



**Submission to the Review of the  
Australian Collectors & Debt Buyers Association Code  
of Practice**

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## **About Financial Counselling Australia and Financial Counselling**

Financial counsellors provide advice to people with money and debt issues. Working in community organisations, their services are free, confidential and independent.

Financial Counselling Australia (FCA) is the peak body for financial counsellors in Australia. FCA's members are the State and Territory financial counselling associations.

## **About the Consumer Action Law Centre**

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just market place for all Australians.

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# 1 Introduction

This is a joint submission from Financial Counselling Australia and the Consumer Action Law Centre.

We welcome the review of the Australian Collectors & Debt Buyers Association (ACDBA) Code of Practice (the Code). Both financial counsellors and community lawyers frequently interact with the debt collection industry. This is because we see many people in financial difficulty and may be involved in setting up repayment arrangements, negotiating debt waivers or in some cases, disputing liability for a debt.

The review of the Code is an opportunity for the members of the ACDBA to set high standards to build community trust. This submission includes a number of recommendations that would build that trust. An effective Code also needs to go beyond the law and our recommendations are also made with this in mind. We also recommend that the Code is approved by ASIC to ensure it meets best practice standards for industry codes.

For the purposes of this submission, we have defined debt collectors as entities that collect debts, whether acting as an agent for a creditor or a debt buyer where the entity has purchased the debt. The term “debt collector” is used this way in the community. We also note that some debt collectors provide finance under a related entity. This function is also considered in this submission.

## 2 General comments

This section makes a number of overarching comments about the Code: benchmarking the Code against ASIC’s regulatory guide; the independence of the review; consultation; the structure of the Code; its coverage, its enforceability and responding to people in vulnerable circumstances.

### 2.1 A best practice benchmarked code

The objective of an industry code is to provide benefits to both consumers and the code subscriber. The Australian Securities and Investments Commission (ASIC) has issued regulatory guidance through Regulatory Guide 183 (RG183) for the approval of financial services sector codes of conduct. This serves as a benchmark for industry codes.

RG183 states that the object of a code to be:

*a set of enforceable rules that sets out a progressive model of conduct and disclosure for industry members that are signed up. Codes should therefore improve consumer confidence in a particular industry or industries.*

The specialist debt collection industry has a substantial amount of its business in financial services. In addition, many specialist debt collectors also provide credit. In these circumstances, it is appropriate to both benchmark the Code against the benchmarks in RG183 and for the ACDBA to seek approval for the code.

## Recommendations

The Code should meet the benchmarks set out in ASIC RG183.

The ACDBA must apply for approval of the Code from ASIC and involve ASIC in the current process.

## 2.2 Independent reviewer

An independent reviewer is a key part of a successful Code review. In RG183 ASIC states that:

*The role of the independent reviewer is to consider, without bias, the broad range of stakeholder views.<sup>1</sup>*

The independent reviewer has an important role of not only conducting a transparent consultation process but also credibility because an independent reviewer can bring “fresh eyes” to the code review.

The reviewer appointed by the ACDBA is not independent, as he is a former CEO of Collection House Group. While in that role with Collection House, the reviewer developed very constructive relationships with consumer organisations. However, there is a broader public policy issue about the review process itself that needs to be considered.

To meet community expectations the reviewer should be funded separately, be a person who is seen to be independent, and has considerable expertise in codes and financial services.

## Recommendation

An independent reviewer should be appointed to ensure that the recommendations from the review will have the confidence of the community.

## 2.3 Consultation with stakeholders

We are concerned that the review of the ACDBA Code is dominated by industry and proceeded without a transparent process to identify and address current consumer issues in the debt collection sector.

The Code review was initiated by advising key stakeholders by email. There has been no discussion paper, setting out specific areas for comment, or direct contact from the reviewer to date. In our experience, consultation is an important opportunity to hear from stakeholders and get initial feedback about possible areas for change. In particular, consultation is a way to bring both code subscribers and consumers together to discuss the code. Consultation of this nature is a common practice in our experience in similar reviews of codes, including those in banking and insurance.

