



AUSTRALIAN COLLECTORS &  
DEBT BUYERS ASSOCIATION

22 May 2009

Mr Geoff Miller  
General Manager, Corporations & Financial Services Division  
The Treasury  
CANBERRA ACT 2600

By email: [consumercrredit@treasury.gov.au](mailto:consumercrredit@treasury.gov.au)

Dear Mr Miller

### **National Consumer Credit Protection Bill 2009**

The Australian Collectors and Debt Buyers Association (ACDBA) welcomes the opportunity to bring it members' regulatory position to Treasury's attention as we believe our industry have been inadvertently caught by the National Consumer Credit Protection (NCCP) Bill.

We seek an exemption from the NCCP Act as our members are heavily regulated across the States and Territories. Existing legislative regimes will not be repealed, leaving our members with an additional regulatory burden. This is counter to Council of Australian Government (COAG) initiatives to reduce the regulatory burden on Australian businesses.

The Australian Government is increasingly cognisant of the impact of the regulatory burden imposed by the duplication of, and inconsistencies between, Federal and State/Territory laws. In this process, debt collection has been specifically identified as an area requiring harmonisation of the existing regulatory frameworks.

Both the Productivity Commission and the Council of Australian Governments (COAG) are working to redress regulatory duplication which impedes competition and which places unnecessary administration and costs burdens on business.

Our industry has been working with Governments over the past two years to develop either a National Debt Collection Act or nationally consistent debt collection laws. The imposition of another licensing regime is counter to achieving effective and consistent debt collection laws across all jurisdictions.

Consequently, our submission is based on the view Treasury did not intend the legislation to apply to service providers beyond finance brokers and credit providers, especially service providers who are already licensed across a range of jurisdictions.

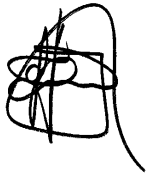
We have formed this view as no debt collector peak bodies were involved in the Treasury Industry & Consumer Stakeholder Consultation Group. Also, we are already heavily regulated with harmonisation/regulatory reform in our industry currently on the Commonwealth Government's reform agenda.

Our submission provides Treasury with an overview of the industry, the services it provides to credit providers and current harmonisation policy developments. We have also addressed some of the key NCCP Bill legislative provisions to illustrate their impact on our members.

We would appreciate confirmation from Treasury that the debt collection industry will be exempt from the NCCP Act.

Should you require further information on how the debt collection industry operates in the consumer credit market, we would be happy to meet with you.

Yours faithfully

A handwritten signature in black ink, appearing to be 'Alan Harries', with a stylized, somewhat abstract shape.

Alan Harries  
Executive Director

# **National Consumer Credit Protection Bill**

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## National Consumer Credit Protection Bill

### 1. Executive Summary

The Australian Collectors and Debt Buyers' Association (ACDBA) seeks a debt collection services exemption from the NCCP Act as our members are subject to a range of licensing regimes in other jurisdictions. In addition, the industry is working with Governments to develop a nationally consistent legislative regime or a National Debt Collection Act.

Our request for an exemption is based on the following:

- Debt collection is a process which involves many regulated entities – collectors, field callers, bailiffs, repossession agents, tow truck operators, auction houses etc
- Members, regardless of collections function, are highly regulated in State/Territory jurisdictions
- Multiple licenses are already required to meet State specific requirements, regardless of head office locale
- Members are subject to ASIC/ACCC Debt Collection Guidelines in addition to regulatory regimes
- Members are subject to Service Level Agreements with their credit provider principals
  - Credit providers, in effect, take full responsibility for collector conduct
  - Collectors, in turn, have high standards given competition in the market
- The additional compliance costs cannot be justified given the regulatory and contractual regimes already in place
- Both COAG and the Productivity Commission have recommended the harmonisation of debt collection legislative regimes
- The Ministerial Council on Consumer Affairs (COAG) recently committed to debt collection being on its forward agenda

Consequently, we seek an exemption from the NCCP Act. It can be achieved by Part 2 – 6 Exemption and Modifications or by amending DEF 5 to exempt the capture of debt collection services under the definition that applies to those who *perform the obligations of, or exercise the rights of, a credit provider*.

Alternatively, we seek an exemption from Phase 1 compliance to enable Treasury to investigate the impact of the act on the debt collection industry.

