reform through."

The National Consumer Credit Protection Reform Package (the Reform Package) sees the Rudd Government deliver on Phase One of the historic agreement made by the Council of Australian Governments (COAG) in October 2008 for the Commonwealth to assume responsibility for consumer credit regulation.

"There are substantial benefits to be realised from the credit reform package and its implementation is long overdue. The package of reforms will see consumers and industry benefit through robust licensing regime—that will exclude the unscrupulous and incompetent from the industry," Mr Bowen said.

The reform will see the integrity of the credit market in Australia significantly enhanced. Providers of credit and credit related services will be world leading as a result of the rigorous entry conditions required for an Australian credit licence and the requirement to meet responsible lending standards when providing credit or credit assistance.

The credit market will benefit from enhanced assurance that consumers are well protected and the international confidence that Australia has a well regulated credit market contributing to the promotion of a stable domestic and international financial sector.

Significantly, phase one of the new national regime includes:

- a national licensing regime regulating credit providers and providers of credit related services enforced by the Australian Securities Commission (ASIC) as the sole regulator;
- world-leading responsible lending requirements;
- significant reduction in red-tape for Australian businesses in the credit industry;
- low cost, easy access dispute resolution mechanisms for consumers;
- new consumer redress options;
- protections for investment property loans;
- numerous enhancements to the State-based Uniform Consumer Credit Code (UCCC); and
- an increase to the threshold for hardship claims.

The Government is keen to strike the right balance in these reforms, so following extensive consultation, has made the following changes to the legislation:

- *Point-of-sale retailers* - for example, car dealerships or retail outlets – will be exempt from the requirements that facilitate credit assistance to consumers. The Government will examine the issue of regulatory oversight within the next 12 months.
- The *responsible lending conduct obligations* will commence on 1 January 2011 to provide industry time to put in place the systems, arrangements and training needed to comply with these obligations.
- The requirement for credit providers to perform the *credit assistance obligations* when providing credit assistance in relation to their own proprietary credit products has been removed.

The Reform Package comprises three Bills:

- the National Consumer Credit Protection Bill 2009 (Credit Bill) which replicates the current UCCC as the National Credit Code (Code);
- the National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009 (Transitional Bill); and
- the National Consumer Credit Protection (Fees) Bill 2009 (Fees Bill).

To ensure the smooth operation of the legislation, the Reform Package will be augmented by regulations on a range of matters to give guidance to industry and allow greater flexibility so that the laws may be applied in a sensible and practical way.

The Government intends to build on the reforms to enhance the regulatory framework established by this package. Work on the next phase will include the areas of credit card limit extensions, fringe lending issues and reverse mortgages as well as extending the regulation of credit to include small business and other investment loans.

The package of consumer credit reforms will be available at www.treasury.gov.au/consumercredit.

FURTHER DETAILS OF THE CREDIT REFORM PACKAGE

Credit Reform Package

The Reform Law Package establishes the key components of the regulatory framework.

- The Credit Bill develops a framework to license credit providers, brokers and intermediaries and applies responsible lending conduct requirements to licensed parties. It also provides a robust dispute resolution mechanisms supported by appropriate enforcement powers for the sole national regulator (ASIC), court arrangements, remedies for consumers and penalties for licensee misconduct.

- The Transitional Bill contains the treatment of rights and liabilities of certain existing credit contracts; and arrangements for court proceedings that existed or arose prior to the commencement of the Credit Bill. It also establishes a registration process for industry participants as a precursor to licensing.
- The Fees Bill provides the mechanism to support the imposition of fees for various matters such as the lodgement of documents and the inspection or search of a register kept by ASIC.

Proposed Regulation

To facilitate the smooth operation of the national credit regime in a sensible and practical manner, broad regulation making powers are included in the Credit law package to enable the making of regulations in relation to matters, such as:

- the treatment of interest paid in advance for residential investment property;
- the setting of fees and charges for lodgement of a licence application and licence renewal;
- exemptions from licensing – for example, exemptions for state-licensed debt collectors (12 months only) and for point of sale credit assistants;
- clarifying the application of responsible lending requirements relating to certain disclosure documents, such as the provision of the credit guide when the transaction is commenced by phone or online and the format for commission disclosures;
- clarifying, where needed, the application of the responsible lending provisions to particular situations in relation to certain products;
- establishing the infringement notice regime;
- clarifying the jurisdiction where legal proceedings must be commenced; and
- streamlining to a licence brokers who hold either an 'A' or 'B' class licence under the *Finance Brokers Control Act 1975 (WA)*.