We suggest that the reviewer engages with all stakeholders to discuss and focus on particular issues. A roundtable for example may be useful. In the absence of such a process, the risk is that the review

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<sup>1</sup> ASIC Regulatory Guide 183 Approval of financial services sector codes of conduct March 2013, page 19. Available at <https://download.asic.gov.au/media/1241015/rg183-published-1-march-2013.pdf>.

is undertaken entirely “on the papers”. This would not allow propositions to be fully explored and understood. The perception of the review could be that it was a perfunctory process.

#### **Recommendations**

Reviews should include funding and support for consumer advocate involvement. Industry should be consulted on the Code review, but not control or dominate the process.

The reviewer should determine relevant and recurring issues or themes and schedule further consultation, by phone, video or face to face, to determine how improvements to the Code can be made.

## **2.4 Structure, approach and plain language**

The Code must be written in plain language so that people can understand it and then use it. We appreciate that the Code was drafted initially in plain language, however, this should be reviewed again to find further improvements. A plain language expert could usefully be involved in the review.

A best practice code has both statements of principle and specific obligations. While there are flaws with the Banking Code of Practice, its drafting follows this approach.

In our experience, statements of principle alone do not lead to improvements in conduct. This is because it may be arguable about what the principles actually mean in practice. To ensure actual changes in conduct, there must be specific conduct provisions that are clear and unambiguous.

The structure of the code is also important as people using it must be able to easily find specific provisions that are relevant. The current structure could be a lot clearer. Our submission recommends extra parts are added to the Code to ensure it covers a broad range of relevant conduct.

#### **Recommendations**

The Code must be in plain language. The reviewer should engage the services of a plain language expert to ensure the code is accessible.

The Code should contain statements of principle and specific conduct requirements.

## **2.5 Coverage**

The Code needs to cover all of the activities in which debt collectors are involved, including the provision of credit through related companies.

#### **Recommendation**

The Code needs to cover the activities of Code subscribers where related entities provide credit.

## 2.6 Enforceability

An industry code is only as good as its compliance mechanism. Community confidence and the credibility of the Code depends on the ability of a consumer to seek access to justice for breaches. It is also critical that enforcement action is taken against subscribers that do not comply with the Code. There are three requirements for a code to be adequately enforceable:

1. Subscribers to the code are contractually bound by it;
2. There is an independent body to administer and enforce the code. The body has powers to receive and investigate complaints; and
3. The code provides that consumers have access to internal dispute resolution (IDR) and external dispute resolution (EDR). The EDR scheme can investigate and award compensation for a code breach that causes financial and/or non-financial loss.

At present, the current Code does not meet all of these requirements.

### *Contractually bound*

The most important criterium is that subscribers are contractually bound by the Code. The current Code does not include this requirement. The Banking Code of Practice in contrast has always incorporated a provision that the code must be a term of the contract between a bank and its customer.

Finance companies run by subscribers must include this Code as a term of the contract between the Code subscriber and its customer. This is to ensure that customers are confident that the finance company complies with best practice industry standards.

We recognise that the contractual relationship between a consumer and a debt collector differs depending on whether the debt collector is an agent or a debt buyer. It would still be possible however for all subscribers to be bound by the Code. Debtors would simply need to be told in the first correspondence that the ACDBA Code subscriber agrees to be bound by the Code.

We recommend that this issue is discussed further with ASIC.

### **Recommendations**

Code subscribers must be contractually bound so the Code is enforceable. The ACDBA should negotiate how this should be achieved with ASIC.

The Code should be a term of the contract for all finance provided by subscribers.

### *Independent body to enforce the Code*

Code administration is discussed further at point 9 below. The principle is that if there is a Code breach, a person can make a complaint to the Code Monitoring Committee.

