AUSTRALIAN COLLECTORS & DEBT BUYERS ASSOCIATION

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Dear Sir

Discussion Paper: Credit Hardship Obligations – Outstanding Issues

Further to your invitation to Australian Collectors & Debt Buyers Association (ACDBA) by email dated 2 August 2013 to participate in a closed consultation project regarding the hardship provisions of the *National Consumer Credit Protection Act 2009 (NCCP Act)* and related regulations, we are pleased to provide the following perspectives in relation to the discussion issues.

In this submission, we utilise the same issue numbering as the discussion paper and provide commentary on the matters of direct concern to ACDBA members involved in contingent collections and/or debt buying in relation to debts subject to the NCCP Act.

In considering the Discussion Paper and preparing material for this Submission concern remains with the concept: "**what exactly is meant by hardship"** recognising the nature of contingent collection activity and debt purchase relates to consumers who are outside the original credit providers' terms and conditions of providing the original and/or revolving credit.

This question is paramount for businesses engaged in debt buying or contingent collections involving consumer credit contracts as almost without exception every debt handled by such businesses involve situations of a consumer experiencing financial difficulties in repaying the specific loan or lease.

Debts referred to contingent collectors and debt buyers whilst unpaid are also aged. In most cases, such debts have been managed through the originating credit provider's internal collection processes prior to referral or sale. At the time of referral to a contingent collector or sale to a debt buyer the full contracted debt amount is payable pursuant to the operation of acceleration clauses within the specific finance contract and arising from the consumer's behaviour in response to default notices.

The contingent collector as agent for the originating credit provider or alternatively the debt buyer following assignment of the debt makes contact with the debtor to request payment of the total amount due. Routinely, when eventually located and contacted the debtor is unlikely to in a position to pay the account in full and accordingly the collector/debt buyer attempts to negotiate a payment arrangement with the individual debtor.

In respect to debts handled by contingent collectors and debt buyers, it is mostly the rule rather than the exception that debtors will respond with advice that he or she is experiencing financial difficulty in repaying the specific loan or lease.

The dimension of the issue of debtors claiming financial difficulties is immense, given that ACDBA Members for the financial year ended 30 June 2012 collectively reported engaging in open, informal and continued constructive dialogue on the unique circumstances of individual consumer's financial difficulties culminating in 333,187 accounts under payment arrangements in relation to a total debt value of $1.9 Billion.

The actual nature of the status of accounts owed by consumers at the stage of referral to a contingent collector or assignment to a debt buyer appears to not be fully understood in discussions on how to regulate for the handling of hardship applications.

In the financial year ended 30 June 2011, ACDBA members collectively handled 941,926 individual consumer credit accounts with a total debt value of $6.97 Billion, with individual negotiations leading to repayments arrangements being agreed to for 288,802 accounts.

For originating credit providers handling the full array of credit accounts within their portfolios, it is perhaps appropriate that accounts involving consumers claiming to be experiencing financial difficulties be separately flagged as hardship applications. There is however a compelling case to acknowledge that overwhelmingly accounts handled by contingent collectors and debt buyers involve debtors with financial difficulties and that all of the processes followed by those contingent collectors and debt buyers are effectively tasked to handling hardship applications.

Our members work cooperatively with consumers to structure appropriate repayment plans which allow the consumer to recognise his or her credit obligations and to remain active members of the community – the process involves assisting the consumer to understand his or her financial situation whilst achieving an appropriate and flexible solution.

As every discussion with a consumer regarding the repayment of a defaulted account involves the variation of the contract the hardship process would potentially be invoked in almost every dialogue with consumers.

Our members report for the financial year ended 30 June 2013 they made 17.6 Million calls to debtors (supplemented by 5.3 Million SMS messages and 12.4 Million written communications) - in every discussion our members work cooperatively with consumers to structure appropriate repayment plans having regard to their individual financial difficulties.

The specialist role of contingent collectors and debt buyers in managing consumer credit accounts subject to the operation of acceleration clauses within the specific finance contracts and arising from the consumer's behaviour in response to default notices we submit should negate the requirement to add an additional layer of bureaucratic process for Hardship Notices, which will undeniably add an unreasonable burden to the administrative processes of the industry for no obvious gain from the consumer's perspective.

In this context, contingent collectors and debt buyers are already prima facie working with consumers in a hardship situation. The role of the contingent collectors and debt buyers is to work with the consumer to find a balance between the ability to pay the outstanding debt and their desire to pay the debt.

