AUSTRALIAN COLLECTORS &
DEBT BUYERS ASSOCIATION

11 September 2023

Ms Natalie Cameron
Lead Ombudsman - Banking and Finance
Australian Financial Complaints Authority
GPO Box 3
Melbourne VIC 3001

By email: consultation@afca.org.au

Dear Ms Cameron,

Submission in response to Consultation Paper: The AFCA Approach to Responsible Lending

The Australian Collectors & Debt Buyers Association appreciates the opportunity to provide the attached Submission in response to the Australian Financial Complaints Authority in relation to its consultation on The AFCA Approach to Responsible Lending.

Please do not hesitate to contact the writer to discuss any aspect of the Submission.

Yours sincerely
AUSTRALIAN COLLECTORS & DEBT BUYERS ASSOCIATION

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Submission to
Australian Financial Complaints Authority:
The AFCA Approach to Responsible Lending

September 2023

Introduction

Australian Collectors & Debt Buyers Association (ACDBA) welcomes this opportunity to comment on The AFCA Approach to Responsible Lending (RL Approach).

ACDBA was established in 2009 for the benefit of companies who collect, buy and/or sell debt. Our members (refer Appendix 1) represent the majority of the collection market in Australia.

ACDBA members do not issue loans directly, rather they acquire defaulted loan portfolios from banks and other financial institutions. As assignees of regulated credit contracts, our members have obligations under RG 271 to respond to responsible lending complaints and are required to be members of the AFCA scheme.

In this submission ACDBA has provided a response by way of general commentary and observations in relation to the draft RL Approach rather than responding to the consultation questions.

Response

The ACDBA is concerned that AFCA's proposed RL Approach significantly over-reaches, going well beyond what the law requires. This will lead to responsible lending complaints being assessed against a framework that is inconsistent with the obligations of lenders under the law, inconsistent with recent case law and unfit for purpose.

While our members do not originate credit, we are also concerned that the over-reach proposed by AFCA will lead to broad de-risking by lenders, will significantly limit access to credit and will discourage innovation and competition amongst lenders.

We respectfully ask that AFCA urgently revise its RL Approach - in particular, AFCA needs to consider the following:

1. The RL Approach should, at the outset, acknowledge the objectives of the responsible lending obligations, as contemplated by the Explanatory Memorandum[1], being to strike a balance between minimising the incidence of unsuitable lending and appropriately maximising access to credit.
2. Better alignment with the Federal Court's decision in *ASIC v Westpac*[2] in relation to unsuitability assessments and the use of benchmarks: the RL Approach must not detract from the flexibility that the law offers lenders in their approach to conducting unsuitability assessments.
3. Clarification of the time limits in which AFCA can hear responsible lending complaints should be incorporated into the RL Approach, including clear examples of complaints that are out of time and will not be heard by AFCA.
4. AFCA must avoid imposing obligations of industry codes on lenders who are not signatories, and on inappropriate market segments, and must consider each responsible lending complaint against the standards and practices that applied at the time of the assessment, avoiding imposing heightened expectations that have evolved over the passage of time.
5. AFCA's calculation of 'loss' should be revised to correctly count 'benefit' and address the current inconsistency within the proposed RL Approach.

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[1] Explanatory Memorandum to *National Consumer Credit Protection Bill 2009*
[2] *Australian Securities and Investments Commission v Westpac Banking Corporation* [2020] FCAFC 111

6. The RL Approach must include reference to, and examples of use of, AFCA Rule A.8.3 relating to appropriate settlement offers as a remedy to responsible lending complaints, which accords with AFCA's efficiency requirement.
7. The RL Approach should meaningfully align with reasonable community standards and expectations to deliver against its fairness objectives - this includes addressing where the RL Approach may result in perverse outcomes, such as financial windfalls to perpetrators of fraud.
8. AFCA's RL Approach should promote inclusivity and avoid inadvertently supporting a culture of direct or indirect discrimination.
9. Improved guidance must be given in relation to interest rate buffers.

Below we have set out the reasons for our concerns together with our suggested considerations and/or amendments.

