AUSTRALIAN COLLECTORS & DEBT BUYERS ASSOCIATION

23 February 2012

Ms Ai-Lin Lee
Policy Guidance Officer
Consumers, Advisers & Retail Investors
Australian Securities and Investments Commission
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By email: disputeresolutionreview@asic.gov.au

Dear Ms Lee,

Consultation Paper 172
Review of EDR jurisdiction over complaints when members commence debt recovery legal proceedings

The Australian Collectors and Debt Buyers Association (ACDBA) welcome this opportunity to provide a submission in response to the above consultation paper.

As a starting point, we note External Dispute Resolution (EDR) processes in our members' experiences are very slow. Associated delays inevitably result in consumers under collections activity being in a worse financial position - the involvement of credit attaches a significant cost to the consumer in being referred to EDR given such delays in dealing with the matter. EDR schemes can take a month or more to refer the matter to a caseworker, let alone referring the matter back to the member for investigation.

Internal Dispute Resolution (IDR) is regarded by members as being far more efficient than EDR processes, particularly given the time lines imposed by the Consumer/National Credit Code.

Complaints raised with both IDR and EDR 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.

Our members do not view hardship and enforcement postponement applications as disputes, appropriately such requests are seen as the consumer exercising rights under the Credit Code and as such their IDR processes are not part of the initial process.

Upon an account progressing through litigation to the stage where judgment is entered, the National Consumer Credit Protection Act (NCCP Act) no longer applies and instead enforcement of the debt is then subject to the particular jurisdiction's civil procedure legislation.

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Once judgment is entered, the NCCP Act no longer applies as in effect, the credit contract no longer exists having merged with the judgment debt. The jurisdiction's 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 should not be a de-facto court of appeal.

From a practical perspective, our members regard the referral of a judgment debt to an EDR scheme simply prolongs resolution of the problem and again increases costs. The reality being the consumer concerned will have had many opportunities to dispute the debt prior to the stage of judgment given the collections process involves collections calls, default notices, hardship applications, enforcement postponement applications, IDR/EDR processes, summons and finally judgment. Once judgment is entered, we submit the involvement of an EDR scheme is neither legally feasible nor in anyone's interests.

EDR processes can drag on for extended periods contrary to established legal principles and sound commercial practice. Allowing consumers to drag out disputes via belated complaints to EDR as a means of frustrating legitimate claims made by credit providers also potentially impacts upon the likely realisable value of any underlying security.

We note from CP 172, ASIC proposes that the requirement in RG 139.77 – RG 139.79 remain in its current form namely:

> *"Where legal proceedings that relate to debt recovery proceedings have already commenced and a complainant or disputant takes their complaint or dispute to an EDR scheme, the Terms of Reference must require the member not to pursue the legal proceedings beyond the minimum necessary to preserve its legal rights.*
>
> *Such complaints or disputes should be accepted by the scheme at least up until the point where the complainant or disputant has taken no step beyond lodging a defence or defence and counterclaim (however described), unless otherwise excluded from the scheme's jurisdiction under the Terms of Reference.*
>
> *For the avoidance of doubt, the complainant or disputant will not be considered to have taken a 'step' if they attend a directions hearing or agree to consent orders of a procedural nature only being filed in those legal proceedings."*

ASIC seeks feedback on the following matters:

B1Q1 Do you agree? If not, why not? We are particularly interested in statistics and feedback from EDR scheme users on this scheme jurisdiction, including examples or experiences that illustrate where the requirements may not be working so well and why: see paragraph 36.

B1Q2 If you disagree with Proposal B1, what refinements do you consider necessary to improve RG 139.77–RG 139.79, and why?

B1Q3 Do you consider any refinements necessary to RG 139.77–RG 139.79 given proposed changes to the National Credit Act? If so, how and why?

Our members regard the EDR schemes currently generally fail to meet the principles of "efficiency" and "effectiveness" and further the existing scheme arrangements mostly impose a more costly avenue than court processes.

As EDR decisions are not reviewable by judicial process, a fair and just outcome is not necessarily always achieved for all parties. Members report there is uncertainty for them where for example an EDR provider may demand information from a member without cause or reason and is able to control the amount of information released back to such member even though the information may well relate to the complaint.