Again, in this context, the original credit provider's "hardship" has taken on a different character when the debt is referred to a contingent collector and it could be argued the debt is different again when a debt is sold. The point being that the original credit provider will accept a rehabilitated debt under a contingent collection arrangement but once sold the original credit provider is closing its' current and future dealing with the consumer.

We strongly contend that the change in hardship character of a debt after the acceleration clauses have been invoked needs to be recognised to give the consumer and the contingency collector and debt buyer the best environment in which to find a satisfactory solution.

One consideration would be to include in the new hardship provision post the issue of a Section 88 Notice, a basis of information exchange between the consumer and whoever is working/owns the debt that allows an open and easy discussion between the parties.

An example of this would be via the provision by the consumer of a financial statement.

Anything that contributes to the better understanding of the situation between the parties will reduce conflict, speed up the assessment and response processes and allow the consumer to feel fairly treated.

Given the character of debt referred to contingent collectors and debt buyers, there is strong evidence that the fair treatment of consumers is a major focus of contingent collectors and debt buyers.

We would welcome the opportunity to explore a hardship handling distinction that will better support consumers who are at least technically in hardship by virtue of the debt being in default and payment in arrears.

In the meantime, pending such an opportunity being provided, in response to the Discussion Paper, on the pages following, we set out our perspectives on the issues raised:

ISSUE 1: Transitional Arrangements – Flexibility and Consistency

- Do stakeholders consider the transitional arrangements adequately support consistent hardship compliance procedures for credit providers and lessors for credit contracts and leases entered into before and after 1 March 2013? In particular:

  - Is there a need to treat 'simple arrangements' differently?
  - What are the implications of responses not being confirmed by writing?
  - Is 90 days the right period for a simple arrangement?

ACDBA response:

We believe it is beneficial to treat 'simple arrangements' differently, as this approach gives credit providers greater ability to flexibly deal with minor contractual variations that may be required by the consumer over the course of a contract.

A simple arrangement should be driven by the individual consumer's financial circumstances which in turn will determine whether the arrangement is a 'simple arrangement' or a 'hardship application'.

Generally, we regard it is a sound principle for all dealings in relation to a hardship application to be recorded in writing to ensure there is permanent documented evidence from all parties as to the agreed arrangement established – increasingly the wide use of call recording within collection calls means relevant discussions are captured. Providing a written confirmation of an agreement to the individual consumer does potentially reduce the likelihood of misunderstanding.

However, we do not see negative implications if a response was not sent in writing in terms of record keeping, as written records will still be maintained on the credit provider's internal systems and such records could be accessed by a consumer under privacy legislation, should it be necessary on a case-by-case basis.

We see 90 days as a generally appropriate period for defining a simple arrangement, but would not be averse to a greater period of time being provided given the making of arrangements can take considerable time for a wide variety of reasons impacting upon a consumer's ability to commit to an arrangement.

- What are stakeholder views on the advantages and disadvantages of making the transitional provisions for hardship permanent, including any practical implications that we should be aware of?

ACDBA response:

We do not have any objection to the content of the transitional provisions being made permanent, but believe that certain additional provisions would be of benefit, as noted elsewhere in this submission.

- Are there any additional or different regulatory features that would better meet the objectives of the transitional arrangements?

ISSUE 2: Trigger Requirements

- Are their relevant distinctions to be made to the circumstances in which a debtor believes they are unable to meet payment obligations (including when a 'notice' is considered to be given)?

  ACDBA response:
  Yes, within the context of accounts handled by contingent collectors and debt buyers (as we noted earlier all accounts being handled from referral/assignment from the originating credit provider involve a consumer claiming financial difficulties) such financial difficulty status should obviate any need for elevation to the formal status of a hardship application.

  We believe there are distinctions to be made dependent on whether the debtor can satisfactorily demonstrate they can meet a formalised repayment arrangement established and agreed between the parties.

  If a modified repayment arrangement cannot be demonstrated, agreed and/or maintained by the debtor, then this could potentially be deemed a hardship request.

- How does this interact with the existing transitional arrangements?

  ACDBA response:

  We do not believe that it does as any discussions with the debtor to alter the repayment arrangement; date of payment, etc. could lead to this being unintentionally classified under the hardship provisions.