Consumer Action's experience of the ACDBA Code was disappointing. In November 2017, Consumer Action lodged a complaint to the Code Compliance Manager alleging that an ACDBA Code member had breached the Australian Consumer Law and Fair Trading Act (Vic) and the ACDBA Code of Practice. Moreover, the complaint indicated that the issue was part of a broader systemic problem. While ACDBA confirmed they had received the complaint nothing further was heard from the ACDBA Code Compliance Monitoring Committee until a follow-up letter was sent 5 months later.

The response from the Committee was underwhelming. The Committee informed Consumer Action that the complaint was being closed without a formal determination, noting that the conduct alleged were matters of law which had not been determined by a court, and so could not be relied upon as potential breaches of the Code. This outcome was disappointing as it refused to address the breaches of law that were raised in the complaint. If ACDBA's position is that allegations of misconduct need to be first determined by a court before it will investigate whether there were breaches of the Code, then this presents a significant barrier for people making complaints under the Code. If opportunities to improve Code members' conduct and influence broader systemic or public policy issues are missed, it is unlikely that financial counsellors and consumer advocates will use the ACDBA Code.

#### *Enforcement in IDR and EDR*

The Code is enforceable in external dispute resolution schemes (EDR) as the scheme considers best practice in the industry. The Code should specifically state that the provisions of the Code are enforceable in an EDR which includes compensation for financial and non-financial loss (for Code breaches).

The Code also needs to cover its role in internal dispute resolution (IDR). This should include a specific commitment to consider the applicability of the Code in disputes.

#### **Recommendations**

Internal processes should be reviewed so that ACDBA is able to investigate misconduct when it breaches the Code.

The Code should include specific commitments to enforce the Code in IDR and EDR.

## **2.7 Vulnerability**

A commitment to assisting vulnerable people needs to be included in the Code. Anyone can become vulnerable depending on the circumstances in which they find themselves. Some people can be vulnerable for years or weeks, while others can become vulnerable because of a difficult set of circumstances. There are many reasons that people may be vulnerable including trauma, disability, English literacy and cultural disadvantage.

It is now best practice to consider that anyone may be vulnerable at some point and commitments around behaviour should be designed to eliminate or at least minimise the effect of any vulnerability. Code subscribers need to take care to avoid detriment. There should be no requirement to self-identify.



This submission will suggest both specific and general changes to conduct to ensure that the Code responds appropriately to the needs of people who may be vulnerable.

### 3 Part A – Introduction

The introduction would be enhanced by including the following:

- Some general information on the industry (people know very little about the structure of the debt collection industry)
- The role of debt collectors in our society
- Expanded information on the guiding principles underpinning the code

This would enhance the Code’s credibility and build trust with the community.

### 4 Part B – Application of this Code

We strongly support that it be a requirement of membership of the ACDBA that all members subscribe to the Code.

#### **Recommendation**

Subscribing to the Code must be mandatory for all members of the ACDBA.

### 5 Part C – Our key commitments to you

#### 5.1 The key commitments

It would be clearer to structure the Code so that there are a set of conduct rules under each commitment in Part C. As noted earlier, this would replicate the approach taken in the Banking Code of Practice.

The first commitments should be that subscribers agree to comply with the:

- Code (not just as an introduction to the list but a stand-alone commitment);
- law; and
- ACCC/ASIC Debt Collection Guideline<sup>2</sup> (“Debt Collection Guideline”).

Including this as the first commitment would therefore reinforce the fundamental importance of these three elements. People need to be certain that the subscriber with whom they are negotiating will comply with the Code, the law and the Debt Collection Guideline. The Debt Collection Guideline is particularly important because it contains specific detail about conduct.

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<sup>2</sup> ASIC Regulatory Guide 96 Debt Collection Guideline: for collectors and creditors, published 29/2/16.

Commitment 1.14 needs further specificity, including a requirement that the Code is prominently named and linked on the home page of the ACDBA and the websites of all subscribers.

## 5.2 Additional commitments

There are a number of additional commitments that should be included.