Courts of equity although not bound by the rule of law, are bound by equitable principles. Our members express concern that EDR providers do not have any such “equitable principles” to guide their decisions, and are completely ad hoc – this is a problem if the EDR provider fails to be compliant with its own terms of reference. EDR schemes having considerable power without attendant proper accountability by way of external challenge or review require structure and should be subject to specific principles.

Complex decisions we submit ought to be made by appropriate authorities to ensure fairness and a more efficient and effective system.

Whether an account is referred to a contingent collector to recover the debt or if the account has been purchased by a debt buyer from the original credit provider, the situation remains the same: the debtor has had many opportunities to raise genuine complaints by accessing IDR and EDR processes.

Our members regard it is inappropriate that a debtor be afforded an opportunity to stay legal proceedings by commencing an EDR process.

Both EDR Schemes, the Credit Ombudsman Service (COSL) and the Financial Ombudsman Service (FOS) have terms of reference as to the way complaints received at the stage of a member having commenced enforcement action on a debt shall be handled. Such terms we submit go too far and impact adversely upon efficiency and effective complaints handling by the schemes.

Specifically we note rule 17.2(b) of COSL provides:

> *“where the Member commenced such enforcement action before the Complaint was recorded as received by COSL, the Member must not continue the enforcement action and, in particular, must not:*
>
> *(i) seek judgment in the legal proceedings; or*
>
> *(ii) where default judgment has been entered, seek to enforce the default judgement."*

As consumers are provided with both appropriate documentation and sufficient time to lodge a defence prior to a scheme member entering a default judgment, it is inappropriate that a consumer can deliberately or otherwise use EDR to effectively thwart the processes of a court of proper jurisdiction and accordingly this portion of the above rule should be removed.

Further we note, under the current FOS terms of reference, clause 13.1(a)(ii) sets out that where a dispute is lodged with FOS, the member *"...must not pursue legal proceedings relating to debt recovery instituted prior to the lodging of the Dispute with FOS save to the minimum extent necessary to preserve the Financial Services Provider's legal rights and, in particular, must not seek judgment in those legal proceedings provided the Dispute is lodged before the Applicant takes a step in those legal proceedings beyond lodging a defence or a defence and counterclaim".*

It is relevant to note CP 172 included the following:

> *"6 During our limited consultation about approving FOS's single Terms of Reference (FOS TOR), it came to our attention that the then RG 139.53 had been drafted too broadly in that it required members to set aside or stay legal proceedings, even if the legal proceedings had advanced to later, and more final, stages of the court process (i.e. to a hearing, or judgment)…*
>
> *7 This could create uncertainty and high costs for scheme members who would have to abandon legal proceedings and start again if a consumer lodged a complaint at EDR and the EDR process was unsuccessful.*
>
> *8 For these reasons, it was recognised that the requirement in then RG 139.53 needed to be pared back* ***to allow for limited access to EDR in the early stages of debt recovery proceedings only*** *(i.e. up to where the consumer had lodged a defence, or a defence and counterclaim)."*

Although ASIC's view clearly appears to be a defendant should only have access to an EDR *"... in the early stages of debt recovery proceedings"*, an ACDBA member reports the experience that FOS relies upon clause 13.1(a)(ii) of its terms of reference to justify intervening in matters where legal action is significantly advanced, leading the member to speculate whether this is due, in part, to such rule being predicated on circumstances where litigation is commenced out of the jurisdiction of Victoria.

The member's experiences involve proceedings commenced in the jurisdiction of the Magistrate's Court of Western Australia where a defendant is not required to lodge a Defence to a claim until near the end of the interlocutory process. That notwithstanding, an actual defence from the court's perspective (i.e. an action which prohibits the Claimant from obtaining Default Judgment) is lodged when a Defendant lodges a 'Notice of Intention to Defend'.

Litigation processes of most jurisdictions will usually consist of the following steps:

1. Claimant files and serves a Statement of Claim,
2. Defendant files and serves a Defence,
3. Documents are exchanged between the parties by way of discovery or interrogatories,
4. A pre-trial conference is attended by the parties in order to settle the matter,
5. If the matter does not settle a trial takes place where a judgment is entered.