Should our industry not be exempted from the NCCP Act, we make the following recommendations:

- Treasury undertake an investigation in the anti-competitive effects of the NCCP Act on the debt collection industry
- The compliance standard be based on “*taking all reasonable steps*” to comply with the NCCP Act, not absolutes
- Registration only be required by 31 December 2009
- Full compliance be phased in over a two (2) year period
- The conflicts of interest provision in LIC 170 (1)(b) be modified to exclude service providers such as debt collectors
- Internal Dispute Resolution processes be appropriately promoted to ensure consumers can quickly resolve their concerns through the right channels

- External Dispute Resolution membership be optional for debt collection service providers given mandatory credit provider EDR membership provides for consumer redress if a complaint arises
- Contracting credit providers only (not service providers) be required to provide credit guides
  - The Credit Guide can disclose debt is outsourced for collection
- Alternatively, if debt collectors and debt purchasers are required to provide credit guides, permit those guides to be incorporated into the assignment or first collection notice sent to the consumer once location is confirmed
- Australian Credit Licence numbers not be required on service provider documentation, particularly where other jurisdictions already require licences to be included on documents.
- Contracting credit providers only be required to provide a copy of a credit assessment
- The obligation to provide a credit assessment be limited to a reasonable period after contract formation e.g. 12 months, as it serves no useful purpose beyond that time frame
- Remove the right of licensees to withhold permission for other licensees to appoint credit representatives
  - Alternatively, provide grounds on which a licensee can withhold permission and grant the credit representative the right to appeal those grounds
- Remove the joint and several liability for credit representative conduct
  - A licensee's liability should only extend to the activities performed on its behalf
- Review the penalty regime for consistency with other relevant legislation such as the *ASIC Act*, *Fair Trading Acts* and State/Territory debt collection legislation

Failure to address these concerns will result in an anti-competitive legislative regime that will adversely impact on the viability of service providers in the debt collection industry.

## **2. Industry Overview**

This overview provides Treasury with an understanding of the debt collection industry. To achieve this, we have addressed the following:

- Industry Specialisation
- Current Regulatory Environment
- Market Failure Indications (or lack of) – Enforcement Action
- Regulatory Policy Environment
- Stakeholder Confidence
- Industry Direction

This will demonstrate to Treasury there is no market failure to justify an additional regulatory regime. It will also explain the policy initiatives currently under consideration to address the existing regulatory duplication and inconsistencies.

### **2.1 Australian Collectors and Debt Buyers Association**

The Australian Collectors and Debt Buyers Association (ACDBA) was established this year for the benefit of companies who collect, buy and/or sell debt.

Our members provide a range of specialist services across a range of debt collection functions. Consequently, debt collection should be viewed as a process rather than a specific activity.

### **2.2 The Debt Collection Industry - Specialisation**

The debt collection industry has changed significantly over the last ten years. It has moved to specialisation in service delivery. Some businesses specialise in call centre collections, others in field calls, repossessions, skip tracing and other related debt collection functions. All are subject to State and/or Territory regulation.

In addition, environmental changes over the past ten years have resulted in a stronger, more professional collections industry. Those changes range from technological impacts on collections practices, industry consolidation, regulatory developments and increased government usage of debt collection services.

The key environmental changes over the past ten years include:

- Members collect government, commercial, trade union and consumer debts
- Debt collection agencies have consolidated, resulting in some larger corporations which usually work across multiple jurisdictions
- Agencies can provide specialist services, often outsourcing other specialist functions
  - Specialist functions include repossessions, field calls, property sales etc
- Technology has allowed the industry to deliver services with no face to face contact with debtors
- Technology allows members to deliver services across multiple jurisdictions without the need for a physical presence in each one
- Our members are subject to strict legal agreements with their creditor clients
  - Agreements cover legal compliance, collection conduct and dispute resolution processes in addition to other contractual arrangements

- The ASIC/ACCC *Debt Collection Guidelines* and the Consumer Affairs Victoria *Guidelines for Debt Collection* have provided members with clear guidance on appropriate debt collection practices
  - Compliance with these *Guidelines* is usually part of the contractual agreement with clients
  - Compliance with these Guidelines routinely provides the framework in which members base all their collection activities with debtors
- The *Privacy Act* (Cth) regulates how members (and their clients) can collect, use and disclose credit and personal information
- Debt purchase assignees are obliged to comply with the Banking and Credit Union Codes of Practice and the Consumer Credit Code for consumer credit debt, where relevant, in addition to their contractual obligations to the assignors

Standards in the industry are high given the contractual and legislative obligations with which our members comply.

Before imposing another regulatory regime, it is important Treasury understands the legislative environment in which the debt collections industry operates.

### **2.3 Regulatory Environment - Current**

All States and the Northern Territory regulate debt collection<sup>1</sup>. Only the ACT does not have a licensing regime. Most regimes license the business, others, like NSW, the individual collector (refer Appendix A).

Those licensing regimes vary from simple to complex applications, similar to the NCCP regime, which require detailed information on a range of factors including experience, business structure, financial position and educational qualifications, amongst others.

While State/Territory jurisdiction is usually limited to where the business or collector is domiciled, NSW has taken a broad jurisdictional view. In 2007, the NSW Crown Solicitor advised that debt collectors based in jurisdictions other than New South Wales, who collect debts from persons located in New South Wales, were required to be licensed under the *Commercial Agents and Private Inquiry Agents Act*<sup>2</sup>.

While this position is currently under review, it means many of our members are licensed in multiple jurisdictions. This results in increased compliance costs which, in turn, result in increased collections costs.

From the consumer perspective, this is an unwelcome outcome as a consumer under collections activity is generally required by the credit provider to pay the enforcement costs. Should our members be required to comply with the NCCP Act, this situation will be compounded.