### *Vulnerability*

The ACDBA Code should specifically commit to taking extra care with people who may be vulnerable due to various circumstances, including age, cognitive impairment, elder abuse, family or domestic violence, illness (including mental illness), difficulty communicating and any other personal or financial circumstance causing significant detriment.

#### **Recommendations**

A key commitment to ensure that services are designed with vulnerability as a consideration.

A commitment to take extra care with vulnerable people.

### *Confidentiality*

A common concern from people in debt is the importance of confidentiality. People consider information about their financial situation to be very sensitive and possibly embarrassing. The members of the Code must already comply with the privacy laws. The ACDBA Code also needs to make an explicit commitment to protecting confidentiality.

#### **Recommendation**

The Code should include a key commitment for the protection of a person's confidentiality.

### *Trained and competent staff*

The Code should contain a commitment that only trained and competent staff will be employed. Staff should specifically:

- Be competent to do their work
- Understand the Code and know how to comply with it
- Understand the Debt Collection Guideline and how to apply it and comply with it

Staff must engage with customers in a fair, reasonable and ethical manner.

#### **Recommendations**

The Code includes a specific commitment to staff of subscriber organisations being competent.

Staff must engage with customers in a fair, reasonable and ethical manner.

## *Best practice for people on Centrelink as their sole source of income*

The banks have subscribed to the Code of Operation: Recovery of Debts.<sup>3</sup> This Code was developed by the Department of Human Services and the banking industry to cover situations where a person in receipt of Centrelink income overdraws a bank account. The Code of Operation provides that in these cases, the maximum amount a bank can recover if a person overdraws their account is 10% per payment cycle. This rule acknowledges that the purpose of income support is to ensure that a person and their family can access the basic requirements of food and accommodation. Income support payments are to cover basic living expenses, which means there is usually very little money available to pay debts. Research has established that the group of people experiencing poverty the most are those relying on Centrelink payments such as Newstart and Youth Allowance.<sup>4</sup> When people are living in poverty, they can be very vulnerable.

Acknowledging the reality of low level of Centrelink payments and their purpose, the Code should therefore include a specific set of commitments to reduce the harm for people in receipt of these benefits. These commitments would include:

- An acknowledgment that people on fixed low incomes can be vulnerable
- An acknowledgment that Centrelink income is needed to meet basic living expenses
- An approach that is realistic about the ability to repay debts on a fixed low income and that repayment arrangements need to be realistic
- Waiver of interest and fees while a person is in receipt of Centrelink

This approach should be developed in the section of the Code dealing with financial hardship. It would build on the guidance in the Debt Collection Guideline at section 14(a) that specifically refers to adopting a flexible and realistic approach to repayment arrangements where:

*a debtor is on a fixed low income (for example a disability pension or other welfare payments) and there are no prospects of the income increasing in the future.*

Many subscribers to the Code already have in place a compassionate approach for debtors who have fixed low incomes. We believe this review is an opportunity to deliver a comprehensive and compassionate industry-wide approach in regard to repayment arrangements and waivers for people on fixed low incomes.

## **6 Part D – How we will deliver on our commitments to you**

### **6.1 Structure of this section**

As we have already noted above the heading for this section should change. This section is primarily about communication and we suggest the heading should say that. Communication is a key way for members of ACDBA to distinguish themselves as fair and ethical.

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<sup>3</sup> Available at <https://www.humanservices.gov.au/organisations/about-us/publications-and-resources/code-operation>

<sup>4</sup> See the ACOSS Poverty in Australia Report at <https://www.acoss.org.au/poverty/>.

## 6.2 Communications

This section has a number of parts:

- a) Communication between the Code subscriber and the customer
- b) Responding to requests for information and documents
- c) Ceasing contact on request
- d) Communicating with third parties
- e) Communicating with people who may be vulnerable

## 6.3 Communications between the Code subscriber and the customer

Communications from a debt collector can be very stressful for people. People who cannot pay debts are in financial difficulty. They can be juggling multiple debts and basic living expenses. The financial difficulty could have been caused by illness, unemployment, family breakdown, and/or family violence, for example. Communication needs to be transparent, informative and predictable.

