



AUSTRALIAN COLLECTORS &
DEBT BUYERS ASSOCIATION

3 June 2021

Ms Niki De Mel
Strategic Policy Adviser, Strategy Group
Australian Securities and Investments Commission
Level 7, 120 Collins Street
MELBOURNE VIC 3000

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Dear Ms De Mel,

ASIC Consultation Paper 340
Breach reporting and related obligations

The Australian Collectors & Debt Buyers Association (ACDBA) is pleased to provide the attached Submission in response to the above Consultation Paper issued 22 April 2021.

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
ASIC Consultation Paper 340
Breach reporting and related obligations***

June 2021

Contents

Introduction	2
Debt purchasing	2
Perspectives	3
<i>A transitional period is warranted</i>	3
<i>Unresolved issues at 1 October 2021</i>	4
<i>General conduct obligations</i>	4
Contact	5
Appendix 1 - Members of Australian Collectors & Debt Buyers Association	6
Appendix 2 - Debt Purchasing explained	7

Introduction

Australian Collectors & Debt Buyers Association (ACDBA) welcomes the opportunity to provide perspectives to Australian Securities & Investments Commission (ASIC) in respect to Consultation Paper 340 (CP340).

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

The core business of our members within the financial services industry is in the credit impaired consumer segment, whether as collectors or debt purchasers, working with consumers who for various reasons, have found themselves in default of their credit obligations.

ACDBA members purchasing debt, each hold an Australian Credit Licence and are members of the Australian Financial Complaints Authority (AFCA). Our members do not provide financial advice.

Debt purchasing

Accounts assigned to debt purchasers typically involve debts where an acceleration clause in the financial agreement has been triggered by the customer’s default in making repayments.

Many with accelerated debts are in hardship giving rise to complex, contested and unresolved issues. Debt purchasers are specialists in dealing with and managing hardship as they almost exclusively interact with customers in some form of financial difficulty.

An expanded explanation of how debt purchasing operates in Australia is included as Appendix 2.

Perspectives

As previously communicated to Treasury's Financial Services Reform Taskforce, ACDBA generally supports the introduction of breach reporting obligations for Australian Credit Licensees (Credit Licensees).

ACDBA urged consideration to ensure the regime was reasonable and practical for implementation and not imposing excessive and unreasonable compliance burdens on Credit Licensees. This was prefaced on the basis that compliant Credit Licensees bearing the cost of meeting the obligations will be at a competitive disadvantage to any Licensee adopting a less forensic or improvement focussed approach to the breach reporting obligations.

As the commencement date approaches and amid the absence of final Breach Reporting Regulations and clear Regulatory Guidance our members have some concerns which we now set out:

A transitional period is warranted

ACDBA and its members are concerned that the commencement date from 1 October 2021 for the breach reporting obligations on Credit Licensees will prove onerous for financial firms not previously subject to breach reporting obligations given the commencement date coincides with the commencement of other legislative changes affecting those same firms including the commencement of *ASIC Regulatory Guide 271: Internal dispute resolution*.

The necessary preparation by firms to modify systems and processes and to train staff in order to meet the breach reporting obligations which is already onerous will be directly exacerbated by the delayed provision of final regulatory guidance for the legislation which has effect from 1 October 2021.

ACDBA members are concerned the release of final guidance in or after July 2021 is not reasonable given the extensive preparation required of firms - the risk for licensees being an inability to be ready to meet these new obligations at the commencement date.

We have heard commentary within financial services that ASIC itself will not be entirely ready for the commencement of the widened breach reporting obligations from 1 October 2021 specifically with respect to the regulatory portal. If correct, the commencement date of 1 October 2021 is neither reasonable nor practical for regulator and Credit Licensees alike.

ACDBA respectfully submits there is a compelling need for an appropriate transitional period with ASIC assisting with implementation by adopting a 'no enforcement' approach for missed, delayed or incomplete reporting in relation to the obligations on Credit Licensees which have not previously been subject to breach reporting obligations as Financial Service Licensees.

Recommendation 1:

That ASIC adopt a 'no enforcement' approach for missed, delayed or incomplete reporting by Credit Licensees in relation to the breach reporting obligations during a transitional period of 1 year from the commencement date of 1 October 2021.

Unresolved issues at 1 October 2021

What is the situation for Credit Licensees in regard to the breach reporting obligations for any issues predating 1 October 2021 which are still being investigated and resolved – are they reportable upon the commencement of the breach reporting obligations? As the Act¹ is unclear as to Licensee obligations in relation to such issues, ASIC guidance must clarify Credit Licensees reporting obligations in these circumstances.

The absence of clarity in the Act on this aspect supports it is not intended such open issues predating 1 October 2021 be reportable as otherwise the new breach reporting obligations would effectively be retrospective on Credit Licensees.

Recommendation 2:

That Regulatory Guide 78 be amended to include guidance for Credit Licensees similar to the guidance given in RG 78.14 in relation to Financial Service Licensees, making it clear that issues and incidents logged prior to 1 October 2021 and remaining open after the breach reporting obligations commence are not required to be reported.