Compliance with the NCCP Act however, should not be necessary. State governments have an obligation under the Mutual Recognition Agreement (the Agreement) with the Commonwealth and other States and Territories<sup>3</sup> to recognise the licensing or registration regimes of the collector's domicile. This recognises the cross jurisdictional nature of debt collection. It should apply equally to the Commonwealth.

<sup>1</sup> Refer Attachment A – Debt Collection Matrix, February 2008.

<sup>2</sup> Julie Cornwell, attachment to email to an IMA member, 30 April 2007.

<sup>3</sup> Commonwealth, State & Territory Governments, *Agreement Relating to Mutual Recognition*, 11 May 1992.

The imposition of another regulatory regime undermines the purpose of this Agreement, particularly where it impacts on only one section of the collections industry, those who collect consumer credit debt. In addition, it is counter to the Council of Australian Governments (COAG) and Productivity Commission (the Commission) initiatives to harmonise debt collection legislation.

While harmonisation is on the policy reform agenda, there are no market failure indicators to suggest additional regulation is required. The reform is based on the competition issues and compliance costs associated with the current duplications.

We provide an overview of regulator enforcement action to reinforce to Treasury market failure is not a driver in the regulatory reform.

#### **2.4 Market Failure Indicators - Enforcement Action**

Enforcement action by regulators is rare. To the best of our knowledge, no action has been taken against debt collectors in any jurisdiction except Western Australia over the past eighteen months.

The Department of Commerce (WA), formerly the Department of Consumer and Employment Protection (DOCEP), action was against a Western Australian debt collector for undue harassment<sup>4</sup>. It was the first successful action since DOCEP took over the debt collection portfolio in 2005. It should be noted the action was brought against a sole trader, new to the industry, under the harassment provisions of the *Fair Trading Act*, not WA's debt collection legislation.

Given the majority of our members work in multi-jurisdictions, the absence of the need for enforcement action, combined with our complaints data which shows a very low level of complaints per debtor contact, indicates the professionalism of our members, unaffected by jurisdictional differences in licensing regimes.

This is further reinforced by Stakeholder Confidence, as expressed by the regulators.

#### **2.5 Stakeholder Confidence**

As evidenced by the information above, the changes in the debt collection industry over recent years have resulted in a stronger, more professional collections industry. This is acknowledged by regulator and consumer stakeholders.

The Australian Securities and Investments Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC) publicly acknowledged this professionalism at the ASIC/ACCC Debt Collection Seminar in September 2008. Regulators, consumer advocates, debt collectors and purchasers, creditors and industry representatives attended the forum.

ASIC/ACCC provided an assessment of the 31 July ASIC/ACCC debt collection phone-in. The phone-in attracted only 140 calls on the day, with an extension of a week taking the total calls from consumers up to approximately 200. The small number of calls indicated no pressing debt collection conduct problems. Both regulators and consumer advocates agreed debt collection activity is conducted professionally.

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<sup>4</sup> DOCEP Media Statement, *Debt Collector Prosecuted – Paula Davenport*, 19 May 2008.

Greg Kirk, Director, Compliance and Campaigns, Consumer Protection, ASIC, made the following comments:

*“The collection industry is vastly improved” and*

*“The collection industry is a changing industry doing a very hard job and doing it much better”*

In addressing the recent FCS Online IMA Debt Collection Conference, Mr Graham Samuel, Chairman, Australian Competition and Consumer Commission, noted the following:

*“The ACCC and ASIC recognise the efforts by the debt collection sector have brought about significant improvements in trader conduct in recent years” and*

*“The ACCC recognised that the number of complaints about debt collection was statistically low given the level of activity in the sector”*

This confidence indicates another licensing regime is unwarranted, particularly when harmonisation of the current regulatory regimes is on the policy agenda of a number of Government policy bodies.

## **2.6 Regulatory Policy Environment**

Over the last three years, Governments have acknowledged the regulatory impacts of inconsistent legislation on Australian businesses. A range of government policy bodies has recognised debt collection as an area in need of harmonisation.

### **2.6.1 House of Representatives – Harmonisation of Legal Systems Enquiry**

In 2006, the House of Representative Standing Committee on Legal and Constitution Affairs conducted an enquiry into the harmonisation of legal systems within Australia and between Australia and New Zealand.

The Committee recommended the Australian Government propose that the Standing Committee of Attorneys-General (SCAG), or other appropriate forum, undertake an investigation into the national legislative harmonisation of the existing regulatory frameworks for:

- Debt collection;
- Civil debt recovery; and
- Stamp duty<sup>5</sup>.

Debt collection is now on the national reform agenda with the work of the Commission and COAG indicating it is an area which could be referred to the Federal Government.

### **2.6.2 The Productivity Commission**

When the Commission released its final report into its *Review of the Consumer Policy Framework*, it recommended consumer protection responsibility reside with the Australian Government.

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<sup>5</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Harmonisation of Legal Systems within Australia and between Australia and New Zealand*, Canberra, November 2006, p.112.