The principles outlined under Part D are generally reasonable. However, we would suggest an additional commitment that all communications will be consistent with the obligations under the Code, the Debt Collection Guideline and the law. As stated above there is also a need for specific conduct commitments. This is so people can know what conduct to expect in each case. We acknowledge that many subscribers already comply with specific conduct recommendations detailed below.

Our suggestions for the specific conduct requirements are:

- a) Providing prescribed written information on first contact with the debtor. This is so people receive basic disclosure about the debt so they can check the details before making further contact. Many people call financial counsellors or community lawyers for help, for example, because they did not know a debt could be assigned. This causes confusion and stress. The prescribed information would include:
  - i. The name of the creditor (or new creditor);
  - ii. The creditor's contact details, including phone, postal address and email;
  - iii. The name and contact details of the original creditor;
  - iv. A copy of the notice of assignment (if the debt has been assigned);
  - v. The amount owed;
  - vi. Details of interest and fees being charged and the basis on which these charges are made;
  - vii. The right to request documents and information to verify the debt claimed;
  - viii. Details of rights to ask for financial hardship and/or dispute the debt claimed, including details of the EDR scheme;
  - ix. If a default has been listed, include details and the repayment history information being listed; and
  - x. Information of how to get free advice by calling the National Debt Helpline on 1800 007 007 or visiting [www.ndh.org.au](http://www.ndh.org.au).
- b) The prescribed letter would need to be sent five days before telephone contact. This would give the debtor time to verify the information and get advice so they are clear about their rights and obligations.

- c) Preferred method of communication. The debtor should be able to choose a preferred method of communication, such as telephone or email. The debtor should be able to specify that no phone calls are made to their workplace. If there are reasons why a preferred method of communication is deemed unreasonable the Code should specify those circumstances (and it should only be in exceptional circumstances).
- d) Ceasing contact on request. The debtor must be able to ask for contact to cease (with the exception of litigation). This is consistent with existing law<sup>5</sup> and needs to be a clear commitment in the Code.
- e) Face to face communication should be banned (except where part of a legal process or EDR). Face to face communication can be intimidating. People want to feel safe in their home. Debt collectors turning up at their door can be frightening. We cannot think of any circumstances where it would be required unless the debtor specifically requested it. If the debtor is refusing to communicate, the Code subscriber can resort to enforcing the debt under the law.

#### Recommendations

A letter is sent to the customer when debt collection starts. The letter contains the information listed above at a to i.

Phone contact to collect the debt does not start until five days after the prescribed letter has been sent.

The debtor should be able to specify a preferred method of communication.

Face to face communication should be banned unless specifically requested by the debtor or is required as part of a legal process or EDR.

## 6.4 Responding to requests for information and documents

People have rights under the law<sup>6</sup> and industry codes<sup>7</sup> to request documents. This is also covered in detail in the Debt Collection Guideline.<sup>8</sup> It is an important right for people to be able to obtain information relating to a debt claimed. This Code should specifically provide that right in order to avoid any confusion about which law or code may apply. It is also a fundamental principle at law that the entity claiming the debt should provide evidence of a debt.

We recommend that the Code contains a specific commitment to provide certain documents on request. The documents should be provided within 30 days of the request. If a request for

<sup>5</sup> See Section 45(2)(m) of the *Australian Consumer Law and Fair Trading Act 2012 (Vic)*.

<sup>6</sup> Some examples Privacy Act (Cth) 1988; National Consumer Credit Protection Act (Cth) 2009.

<sup>7</sup> Some examples Code of Banking Practice; Telecommunications Consumer Protection Code.

<sup>8</sup> Section 11 of the Debt Collection Guideline.

documents has been made, enforcement action should be put on hold until the documents are provided. The documents should be provided free of charge electronically.

The documents to be provided on request are a copy of:

- a) the contract;
- b) account statements;
- c) default notice;
- d) mortgage or security document;
- e) details of any court judgment; and/or
- f) guarantee (if the request is from the guarantor).

