

14 May 2015

By email: admin@acdba.com

Alan Harries
Chief Executive Officer
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PO Box 295
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Dear Mr Harries

Stakeholders Consultation: ACDBA Code of Practice

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the draft ACDBA Code of Practice (**the Code**).

We generally support the aim of the Code, which is to 'enable consumers and businesses to address their debts in confidence of fair treatment'. We also support the Code's requirement for members to 'commit to genuinely endeavour to ensure their work practices exceed the minimum legislative compliance and conduct standards expected of the industry'.

However, in our view the Code requires a number of improvements in order to ensure that these outcomes are achieved.

Among other things, this submission argues that:

- the Code should not simply restate the law, but build on existing guidelines;
- a consumer representative should be appointed to participate in Code administration;
- claims for compensation should be covered by the Code;
- sections 1, 2 and 4 generally require strengthening and clarification;
- section 3 should be in line with the revised 2014 Australian Standard for complaints management;
- collections communications that claim additional fees and charges should include the basis on which these are claimed; and
- the Code should provide further guidance about the requirement to cease contact when requested by the consumer.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged

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and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

General comments

The role of industry codes

Industry codes are most useful when they build on existing protections in the law, or explain those protections in the context of the specific industry. There are a number of provisions in the Code that appear to restate the existing law.

It may be that compliance with existing laws are brought within the scope of the Code so that the Code administration body has power to take action or respond to complaints in relation to breaches of the general law. This may be worthwhile, but we believe that any breaches of existing laws should also be brought to the attention of relevant regulators.

It is also not clear how the proposed Code interacts with the ACCC/ASIC Debt Collection Guideline (the **Debt Collection Guideline**). The Debt Collection Guideline provides much more practical advice for debt collectors compared to the requirements of the proposed Code. The Code could play a greater role in setting out best practice standards by building on the Debt Collection Guideline.

Code administration

It is not entirely clear how the Code will fit within existing requirements for the debt collection industry. For example, will ACDBA seek authorisation on public benefit grounds for what would otherwise be anti-competitive conduct? Or will ACDBA seek to have the Code regulated as a voluntary code pursuant to section 51AE(c) of the *Competition and Consumer Act 2010* (Cth)? It is not clear from the consultation documents how it is proposed that the Code will fit into the regulatory framework, and thus it is difficult to make comment on issues related to code administration, monitoring and compliance.

The ACCC guidelines for developing voluntary industry codes (**the Industry Code Guidelines**) state that code administration should include consumer representation. Unfortunately, this does not appear to be a feature of the Code. Instead, it appears that ACDBA may act as the Code administrator and any complaints will be the purview of the ACDBA CEO. As stated by the ACCC, stakeholder input into Code administration “provides transparency to the scheme by providing a ‘public window’ into its operations”.¹

The Industry Code Guidelines also state that industry codes should provide for a review mechanism when a member of the public or an industry member is dissatisfied with an initial

¹ Australian Competition & Consumer Commission, Guidelines for developing effective voluntary industry codes of conduct', July 2011, pp. 8-9, available at: <https://www.accc.gov.au/system/files/Guidelines%20for%20developing%20effective%20voluntary%20industry%20codes%20of%20conduct.pdf>.

attempt to resolve a complaint. The industry should sponsor an independent complaint body to review complaints. According to the Industry Code Guidelines, the independent review body should be recruited from outside the industry, have fixed tenure, be suitably qualified and hold 'no preconceived ideas about the industry.'² However, under the Code reviews of complaints will be undertaken by ACDBA, which is not independent.

We also suggest that more guidance be provided in the Code about the role of the Code administration body and what it will do. For example, will it undertake audits and own-motion investigations, or only respond to complaints? To be effective, the Code administrator should be empowered to assess compliance as well as resolve disputes.