However, the situation In Western Australia is that the following process takes place:

1. Claimant files and serves a General Claim Form which outlines the amounts claimed and other basic matters,

2. The Defendant ticks a box on the form indicating whether they intend to defend the matter (this process actually registers a Defence in the proceedings, that is the point at which a Claimant can no longer obtain Default Judgment),
3. Documents are exchanged between the parties,
4. A pre-trial conference is attended by the parties where orders are made if the matter does not settle about filing documents,
5. A Statement of Claim is filed by the Claimant,
6. A Defence is filed by the Defendant,
7. The matter proceeds to trial and judgment.

In our member's view, FOS is only meant to intervene when the proceedings have not gone beyond step 2 in the above outlined process for Western Australia. In one case (FOS Case # 202703) FOS intervened when the proceedings had reached step 5 in that process.

In such case the complainant had in effect defended the matter (by lodging a 'Notice of Intention to Defend'), attended a pre-trial conference and exchanged documents before making a complaint to FOS. Initially FOS determined it did not have jurisdiction as, quite rightly, it indicated that the Court was seized of the matter.

The Banking & Finance Ombudsman's office subsequently determined that it did have jurisdiction as the defendant had not filed a 'defence' - despite the fact that the Court had already made Orders that she file a defence prior to the time she lodged her complaint with FOS. In fact the defendant was in breach of the Court's order to file its defence as she was using the fact that it had not filed a 'defence' to usurp the court's jurisdiction and bring the matter before FOS.

We submit FOS's determination in such matter clearly did not follow the tenor of ASIC's guidelines, which is that where a Court is seized of a matter, it should remain with the Court. This was a matter where if the defendant had filed the 'defence' the matter would have been given a date for trial. There were in fact no further matters to attend to.

In the specific matter, the defendant had clearly done significantly more than protecting his or her interests and FOS clearly undermined the Court's authority. In all of the circumstances, there is no way FOS could justifiably say that this matter was *"…in the early stages of debt recovery proceedings".*

<u>Preservation of legal rights</u>

Pursuant to regulatory guidance from ASIC (originally under RG 139.53), we note External Dispute Resolution Schemes' Terms of Reference were to allow a member to commence legal proceedings necessary to preserve the member's legal rights.

Another ACDBA member reports having been subjected to decisions by FOS where in its view FOS did not comply with such regulatory guidance.

For example in a case with FOS lodged in 2010 (FOS Case # 203344) the member advised FOS it was necessary for the member to commence proceedings in relation to the matter as the account was nearing the point of becoming barred from enforcement under the relevant statute of limitations.

The member reports it warranted to FOS that it would not take action beyond that necessary to preserve its legal rights, and further that in the event FOS ultimately determined the dispute against the member, it would meet any court costs the Defendant may have incurred resultant from it commencing recovery proceedings.

FOS subsequently advised the member that it did not consent to the member taking the legal proceedings necessary to preserve its legal rights. The basis under which FOS made such ruling included its views that:

A. FOS did not believe at the time that the WA Magistrates Court (or any other Australian court) had jurisdiction to determine the matters; and
B. The member taking legal proceedings would cause a notation to be added to the credit file of the Defendant.

Our member maintains the basis on which FOS made its decision was flawed on both counts.

With regards to point A, the internal legal counsel of FOS at the time (Ms Jillian Brewer) originally came to the view the Western Australian Magistrate's Court (or indeed any other Australian court) could not have jurisdiction to hear the matters in question, as the credit contracts which the member sought to enforce were originated in the United Kingdom.

Subsequent to this decision by FOS, both the member and FOS obtained advice externally from separate Senior Counsel. Senior Counsels for both parties concluded that Ms Brewer's view that an Australian court could not have jurisdiction in the cases concerned was erroneous.

Our member maintains it was a negligent for FOS on the basis of flawed interpretation of relevant legislation to prejudice the member's rights in this matter.

With regards to point B, our member notes that as a matter of normal routine, credit rating agencies such as Veda Advantage Ltd (Veda) list all debt recovery legal actions commenced in Western Australia. This practice is entirely outside the control of any scheme member.

Such arrangement ACDBA understands applies in most jurisdictions with the credit rating agencies having formal commercial agreements with the respective state & territory governments to pay a fee to purchase the data of court judgments for inclusion in their database records.