General conduct obligations

In our submission to Treasury's Taskforce² we identified that determining what amounts to a significant breach involves a subjective assessment and as such careful definition and regulatory guidance was warranted so as to ensure all Credit Licensees adopt and are held to a consistent methodology in terms of assessing which matters are reported.

This observation is particularly relevant in respect to potential breaches of s47 of the NCC³ being the general conduct obligations of licensees, some of which are broad for example s47(1)(a) which requires licensees to engage in credit activities efficiently, honestly and fairly. Whether this obligation is met by a Credit Licensee is subjective rather than being determined by any clear objective measure.

Breach reporting by Credit Licensees in respect to the s47(1)(a) obligation will be onerous and excessive without some filtering to determine the significance of any actual or potential breach.

Given the limited and questionable value of reporting such breaches, we respectfully submit the guidance would benefit from inclusion of clear objective measures which allow licensees to determine whether a significant s47(1)(a) breach has occurred and is reportable.

Recommendation 3:

That ASIC includes in the regulatory guidance clear objective measures to assist licensees in determining whether a significant s47(1)(a) breach has occurred and is reportable.

¹ Financial Sector Reform (Hayne Royal Commission Response) Act 2020

² [ACDBA Submission to Treasury's Financial Services Reform Taskforce](#), 28 February 2020

³ National Consumer Credit Protection Act 2009

Contact

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

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Appendix 1 - Members of Australian Collectors & Debt Buyers Association

- Axxess Australia Pty Ltd
- CCC Financial Solutions Pty Ltd
- CFMG Pty Ltd
- Charter Mercantile Pty Ltd
- CollectAU Pty Ltd
- Collection House Limited (ASX: CLH)
- Complete Credit Solutions Pty Ltd
- Credit Collection Services Group 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
- Prushka Fast Debt Recovery Pty Ltd
- Recoveries Corporation Holdings Pty Ltd
- Shield Mercantile Pty Ltd
- Standard8 Advisory Pty Ltd

Appendix 2 - Debt Purchasing explained

Debt sale contracts exhibit the features of outsourced service provision rather than asset divestment - the contracts contain substantial ongoing conduct obligations and restrictions imposed on the purchaser, which are supported by warranties, indemnities and other potential penalties. The conduct obligations deal with matters such as ongoing compliance with laws, codes, guidelines, data security, principles of fairness and policy directives of the seller.

These contractual requirements are supported by ongoing reporting obligations for matters including breaches, complaints and the identification of customers in sensitive circumstances. There are provisions for extensive auditing, on-site visits and regular review meetings to share emerging issues. Sellers retain substantial discretion to recall individual customer accounts at any time.

The contractual elements create an outsourcing relationship granting the seller substantial control over the ongoing conduct of the purchaser and the experience of individual consumers.

It is appropriate to note ASIC as the regulator for the financial services industry provides guidance in respect to conduct relating to a debt⁴:

A creditor may also remain liable for conduct regarding a debt despite having sold or assigned the debt. Liability will generally remain for misconduct occurring before the sale or assignment of the debt.

Accounts assigned to debt purchasers by original credit providers typically involve debts where an acceleration clause in the financial agreement has been triggered by the consumer's default in making repayments. Once a debt has been accelerated, the amount owing is immediately due and payable.

Many, if not most consumers with accelerated debts are likely to be in hardship giving rise to complex, contested and unresolved issues.

Debt purchasers are specialists in dealing with and managing hardship as they almost exclusively interact with customers in some form of financial difficulty.

Debt purchasers do not establish separate hardship teams and do not need to implement protocols and systems to identify hardship. Rather, they proceed on the basis that every customer is in hardship. This means that every customer receives an empathetic and understanding experience designed to reach mutual agreement on a sustainable repayment arrangement.

The debt purchase business model includes two key features being:

- a. The model is uniquely suited to the promotion of affordable and flexible long-term payment arrangements which most effectively respond to individual customer circumstances
- b. Debt purchasing involves the assignment of permanent tenure to defaulted loans at prices which represent a substantial discount to the face value outstanding

The benefit of these two features is allowing debt purchasers to agree to longer-term payment arrangements with lower and more affordable repayments for the customer in hardship and to take a patient approach to understanding and accommodating individual customer circumstances.

⁴ Equifax Default Information Guide version 23.0 - February 2019

Each year ACDBA members and other industry firms participate in a data survey to provide industry wide demographics. Reviewing the data survey for FY2020 reveals there were 2.99 million accounts with a total face value of \$15.5 billion under collection that had been purchased from originating credit providers.

These aggregated figures reveal a low average value per account of only \$5,184.

Debt purchasers handle a range of debt values in their portfolios from lesser amounts in respect to telecommunication debts through to larger amounts for higher value credit card and other banking product debts.

Survey respondents in FY2020, reported for both debt purchase and contingent collections collecting \$2.37 billion of defaulted consumer credit obligations, restructuring \$2.86 billion into sustainable repayment arrangements together with a \$1.46 billion in hardship arrangements and waiving a further \$31.3 million owed by vulnerable customers in financial hardship.