- What, if any, regulatory guidance would assist in understanding when a consumer has provided relevant notification sufficient to ""trigger"" the hardship provisions?
  – How should the guidance be formulated?

  ACDBA response:

  We would like to see highly definitive regulatory clarification of what triggers a consumer giving hardship notice, in the view of ASIC. We note and agree with ASIC's comments that case law suggests that for a legal notice to be given, a consumer should be 'conscious' they are giving a notice. Even taking such comments into account, attempting to 'operationalise' a definition of a verbal hardship notice remains problematic.

  Under the amended hardship legislation, and in the context of a debt buyer's business model, the majority of verbal contacts with a consumer could be interpreted as the consumer giving a hardship notice. We believe it is very unhelpful and most likely unworkable, to both industry and consumers, to have formal responses sent to all of these potential 'hardship notices'.

  Under the contractual terms that consumers hold with debt buyers, the accelerated full account balance is generally contractually owed. A debt buyer will generally explore with a consumer whether he or she can meet this 'up-front payment' obligation, and the consumer will usually (legitimately) indicate that they cannot.

We do not think it is helpful to either party for such an interaction to be viewed as a hardship notice, as it will capture too broad a segment of consumers. Indeed it is quite normal for a consumer of almost all demographics to be unable to make an immediate payment of a typical credit card or personal loan debt (for example in the range of $10,000 - $20,000).
The fact that the consumer cannot immediately meet this obligation does not, nor should it automatically mean they are in hardship.

We believe the requirement for a written hardship notice, under pre-March 2013 contacts is far more functional.

- Is further regulatory change required to address the issues? If so, what would be an appropriate outcome?

ACDBA response:

We believe the earlier form of the hardship legislation (in terms of the hardship notice trigger) provided a clearer path for industry compliance. If broad verbal indications of financial difficulty are to be broadly taken as a 'hardship notice', we think that debt assignees (debt buyers) should be exempt from the requirement to respond in writing – and rather should be required to provide a verbal response, and record that response on their internal system.

ISSUE 3: Debt Buyers – Assignees

- Please describe the nature of the negotiations between a debt purchaser and a debtor.

ACDBA response:

In the majority of cases, significant resource is expended by the debt purchaser to make contact with the debtor, given that the contact details provided at debt assignment are often not current. Once a discussion has been initiated between the debt purchaser and the debtor, the purchaser will clarify to the debtor their outstanding liability, and attempt to build a profile of the debtor's financial circumstances, through posing questions to the debtor. Good industry practice involves customer service and rapport-building efforts made by the debt purchaser – this approach puts the debtor better at ease and consequently a better profile can usually be built of the debtor's financial circumstances.

The overwhelming majority of interactions between debt purchasers and debtors result from telephone calls made by debt purchasers to debtors, rather than debtors proactively contacting the debt purchasers in relation to their accounts.

As debt purchasers typically purchase accounts on which no payments have been received in at least 180 days, virtually all accounts actioned by debt purchasers have been accelerated pursuant to a Section 88 Notice and the full balance of the debt is legally immediately due and payable. This means 'hardship variations' are substantially more complex, as the focus is not on a minor change in repayment amounts, frequency or a short-term payment holiday but rather in establishing a repayment arrangement whereby a large amount which is immediately due and payable is repaid over a long period of time.

Given that the debtor contractually owes the full accelerated debt 'up-front' by the time the debt has been sold, the debt buyer will usually initially ask the debtor whether he or she can meet this debt in full.
A small minority of debtors will be able to so, but most debtors cannot afford to do so, however many are willing to look into sourcing the funds from various sources (e.g. family assistance, refinancing, selling an asset etc). Where the debtor cannot meet the full balance upfront the debt buyer will often explore whether the debtor can make a significant lump-sum payment, prior to entering an instalment arrangement.

Negotiations (virtually all being telephone based) involve the debt purchaser seeking to develop an understanding of the debtor's financial situation including assets, liabilities, income and expenditure. Whilst a statement of financial position is commonly requested, it is rarely comprehensively completed and returned. Thus, discussions regarding repayment options can extend over multiple calls over some period of time, each call involving a request for a debtor to provide further information of some nature (eg discuss a proposed repayment arrangement with their partner, provide evidence of income and/or expenditure, determine whether a lump sum can be obtained for a discounted settlement, etc). Additionally, it is most commonly the debt purchaser, rather than the debtor, who will initiate the follow up conversations to see what progress (if any) has been made in addressing earlier enquiries.