Despite such listings being wholly initiated and under the independent control of an unrelated third party, FOS put on record it did not see fit to allow the member concerned to preserve its legal rights, based upon the fact that a credit rating agency would list the action on the credit file of the defendants. It is totally inappropriate.

Concern about the preservation of legal rights was also expressed to us by another ACDBA member who reported that when a member of FOS, it had not been afforded the option to issue proceedings to preserve its legal rights, when the limitations period was about to expire and to preserve assets the subject of a complaint - instead the member was subjected to incurring repeat costs to re-commence legal proceedings.

The member concerned noted if each of the specific matters had been referred through the formal court process, the resolution time and costs would have been significantly less excessive than the actual costs incurred through the FOS processes.

Based on feedback from our members, we submit refinements ought to be made to improve RG 139.77 – 139.79 in support of financial literacy, time, and responsibility:

a. Financial literary

The education of consumers with respect to the obligations and consequence of credit should be paramount with such messages being far more evident in EDR schemes and the EDR provider rules.

Our members express concern that consumers are not encouraged to deal with their financial responsibilities, evidenced by some consumers simply ignoring EDR determinations, thereby requiring the member to proceed further for proper resolution of the specific matters by way of legal recovery action.

In some instances, consumers pursuing options such as bankruptcy may be more beneficial to the individual consumer than referral to an EDR scheme. If a consumer is caught in a spiralling debt cycle, bankruptcy allows the space and opportunity to deal with their liabilities and to start again - avoiding this by protracted EDR processes simply prolongs the situation for the individual consumers and does not help them in the long run.

b. Time

The practice of EDR complaints still being accepted at the stage of when a originating process (eg Statement of Claim) is issued (being the initial stage of legal proceedings), we submit actually contradicts the purpose for which EDR schemes were implemented: with the stated aim of being more time efficient, cost effective and easier.

As a general observation, consumers should be allowed more time and encouraged to effectively resolve any issues direct with scheme members with the IDR scheme period extended to allow adequate and appropriate opportunity for more complex complaints to be resolved.

We submit that if this recommendation was implemented, it would greatly assist consumers with larger loan values and also place greater emphasis upon credit providers to first attempt to address hardship issues before commencing enforcement proceedings.

c. Responsibility

We submit that EDR complaints should be only accepted by the EDR Schemes up to 14 days of expiry date of the Section 88 (‘S88’) notice served by the credit provider upon the consumer, given such S88 notice provides the consumer an additional 30 days to contact the credit provider to resolve any complaints/disputes or to discuss an alternative arrangements.

Such improvements if adopted would be in line with the Australian Government’s intention that IDR and EDR processes be used wherever possible (instead of court) to resolve complaints and would assist consumers to have their complaint handled in a forum which is genuinely quicker, cheaper and easier to access than court.

It is concerning to ACDBA and its members that EDR schemes under the current arrangements will continue to be utilised by consumers to cease pending legal recovery action of an account, despite the consumer/authorised party having otherwise been provided with sufficient time to resolve or make contact with the credit provider to resolve any issues.

We submit the utilisation of EDR Schemes for such purposes conflicts directly with the intentions of the NCCP regime which promotes responsible lending, and further does not ensure the stated objectives of fairness, effectiveness and efficiency.

We further submit the EDR Schemes ought to be required to ensure their respective terms of reference specifically meet the existing requirement to allow only limited access to EDR in the early stages of debt recovery proceedings (i.e. up to where the consumer had lodged a defence, or a defence and counterclaim **or where the member has obtained judgment in its favour**. The EDR Schemes should ensure with absolute clarity that no complaint shall be actioned by the scheme once the member has judgment in civil proceedings and instead acknowledge that upon judgment being entered by a court of competent jurisdiction it has no opportunity to action any related complaint.

Finally, the requirements of EDR Schemes should include proper scrutiny of EDR complaints received to identify and not reward attempts to misuse EDR processes as a tool for thwarting recovery processes or making vexatious complaints.

Any enquiries in relation to the matters canvassed in this submission may be directed to the writer on 02 4925 2099 or via email to akh@acdba.com. We note our interest in participating in any further consultation processes specific to CP 172.

Yours sincerely

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Australian Collectors & Debt Buyers Association