Objective of responsible lending

The Regulatory Impact Statement - contained in the Explanatory Memorandum and ASIC's Regulatory Guide 209 (RG 209) both confirm the aim of the responsible lending laws, being to establish a regulatory framework, and to promote the objectives of the responsible lending obligations:

> *"in a manner that strikes a reasonable balance between the goals of minimising the incidence of consumers entering unsuitable credit contracts, and the goal of maximising access to credit for consumers who have the desire and ability to service it."*

We consider that it is vital for the RL Approach to acknowledge the objectives underpinning responsible lending obligations as it is in this context that responsible lending obligations are applied.

Therefore, we propose that AFCA amends the RL Approach to state and acknowledge this objective in its introduction and to ensure the objective informs the guidance and examples.

ASIC v Westpac

The RL Approach sets out how AFCA will consider unsuitability assessments and the use of benchmarks.

AFCA's proposed guidance on benchmarks notes[3]:

> *"A benchmark should not be used as an estimate of a consumer's likely future expenses when information known to the financial firm indicates that the consumer's actual future expenses may be higher than the benchmark"*

Without further context, we consider that the RL Approach, as drafted, does not sufficiently reflect the position established in *Australian Securities and Investments Commission v Westpac Banking Corporation* [2020] FCAFC 111 (*ASIC v Westpac*).

In *ASIC v Westpac*, the Full Federal Court considered, on appeal, responsible lending contraventions alleged by ASIC, including Westpac's use of benchmarks in its unsuitability assessment, required under the *National Credit Act*.

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[3] *The AFCA Approach to Responsible Lending* - page 17

In particular, the Court considered whether Westpac had failed to comply with its responsible lending obligation to assess unsuitability by using values derived from the Household Expenditure Measure within its serviceability ratio instead of a consumer's declared living expenses.

The Court dismissed ASIC's appeal and found that there was no error by the trial judge in concluding that Westpac did not breach its responsible lending obligation to assess whether borrowers could meet their repayment obligations.

Relevantly, the Court held that[4]:

> *The language of the Act does not support the degree of prescription contended for by ASIC.*
>
> *Rather, the Act leaves it open to the licensee to decide:*
>
> *(1) what inquiries it will make under s 130(1)(a) and (b), provided that those inquiries are reasonable;*
>
> *(2) what steps it will take to verify the consumer's financial situation under s 130(1)(c), provided that those inquiries are reasonable; and*
>
> *(3) how it will use the results of its inquiries and verification to make the unsuitability assessment, provided that it in fact assesses whether the contract will be relevantly unsuitable for the particular consumer and noting that the licensee is otherwise motivated by the Act to refrain from entering into an unsuitable contract.*

The majority in *ASIC v Westpac* further confirmed that[5]:

> *"it does not follow that the statutory purpose can only be achieved by taking into account all information collected, regardless of its relevance or materiality to the assessment of unsuitability. Simply labelling an expenditure as a Declared Living Expense, and the fact that the consumer incurs that expense on their current lifestyle, does not necessarily change its nature from being discretionary. It is plain that a consumer may choose to, and can be expected to, forgo particular living expenses in order to meet their financial obligations under a credit contract."*

We are concerned that the guidance set out in the RL Approach, particularly in relation to unsuitability assessments and the use of benchmarks, is in contrast with the decision in *ASIC v Westpac* and the Court's view that it is open to a lender to decide how it will conduct its assessment and how it will use the results of its inquiries and verification[6].

The example set out in the RL Approach states that[7]:

> "*In AFCA's view the financial firm did not have a reasonable basis to predict the complainant's likely living expenses… when her bank statements indicated her previous month's expenses were over four times higher than that [her declared] amount.*."

In view of the decision in *ASIC v Westpac*, we consider that the example arrives at the wrong conclusion and we ask that AFCA corrects the example and more broadly its approach, to better align it with the findings of the Court.

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4 *Australian Securities and Investments Commission v Westpac Banking Corporation* [2020] FCAFC 111 - para 141
5 *Ibid* - para 172
6 *Ibid* - para 141
7 *The AFCA Approach to Responsible Lending* - page 19

Innovation, competition and access to credit

In highlighting risk factors as indicators requiring further work as part of any unsuitability assessment AFCA is seeking to operate beyond the boundaries of the responsible lending framework.

Responsible lending is an assessment of future financial capacity to meet repayment obligations. It is not an assessment of past or future credit behaviour. Customers may deprioritise certain obligations, act carelessly or suffer a change of circumstances.