It suggested this could be achieved by the creation of a nationally coherent consumer policy framework through the introduction of a single generic consumer law applying across Australia (the *Australian Consumer Law*, as it will be known). That law should be based primarily on the consumer provisions in the Trade Practices Act (TPA), the Act on which the ASIC/ACCC *Debt Collection Guidelines* are based<sup>6</sup>.

The Commission suggested the generic consumer law may also be applicable to debt collection practices.<sup>7</sup> It noted the Department of Commerce (as DOCEP) WA received legal advice its debt collection legislation will not apply where a debt demand originates in another jurisdiction. DOCEP went on to suggest a national approach would be preferable.<sup>8</sup>

### **2.6.3 Council of Australian Governments**

In addition to the Commission's Report, COAG is working to reduce the regulatory burden on Australian businesses. COAG is the peak intergovernmental forum in Australia which comprises the Prime Minister, State Premiers, Territory Chief Ministers and the President of the Australian Local Government Association (ALGA).

COAG's role is to initiate, develop and monitor the implementation of policy reforms that are of national significance and which require cooperative action by Australian governments. As such, its aims are consistent with those of the ACDBA in addressing the debt collection regulatory environment.

COAG has a Business Regulation and Competition Working Group, the objectives of which are to:

- accelerate and broaden the regulation reduction agenda to reduce the regulatory burden on business
- improve processes for regulation making and review, including exploring a national approach to processes to ensure no net increase in the regulatory burden, and common start dates for legislation
- deliver significant improvements in Australia's competition, productivity and international competitiveness.

One of the priority areas identified includes a plan for addressing areas of regulation that impede national workforce mobility or skills acquisition through national systems for trade and professional qualifications and licensing. This is relevant to the scope of the NCCP and its current approach to the licensing regime.

### **2.6.4 Ministerial Council on Consumer Affairs**

In addition to the initiatives listed above, the Ministerial Council on Consumer Affairs, (MCCA) at its May 2009 meeting, MCCA agreed that the regulation of debt collection and debt collectors would be placed on the MCCA forward agenda. MCCA's aim is minimise the regulatory overlap between the regulation and licensing of debt collectors currently administered by the States and Territories and the NCCP regime.

Rather than impose the NCCP regime on the industry when it is already recognised it would place an unfair burden on it, it makes commercial and policy sense to exempt the industry while a harmonised approach is developed.

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<sup>6</sup> Op cit. Volume 2, pp. 460-461.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid, p. 461.

## **2.7 Industry Direction**

Over the past two years, debt collectors' peak bodies have been consulting with members and regulators about harmonisation of the regulatory framework. This a key policy objective for us, as it is both a competition and business management issue for all our members.

We have developed short, medium and long term policy objectives based on the premises that:

- the regulatory environment recognise the maturity of the debt collection industry; and
- regulation is relevant to market practices, promotes competition and provides confidence in the debt collection industry

In the short term, we are seeking the following outcomes to manage our State/Territory obligations:

- mutual recognition of licensing/registration regimes in all States/Territories
- the implementation of a registration, rather than a licensing, regime in NSW
- a registration regime apply to the business entity only, not individual operators
- a co-regulatory training regime be developed in consultation with industry and regulators
- any qualified, independent accountant be permitted to conduct an audit

In the medium term, we have recommended the following processes for the development of an appropriate national co-regulatory regime:

- State/Territory regulators facilitate stakeholder consultations on the most appropriate regulatory model for debt collection
- Consideration be given to a national registration regime that incorporates a mandatory Code of Conduct
- A co-regulatory training regime be developed in consultation with industry and regulators

While we have not decided our final policy position on the most appropriate regulatory regime, we have considered three key regulatory options in detail. They are:

- A National Debt Collection Act – with a registration regime
- Harmonised State and Territory regimes
- A mandatory Code of Conduct under the Trade Practices Act

We continue to work with regulators to achieve an appropriate regulatory outcome.

It is against this overview of the industry we wish to address the NCCP Bill's impact on our industry.

### **3. NCCP Bill – Industry Impact**

While we are of the view capture of the collections industry is an unintended consequence of the drafting, we provide our comments on its provisions to assist Treasury appreciate the impact on our members.

Given the short time available to consider the NCCP Bill, we have been unable to assess its impact in detail. Consequently, our comments and recommendations are restricted to those provisions which have the greatest impact on our members' business operations.

The key issues are:

- Legislative Scope
- Credit Representatives – anti-competitive provisions
- Registration Process
- Compliance Timeframe
- Conflicts of Interest
- External Dispute Resolution Scheme Membership
- Credit Guides
- Licence Numbers
- Credit Assessments
- Penalties

#### **3.1 Legislative Scope**

There are a number of issues involving scope and legislative language that are of concern to our members. They include:

- The broad wording of DEF 5 results in the NCCP Bill applying to the consumer credit collections industry, despite it being heavily regulated and also subject to contractual principal/agent agreements between credit providers and their outsourced service providers
- Consumer credit collectors who also collect commercial debts are at a competitive disadvantage as they are subject to additional compliance obligations than commercial debt collectors
- The compliance language is in absolutes which, in effect, sets all businesses up to fail – 'reasonable steps' should be the compliance standard

##### **3.1.1 DEF 5**

As noted above, debt collection is a process which involves a range of specialist service providers. It includes call centre collectors, field callers, repossession agents and tow truck operators right through to auction houses and real estate agents.

