

31 January 2014

By email: neil.unantenne@afsa.gov.au

Neil Unantenne
Acting Assistant Director
Regulation and Enforcement
Australian Financial Security Authority

Dear Mr Unantenne

Draft revision of Inspector-General Practice Guideline 1 - debt agreement administrators' guidelines relating to advertising

Thank you for the opportunity to comment on the abovementioned Guideline. Consumer Action is particularly interested in the practices of debt agreement administrators, and in April 2013 last year published a review of website advertising called *Fresh start or false hope? A look at the website advertising claims of Debt Agreement administrators*. A copy is attached to this submission.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Consumer Action operates MoneyHelp, a not for profit email and telephone financial counselling service providing free, confidential and independent financial advice to Victorians experiencing financial difficulty. MoneyHelp is nationally-recognised as the first point of telephone contact in Victoria for anyone with financial counselling issues.

Introductory comments

Our MoneyHelp financial counselling practice helps disadvantaged, low income Victorian consumers who are experiencing severe financial distress consumers Victorians, some of who have used debt agreements.

Consumer Action Law Centre

Level 7, 459 Little Collins Street Telephone 03 9670 5088
Melbourne Victoria 3000 Facsimile 03 9629 6898

info@consumeraction.org.au
www.consumeraction.org.au

The combination of disadvantage and financial stress makes this consumer segment particularly vulnerable to deceptive advertising claims that overstate the potential benefits of a Part IX agreement, and fail to mention other debt options that may in fact be in the client's best interest.

It stands to reason that the vast majority of consumers who enter debt agreements would be considered financially stressed and vulnerable. MoneyHelp clients who are in debt agreements often do not have an asset, such as a home, to protect. It is not clear why they have chosen to take a debt agreement when bankruptcy may have been a superior option for them; indeed, when these clients speak to an independent financial counsellor (rather than a firm that has a financial incentive to promote an unsuitable solution) the advice often given to those clients involves entering bankruptcy. Accurate and honest advertising of debt agreements is crucial to ensuring that consumers aren't misled and prompted to enter into a debt agreement (or any other act of bankruptcy) without full understanding of all their options and their consequences.

Further, it is worth noting that case law with respect to the prohibition against misleading and deceptive conduct (section 18 of the Australian Consumer Law) states that the audience at whom the conduct is directed is relevant. In *Campbell v Backoffice Investments Pty Ltd*, French CJ stated:

The state of knowledge of the person to whom the conduct is directed may be relevant, at least in so far as it relates to the content and circumstances of the conduct.¹

The assessment of whether conduct is likely to mislead proceeds by reference to what 'a reasonable person in the position of the [representees], taking into account what they knew, would make of the [representor]'s behaviour'.² While advertising by debt agreement administrators is directed to the public at large, it is most often (through use of words, images and promotions) directed at those that are financially vulnerable. In assessing whether such advertising is misleading in breach of the Australian Consumer Law (**ACL**), it is relevant to consider the point of view of the vulnerable debtor, who in many cases is not in a rational state of mind to assess advertising claims fully but is driven to particular steps due to their financial vulnerability. We submit that the Guideline should be reviewed with this in mind, so that it promotes advertising that is clear and balanced from the perspective of the vulnerable debtor.

Positive elements of the draft Guideline

Consumer Action is particularly supportive of the approach taken to debt consolidation in advertising, and the strong statement that debt agreement administrators 'will not include any reference to the term "debt consolidation" in advertising their services or in describing debt agreements'.

This sort of guidance is very clear and transparent and is extremely useful to both administrators and consumers. In our experience in advising vulnerable debtors, there can be a lot of confusion about debt consolidation services and the promotion of such services. This is exacerbated by service providers that offer or promote both debt agreements and debt consolidation services (that is, they are also licensed as credit providers). We submit that the

¹ *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [26].

² *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [50].

guidance could be improved by describing that such service providers should not promote their service as “debt consolidation” if there is a risk that the consumer will end up with a debt agreement.

Recommended amendments to the draft Guideline

Introduction It would be useful to slightly amend this section to make clearer that whilst this is a best practice document, the ACL applies to all advertising the present 1.1 and 1.2 should be clear that whilst there are no legislative requirements in the Bankruptcy Act, there are in the ACL. The text in the current 5.7, which notes advertising may be misleading and deceptive even where that is not the intention, would be useful here to set the tone of the document.