Customers with such indicators may or may not fall into hardship in the future while other customers without such indicators may fall into hardship. While there may be indicators of such potential future behaviours or events, their presence has no bearing on the unsuitability of credit offered to an individual customer pursuant to the responsible lending regime.

These are matters which bear on the credit risk assessment of the lender. Some lenders may provide loans to customers with lower credit bureau scores or with other credit risk derogators, such as payment reversals and default listings. These lenders may feel that they can look past such scores and derogators to identify better risk customers using other non-traditional statistical data. This is part of normal competitive action in the credit market, rewarding innovation and broadening access to credit while minimising its cost to the consumer.

There is nothing in the responsible lending regime which justifies expansion into the realm of competitive market activity and the assessment of credit risk. We are concerned that AFCA's guidance generally suggests a more prescriptive approach to lending assessments than the law requires, discouraging innovation and competition. Despite many lenders, and particularly fintech lenders, using sophisticated lending scorecards as part of their automated decisioning processes, the RL Approach is silent on this practice.

Scorecards are typically highly sophisticated models, built by actuaries using analytical modelling against which the individual consumer is assessed, with such scorecards designed to accurately predict performance of the loan and the likelihood that a particular consumer will fail to meet their repayments under the loan.

While AFCA outlines a range of factors[8] where, in adjudicating responsible lending complaints, it will consider that further inquiries and verification ought to have been made, including overdrawn accounts or reversed payments, many modern lenders apply these behavioural factors as derogators within a scorecard. Derogators combine with countervailing positive attributes to produce a score that predicts the likelihood that a particular consumer will be unable to meet their loan repayments.

AFCA's proposed guidance requiring further inquiries and verification in certain cases adopts an overly simplistic approach that is out of step with industry's technological advancements and undermines the flexibility the law permits lenders. AFCA's approach would determine a lender who had applied an unsophisticated 'tick the box' exercise as compliant, while determining a lender who employs an innovative and sophisticated analytical modelling approach non-compliant.

We are concerned that lenders may de-risk in line with the over-reach of AFCA's RL Approach, increasing assessment costs and therefore the cost of credit, negatively impacting competition and innovation, and leading to the creation of a cohort of credit excluded consumers. Indeed, any consumer with a less than perfect credit and banking profile (i.e., the whole sub-prime and mid-prime market) is likely to have lending options restricted.

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[8] *The AFCA Approach to Responsible Lending* - page 12

AFCA needs to reign in its over-reach and restrict responsible lending to an assessment of future financial capacity in accordance with responsible lending legislation and the *ASIC* v *Westpac* decision. Responsible lending has no place in behavioural/credit risk assessments.

Applicable time limits

The RL Approach does not currently set out the applicable time limits which apply to responsible lending complaints. While time limits are outlined in AFCA's Rules and Operational Guidelines, we consider that it would be useful to state those time limits within the RL Approach and provide clear examples of complaints that are out of time which cannot be heard by AFCA.

The applicable time limits for an AFCA complaint are set out in AFCA Rule B.4. These time limits reflect those provided in ASIC's Regulatory Guide 267[9].

Rule B.4.3 sets out the time limits for responsible lending complaints to be the earlier of:

a) within six years of the date when the Complainant first became aware (or should reasonably have become aware) they suffered the loss; and
b) where, prior to submitting the complaint to AFCA, the Complainant was given an IDR Response in relation to the complaint from the Financial Firm, - within two years of the date of that IDR Response.

AFCA's Operational Guidelines[10] provide guidance on identifying the date when the complainant 'should reasonably have become aware' they suffered the loss and considers that a person who is unable to repay a loan without substantial hardship should reasonably become aware when the person commences making monthly repayments they cannot afford. Although this is assessed on a case-by-case basis, it will generally be within the first few months of the loan.

Members report that AFCA has often fallen into error, finding jurisdiction to consider responsible lending complaints where none exists in circumstances where the complaint was made more than six years after the complainant became (or ought to have reasonably become) aware that they suffered loss.

Time limits are important as they support procedural fairness.

Availability of pertinent information enables parties to adequately and appropriately respond to claims. Section 132 of the *National Credit Act* requires provision of a credit assessment for a period of up to seven years after entry into the credit contract where the consumer has requested a copy (Retention Period).