As a consequence, DEF 5 captures all service providers who provide any form of debt collection service to credit providers. They are caught under definition of 'credit activity'. This definition covers any person who:

*performs the obligations of, or exercises the rights of, a credit provider*

Clearly this applies to those in the collections industry who undertake any of the following functions on behalf of a consumer credit provider:

- Collections calls – inhouse phone calls
- Field calls – face to face debtor contact
- Service of s80 Default Notices
- Repossessions – goods and land
- Sale of goods and land

Consequently, the NCCP Act will apply to all the service providers in the table below. As indicated, those service providers are already regulated by State and Territory legislation. Many are subject to licensing regimes in one or more State/Territory jurisdictions.

<b>Service Provider</b>	<b>State/Territory Regulation</b>	<b>Licensing Regime(s)</b>
Call Centre Collections	Yes	Yes
Assignees	Yes	Yes
Field Callers/Bailiffs	Yes	Yes
Repossession Agents	Yes	Yes
Tow Truck Operators	Yes	Yes
Auction Houses	Yes	Yes
Real Estate Agents	Yes	Yes

The legislation imposes yet another regulatory regime on many who are already regulated and intrudes into the principal and agent relationship on which many commercial arrangements in the finance sector are based.

### **3.1.2 Contractual arrangements - clients**

Apart from compliance with the legislative environment indicated above, our clients (credit providers) have strict service agreements in place which specify conduct and account management standards. In turn, debt collection agents have similar agreements in place with other service providers who offers specialist services that provider does not.

Service agreements<sup>9</sup> generally include the following clauses:

- Performance standards, including quality management systems
- Duties, obligations and warranties
- Compliance with relevant legislation – including the Trade Practices and Fair Trading Acts, Consumer Credit Code, Privacy Act and ASIC/ACCC Debt Collection Guidelines
- Dispute resolution procedures
- Reporting obligations
- Auditing requirements

These business to business contractual arrangements indicate the high service delivery standards agreed between members and their clients. The agreed obligations are broader than debt collection specific legislation.

Regardless of the layering, the credit provider has primary responsibility for the conduct of its agents and, consequently, any service providers to those agents.

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<sup>9</sup> ACA Member Survey, *Service Agreements*, May 2008.

**Recommendation:**

- The debt collection industry be exempt from the NCCP Act through a specific exemption under **Part 2 – 6 Exemption and Modifications** and/or
- amending **DEF 5** to remove the capture of those who *perform the obligations of, or exercise the rights of, a credit provider*

**3.1.3 Competition Issues**

There are two key competition issues raised by the NCCP Bill scope. The first is the compliance impact on small business service providers and the second is the

Compliance with the NCCP Act requires sophisticated systems and dedicated resources. The licensing requirements clearly do not take into account the commercial impact on small business operators, of whom there are many in the debt collection industry. Smaller service providers may be forced out of the market given the financial impact of the licensing regime, particularly EDR membership.

Consequently, small business will be at a significant competitive disadvantage to its larger competitors as they will not have the expertise or resources to manage the compliance obligations. If the financial impost forces services providers from the market, the anti-competitive effects will be evidenced by increased unemployment, higher prices and small communities without necessary service providers.

For service providers who offer both consumer credit and commercial collection services, they will also be at a competitive disadvantage to those who provide commercial collection services only. The current State/Territory legislative regimes regulate the industry, not the product type. With the NCCP Act regulating product types, those who offer consumer and commercial collection services will be subject to an additional regulatory regime that does not apply to their commercial competitors. The outcome is anti-competitive as those who must comply with the NCCP Act will have additional compliance costs.

**Recommendation:**

- Treasury undertake an investigation in the anti-competitive effects of the NCCP Act on the debt collection industry

**3.1.4 Compliance language**

The NCCP Bill language is one of absolutes e.g. “must”. It imposes a compliance standard that is operationally unrealistic as it does not allow for systems failures or human error. Despite a service provider’s best endeavours, it is difficult to be fully compliance all the time.

**Recommendation:**

- The compliance standard be based on “*taking all reasonable steps*” to comply with the NCCP Act, not absolutes

**3.2 Credit Representatives**

The credit representative provisions have the potential to be anti-competitive and to result in a loss of employment.

Given the costs and obligations involved in obtaining and maintaining an Australian Credit Licence, many service providers in the debt collection industry may choose to be appointed as credit representatives rather than hold a licence in their own right.

However, a licensee can refuse to agree to other licensees appointing the same credit representative. This has the potential to restrict credit representatives from providing services to competitors and/or to limit the type of work they can undertake.

