

Australian Credit Forum

(australiancreditforum.com.au)

All correspondence to

G. Scales, President

c/- Hagemeyer Brands Australia Pty Ltd

104 Vanessa St

Kingsgrove NSW 2208

30th June 2009

Debt Collection Feedback
ACCC
GPO Box 520
Melbourne VIC 3001
debt@acc.gov.au

Dear Sir

Debt Collection Practices in Australia – Summary of Stakeholder Consultation, May 2009

The Forum appreciates the opportunity provided by ACCC and ASIC to provide feedback on the issues contained in the summary of stakeholder consultation regarding debt collection practices.

About the Forum

The Australian Credit Forum is a not for profit organisation formed in the 1970's by a group of credit professionals who in addition to wanting to build and strengthen existing credit standards, reviewed and discussed legislation suggesting changes that may affect the credit industry.

Since its inception, one of the major strengths of the Forum has been its dedication to select the membership of individuals from as many industries as possible ensuring a cross section of knowledge and experience in all credit related areas.

This has been combined with the granting of membership to individuals within various service providing roles including debt collections firms, insolvency practitioners, legal firms, accountancy, credit insurance and business information providers.

Please refer to the attached website for further information:

<http://www.australiancreditForum.com.au/>

Response to consultation paper

In responding we wish to make some general comments regarding debt collection practices and the document. In addition we make some observations and recommendations to those general comments.

In relation to the thirteen 13 issues raised in the discussion paper the forum supports the concluding observations as presented on the whole, noting that the observations include reference to further investigation and clarification. We make specific comment in relation to two issues concerning issue no. 8 enforcement responses and issue no. 11 Complaints handling – external disputes resolution.

Coverage and focus of the Document – Debt Collection Practices in Australia

The paper's focus would appear to be largely concentrated on credit and debt collection practices as they relate to consumers as individuals in a retail, household or non business context and also where these debts may be sold or assigned by the original creditor to a small number of active debt purchasers.

Debt purchase transactions are almost exclusively in the financial service or telecommunications industries. It is estimated that there is less than ten active debt purchase businesses operating in Australia.

The majority of the transactions for consumers as individuals are in a retail, household or non business context and occur where there is already significant legislative, regulator, industry code, EDR and ombudsman scheme coverage in the financial services, telecommunications and insurance industries.

Consumer credit and telecommunications debt purchase commenced as a major factor in debt recovery practices in approximately 2000. Since the industries introduction there has been considerable effort by stakeholders to focus on specific consumer protection issues that have resulted with the introduction of this new business model. Debt collection practices in this area is where the largest area of consumer concerns have arisen. It is noted that for financial service transactions the NCCP has an increased focus on this sector.

Consumer coverage

Unlike the Privacy Act that has specific provisions for an individual's credit transactions in a non commercial context, the ASIC and Trade Practices Acts have a much wider definition of consumer and therefore type of credit transaction coverage. Consumers can include transactions with individuals in a commercial context, with business and corporations.

Industry overview

The industry overview in the consultation paper somewhat understates the coverage of debt collection activity. It is considered by the forum that all original creditors that provide goods or services on credit terms are likely to engage in some form of debt recovery activity rather than “may engage” as the consultation paper indicates.

The identification of third party collectors as mercantile agents or debt purchasers omits any reference to the legal profession.

There is significant involvement by the legal profession in acting for creditors in provision of debt collection services at both a demand stage and after issue of legal process. A large percentage of legal involvement is direct with creditors and would be in addition to the figures in the consultation paper taken from the Institute of Mercantile Agents.

At a wider level it is noted that all levels of government and many other organisations such as trade unions deal in a highly visible environment for ensuring consumer protection and engage the services of third party collectors be they mercantile agents or legal profession.

In this context there is a very small number of reported instances of consumer detriment resulting from unlawful debt collection practices by creditors, their agents or legal service providers. Whilst the level of consumer detriment is acknowledged to be small in the debt purchase, telecommunications and consumer financial services area it is extremely so in other sectors.

Comments/recommendations

That any “future work” have regard to the wide coverage the definition of consumer applies in the ASIC Act and Trade Practices legislation, especially transactions involving business as consumers.

A concern is that future regulation or updating of the guide that is focused largely on experience of individual consumers and their representatives in the already highly regulated areas of financial services and telecommunications may have unwarranted impact on business in other sectors.

That there is acknowledgement of the legal professions role in debt collection activity, and that the views of specialist firms active in the area, relevant committees of the profession or law council be involved as stakeholder in the development of ‘further work’ in consideration of debt collection practices.

Mercantile agents and creditors

The consultation paper notes that the mercantile/commercial agent industry provides a valuable service to business ultimately allowing for access to a lower cost of goods and services.

The forum recognises that this industry provides an essential service for members and their respective industries in assisting with the ability to collect debt and provision of both commercial and consumer credit.