Should AFCA permit responsible lending complaints to be made more than six years after the complainant became (or should have reasonably become) aware that they have suffered loss, and after the Retention Period, in view of section 132, it is likely that some or all of the information, which is no longer required to be retained, may not be available. This would make it difficult for AFCA to reasonably assess the complaint and is a key reason that complaints are subject to time limits. Hearing such complaints is unlikely to be beneficial to consumers, financial firms or AFCA.

Therefore, we consider that the RL Approach should clearly set out the time limits applicable to responsible lending complaints and those time limits should be strictly applied by AFCA staff outside of extraordinary circumstances.

[9] Regulatory Guide 267 *Oversight of the Australian Financial Complaints Authority* – RG 267.163
[10] *Operational Guidelines to the Rules* - page 113

Members also report that AFCA frequently uses its longer timeframes in relation to unjustness complaints to permit out of time responsible lending complaints. Clearer guidance is needed in relation to how AFCA will exercise its jurisdiction in such circumstances.

In the event that AFCA finds that it has jurisdiction to consider any complaint after the Retention Period, the RL Approach should make it clear that AFCA will not draw an adverse inference against financial firms for not being able to produce records that it has no obligation to retain.

Inappropriate application of industry codes

We understand that AFCA will have regard to applicable codes of conduct when forming its decisions[11]. AFCA must avoid imposing standards set by codes on financial firms to whom the code does not apply. For example, the Banking Code of Practice is a code which sets standards of practice and service in the Australian banking industry. Such a code should not be applied to non-banking industry participants, nor should it be applied to non-signatories of the code.

Where industry codes go beyond the law, they amount to a choice made by one segment of the industry. Such choices may be inappropriate for other segments of the industry or other participants seeking to fill gaps in the market and broaden access to credit while lowering its cost to the benefit of consumers and the economy.

It is inappropriate to assess complaints through the lens of such choices made by certain lenders and impose them on other lenders who are not subscribers to such a code and may be seeking to compete with established subscribers.

Members have reported that AFCA has in the past failed to ensure that it assesses conduct of financial firms against the law, codes and standards of industry practice that were in place at the time of the conduct. We welcome AFCA's guidance[12] on this issue.

We note that the RL Approach outlines that:

> *"AFCA recognises the fact that while certain practices are adopted by industry participants at particular points in time (i.e. a practice may have been 'standard industry practice'), it does not mean that practice is necessarily 'good industry practice' or compliant with the law."*

While we do not disagree, we consider that standard industry practice is likely to be relevant to the question of what is 'reasonable', noting that what is reasonable is a question of fact in each individual case and is an objective test that has regard to how a reasonable person, who is properly informed, would be expected to act in the circumstances. What is reasonable can be influenced by current standards and practices[13].

Calculating loss

We are concerned that the approach to the assessment of loss fails to correctly count 'benefit' and produces unexpected and inconsistent outcomes.

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[11] Regulatory Guide 267 *Oversight of the Australian Financial Complaints Authority* – RG 267.127
[12] *The AFCA Approach to Responsible Lending* - page 8
[13] *Jones v Bartlett* [2000] HCA 56 – para 57 & 58 (Gleeson CJ); *Bankstown Foundry Pty Ltd v Braistina* [1986] HCA 20 – para 12 (Mason, Wilson and Dawson JJ)

Such inconsistency can be readily observed when comparing the difference between the calculations for loss arising from an unsecured personal loan and loss arising from a secured car loan.

In AFCA's unsecured personal loan example[14], a complainant is required to repay the net principal balance (calculated by subtracting the amount of repayments from the principal credit amount received by the complainant).

In contrast, AFCA's secured car loan example[15], in which the car is returned to the financial firm requires all repayments made by the complainant to be refunded by the financial firm together with compensation for any deposit the consumer paid to the dealer, with the balance owing under the loan contact to be waived. This example does not account for the benefit received by the complainant, being the use and enjoyment of the vehicle prior to its recovery by the financial firm.

The below table sets out two scenarios that are, in essence, identical, however one loan is secured and the other is unsecured.