Inspector General’s expectations We strongly support the statement that administrators should ensure advertisements will not be misleading as a means of attracting potential but unsuitable debtors. We would like further guidance on what specifically amounts to an unsuitable debtor would be to be stated in the Guideline. As outlined in the introductory remarks and as per the case study below, we submit that unsuitable debtors include those that do not have an asset to protect. In many instances, our clients are seeking help after they’ve already entered into a debt agreement despite having no home to protect.

Additional examples of misleading advertising would be helpful. In particular, we suggest the following additional guidance:

‘Alternative to bankruptcy’ This term should be identified as misleading, or at least such a term should not be used unless it is balanced by a subsequent acknowledgment that debt agreements are a form of personal insolvency, are also regulated by the Bankruptcy Act and have many of the same consequences as Bankruptcy. At a minimum, a trader who wishes to use the term ‘alternative to bankruptcy’ (or something similar) should be expected to explain that a debt agreement will still be recorded on the client’s credit file for five years, and on the Personal Insolvency Index indefinitely. This should be stated immediately after the description of the effect of a debt agreement, so as to not be misleading by omission. This term has great significance to many of our clients, and we think many do not understand the consequence of a part IX debt agreement because of the use of terms like this.

Use of ‘Free’ The term ‘free’ is used extensively in advertising promoting debt consultations. Offering ‘free’ trials or consultations is often a tactic that results in high-pressure sales pitches at a later time, which would be inappropriate for a particularly vulnerable group of people. Guidance around how free should and should not be used would enhance the Guideline and should reflect legal interpretation around the use of free. We again refer AFSA to the ASIC guideline on financial services and credit advertising which provides significant guidance, as well as examples, about the use of the term “free” and how to describe fees and charges.

Broad claims that are not going to be achievable for all clients The Guideline should address common claims made by debt agreement administrators, such as the ability to cut debt, freeze interest, promise affordable repayments and similar claims that appear to be designed to inflating consumer expectations. The claims made are *possible* outcomes of a debt agreement they are not guaranteed or even likely to be achieved. We submit that honest and truthful advertising should not state or imply an outcome from entering a debt agreement unless it can

always be or generally be achieved. The ability to reduce the debt is a big selling point, and as outlined in our report *Fresh Start or False Hope*, many administrators overstated what they could do for consumers. The guide needs to give more detailed guidance on this issue.

Recommended additions to the Guideline

Websites to publish comparison of debt agreements and bankruptcy Our experience with users of debt agreements suggests that many people are entering Part IX debt agreements without fully understanding the differences—and similarities—with bankruptcy. This could be addressed very simply by requiring businesses to publish a simplified version of the AFSA's [comparison of options](#) table. Whilst not compelled legislatively to do so, regulated businesses who seek to encourage consumers to make a balanced decision in their own best interests and based on objective information (as opposed to marketing) should be expected to take this step.

References to free financial counselling services MoneyHelp regularly receives calls from clients who have first sought the assistance of debt agreement administrators or others businesses that profit from those in financial difficulty. It would be in the best interests of consumers and businesses if websites advertised the existence of free financial counselling services and the national hotline, which is 1800 007 007. There are precedents for this; payday lenders for example are required by law to provide the contact details of free financial counselling services on their shop fronts and websites.

Obligations on all promoters of debt agreements We are aware that many advertisements about debt agreements are not the conduct of debt agreement administrators, but are the conduct of third parties who promote the services for a commission. The Guideline could be improved by providing reference to this type of conduct by parties such as debt collectors, brokers or internet marketers that promote debt agreements. We submit that debt agreement administrators that pay commissions to these parties should be responsible for ensuring advertising by them is compliant with the Australian Consumer Law.

Case study

In January, a client from regional Victoria contacted us about debts she had that had been sent to debt collection agencies. She has reached agreement with two, and the third said she should enter debt agreement. The client called seeking our advice on this recommendation.

MoneyHelp explained that a debt agreement was not a good option, as she has no assets to protect, and recommended she maintain the agreements she's already made. For this client, a part IX agreement was unsuitable.

On a final note, in the Consumer Law Guidance section (page 4) there is an extra 'd' on "Don't take Advantage of Disadvantage" that should be removed.

Please contact Sarah Wilson on 03 9670 5088 or at sarahw@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

CONSUMER ACTION LAW CENTRE



Gerard Brody
Chief Executive Officer

Sarah Wilson
Senior Campaigner