Such negotiations can occur over an extended period – a large ACDBA member reports over 10% of its hardship variations conclude in agreement more than 90 days after the commencement of negotiations and further less than 5% of its collections on defaulted accounts arise from accounts where some form of legal activity has been initiated, with legal enforcement only initiated once all attempts at negotiated resolution have been exhausted. These results demonstrate that every option is explored in an endeavour to establish a suitable payment solution to settle the outstanding debt, satisfactory to all parties.

Most negotiations resolve in the debtor ultimately entering an instalment payment arrangement which can range in duration from a period of months to a number of years.

During the negotiation process there are often times involving various gaps in a communication where a debtor is looking into their options, or falls out of contact with the debt purchaser.

Under the pre-March 2013 hardship legislation, a debtor can apply in writing for a hardship variation at any stage during this negotiation process. Under the post-March 2013 hardship legislation, there are various points during this typical negotiation process which could be viewed as a 'hardship notice'.

Much of the regulation of hardship is designed to ensure that the credit provider does not act precipitously by initiating legal enforcement before the consumer has had the opportunity to have reasonable repayment alternatives considered.

In the context of accounts handled by debt purchasers where no payments have been made for 180 days and the entire amount outstanding is immediately payable it is open to the debt purchaser to initiate legal enforcement before pursuing a negotiated resolution. In almost all instances, however, debt purchasers will seek to reach a negotiated resolution and will initiate almost all the contact between the parties in an effort to reach such a resolution.

ACDBA and its members are concerned that a process requiring the premature injection of formal notices into a flexible negotiation process will only serve to limit dialogue between the debt purchaser and the consumer, leading to an increase in the incidence of legal enforcement. This would be completely at odds with the objective of the regulation and would amount to an unintended consequence.

- Does communication between a consumer and a debt purchaser about circumstances where the consumer is "unable to meet his or her obligations" under the contract amount to a hardship notice?

ACDBA response:

As noted above, there is significant danger of this interpretation being applied to the post-March 2013 hardship legislation.

The majority of debtors dealt with by debt buyers require a 'simple arrangement' rather than being regarded as a 'hardship' application.

Given that the debtor's obligation in the case of an accelerated defaulted debt is immediate payment of the entire outstanding amount, virtually every conversation a debt purchaser has with a debtor could be argued to include an indication from the debtor that he or she is unable to meet his or her obligations. This is arguably a grey area however a more realistic interpretation given the full circumstances of such accounts and the usual array of communications with debtors is to regard in the first instance any conversation which does not result in agreement to immediately repay the outstanding balance in full as a verbal application for a simple repayment arrangement.

- Is this issue sufficiently accommodated by the transitional arrangements and existing guidance provided by ASIC in Information Sheet 105?

ACDBA response:

No, we believe the hardship trigger is the post-March 2013 legislation is too broad – at a minimum we need more definitive guidance from ASIC on when a hardship notice is taken to be given, and preferably, we would like to be able to respond verbally, if a hardship notice is given verbally.

ACDBA and its members do not believe this issue has yet been accommodated.

The existing guidance enables a credit provider to determine that the 21 day response period does not commence until all requested information is received, however such guidance does not provide adequate clarity of what comprises an "information request" and what comprises "a debtor showing willingness to comply".

In practical terms, operating with such guidance would require debt buyers to make a determination of, and record:

- whether what they had just communicated with the debtor (for example "discuss that with your wife and come back to me") is indeed an information request; and
- whether the debtor had shown a willingness to comply.

The obvious concern here is that this potentially opens new avenues for challenging the processes of the assignee credit provider by entities who already demonstrate an eagerness to capitalise on such grey areas (debt mediators, debt negotiators, credit repairers, etc.)

Accordingly, it is our strong recommendation that more specific and operationally workable guidance be provided such as: that agreement notices be sent within 21 days of reaching agreement to change the contract and that decline notices be sent following a period of 21 days of no contact with the debtor.

- If time periods can be extended, should debt purchasers be granted an extension of time to address the issue? If so, what time period would be appropriate and in what circumstances?

ACDBA response:

We agree with the concerns and argument outlined in the discussion paper relative to points 38, 38.1 – 38.4.

Stakeholders have indicated that even if the period, in which to respond to a hardship decision extends to 90 days, the numbers of consumers for whom negotiations are still underway are significant.