Commencement of the Reform Package

Subject to the passage of the Reform Package and reference legislation in each state, the Reform package will commence on 1 November 2009:

- Lenders and credit-service providers (such as brokers) will be required to register with ASIC between 1 November 2009 and 31 December 2009, and will have to apply for a licence by 30 June 2010 in order to continue to engage in credit activities.

- The responsible lending conduct obligations will commence on 1 January 2011 to provide industry time to put in place the systems, arrangements and training needed to comply with these obligations.

Key features of the Reform Package include:

- a comprehensive licensing regime for all providers of consumer credit and credit-related services in the industry;
- industry-wide responsible lending conduct requirements on licensees – these requirements will prohibit the suggestion or provision of credit products and services that are unsuitable for the consumers' needs and that the consumer does not have the capacity to repay;
- improved sanctions and enhanced enforcement powers for the regulator, the Australian Securities and Investments Commission (ASIC);
- expanded protection for consumers through court arrangements, remedies for consumers and penalties for licensee misconduct; and
- an expanded scope for the Code to include regulation of credit provided to purchase, renovate, improve or refinance a residential investment property.

Comprehensive licensing regime

Recognising that industry will need time to move over to the new credit regime, a two-stage approach – a period of registration followed by licensing – is designed to ease the transition burden for industry and ensure that consumers are not left exposed in the transfer.

A person will not be able to obtain a credit licence if they cannot demonstrate:

- they are a fit and proper person, and
- they meet the legal obligations of a licence holder (such as acting honestly, efficiently and fairly or properly training and supervising their agents).

Questionable operators on the margins who cannot meet these new national standards will not get a licence and will be forced to exit the industry.

The requirement to hold a credit licence will apply to:

- all banks, credit unions, finance companies and other lenders; and
- mortgage and finance brokers, and other intermediaries who assist consumers to obtain credit.

Authorised deposit-taking institutions will be streamlined into holding an Australian credit licence in recognition of the adequacy of existing rigorous levels of government oversight.

Regulations may also provide for the streamlining of other participants and licence exemptions.

Point-of-sale retailers – retail outlets and intermediaries (for example, car dealerships or other point of sale retailers) that facilitate credit assistance to consumers will be exempt from these requirements, with a review of the issue of the appropriate regulatory oversight to occur within 12 months. Lenders of credit and lease arrangements in the retail sector will not be exempt.

Debt collectors that hold a state or territory licence and are authorised by a lender to collect a debt are exempt for a 12-month period pending further consultation with state and territory governments and industry.

Consumers across Australia will be protected, as a person who loses their licence will be excluded Australia-wide. At present, there is nothing to prevent a person banned in one State continuing to operate simply by moving to a different State or Territory, a situation that undermines the integrity of the industry.

Responsible Lending

- To address community concerns of consumer over-indebtedness and fringe lending problems, the Credit Bill introduces a set of responsible lending conduct requirements, which set a standard of expected behaviour of licensees when they enter into a credit contract, or when they suggest a credit contract to a consumer or provide assistance to a consumer to apply for a credit contract.
- The obligations ensure that licensees do not provide or suggest unsuitable credit to a consumer. To meet these obligations, licensees will have to make an assessment to ensure that any credit contract meets the consumer's requirements; and that they have the capacity to repay the financial obligations.
- There are clearly delineated responsible lending conduct obligations on credit assistants (such as finance brokers) and credit providers (e.g. banks) to facilitate industry compliance.
- The Credit Bill introduces important disclosures for consumers in relation to: credit related costs and commissions, key rights of consumer redress, and transparent assessment outcomes. These disclosures assist with consumer decision making when making often significant, financial decisions.
- Importantly for Australian home owners who are refinancing in the face of financial difficulty, the law includes a presumption that the refinancing will be unsuitable for the consumer if the consumer would have to sell their primary residence to meet the financial obligations of the new finance arrangements.
- In the event that a consumer's existing credit contract is unsuitable and no other credit contract would be suitable, credit assistants will now be obliged to inform consumers of their ability to seek respite from their credit provider, such as a variation to their contract on the basis of financial hardship.

