



AUSTRALIAN COLLECTORS &
DEBT BUYERS ASSOCIATION

27 November 2014

The Hon. Joe Hockey MP
Treasurer
PO Box 6022
House of Representatives
Parliament House
CANBERRA ACT 2600

Email: joe.hockey.MP@aph.gov.au

Dear Treasurer,

**UNINTENDED CONSEQUENCE -
FINANCIAL SECTOR (COLLECTION OF DATA) ACT, 2001**

The Australian Collectors & Debt Buyers Association (ACDBA) is the national industry association representing corporations who collect & buy debt. The principal mission of ACDBA on behalf of its members is to seek to improve the Australian collections environment (legislative and regulatory).

The reason for this letter is that our members have raised some concern and sought clarification on recent efforts by the Australian Prudential Regulation Authority (APRA) for the industry engaged in debt purchasing activities to report under the Financial Sector (Collection of Data) Act, 2001 (the Act).

Following a review and consideration of the Act and its legislated intentions we are of the view APRA's efforts directed towards requiring some of our members to apply to be a "registered entity" and to participate in a reporting regime provided for by the Act is an unintended consequence of the Act for the reasons detailed below:

The Act

We note the Object of the Act is detailed as:

3 Object of Act

- (1) *The object of this Act is to enable the collection by the Australian Prudential Regulation Authority (APRA) of information to assist it in the prudential regulation of bodies in the financial sector and to facilitate the formulation by the Reserve Bank of monetary policy.*

APRA historically has had no direct engagement with or regulation of Australian businesses engaged in

debt buying or debt collection activities. Instead, we note:

The Australian Prudential Regulation Authority (APRA) has been established by the Australian Parliament to supervise banks, credit unions, building societies, general insurance and reinsurance companies, life insurance companies, friendly societies and superannuation funds (except self-managed superannuation funds).¹

The Object of the Act and the primary supervisory responsibilities of the appointed regulator APRA strongly identify the legislation as being directly related to credit provision activities rather than for any other purpose.

The opportunity for confusion and creation of the unintended consequence arises from the lack of clarity in the Act's defined meaning of what constitutes "provision of finance":

32 Meaning of certain other expressions

Provision of finance

(1) A reference in this Act to the provision of finance includes a reference to the following:

- (a) ...
- (e) **the acquisition of debts due to another person...**

As the Act relates to credit provision activities we respectfully submit that the meaning detailed in s32 (1) (e) is a definition intended at the time the legislation was drafted and enacted to capture the traditional finance creation activity of "factoring".

Factoring is a financial transaction and a type of debtor finance in which a business sells its accounts receivable (i.e. its invoices) to a third party (called a factor) at a discount. Factoring is a form of finance creation, with a business factoring its receivable assets so as to meet its present and immediate cash needs.

The finance creation activity of "factoring" is entirely different in character, nature and purpose to what is now the discrete industry of "debt purchasing" or "debt buying".

The activities of Australian businesses engaged in debt purchasing are regulated by the Australian Securities & Investments Commission (ASIC) – specifically, the regulatory regime is provided for by the National Consumer Credit Protection Act 2009 (National Credit Act) with businesses engaged in debt purchasing required to hold an Australian Credit Licence. We describe debt purchasing in more detail below.

¹ APRA Service Charter – December 2011, www.apra.gov.au

Debt Purchasing

The following characteristics underpin the industry of “debt purchasing” in Australia:

- Member businesses mostly through a dedicated purchased debt subsidiary purchase delinquent credit facilities from credit providers – this is often in the form of “debt ledgers” or large volume debt tranches which are collections of outstanding debt accounts which credit providers instead of continuing their efforts to recover the debt decide to “sell”. In many respects debt purchasing is an enhanced formalised outsourcing of the back office function of debt collection activity such that the purchaser assumes, or is obligated to assume, the obligations and benefits of the original credit provider through managing the collection of those accounts.
- Debt ledgers/tranches of delinquent accounts sometimes referred to as non-performing assets are offered for sale by credit providers in the banking and finance sectors (personal, motor finance, fixed loans and credit cards), telecommunications (fixed line and mobile) and utilities (power and gas).
- The transaction for an actual “debt sale” or “debt purchase” involves an “assignment absolute” or legal assignment of the debt from the original credit provider or vendor to the purchaser. The requirements for the legal assignment of debt and “choses in action” are determined by State and Territory legislation².
- Debt purchasers do not provide finance - they do not extend credit. Instead, debt purchasers acquire a “chose in action” or right to recover a debt owed to an original credit provider at a price based upon an assessment of the debt recovery options considered attainable for the debt.
- Debts purchased are noted as delinquent accounts or non-performing assets - the consumers are in default under the terms and conditions of their accounts. Consequentially, the original credit provider has cancelled, terminated, declined the provision of further credit to those customers under the accounts and written off or charged off the debts by reason of the consumers’ defaults in repaying the overdue and outstanding money.
- Debt vendors which are banks and financiers through their respective regulatory obligations report their credit creation transactions to APRA including the writing off/charging off of debts.
- The price paid for debts sold by vendors are less than the face value of the debts owing reflecting the work the debt purchaser will need to undertake to attempt to recover the debts and also the risk the purchased debts may never be recovered³.
- As a result of the debt assignment and the National Consumer Credit Protection Act, the purchaser stands in the shoes of the original credit provider for the benefit of the consumer in relation to continuing obligations, but specifically excluding the benefit of extending further credit.