Further, some stakeholders have raised concerns that the 'reasonable expectations' test could be open to abuse by those who could use it as a grounds to go to EDR and delay repayments

We suggest in relation to accounts which have been accelerated pursuant to a Section 88 Notice, the following time periods:

- A credit provider or lessor has 21 days from the date of agreeing to a change to the credit contract to notify the debtor or lessee about how they will change the credit contract in accordance with 72(4)(a) and 177B(4)(a) of the Code.

- After a period of 21 days without contact with the debtor or lessee, a credit provider or lessor must, within 28 days of the most recent contact, provide a decline notice in accordance with 72(4)(b) and 177B(4)(b) of the Code.

- What are stakeholder views on the two options suggested by Treasury?

ACDBA response:

The options suggested by Treasury are generally beneficial in terms of providing more flexible time periods prior to rejecting a hardship variation request, however in our view they do not adequately address the over broad nature of the hardship triggers.

We respectfully submit our recommendations (outlined in the previous response above) are more appropriate than those proposed by Treasury, because:

- The option at paragraph 38.2 provides a definitive period (60 days or 90 days) and the experience of ACDBA members is that a material volume of discussions and negotiations extend beyond these proposed periods.

- The option at paragraph 38.2.2 suffers from potential interpretation issues and logistical/record keeping concerns as highlighted earlier, ie it introduces the questions of what is further information and what can be reasonably expected, together with issues relating to how to record the assessment of these questions.

- How could debt purchasing arrangements be defined for the purposes of regulatory capture?

ACDBA response:

Debt purchasing arrangements are already defined in terms of the credit licensing regime, as ‘credit providers which are an assignee’. We submit debt purchasers should not be defined by industry or company type but rather, the status of the account should trigger the alternative process, such that any account which has been accelerated in accordance with a Section 88 Notice will be subject to the alternative process described in any amended regulation.

ISSUE 4: Credit Reporting Considerations

- What are stakeholders' views on whether a missed payment should be listed in relation to a hardship agreement? What practical issues are faced in implementing the preferred outcome?

  ACDBA response:

  It is our opinion that a missed payment relative to a hardship agreement should not be listed automatically and contact/dialogue should be conducted with the debtor to determine the reason for the missed payment. Based on the debtor's reasons for missing the payment, we believe that consideration to listing this under the hardship arrangement should be subjective and should be left to the discretion of the credit provider/debt owner.

- Are there any additional disclosure requirements that may be appropriate to inform consumers about the impact a hardship agreement would have on their credit record?

  ACDBA response:

  No, as we do not believe that there are any additional requirements that can be imposed on a consumer's credit record relative to a hardship agreement.

- Do existing record keeping requirements by licensees adequately evidence oral hardship notices or hardship agreements (where no written confirmation is required) in cases of dispute?

  ACDBA response:

  This approach should be changed as the requirement to convert the claim to writing will be seen as unnecessarily adding to the debtor's burden, and as set out earlier, call recording makes it possible to have the evidence of the discussion if there becomes a need at some time in the future. Currently, all cases relative to a hardship application must be in writing and fully documented.

- Is further regulatory clarity required to address these issues?
  - If yes, is this best achieved through the Privacy Act reforms or Credit reforms?
  - How should any regulatory change be formulated?

  ACDBA response:

  No, we do not believe that further regulatory clarity is required.

ISSUE 5: Additional Issues

- In what circumstances would a credit provider expect that consent be obtained from a joint debtor or guarantor for a hardship notice or application?

  ACDBA response:

  In practice, it is often the case one joint debtor will make a hardship application and the other joint debtor (or guarantor) will not be contactable – accordingly, gaining the consent of the second party is not necessarily possible when a hardship notice is made.

- Is it appropriate to accommodate the obtaining of consent or approval of a co-borrower or guarantor for changes to a credit contract, in all circumstances?

  ACDBA response:

  No, for the reason set out above.

- Is the existing wording in Information Sheet 105 sufficient to address the issue of obtaining consent from co-borrowers and guarantors?

- What, if any, further guidance is required?

- If further guidance is required, what is the best way to formulate the guidance?

We thank ASIC for the opportunity to provide this Submission in response to its Discussion Paper: *Credit Hardship Obligations – Outstanding Issues* and note Australian Collectors & Debt Buyers Association would welcome the opportunity to participate in any stakeholders' roundtable discussion on these matters.

Yours sincerely
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