AUSTRALIAN COLLECTORS & DEBT BUYERS ASSOCIATION

9 September 2009

Ms Ai-Lin Lee
Policy Guidance Officer
Consumers & Retail Investors
Australian Securities and Investment Commission
G PO Box 9827
MELBOURNE VIC 3001

By email: disputeresolutionreview@asic.gov.au

Dear Ms Lee

Australian Collectors & Debt Buyers Association Submission
ASIC Consultation Paper 112: Dispute resolution requirements for consumer credit and margin lending

The Australian Collectors & Debt Buyers Association (ACDBA) appreciates the opportunity to provide comment on the ASIC Consultation Paper 112: *Dispute resolution requirements for consumer credit and margin lending.*

The ACDBA welcomes harmonised and fair regulation to ensure the activity of debt collection (whether as an agent or debt buyer) is managed to community standards. The NCCP regime, however, is not the appropriate vehicle to bring about a national regulatory framework for our industry. Nor is it appropriate to develop a 'one size fits all' training and competency regime that imposes the same onerous and unnecessary standards on service providers who offer narrow services to credit providers.

We are strongly of the view both contingent collectors and debt purchasers should be exempt from the National Consumer Credit Protection (NCCP) regime. While only debt collectors currently have an exemption for 12 months pending a review, the reality is both groups provide exactly the same services. The only difference is debt ownership. Consequently, we wish to comment on ASIC's Consultation Paper 112 so our industry perspective, in its entirety, is considered in its development, particularly given the competition issues that result from one inconsistent regulation of those providing exactly the same services.

Our comments on the CP 112 are confined to the impact on debt collection and enforcement processes.

In our view, ASIC's approach to dispute resolution in relation to debts under collections and enforcement processes is based on a range of flawed premises that will result in significant consumer and commercial detriment if established as the dispute resolution standard. Those flawed premises include:

- EDR is an expedient means of dealing with disputes
- IDR processes do not manage enforcement disputes quickly and effectively
- Disputes raised during the collections/enforcement process relate to those processes
- Hardship and enforcement postponement applications are managed through IDR processes
- The NCCP Act applies to judgment debts

From our members' perspective, the following is true:

- EDR processes are very slow - the delay will result in consumers under collections activity being in a worse financial position
- IDR is more efficient than EDR processes, particularly given the time lines imposed by the Consumer/National Credit Code
- Complaints raised during collections/enforcement process can refer to how the consumer entered the contract or some other aspect of contract management rather than the actual collections/enforcement process itself
- Hardship and enforcement postponement applications are not disputes, simply the consumer exercising rights under the Credit Code, so IDR is not part of the initial process
- Once judgment is entered, the NCCP Act no longer applies – enforcement of the debt is then subject to the jurisdiction's civil procedure legislation

In our view, any attempt to establish EDR schemes as the first point for hardship and enforcement postponement application disputes completely undermines the integrity of the dispute resolution process. It overrides the credit provider's rights and obligations to consider the consumer's complaint, the legislation involved and to make a commercial decision. In effect, by-passing the IDR process hands control of the business to the EDR schemes. Commercial decisions have no place in EDR schemes.

The approach is also based on the mistaken view that EDR is more efficient than IDR. This is not the case. EDR schemes currently report long delays in dealing with matters. This will only increase as NCCP documents mistakenly direct consumers to EDR before IDR. In addition, a review of EDR schemes' annual reports indicates most matters are resolved by the member, without the involvement of the EDR scheme.

Where credit is involved, there is a significant cost to the consumer in being referred to EDR given the delay involved in dealing with the matter. EDR schemes can take a month or more to refer the matter to a caseworker, much less back to the member for investigation. Interest, and possibly default fees and/or other charges, will continue to apply to the account, so a consumer in financial difficulties can be placed in a worse financial position through EDR involvement. Given IDR schemes resolve the majority of complaints without EDR assistance (other than the referral back), there is no justification for referring complaints relating to hardship and enforcement postponement decisions directly to EDR, or at all, given their commercial nature.

It is important ASIC appreciates hardship and enforcement postponement applications are not disputes. They are simply the consumer exercising his or her rights under the Code to seek concessions for a period of time. Credit provider agreement is not mandatory, but subject to a range of commercial considerations. While the consumer may disagree with the decision, there may still be no grounds to dispute it. Regardless, the consumer has a right under the Code to lodge a dispute.

There is a very delicate balance here between commercial rights and a genuine dispute. ASIC has an obligation to balance the rights and obligations of both parties and avoid processes that regulate market conduct without any legislative right. Regulatory overreach is a real possibility when commercial decisions like this are referred directly to EDR without the business having the opportunity to review its operational decisions through the IDR process. In our view, no matter should be referred to EDR unless it has been through the IDR process, particularly those matters that have significant commercial impacts.

While ASIC has made specific referral to hardship and enforcement postponement applications, we believe it is crucial there is an expedient means of determining the exact nature of the consumer's complaint so it is referred to the appropriate IDR scheme of the party responsible for the complaint. That party's EDR scheme will only become involved once the IDR process is exhausted.

It is common with collections/enforcement matters for consumers to raise contract entry or account conduct issues during the collections process. The complaints are unrelated to collections conduct. We are strongly of the view complaints must be referred to the IDR scheme of the party responsible for the conduct in question. Where the dispute involves contract entry or account conduct, the complaint should be referred to the credit provider. If it involves debt collection conduct, then it sits with the debt buyer or collector.

It is completely inappropriate for ASIC to specify which party should bear arbitrary liability. Such an approach skews commercial relationships and will be rejected by PI schemes. Instead, the onus should be on the party dealing with the consumer at the time of the complaint to assess the nature of the complaint and to identify the appropriate IDR scheme. IDR processes can manage this far more efficiently than EDR and the process is no different to the one the EDR schemes take now.

This ensures the right party manages the complaint and avoids the EDR delay and subsequent referral back process, a process, consumers will find extremely frustrating and financially disadvantageous. It avoids regulatory overreach into commercial arrangements, including PI coverage.

Lastly, any suggestion EDR schemes can have jurisdiction over judgment debts is based on what appears to be a flawed understanding of the legal position. Once judgment is entered, the NCCP Act no longer applies to the debt. In effect, the credit contract no longer exists as it has merged with the judgment debt. The civil procedure laws then govern the rights of the parties, so any dispute can only be managed through the Courts in a process to have the judgment set aside. EDR cannot become a defacto court of appeal, which is exactly the position ASIC proposes by extending EDR coverage to judgment debt.

From a practical perspective, referral of a judgment debt to an EDR scheme simply prolongs resolution of the problem and increases costs. The consumer will have had many opportunities to dispute the debt in that process, a process that involves collections calls, default notices, hardship applications, enforcement postponement applications, IDR/EDR processes, summons and judgment. EDR is neither legally feasible nor in anyone's interests once judgment is entered.

In summary, we make the following recommendations:

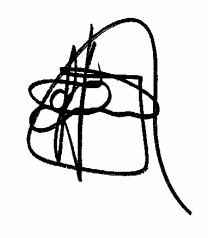
- IDR must always be the first point of reference for complaints of any kind, regardless of where they arise in the lending cycle
- Hardship and enforcement postponement application disputes must be referred to IDR before referral to EDR

- Complaints must be referred to the IDR scheme of the party responsible for the conduct in question
- ASIC should clarify EDR can have no jurisdiction over judgment debts
- ASIC required EDR schemes to be more efficient in managing casework

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.

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

Yours faithfully,



Alan Harries
CEO

Email: akh@acdba.com
Mob: 0412 686997