National Credit Code

To facilitate transition to the new regulatory framework and minimise disruption to industry and consumers, the UCCC has been largely replicated as a Schedule in the National Consumer Credit Protection Bill and has been extended and improved in a number of key ways:

- It extends protection of the Credit laws to cover residential investment property loans, providing important protections to "mum-and-dad" property investors.
- The monetary thresholds under which consumers can apply to their credit providers for hardship variations or stays of enforcements have been increased to \$500,000. This will enable more consumers to apply for changes to the terms of their credit contract when in financial hardship, for example because of illness or unemployment. In addition, credit providers will have to respond to such requests within 21 days.
- Lenders will be prohibited from using essential household goods as security.
- Lenders will be required to give consumers information when a consumer defaults on their contract or a direct debit is dishonoured.
- Reduces the potential for unscrupulous lenders to avoid the application of the Code's protection to consumers.

Penalties, remedies and ASIC's enforcement powers

The Credit Bill enhances consumer protection in a number of key ways through:

- criminal penalties for licensee misconduct, which can include possible imprisonment for up to 2 years for serious breaches of the responsible lending conduct requirements;
- civil penalties for licensee misconduct, which enable ASIC to seek heavy fines of up to \$220,000 for an individual and \$1.1 million for a corporation;
- infringement notices (fines) issued by ASIC so that they can act quickly to penalise certain breaches of the law; and
- consumer remedies, such as compensation, which allow consumers to seek redress for their loss or damage from a licensee.

The Credit Bill includes a no-cost, three-tier dispute resolution system designed to make it easier for consumers to have their disputes resolved. This system consists of access to:

- the licensee's internal dispute resolution process;
- the licensee's ASIC approved external dispute resolution scheme; and

- the Federal Court, Federal Magistrates Court and the courts of the States and Territories.

Consumers and licensees will be able to access a streamlined court procedure for 'small claim' actions for loss or damages of up to \$40,000; or to obtain orders under the Code that they have started in a magistrates' court, local court or Federal Magistrates Court.

- The streamlined process creates presumptions that the parties do not need legal representation and against issuing adverse cost orders. In addition, it allows the Courts to adopt informal legal procedures and to depart from the formal rules of evidence.

Transition to the National Consumer Credit Regime

ASIC will play a key role during the transition period to provide assistance to industry.

To ease the transition burden for industry and facilitate the implementation of the national credit regime in a sensible and practical fashion, the Government has given ASIC greater flexibility to exempt or modify the application of licensing requirements, where this is desirable.

ASIC has been resourced to provide guidance to industry and to assist them to comply with the new obligations under the law. ASIC will also be able to exercise discretion in imposing penalties where persons have attempted in good faith to comply.

Enhancements to the Reform Package following consultation

The table below outlines the key changes made to the draft bills following their release for public consultation on 27 April 2009 and the industry and consumer consultation process undertaken in the development of the credit package.

KEY CHANGES
Licensing
Breach reporting by holders of an Australian Credit Licence has been removed.
An express provision has been included to allow some flexibility to the application of the obligations of a licence holder according to the nature, scale and complexity of the credit activities engaged in by the licensee.
Licence requirements only apply to legal assignees of debts and rights under credit contracts
Responsible Lending Conduct
The requirement for credit providers to perform the credit assistance obligations when providing credit assistance in relation to their own proprietary credit products has been removed.
Responsible lending conduct requirements have been applied to consumer leases.
Inclusion of a provision in the law that presumes that if a consumer will only be able to comply with the consumer's financial obligations under the contract by selling the consumer's principal place of residence, the consumer could only comply with those obligations with substantial hardship, unless the