A time limit is reasonable, and our suggestion is two years from the end of the contract.

If the Code subscriber is unable to provide evidence of the debt, the debtor should be released from the debt claimed.

### **Recommendations**

The debtor has a right to request documents and information as evidence of the debt claimed. The documents and information must be supplied within 30 days of the request. Enforcement action should be put on hold from the date of the request until the documents are provided. The documents and information are provided free of charge electronically.

If the Code subscriber is unable to provide evidence of the debt claimed, the debtor should be released from the debt in writing.

## **6.5 Communicating with third parties**

Financial counsellors and community lawyers receive regular complaints about debt collectors communicating with third parties about a person's debt. There is a clear community expectation that debt collectors should only contact the debtor about their debt. No one else should know about the debt and the matter should be confidential.

The Debt Collection Guideline<sup>9</sup> do allow third parties to be contacted for location information every six months if reasonable. We remain concerned that contact with third parties is not being used for location information but instead to put pressure on the debtor. This can be embarrassing and intimidating.

We recommend putting in the Code specific conduct rules so the public can see a clear commitment from subscribers to protect the privacy of third parties. We recommend the following specific requirements:

- a) If contacting a third party for contact information about a debtor, the Code subscriber will not disclose the nature of the call, any details relating to the debt or other personal information; and
- b) If the third party refuses to speak about the debtor or provide the location information, the Code subscriber cannot contact the third party again.

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<sup>9</sup> Section 5(i) of the Debt Collection Guideline

### **Recommendation**

The Code should include specific commitments about contacting third parties as outlined above.

## **6.6 Communicating with people who may be vulnerable**

### *Supporting people from a non-English speaking background*

People should be able to speak to a Code subscriber and understand what they are saying. The person also needs to be able to communicate their situation. Communication is needed to make a repayment arrangement and raise a dispute.

Code subscribers need to supply an interpreter on request or when needed to communicate effectively. The interpreter can be a member of the Code subscriber's staff or an external interpreter. This does not mean the person has to use an interpreter. A person can say they do not need this service.

Code subscribers should also include information on their website covering that an interpreter can be requested and how to do this. The information should be translated into other languages.

### **Recommendations**

Provide access to an interpreter on request.

The Code subscriber includes information on their website in other languages about the right to request an interpreter.

### *Family violence*

Financial Counselling Australia has spent the last year training financial counsellors across Australia on assisting people affected by family violence. We consider that training on family violence is essential to work towards a whole of society solution. Dealing with debt collection when affected by family violence can be highly traumatic. A relevant report outlining the challenges is *Stepping Stones: Legal Barriers to Economic Equality after Family Violence*.<sup>10</sup>

The ACDBA and its subscribers must be actively involved in reducing the detriment for customers affected by family violence. There are a number of actions that should be taken and included in the Code:

- a) Training staff about family violence including prioritising safety and recognising economic abuse;
- b) Never asking a customer of a joint account to seek information or consent from their ex-partner;
- c) Keeping personal information confidential on request;
- d) Making referrals for assistance to specialist family violence services, counselling and other support services;

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<sup>10</sup> Smallwood, Emma *Stepping Stones: Legal Barriers to Economic Equality after Family Violence*, Women's Legal Service Victoria, 2015. Available at [http://www.womenslegal.org.au/files/file/Stepping%20Stones%20Report\(1\).pdf](http://www.womenslegal.org.au/files/file/Stepping%20Stones%20Report(1).pdf).

- e) Flexible options for people affected by family violence including:
  - i) Moratoriums when the person has no income or little income (for example, because the person is living in a refuge);
  - ii) Severing joint debts or reducing the debt owed by one person;
  - iii) Waivers when there is long term financial hardship; and
  - iv) Not listing a default (or removing a default) where the person needs to get a rental property to escape violence.

The ACDBA should also develop a detailed family violence policy or guideline that is publicly accessible that is referred to in the Code.