	Unsecured Personal Loan	**Secured Car Loan**
Loan Amount	$50,000	$50,000
New Vehicle Value	$55,000	$55,000
Deposit paid by customer to dealer	$5,000	$5,000
Repayments	$3,000	$3,000
Residual Debt	$56,000*	$56,000*
Sale of Vehicle	$30,000	$30,000
Outcome	Consumer is to repay the principal benefit, being $47,000, which is reduced to $17,000 after the consumer applies the proceeds of the sale.	Consumer hands back the vehicle for lender to sell, owes nothing more and receives a refund of $8,000, being the funds paid under the loan and the deposit paid to the car dealer.

*includes accrued interest

The above scenarios are identical, but for the security interest, however the outcomes deviate by $25,000.

This deviation is due to the secured loan example failing to properly account for the consumer's benefit from use and enjoyment of the vehicle. We consider that outside of exceptional circumstances, depreciation is the most appropriate measure of such benefit. The difference between the purchase and sale price is the value to the consumer.

The failure to account for benefit in the car loan scenario is in contrast to the objectives of remediation, as articulated by RG 277. Rather than return the consumer to the position they would have been in but for the failure, the consumer receives a windfall gain, being the free use and enjoyment of the vehicle, perhaps for a number of years.

We note that the calculation of loss in the *Keeping the family home* example[16] similarly fails to account for the benefit the consumer receives from residing in the family home for 5 years.

In view of the above, we consider it appropriate that AFCA revisit its approach to calculating loss to correct these manifest errors.

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[14] *The AFCA Approach to Responsible Lending* - page 54
[15] *Ibid* - page 52
[16] *Ibid* – page 37

Members have also asked for clarity in relation to AFCA's approach for loans that have been considered unsuitable only in part. This may arise in relation to a credit card debt where the original limit and early limit increases were not unsuitable, while the last credit limit increase was assessed by AFCA to be unsuitable.

We consider that it would be helpful for the RL Approach to set out the calculation of loss in such circumstances, to ensure that AFCA's RL Approach correctly ascribes loss only to the part of the balance deemed to be unsuitable.

Remedies - appropriate settlement offers

AFCA's efficiency requirement recognises the importance of complaints being resolved in a timely manner[17]. Our members report that AFCA is not generally achieving this objective.

In its review of AFCA, Treasury found that AFCA could better exercise its existing discretion to exclude cases in appropriate circumstances[18]. Our members have not seen any evidence of meaningful improvement by AFCA relying on its existing rules.

In response to Treasury's Review, AFCA recently proposed amendments to the AFCA Rules, including in relation to Treasury's findings regarding efficiency[19]. One change proposed by AFCA is to include in its Rules that AFCA may decide that it is not appropriate to continue to consider a complaint where the financial firm has appropriately compensated the complainant for their loss, or has offered the complainant an appropriate remedy or compensation, which has not been accepted by the complainant. We encourage AFCA to continue to pursue this rule change to improve efficiency, reduce costs of the scheme and improve outcomes for consumers.

We understand that currently, AFCA Rule A.8.3 permits AFCA to exclude a complaint where the complainant has suffered no loss or *has been appropriately compensated for such loss and AFCA would not award any further amount.*

Guidance on the possible or likely outcomes for responsible lending complaints is essential for consumers, industry and AFCA case managers to understand AFCA's approach to responsible lending and help to determine where rule A8.3 should apply.

We consider that in the interests of supporting AFCA's efficiency requirements, the RL Approach should set out clear guidance on circumstances where AFCA considers it would be appropriate to exercise its discretion under Rule A.8.3, where the financial firm has appropriately compensated the complainant (including by application of a debt reduction) and where AFCA would not award any further amount.

Adopting this approach will be beneficial to consumers, who are unlikely to be awarded more and will often be awarded less (if anything) at the end of the complaints process; will be beneficial for the scheme, which will be able to improve on its current inefficiency and reduce the current significant delays; and will beneficial to financial firms, by reducing costs and providing early resolution.

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17 Regulatory Guide 267 *Oversight of the Australian Financial Complaints Authority* - RG 267.137; AFCA Rule A.2.1(c); *Operational Guidelines to the Rules* - page 10

18 *Review of the Australian Financial Complaints Authority*, August 2021 - para 4.106

19 *AFCA Rules and Operational Guidelines – Proposed Amendments Consultation Paper*, March 2023 - section 3.1 We note AFCA's website (https://www.afca.org.au/news/consultation/rulesandOGconsultation) indicates more information about the outcomes of the consultation and next steps will be published in September 2023

AFCA's misalignment with community expectations

Our members note their concern in relation to the example within the RL Approach[20] which outlines a scenario in which the complainant falsifies payslips to fraudulently obtain a loan that, but for the deception, would have been assessed as unsuitable.