Claims for compensation

Claims for compensation appear to be excluded from the Code.³ In our view, compensation should be included in the Code to ensure that consumers are able to seek appropriate redress and in order to ensure at least some consistency in awards of compensation across the industry. Consumer Action has acted for a number of clients to seek compensation pursuant to the prohibited debt collection provisions of the *Australian Consumer Law & Fair Trading Act 2012* (Vic). It is our experience that settlements pursuant to these provisions can be quite inconsistent, meaning that both businesses and consumers are disadvantaged. The Code could play a useful role in setting out suggested or appropriate levels of compensation for different prohibited debt collection practices.

Section 1 - Key Requirements

As noted above, certain sections of the Code merely restate the law, rather than build on existing protections. For example, clause 1.1 requires every member to obey the law, while clause 1.9 requires every member to 'not unlawfully discriminate against any person.' Members are already required to comply with the law, and in our view duplicating these requirements in yet another regulatory document is unlikely to assist members or consumers.

In some circumstances, the Code actually requires a lesser standard of conduct than that required by law. For example, clauses 1.2 and 1.21 refer to 'intentionally' misleading conduct. This is a lesser protection than provided by the Australian Consumer Law (**ACL**). The ACL prohibits misleading or deceptive conduct, and conduct that is likely to mislead or deceive, regardless of intention.

Given this Code is 'intended to be a helpful resource for consumers',⁴ it is also important that each clause is written in plain English and that the meaning of each clause is clear. In our view,

² Australian Competition & Consumer Commission, Guidelines for developing effective voluntary industry codes of conduct', July 2011, pp. 10, available at: <https://www.accc.gov.au/system/files/Guidelines%20for%20developing%20effective%20voluntary%20industry%20codes%20of%20conduct.pdf>.

³ Australian Collectors & Debt Buyers Association, 'Code of Practice - Stakeholders Consultative Draft', April 2015, p. 3.

⁴ Australian Collectors & Debt Buyers Association, 'Code of Practice - Stakeholders Consultative Draft', April 2015, p. 2.

clause 1.15 is confusing and requires further explanation. Clauses 1.24 and 1.25 are also vague requirements, and may be more appropriate in the following section on financial difficulty.

In relation to clause 1.24, we query why this clause is limited to those 'particularly vulnerable or experiencing severe financial hardship'. In our view, this is an unreasonably high threshold that would preclude other debtors from the benefit of 'forbearance and consideration of their circumstances' that they deserve.

Section 2 - Dealing with customer difficulties

Evidence of hardship

This section of the Code is particularly important as it relates to consumers who are often among the most vulnerable in our community. It would be helpful for this section to explain the level of information required in order to demonstrate that any repayments are unaffordable. For example, is a Centrelink statement sufficient, or are bank statements also required?

There is an opportunity for the Code to set a best practice standard about the level of evidence required. In its guideline on financial hardship, the Australian Banking Association has included a principle "banks will only request customers provide information that is reasonably necessary to help the bank understand the customer's personal circumstances and financial situation and determine whether assistance is suitable".⁵ It then provides examples of the types of information that might be sought and notes that hardship process should minimise the effort required from customers (and thus the amount of information requested). The Code could include similar principles.

Many of the other requirements in Section 2 are vague and do not provide any clearer guidance than section 14 of the Debt Collection Guideline.⁶ In our view, the Code should improve on the guidance contained in the Debt Collection Guideline. Clause 2.10 is particularly vague, referring to instances where the customer is experiencing health problems, without elaborating on the meaning of 'reasonable and proportionate'.

Fees and charges

In relation to clause 2.6, members should not just 'consider' stopping interest and fees accruing if a consumer has demonstrated that they are experiencing financial difficulty—this should be mandatory. At the very least, the Code should describe in what situations a collector might stop interest accruing or charging fees.

In our experience, it is common for some debt collectors to impose significant fees and charges in addition to outstanding debts. These fees generally exacerbate an incapacity to pay. Debt

⁵ Australian Bankers' Association, 'Media Release - New guidance to enhance support for people in financial hardship', 12 March 2015, available at: <http://www.bankers.asn.au/Media/Media-Releases/Media-release-2015/New-guidance-to-enhance-support-for-people-in-financial-hardship>.