### **Recommendations**

The Code should provide for specific commitments to assist people affected by family violence.

#### *Disability*

People with a disability can face a range of problems. The ACDBA should consider the following specific measures:

- a) Ensuring that TTY is available and there is a way to use Auslan interpreters for people who are deaf or have suffered hearing loss;
- b) Training to deal with disability that may be invisible such as mental illness or cognitive impairment.

### **Recommendations**

The Code include specific provisions to assist people with disability.

#### *Aboriginal and Torres Strait Islander people*

Aboriginal and Torres Strait Islander people can be very disadvantaged and vulnerable. We recommend that the ACDBA develop a Reconciliation Action Plan. This is so the ACDBA can support the national reconciliation movement.

The Code should include the following commitments:

- a) Follow the AUSTRAC Guidance on identification for Aboriginal and Torres Strait Islander people (if required);
- b) Identify ways to make arrangements in a fair and clearly understandable way for Aboriginal and Torres Strait Islander people in remote areas with limited English;
- c) Providing interpreters when needed;
- d) Considering how to provide information that is informative and culturally appropriate; and
- e) Cultural awareness training for staff.

### **Recommendations**

The Code should include specific commitments to assist with the inclusive and fair treatment of Aboriginal and Torres Strait Islander.



## 7 Part E – How we will deal with cases of financial hardship

### 7.1 What is financial hardship?

We suggest that the Code defines financial hardship. It needs to be defined because there are diverging views of what hardship actually is. We strongly recommend a broad definition of financial hardship. For example, the definition in the Banking Code of Practice is:

*Financial difficulty means you are unable to repay what you owe and are experiencing difficulty meeting your repayment obligations. This can be as a result of an unexpected event or unforeseen changes outside your control.*

It is also critical to include an acknowledgment that financial hardship should be assumed when a debt collector is collecting a debt. By definition, these people are unable to repay. The debtor should not be obliged to mention magic words such as “financial hardship” to get help with making an affordable repayment arrangement.

#### Recommendations

The Code should include an agreed definition of financial hardship or financial difficulty.

The Code should include a commitment to an assumption that the debtor is in financial hardship and the debt collector will be proactive about discussing financial hardship options.

### 7.2 Information about financial hardship processes

The Code should require information about hardship processes to be publicly available for customers in financial hardship. It is our understanding that most subscribers already do this. However, that public information needs to address the provisions in this Code. For example, specific details on when interest will not be charged, how to apply for this provision and what evidence is required. It would be our recommendation that some of this detail be set out in the Code. At a minimum it needs to be in a public hardship policy.

#### Recommendations

Each Code subscriber must have a publicly available hardship policy that covers in detail the process for working with people in financial difficulty.

### 7.3 The current commitments in the Code

The current commitments are generally useful. As outlined above we consider further detail is required to make it clear how the commitments will work in practice.

For example:

- 5.1 What does working with a person entail? What options are available? We suggest setting out the available options for financial hardship similar to those set out in the new Code of Banking Practice.<sup>11</sup>
- 5.2 How is a reasonable offer worked out?
- 5.3 How can the income be apportioned? Is there a process for referring to a financial counsellor or the MoneySmart website for budgeting help?
- 5.4 Does this mean you can keep calling? There should be a set period for a stay of enforcement when someone is genuinely seeking an appointment with a financial counsellor. It seems unfair to continue legal action when a person is seeking help without there being a process to tell the person this is happening so they can seek urgent advice.
- 5.5 This commitment does not make much sense when considering 5.6. If the person cannot repay principal and interest then 5.6 should be considered.
- 5.6 How does a person apply for this? What evidence is needed? What criteria apply?
- 5.7 This should also happen when the debt is sold.

#### **Recommendation**

Further specific detail should be added to the commitments so it is clear how they apply in practice.