As there are no guidelines on when a licensee can withhold agreement for a credit representative to provide services to another licensee, this gives licensees an unfettered right to restrict a credit representative's business opportunities. It is inherently anti-competitive.

An additional issue is the commercial implications of licensees being held jointly and severally liable for credit representative conduct, even if not directly engaged on that licensee's instructions. In attempting to limit exposure under this provision, licensees are even more likely to restrict who credit representatives can work for and the type of work in which they can engage.

As credit providers and debt collectors have service level agreements in place, liability for adverse conduct is clearly attributed and managed. To avoid anti-competitive conduct in this market sector, liability should remain on the principal and agent contractual basis.

**Recommendations:**

- Remove the right of licensees to withhold permission for other licensees to appoint credit representatives
  - Alternatively, provide grounds on which a licensee can withhold permission and grant the credit representative the right to appeal those grounds
- Remove the joint and several liability for credit representative conduct

**3.3 Registration Process**

We note the requirement for all caught by DEF 5 to register between 1 November 2009 and 31 December 2009.

Our main concern with the registration process is that members must be fully compliant with the NCCP Act at the time of registration.

Clearly the full compliance at registration requirement is based on assumptions all businesses have:

- sophisticated risk management and compliance systems in place already
- dedicated staff managing risk and compliance matters
- significant financial, technical and human resources

This is incorrect. Many involved in the debt collection industry are small business operators with very limited resources. To expect all businesses to be fully compliant by registration is unreasonable. Many in the industry will be unable to comply by the registration time frame. The outcome will be anti-competitive as businesses will withdraw from the market and higher unemployment will result.

A phased registration and compliance process can address some, but not all, of these issues.

**Recommendations:**

- Registration only be required by 31 December 2009
- Full compliance be phased in over a two (2) year period

### **3.4 Conflicts of Interest**

The “conflicts of interest” provision (LIC 170 (1)(b)) makes no sense in the collector/debtor context. The relationship is inherently one of a conflict of interest.

It is possible this provision is meant to apply to how the consumer enters a loan contract so it is relevant to broker conduct. If that is the conduct targeted, then the provision must be modified to limit its application.

#### **Recommendation:**

- The conflicts of interest provision in LIC 170 (1)(b) be modified to exclude service providers such as debt collectors

### **3.5 External Dispute Resolution Scheme Membership**

The NCCP Bill requires mandatory External Dispute Resolution (EDR) Scheme membership but fails to promote Internal Dispute Resolution (IDR) as the most important first step in resolving any consumer concerns or complaints.

The mandatory EDR Scheme membership raises three key issues. The first is the importance of IDR in the dispute resolution process. The second is credit providers, as the principals in the debt collection relationship, have EDR membership which covers agents’ conduct and, thirdly, the cost of EDR scheme membership on small businesses impacts on their viability.

The first step in any dispute resolution process is to manage the customer’s concern or complaint through IDR. Where the consumer is directed to EDR as the first step, the EDR scheme will immediately refer that person back to IDR before any further action is taken.

The promotion of EDR over IDR has two adverse consequences. First, the consumer is misled about the process and inconvenienced by the referral “merry go round”. This creates an adverse atmosphere in attempting to resolve the dispute. Secondly, there is a cost to the business for the referral back (up to \$60 depending on the scheme). This has significant costs implications for the business.

Treasury has an obligation to ensure consumers are given the correct information about the dispute resolution process and that starts with the promotion of IDR, not EDR. Consumers will be informed of EDR scheme membership as members are obliged to inform the consumer of their right to access that scheme if IDR is unsuccessful.

Mandatory membership of an External Dispute Resolution (EDR) Scheme imposes a high compliance cost on many businesses, particularly small businesses. It also conflicts with some State legislative regimes where consumers are directed to Fair Trading/Consumer Affairs Offices if there are complaints about service provider conduct.

The Explanatory Memorandum does not indicate any market failure from the debt collection industry which justifies such a requirement. As noted above, credit providers are responsible for their agents’ conduct and, as such, credit provider membership is all that is required to ensure consumer redress if a complaint arises.

#### **Recommendation:**

- IDR processes be appropriately promoted to ensure consumers can quickly resolve their concerns through the right channels

- EDR membership be optional for debt collection service providers given mandatory credit provider EDR membership provides for consumer redress if a complaint arises

### **3.6 Credit Guides**

The provision of credit guides to each debtor serves no useful purpose in the debt collection process, particularly given the contractual agreements between credit providers and their debt collection agents. Consumers have redress through the contracting credit provider if a dispute arises.

As contracting credit providers will already have provided applicants with their credit guide prior to contract, consumers will know they can access EDR if a dispute arises. They will also be aware of compensation arrangements.

Should a consumer suffer detriment as a result of debt collector conduct, the credit provider will provide redress and then seek compensation and improved performance of the debt collector/service provider concerned. This is appropriately dealt with by principal/agent service level agreements.

To provide consumers with another credit guide at the beginning of the outsourced collections process is to divert attention from the payment issue, confuse consumers about what EDR scheme applies and to drive up collections costs, costs the consumer ultimately pays.