² s199 of the Queensland Property Law Act 1974, s12 of the NSW Conveyancing Act 1999, s134 of the Victorian Property Law Act 1958 and equivalents in the other States and Territories.

³ ACDBA members estimate about 30% of debts purchased from original credit providers are unrecoverable.

Registration under the Act

The Act specifically deals with financial sector entities and refers to either registered entities or regulated entities⁴. There is no suggestion that debt purchasers are “regulated entities” as set out in s5(4) of the Act. Instead, APRA has recently asserted debt purchasers potentially are “registrable corporations” as provided by the Act as follows:

7 Registrable corporations

- (1) *Subject to subsection (2), a corporation is a registrable corporation if, and only if, the corporation is a foreign corporation, a trading corporation formed within the limits of Australia or a financial corporation so formed and:*
- (a) *the sole or principal business activities in Australia of the corporation are the borrowing of money and the provision of finance; or*
 - (b) *the sum of the values of such of the assets in Australia of the corporation as consist of debts due to the corporation, being debts resulting from transactions entered into in the course of the provision of finance by the corporation, exceeds:*
 - (i) *50%; or*
 - (ii) *if a greater or lesser percentage is prescribed by the regulations—the percentage so prescribed;*
of the sum of the values of all the assets in Australia of the corporation; or
 - (c) *the corporation engages in the provision of finance in the course of carrying on in Australia a business (whether or not that business is its sole or principal business) of selling goods by retail and the sum of the values of such of the assets of the corporation and of any corporation that is related to the corporation as consist of debts due to the corporation concerned, being debts resulting from transactions entered into in the course of the provision of finance by that corporation, exceeds:*
 - (i) *\$25,000,000; or*
 - (ii) *if a greater or lesser amount is prescribed by the regulations—the amount so prescribed..*

The Act in s7(2) lists certain situations where a corporation is not a registrable corporation but none of those provisions relate directly to the situation of corporations directly engaged in debt purchasing.

The activity of debt purchasing as undertaken by members of ACDBA⁵ is not a credit creating or provision of finance activity.

We respectfully submit APRA in reliance upon the description of the “provision of finance” in s32(1)(e) of the Act to target the Australian Debt Buying Industry fails to acknowledge or understand the contemporary meaning of “debt purchasing”, which as we have explained earlier is entirely different in nature, character and purpose to the more traditional financing activity of factoring and rather refers to the mechanism by which original credit providers effectively and lawfully outsources debt collection activities of delinquent accounts or non-performing assets to corporations not engaged in activities related to credit creation or the provision of finance.

⁴ s5 of Financial Sector (Collection of Data) Act 2001

⁵ Annexure A is a list of current members of Australian Collectors & Debt Buyers Association

Letter to The Hon. Joe Hockey MP, Australian Treasurer
Re: Unintended Consequence – Financial Sector (Collection of Data) Act 2001

We submit that APRA's recent efforts directed to the Australian Debt Buying Industry to register as corporations under the Act are an unintended consequence of the Act and seek your assistance to resolve the situation and further that until such time as the Issue of this apparent unintended consequence is satisfactorily resolved we request your assurance in writing that APRA will not take any action whatsoever to attempt to enforce the Act against members of ACDBA.

Your assistance in reviewing and resolving this issue is greatly appreciated.

Yours sincerely

AUSTRALIAN COLLECTORS & DEBT BUYERS ASSOCIATION



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ANNEXURE A

**Listing of Members of
Australian Collectors & Debt Buyers Association**

- ACM Group Limited
- Australian Receivables Limited
- Axess Australia Pty Ltd
- Baycorp (Aust) Pty Ltd
- Charter Mercantile Pty Ltd
- Collection House Limited
- Complete Credit Solutions Pty Ltd
- Credit Corp Group Limited
- Credit Four Pty Ltd
- Dun & Bradstreet (Australia) Pty Ltd
- eCollect.com.au Pty Ltd
- Insolvency Management Services Pty Ltd
- Pepper Australia Pty Ltd
- Pioneer Credit Limited
- Shield Mercantile Pty Ltd
- State Mercantile Pty Ltd
- The ARMS Group Pty Ltd