In the example, despite the lender not having been aware of the fraud, because the lender held data that could have contradicted the falsified statements provided by the consumer (thus having constructive knowledge of the discrepancy), the financial firm was found to have breached its obligations and was required to pay compensation to the consumer. The compensation was reduced by 25% due to the consumer's own fraudulent actions.

We consider that obtaining payslips would ordinarily discharge a lender's reasonable steps. Absent the lender's actual knowledge that the documents were false, it should not be considered to have breached its obligations.

The idea that a consumer who deliberately falsifies documents to fraudulently obtain a loan ought to be paid compensation for their crime would seem likely to be out of step with reasonable community values and expectations. It also establishes perverse incentive for customers to commit fraud in credit applications.

Equal credit opportunity

We are concerned that the guidance may cause direct or indirect discrimination to certain segments of consumers. This includes AFCA's guidance relating to reasonably foreseeable changes[21], where AFCA refers to consumers approaching retirement age and requires further inquiry and verification.

Some customers may choose to remain in the workforce longer than others and this is not a question of responsible lending. Because of the heightened inquiry and verification steps, lenders (particularly for smaller credit amounts where the loan size does not warrant extensive manual inquiry and verification) may simply choose to exclude such groups of consumers to de-risk.

A difficulty with the concept of foreseeable change is that it presents a slippery slope. Differences will always be inherent amongst different groups of consumers. For example, women of a certain age may be more likely to become pregnant and need to take maternity leave.

Creating credit policy that creates barriers for particular groups of consumers is discriminatory, may be unlawful and is out of step with international approaches to lending[22].

Use of interest rate buffers

The guidance[23] outlines AFCA's view that lenders should apply interest rate buffers to both a complainant's new and existing fixed and variable interest rate debts. It is unclear why an interest rate buffer would be appropriate for a fixed rate debt.

We also consider that the guidance needs to better articulate when buffers may not be appropriate. For example, when interest rates are already at their likely peak, requiring a standard buffer is likely to significantly restrict lending in circumstances where further rate rises are much less likely.

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[20] *The AFCA Approach to Responsible Lending* - page 41
[21] *Ibid* - page 20
[22] For example, the United States of America's *Equal Credit Opportunity Act*
[23] *The AFCA Approach to Responsible Lending* - page 20

Conclusion

In summary, ACDBA respectfully submits that further consideration and corresponding amendments are required to The AFCA Approach to Responsible Lending in relation to:

1. Acknowledging the objectives of Responsible Lending;
2. Better alignment with the Federal Court's finding in ASIC v Westpac;
3. Clarification of AFCA's application of the time limits which apply to bringing responsible lending complaints to AFCA;
4. Avoidance of imposition of obligations of industry codes to inappropriate segments and non-subscribers;
5. AFCA's approach to the calculation of 'loss' and 'benefit';
6. Inclusion of the use of AFCA Rule A.8.3 for appropriate settlement offers, as a remedy to RL complaints;
7. Improved alignment with community values and expectations;
8. Promoting inclusivity and avoiding a culture of direct or indirect discrimination; and
9. Improving guidance relating to interest rate buffers.

Contact

For any enquiry in relation to this Submission, please contact:

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Appendix 1
Members of Australian Collectors & Debt Buyers Association

- Axess Australia Pty Ltd
- CCC Financial Solutions Pty Ltd
- CFMG Pty Ltd t/as reminda
- Charter Mercantile Pty Ltd
- CollectAU Pty Ltd
- Complete Credit Solutions Pty Ltd
- Credit Corp Group Limited (ASX: CCP)
- Lyndon Peak Pty Ltd t/as Access Mercantile Services
- PF Australia Pty Ltd
- PRA Australia Pty Ltd
- Recoveries Corporation Holdings Pty Ltd
- Shield Mercantile Pty Ltd
- Standard8 Advisory Pty Ltd
- Strategic Collections Pty Ltd