From a debt buyers operational perspective, a very high percentage of purchased debt (up to 80%) does not have current contact details available. Initial processes require locating the debtors. If debt buyers are required to send out credit guides at the time the debt is purchased, the costs involved with have no consumer benefit given the high percentage which will not be delivered.

If there is an obligation to send a credit guide for debt collectors and debt purchasers, it should only arise when the debtor's location is confirmed. It can then be incorporated in the assignment or first collections notices.

#### **Recommendation:**

- Contracting credit providers only be required to provide credit guides
- Alternatively, if debt collectors and debt purchasers are required to provide credit guides, permit those guides to be incorporated into the assignment or first collection notice sent to the consumer once location is confirmed

### **3.7 Licence Numbers**

Debt collectors are already required by some State regulators to include their licence numbers on documentation and to cite it at the commencement of a collection call. The NCCP Bill requirement to include the Australian Credit Licence number will serve no useful purpose and drive up collections costs without any consumer benefit.

Members report consumers object strongly to licence numbers being cited at the commencement of a collections call as it simply delays dealing with the matter at hand. This indicates licence numbers are of little interest to consumers.

We understand ASIC will have a website listing all licensees and credit representatives. This allows for anyone who wishes to verify the identity and licence number of the service provider. Our experience indicates the website will have minimal consumer use.

**Recommendation:**

- Australian Credit Licence numbers not be required on service provider documentation, particularly where other jurisdictions already require licences to be included on documents.

**3.8 Credit Assessments**

Our debt purchase members question the requirement for credit assessments to be provided to consumers up to 12 months after the contract is finalised. Credit assessments can have no valid purpose once a reasonable post settlement time has lapsed.

More importantly, it is inappropriate for debt purchasers to have access to commercially sensitive credit assessment data under any circumstances, particularly as they have multiple credit provider clients.

If the purpose of the provision is to provide evidence where there is a dispute about the grounds on which credit was advanced, that is a matter for the contracting credit provider and the customer concerned. Debt purchasers have no control over the criteria and cannot be held liable for it.

It also raises concerns about possible Privacy Act breaches as consumers would not expect debt purchasers to have access to that type of personal and credit information.

**Recommendation:**

- Contracting credit providers only be required to provide a copy of a credit assessment

**3.8 Penalties**

The civil and criminal penalties regime cannot be justified in light of potential consumer detriment and in comparison with other regulatory regimes. Individual civil penalties up to \$220,000 and jail terms are completely disproportionate to the mischief they seek to redress. Failure to provide a document does not warrant a personal fine of \$220,000 or five (5) times that for a corporation.

The proposed penalty regime does not correlate with the penalty regimes in other relevant legislation such as the *Property Agents and Motors Dealers Act (Qld)*, *Fair Trading Acts* or the *Australian Securities and Investment Act* in terms of similar breaches.

**Recommendation:**

- Review the penalty regime for consistency with other relevant legislation such as the *ASIC Act*, *Fair Trading Acts* and State/Territory debt collection legislation

## APPENDIX A

### DEBT COLLECTION LEGISLATION

#### STATE/TERRITORY LEGISLATIVE SUMMARY

<i>STATE</i>	<b>LEGISLATION, REGULATION &amp; CODES</b>	<b>REQUIREMENTS</b>	<b>PROCESS</b>
<b>Australian Capital Territory</b>	None	No requirement, but practitioners often maintain licences under NSW legislation	N/A
<b>New South Wales</b>	<p><b>Commercial Agents &amp; Private Inquiry Agents Act 2004</b></p> <ul style="list-style-type: none"> <li>• Applies to any individual and business engaged debt collection activities in NSW</li> </ul> <p>NB: CAPI unit advises anyone collecting debt in NSW must comply, even if business based in another jurisdiction</p>	<p>Licences have been placed into two groups.</p> <p><b>Operator</b> licences for Agents (employees) – must be employed by a holder of a Master licence</p> <p><b>Master</b> licences for Businesses (employers)</p> <p>Licence refusal if:</p> <ul style="list-style-type: none"> <li>• persons convicted of prescribed offences within the last 10 years.</li> <li>• persons found guilty, with no conviction recorded, of prescribed offences within the last 5 years.</li> </ul> <p>Operator licences:</p> <ul style="list-style-type: none"> <li>• may be issued for a period of 1 or 5 years</li> </ul> <p>probationary for 1 year – with holder supervised by a fully licensed operator or master licence holder</p>	<b>CAPI Unit, NSW Police</b>