The forum agrees with the industry that it has an unnecessarily complex State and Territory regulatory regime and that there is a need for national harmonisation of legislation regulating their activities and licensing.

Any move to harmonisation would assist both creditors and consumers.

The nature of the industry is diverse in its location, services and structure as is represented in the membership and coverage of its industry associations. There is a large number of small to medium sized enterprises with a degree of specialisation, especially by service, type of debt collected or by location in country and remote areas.

Any change in regulation of this industry should ensure that it is mindful of this diversity and that there is a sensible approach to compliance structure to avoid an unwarranted adverse impact on industry. It is considered that the proposed coverage of debt collectors in the NCCP that has been exempted for 12 months is unworkable for this reason in addition to it introducing another level of regulation and licensing to an already regulated industry.

Comment/recommendation

That any considerations regarding future changes to regulation of mercantile agents take account of the diverse nature of the industry and its many small specialised members resources.

That the NCCP coverage for debt collectors exempted for 12 months, be permanent and government work with industry to create a national harmonisation of existing regulation.

Debtor conduct and communication

It is noted the guide makes reference to debtors responsibilities.

The forum considers that avoidance of obligations and communication by debtors with their creditors is a significant contributory factor in escalating debt recovery action.

Creditors have a commercial interest in minimising expensive legal or other action and working with debtors to resolve issues and make arrangements to deal with a debtors changed financial circumstance.

It is understood that dealing with debt can be a stressful for debtors. Anecdotal reports of Forum members is that occasionally that stress results in abusive and sometimes a violent behavior toward employees of creditors, their agents and others engaged in the legal system and insolvency system.

Comments/recommendations

That ACCC and ASIC actively promote conduct by debtors and their advocates that encourages debtors to promptly communicate effectively with their creditors.

That ACCC and ASIC explain and reinforce the legitimate role debt collection activity plays in the credit system with debtors.

That ACCC and ASIC reinforce that abusive, threatening and violent behavior by debtors is unlawful and that they should seek assistance if they are overly stressed about their financial circumstance.

Issue 8 – Enforcement Responses

The Forum does not agree that creditors knowingly pursue unwarranted bankruptcy petitions and other legal enforcement options.

The cost of bankruptcy and legal action generally is significant for creditors and sufficient incentive to ensure commercial decisions.

The ACF agrees with industry comments that creditors should be entitled to pursue legitimate enforcement rights.

Where bankruptcy action proves not to be of financial benefit for creditors because of the financial or other circumstance of debtors, the significant factor contributing to the outcome is the conduct and lack of communication from debtors to provide realistic information to creditors.

In the absence of information, realistic settlement proposals or genuine efforts to resolve disputes or claims, it is considered that prudent creditors protect their interests by seeking to obtain a judgment, even for “relatively small amounts”. This

is especially important if a large percentage of a creditors business provides goods or services for those "small amounts".

The Forum considers there may be some enhancements to be made to civil claims and bankruptcy documentation to more clearly identify the implications on debtors of enforcement and listing of judgments.

It is noted the Federal Attorney General is soon to release an exposure draft of amendments to the Bankruptcy Act. The detail disclosed appears to be in line with general bankruptcy reform in most common law countries.

In general the Forum supports the move to shorter discharge periods for first time bankrupts and enhancements to part 9 and other amendments that encourages contribution arrangements.

There is significant concern regarding a proposed five fold increase to \$10,000 to for the statutory limit on creditor petitions. The UK process where debts below a certain value can be referred for possible IVA (equivalent to a part 9) appears to have merit in a system where the statutory minimum is only gbp750.

The bankruptcy impact on an individuals employment is an area that some professions and others may need to review.

Issue 11 – Complaints Handling – External Dispute Resolution

Firstly proper promotion and maintenance of internal dispute resolution processes by industry participants and other stakeholders is recommended.

The AFC considers that where an EDR scheme applies for an industry, whether it is mandated by legislation or not, that consumers should be directed to a scheme in which the creditor principal is a member.

Where a mercantile agent may be acting as an agent of a creditor to collect a debt, serve legal process or carry out a repossession the interests of both the creditor and consumer are better served by the matter being referred to the creditor principal's scheme.

Creditor principals are responsible for the conduct of their agents and have both a legal and commercial interest in ensuring the lawful conduct of their agents.

By ensuring consumers can complain to the creditors scheme consumers have a clear pathway for consumer redress.

It is noted that the NCCP Bill will require debt assignees of consumer credit contracts to be members of an EDR scheme approved by ASIC. As assignees

take on the responsibilities of the credit provider under the NCCP they in essence become the principal.

We trust this feedback on the consultation paper is of assistance.

Yours sincerely

Gordon Scales
Chairman
Australian Credit Forum

Contacts
Chairman
Mr Gordon Scales
Ph: 02 9370 8936
Email : scalesg@hagemeyer.com.au

Vice Chairman
Mr James Van Poppel
Ph 02 9671 0400