contrary is established.
Enhancements to the credit assistance quote.
A prohibition on a credit assistant from securing their fees for providing credit assistance by taking a caveat has been included.
The timeframe within which a written assessment requested by the consumer must be provided has been extended to seven business days, if the request is made within two years of the quote or contract date or 21 business days if the request is made thereafter. A consumer's right to request a copy of the assessment is limited to seven years after the date of the quote or contract.
National Credit Code
A lender will be required to give the debtor (and any guarantor) a notice within 10 business days of the first direct debit payment failing in relation to a direct debit instruction.
Penalties, Remedies and ASIC's Enforcement Powers
The civil penalty infringement notice amount is reduced from 1/20th to 1/40th.
The criminal penalty is reduced to two years jail term and 100 penalty units. This reflects the different economic risks in credit matters compared to other financial products.
The small claims procedure has been significantly expanded to include actions for loss or damages of up to \$40,000 or to obtain certain orders under the Code where the contract is valued at less than \$40 000.
The court jurisdiction and framework has been established and confers civil jurisdiction to Federal and State and Territory courts, including local and magistrates courts, and confers criminal jurisdiction to State courts.
A provision is included to permit the jurisdiction of where legal proceedings can commence to be determined by regulations.

**Addendum to Submission by
Australian Collectors & Debt Buyers Association to
Senate Economics Legislation Committee Inquiry on
National Consumer Credit Protection Bill 2009**

This document being an addendum to a Submission by the Australian Collectors & Debt Buyers Association (ACDBA) provides further detail on some of the issues of concern to ACDBA and its membership in respect to the National Consumer Credit Protection Bill (NCCP).

GENERAL OBSERVATIONS

We refer to and make the following comments in response to the National Consumer Credit Protection Bill 2009 Explanatory Memorandum¹:

Outline

The Consumer Credit Protection Reform Package establishes the key components of the proposed national credit regime which include:

- *a comprehensive licensing regime for those engaging in credit activities via an Australian credit licence (ACL) to be administered by the Australian Securities and Investments Commission (ASIC) as the sole regulator;*
- *industry-wide responsible lending conduct requirements for licensees;*
- *improved sanctions and enhanced enforcement powers for the regulator;*
and
- *enhanced consumer protection through dispute resolution mechanisms, court arrangements and remedies.*

ACDBA Comment

The key components detailed by the Minister are commendable for a national consumer credit regime however they are so specifically focused on credit provision obligations that there is no proper recognition or appreciation of “industry wide” business activities and responsibilities associated with credit, particularly those subsequent to consumer default of credit facilities.

The ACDBA represents businesses which will be “caught” under the obligations of the National Consumer Credit Protection Bill and is concerned that unless proper consideration is given in this legislation to the actual role of debt collection and debt purchase functions, then the imposition upon those activities of the obligations under the legislation will become onerous to the consumer as well as the debt collector and the debt purchaser.

¹ *National Consumer Credit Protection Bill 2009 Explanatory Memorandum (Circulated by the authority of the Minister for Human Services, Minister for Financial Services, Superannuation and Corporate Law, the Hon Chris Bowen MP) 25-06-2009 House of Representatives*

National licensing regime

The proposed reforms introduce a comprehensive national licensing regime, which is to be distinguished from the current regulation of financial services under the Corporations Act 2001 (Corporations Act). This arises because credit involves consumers receiving money that they must repay, rather than the purchase of, or investment in, a financial product that generally includes the expectation of a benefit or return from the payment. The ACL is tailored to meet the issues arising in the credit context.

ACDBA Comment

The above explanation again indicates a singular view of the application of this legislation to a section of the financial sector and does not give appropriate recognition to the other business services in the financial services sector which are caught by the reach of the NCCP.

The new national licensing regime does not take into consideration the existing States & Territories commercial agent licensing regimes under which the debt collection industry must operate.

The additional licensing requirements imposed by the NCCP do not support the business impact intent of the legislation to cut red tape for business, but in fact will place additional financial and bureaucratic constraints on debt collectors and debt purchasers and so discriminates that one section of the wider credit industry.

The ACL is tailored to meet the issues arising in the credit context and does not consider the issues arising in the debt collection context. To effectively and equitably administer this legislation due recognition should be given to the existing legislated licensing requirements for debt collection and debt purchase activities.