		Educational qualifications required – Cert 111 in Financial Services (Mercantile Agencies) - higher for Master Licenses	
<b>Northern Territory</b>	<p><b>Commercial &amp; Private Agents Licensing Act</b></p> <p><b>Definition:</b> A commercial/sub-agent is licensed to (on behalf of others):</p> <ul style="list-style-type: none"> <li>• Collect, request or demand payment of debts;</li> <li>• Serve legal process; Repossess goods;</li> <li>• Obtain evidence for legal proceedings; &amp;</li> <li>• Search for missing persons.</li> </ul>	<p>In a form approved by the Commissioner for Consumer Affairs &amp; accompanied by the appropriate fee &amp; a bond &amp;/or the prescribed security require to be lodged with the Commissioner.</p> <p>Must be of good character, no criminal history &amp; of good reputation.</p> <p>Must convince the Commissioner of necessary and financial resources to carry out the business</p> <p>Evidence of fidelity guarantee required</p>	<b>Commissioner of Consumer Affairs</b>
<b>Queensland</b>	<p><b>Property Agents &amp; Motor Dealers Act, 2000 &amp; PAMDA Regulations 2001</b></p> <p><b>Definition:</b> An commercial agents licence authorises the holder to (on behalf of others):</p> <ul style="list-style-type: none"> <li>• Find, or repossess, for any person any goods or chattels;</li> <li>• Collect or request payment of debts; &amp;</li> <li>• Serve any writ, claim, application, summons or other process</li> </ul>	<p>No experience or minimum educational requirements.</p> <p><b>Code of Conduct</b> ** no more than 2 calls per week</p>	<b>Office of Fair Trading</b>

<p><b>South Australia</b></p>	<p><b>Security &amp; Investigations Agents Act 1995 &amp; SIAA Regulations 1996</b></p> <p><b>Investigation Agents classification</b></p> <p><b>Definition:</b>  <b>An investigation agent</b> is licensed to:</p> <ul style="list-style-type: none"> <li>• Ascertain whereabouts &amp; repossess goods;</li> <li>• Collect or request the payment of debts;</li> <li>• Execute legal process for the enforcement of a judgment or court order; &amp;</li> <li>• Execute distress for the recovery of rates, taxes or money.</li> </ul> <p><b>Credit providers &amp; their employees exempt</b></p>	<p>If involved in <b>process serving</b>, must have:</p> <p><b>Qualifications &amp; experience required by Regulation or by Commissioner</b></p> <p>Other criteria (excluding residency criterion) as per New South Wales  Including:  Breaches of Police Act.  Listening Devices Act &amp; Telecommunications Act (Cth)</p> <p>Enrolment in completion of approved courses – 3 units from Diploma in Financial Services (Credit Management &amp; Mercantile Agencies)</p> <ul style="list-style-type: none"> <li>- Repossess property</li> <li>- Serve legal process</li> <li>- Initiate debt recovery</li> </ul> <p>Qualifications must be Statement of Attainment, or Certificate of Equivalency through Registered Training Provider</p>	<p><b>Office of Consumer &amp; Business Affairs</b></p>
<p><b>Tasmania</b></p>	<p><b>Security &amp; Investigations Agents Act 2002 &amp; SIAA Regulations 2002</b></p> <p><b>Definition:</b>  A commercial/sub-agent is licensed to (on behalf of others):</p> <ul style="list-style-type: none"> <li>• Collect, request or demand payment of debts;</li> <li>• Serve legal process;</li> <li>• Repossess goods;</li> </ul>	<p><b>Application to Commissioner &amp; Character report &amp; Competency standards re education, practical skills &amp; experience as determined by the Commissioner</b></p> <p>Enrolment in approved courses – 3 units from Diploma in Financial Services (Credit Management &amp; Mercantile Agencies)</p>	<p><b>Commissioner for Consumer Affairs &amp; Fair Trading</b></p>

	<ul style="list-style-type: none"> <li>• Obtain evidence for legal proceedings;</li> <li>• Search for missing persons; &amp;</li> <li>• Any other prescribed act</li> </ul>	<ul style="list-style-type: none"> <li>- Repossess property</li> <li>- Serve legal process</li> <li>- Initiate debt recovery</li> </ul> <p>Ineligible: 3 year goal sentence; Harassment; Undue or frequent communication; &amp; Threats to embarrass or shame.</p>	
<b>Victoria</b>	<p><b>Private Agents Act 1966 &amp; Regulations 2003</b></p> <p><b>Definition:</b> A commercial/sub-agent is licensed to (<b>on behalf of others</b>):</p> <ul style="list-style-type: none"> <li>• Collect, request or demand payment of debts; &amp;</li> <li>• Repossess goods</li> </ul>	<p>Personal details, principal place of business, info on prior convictions or charges pending &amp; experience &amp; qualifications</p> <p>Similar to NSW re convictions and character</p> <p>Capacity to carry out duties as licence holder</p> <p>Publication in Government Gazette with right to objections</p>	<p><b>Registrar of Magistrates Court</b></p> <p>Licence granted if Magistrate satisfied no objections</p>
<b>Western Australia</b>	<p><b>Debt Collectors Licensing Act 1964</b></p> <p><b>Definition:</b> Person who, on behalf of any other person and for, or in expectation of, any gain, fee or reward whatever, carries on the business of collecting, requesting or demanding payment of debts</p>	<p>Application must provide identification, residential and business address details &amp; testimonials from 3 people of good repute</p>	<p><b>Department of Consumer and Employment Protection</b></p>

As at February 2008.