⁶ ACCC & ASIC, 'Debt collection guidelines: for collectors and creditors', July 2014, pp. 29-30, available at: <https://www.accc.gov.au/system/files/Debt%20collection%20guideline%20for%20collectors%20and%20creditors.pdf>.

collectors sometimes claim there are 'trading terms' that allow for recovery of costs associated with debt collection. These trading terms are commonly not provided (almost never in letters of demand) and, if they are, they either do not provide for recovery of costs or the relevant term is arguably unfair. These fees and charges should not be charged if a consumer is facing financial difficulty.

Section 3 – Dealing with complaints and disputes

The requirements in Section 3 should be in accordance with the revised 2014 Australian Standard for complaints management (**the Australian Standard**).⁷ In line with this recommendation, we query the definition of 'dispute' in the Code. The Australian Standard defines a dispute as “an unresolved complaint escalated internally or externally, or both”. The proposed definition in the Code is unreasonably narrow, and does not accord with the Australian Standard.⁸ For example, the proposed definition in the Code would exclude a dispute regarding a failure to provide a statement of account to a consumer upon request.

In relation to the reference to 'where practical' in clauses 3.1 and 3.9, we query the reasoning behind the inclusion of this phrase. If a complaint has been lodged, debt collection and recovery activities should cease without qualification.

Section 4 – Information protection

Clause 4.6 is essentially just restating the law by requiring parties to comply with their legal obligations in relation to access to personal information. In our view, this clause should go further and require members to ensure easy and simple access to personal information, having regard to the various accessibility issues consumers dealing with debt collectors may face.

Section 5 – Monitoring compliance

While we welcome the requirement under clause 5.2 for members to 'periodically test compliance knowledge', we recommend that the Code stipulate how often this testing is expected. In our view, this testing should occur at least annually, if not more frequently. This section could also link with the activities of the Code administration body.

Section 7 – Communications in collections

Use of pseudonyms

One of the major frustrations of people dealing with debt collectors is the difficulty of getting back in contact or having a reference point when they have only been provided with a first name. Clause 7.4 should require members to provide a full name (even if this is a pseudonym), and that the same pseudonym be used by that person on an ongoing basis to ensure that debtors are able to get in contact with staff and have a reference for correspondence.

⁷ Australian/New Zealand Standard, 'AS/NZS 10002:2014 - Guidelines for complaint management in organizations', October 2014.

⁸ The Code defines a dispute as "any denial of certain facts in relation to the debt itself" - see p. 9.

Threats to litigate

We also commonly receive complaints about threats to litigate for very small amounts or threats to list debts on credit files. Often there seems to be no basis for these claims. In our view, this conduct is misleading and is used to obtain payment, rather than there being any real basis for the claims. Any communication which includes a claim for additional fees and charges should include the basis on which they are claimed (for example, by referring to the relevant term in initial contract). This should be a requirement under the Code.

Ceasing contact

We are also concerned about debt collectors failing to cease contact upon request from the consumer. Section 45(2)(m) of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) states that a prohibited debt collection practice includes contacting a debtor after the debtor asked the collector to cease contact, other than contact through litigation. In our experience, there continues to be non-compliance with this requirement resulting in ongoing harassment by a number of different creditors and debt collectors. Often, following a request to cease contact, the debt is referred to another debt collector or sold to a debt purchaser. The Code should make it clear that members are required to cease contact when asked by the consumer, and provide further guidance on this point.

Other issues - Enforcement

We are increasingly seeing large national debt collection firms proceed with bankruptcy proceedings or property seizure following a judgment, without negotiating or considering the debtor's financial position. This can place clients at risk of losing their home. In our experience, this particularly impacts individuals who have a mental illness or some other incapacity which means that they have not been able to engage proactively with a debt collector at an earlier point in the collection process.

We believe that debt collectors and other creditors should be required under the Code to conduct an oral examination following a judgment to determine the appropriate enforcement approach. If the individual is particularly vulnerable, a referral may be made to a legal assistance service at that time.

Please contact Katherine Temple on 03 9670 5088 or at katherine@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

CONSUMER ACTION LAW CENTRE



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