The key elements of the new licensing regime are that:

- *it requires persons who engage in credit activities to, initially, be registered with ASIC, and to subsequently hold an ACL;*
- *it imposes entry standards for registration and licensing, and enables ASIC to refuse an application where the person does not meet those standards;*
- *it requires registered persons and licensees to meet ongoing standards of conduct while they engage in credit activities; and*
- *it provides ASIC the power to suspend or cancel a licence or registration, or to ban an individual from engaging in credit activities.*

ACDBA Comment

Debt collection and debt purchase businesses in the context of the NCCP **do not** engage in the provision of credit – instead, only the latter group become a credit provider through the transference of the obligation through purchasing the debt.

The legislation sets out to preclude debt purchase activities by businesses if they do not hold an ACL – this is despite the fact the actual originating provider of the credit would have to had held the ACL and meet the responsible lending conduct obligations of the NCCP.

Debt purchasers do not extend credit or make credit decisions but are only involved in the credit transaction long after the originating credit provider has extended credit and entered into contractual terms with the consumer.

Responsible lending conduct

In addition to licensing obligations, the Credit Bill includes a collection of conduct obligations applicable to all holders of an ACL, which apply responsible lending conduct requirements. Broadly, the responsible lending conduct obligations set in place expected standards of behaviour of licensees when they enter into consumer credit contracts or leases, where they suggest a credit contract or lease to a consumer, or assist a consumer to apply for a credit contract or lease.

The key obligation on licensees is to ensure they do not provide a credit contract or lease to a consumer or suggest or assist a consumer to enter into a credit contract or lease that is unsuitable for them. This obligation requires licensees to assess that the credit contract or lease is not unsuitable for the consumer's requirements and that the consumer has the capacity to meet the financial obligations under the credit contract or lease.

ACDBA Comment

Given the key obligation is to ensure that licensees don't provide a credit contract or lease to a consumer or suggest or assist a consumer to enter into a credit contract or lease that is unsuitable for the consumer and further if this obligation is properly administered and the originating provider of the credit meets such obligation there is no reasonable basis for the proposed licence and responsible lending conduct obligations being transferred to a debt purchaser – the ACDBA believes at best, this is an unintended consequence of the NCCP.

Once the credit provider has assessed the credit contract or lease as suitable for the consumer's requirements and that the consumer has the capacity to meet the financial obligations under the credit contract or lease in the event that consumer subsequently defaults on the credit contract or lease, then collection and/or purchase of that debt can be fairly and lawfully managed by a duly licensed² debt collection agency.

² Being licensed as a commercial agent/debt collector pursuant to the licensing regimes of the States & Territories.

Dispute resolution and the courts

A key feature of the Credit Bill is the improved accessibility to dispute resolution in terms of location, procedural simplicity and lower costs.

ACDBA Comment

Established and credible debt collectors and debt buyers already have robust internal dispute resolution (IDR) processes which consumers access.

The NCCP requirement for debt collectors and debt buyers to have membership of an ASIC approved External Dispute Resolution Scheme (EDR) will disadvantage collectors and debt buyers.

Debt collectors and debt buyers service a wide variety of industries many of which already have industry focused EDR schemes.

Given the focus of the NCCP is restricted to consumer credit activities, this requirement for debt collectors and debt buyers to become members of an EDR scheme within the financial services industry will create further financial burden to debt collectors and debt buyers without necessarily providing any additional advantage to consumers.

Consumers retain access to the courts to seek redress in any case, regardless of whether the consumer takes advantage of IDR and EDR schemes or not.

SPECIFIC OBSERVATIONS

ACDBA's position is that debt collectors and debt buyers should not be caught by the reach of the NCCP, however, we do make these further comments in respect to our concerns arising from the form and intent of the NCCP as currently drafted:

Provision of documentation

Under section 188 of the National Credit Code, if the rights of a credit provider under a credit contract, mortgage or guarantee are assigned or pass by law to another person, the National Credit Code from then on applies to that other person and does not impose any further obligation on the credit provider. A significant requirement is the provision of documentation.

It is the experience of ACDBA members, that in the majority of cases, consumers are well aware of the outstanding credit account and how it originated and do not request or require a copy of the original credit contract, preliminary credit assessment, invoices or statements – it is only a very small percentage of consumers who request such documentation.

The debt buying industry in Australia recognises the need for the consumer to be informed and notes it remains the responsibility of the original credit provider to maintain and comply with the requirements of the UCCC and consequently to ensure that all supporting documentation is available to respond to the request of the specific consumer.

Debt Sale Contracts contain details of the commitments by the credit originator to provide such documents upon request.³

When required the debt buyer will simply order those documents from the credit originator for provision to the consumer concerned. However, the passage of time since the original credit transaction was entered into and a request being made by the consumer, such documents are often archived, which may cause some delay in forwarding these documents to the consumer.

For this practical reason it can be difficult to comply with the timeframes for producing documentation and accordingly, ACDBA submits the timeframe for the provision of a Preliminary Credit Assessment ought to be 30 days instead of 2 days.

Further any obligation to produce a Preliminary Credit Assessment ought to expire after 3 years instead of 7 years - the ACDBA contends, that in all circumstances this is a reasonable timeframe for a consumer to call into question whether he or she should have been provided the credit by the original credit provider at the time of assessment.

Again given documentation is in the experience of the ACDBA members only required in a very small number of cases and further as such documents are safely held by the credit originator adding a requirement for the debt buyer to hold duplicated copies of this information "just in case" imposes an unnecessary and unreasonable cost on both the debt buyer and the credit originator and is not justified.

ACDBA agrees debt buyers should be required to implement processes to ensure the consumer is not disadvantaged while awaiting documentation to prove liability. The debt buyer must keep the consumer informed of the progress of their request and in cases where liability is denied, collection activity must be placed on hold and any related default listing must be marked as disputed until the matter of the documentation is resolved.

We suggest the National Credit Code should require the original provider to enable the assignee to comply with the National Credit Code requirements. Given the actual nature of the transactions involved, included the original granting of the credit and the subsequent assignment to a debt buyer, we contend it is both reasonable and appropriate that upon a debt being assigned, the credit originator should retain an obligation for provision of documents to the consumer if such documents have not previously been supplied to the debt buyer (e.g. contract, preliminary credit assessment, invoices and statements).

Responsibility of Credit Representatives

A licensee should be responsible for the conduct of Credit Representatives for the activities they undertake on its behalf, however, any further imposed obligations would be outside the scope of influence for the licensee and may result in the larger companies no longer working with small businesses and contractors (e.g. field agents, repossession agents and debt collection agents) over which they cannot practically be expected to exercise control. This loss of independence and autonomy will push many small businesses out of the industry and result in increased cost and inefficiency as larger businesses attempt to replicate these activities internally.

³ AGENT Magazine Volume 41, Issue 5, October/November 2008 Article "Debt Purchase – transactions a double sided coin!" pp17-21

Compensation arrangements

Due to the limited nature of credit activities undertaken by the debt collection and debt buying industry ACDBA contends the proposed compensation arrangements are an unnecessary burden.

Our members' interactions with a consumer **do not** involve the provision of credit and therefore compensation for losses arising from the provision of credit are unnecessary.

The latest revision of state based occupational licensing for the debt collection industry was undertaken by NSW.⁴ When that jurisdiction's legislation was enacted, the state regulator repealed the need for collection agencies to hold a fidelity bond as it did not afford the consumer any further protection and there were powers to enforce compensation by other means if necessary.

Debt buyers should be exempt from the NCCP compensation arrangement requirements for the same reasons.

Jurisdiction of legal proceedings

Whilst appreciating the concerns raised in relation to consumer inconvenience if proceedings are instituted in different state or territory of their residence, it is the practical experience of ACDBA members that jurisdictional issues only arise in the very small percentage of instances where the consumer intends to raise a defence to the proceedings.

We note consumers are able to move the action to their jurisdiction through the long established court processes in all jurisdictions.

ACDBA submits the NCCP legislation should allow credit providers the option of initiating legal process in any jurisdiction, provided that they inform the defendants of their option to transfer the proceedings to a court more suitable to them in order to appear and defend the proceedings.

⁴ *NSW Commercial Agents & Private Inquiry Agents Act, 2004*