### **7.4 Assessing financial hardship**

We are concerned about the wording of section 6 of the Code. This is really a list of evidence that could be requested in considering a financial hardship arrangement. We remain concerned that financial hardship can be difficult to access when considerable documentary evidence is required. The person who needs to provide the evidence can get worn down and stressed by the experience. We agree that some evidence might be required. However, these requests should be minimised and streamlined.

We would argue that a debt collector is not providing credit, the debt already exists and sufficient information is only required to work out what is affordable and reasonable in the circumstances.

We suggest this section be rewritten to provide the option of relying on the verbal information of the person with further relevant evidence requested as required.

#### **Recommendation**

Section 6 is rewritten to offer flexibility in requesting relevant information for financial hardship.

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<sup>11</sup> Page 47 of the Code of Banking Practice available at [https://www.ausbanking.org.au/images/uploads/Banking\\_Code\\_of\\_Practice\\_2019\\_web.pdf](https://www.ausbanking.org.au/images/uploads/Banking_Code_of_Practice_2019_web.pdf).

## 7.5 Savings buffers

In assessing ability to pay, a savings buffer needs to be included in the reasonable expenses. Section 6 of the Code should specifically refer to a savings buffer as a consideration. The principle here is that everyone is entitled to retain some savings for an unforeseen emergency or expense.

Financial Counselling Australia issued a consultation paper in 2016 titled Everybody needs a savings buffer: Why income and expenditure statements need a default savings category<sup>12</sup> which suggested that people with a savings buffer can build financial resilience and financial literacy. The recommended savings buffer would be 10% of a person's income or \$20 per month (where sustainable).

### Recommendations

A savings buffer is built in to the assessment of affordability.

## 7.6 Medium and longer-term repayment arrangements

A debt is usually only sent to a debt collector when it is more than 90 days in default. This usually means that the person is having more than temporary difficulty in repayment the debt. The debt has also accelerated by this time so that the whole debt is owing. This means that medium and longer term repayment arrangements are required because of the evident financial hardship.

We are already aware that debt collectors regularly make such arrangements. We support this approach. Many people need a longer period of time to repay the debt after being in, or continuing to experience, financial hardship. We believe that the Code should make people aware that these types of arrangements are available and how to access them.

Reducing the debt can also be an important way to make these types of repayment arrangements work over the medium and longer term.

### Recommendations

The Code should specifically acknowledge the availability of medium and longer-term repayment arrangements and include details of how to access such arrangements.

## 7.7 Debt waivers/releases

Debt collectors often consider, and give, waivers of a debt on compassionate grounds. Some people are never going to be able to repay a debt in a reasonable time as their circumstances have permanently changed for the worse. We believe that people need to know that they can ask for a waiver. It should not be necessary to find a financial counsellor, get an appointment and then finally be able to get assistance to ask that a waiver be considered.

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<sup>12</sup> Available at

<https://www.financialcounsellingaustralia.org.au/getattachment/Corporate/Publications/Reports/Everybody-Needs-a-Savings-Buffer.pdf>.

The Code should specifically recognise the right for people to ask for a waiver (which is granted at the discretion of the Code subscriber) if the following criteria apply to the person:

- a) Long-term hardship, which means not being able to meet the repayments now and in the foreseeable future;
- b) the debt is unsecured;
- c) is on a fixed low income (for example, Centrelink);
- d) has no valuable assets; and
- e) evidence can be provided that the above criteria applies.

#### **Recommendation**

The Code should include a specific commitment that debt waivers will be considered where the criteria listed above have been met.

### **7.8 Suggesting refinance or getting a loan to pay a debt**

Section 14(g) headed Repayment Negotiations of the Debt Collection Guideline states that it is unacceptable to pressure a debtor to:

- Get further into debt to pay out an existing debt;
- Show proof of unsuccessful alternative credit applications before a repayment plan will be negotiated;
- Borrow from family or friends to pay out a debt.

The principle here is that the debtor should not be forced to get a loan to pay out the debt when a repayment arrangement could be negotiated. The debtor has a right to a reasonable repayment arrangement. It does not make sense for the debtor to get another loan to repay a debt.

We have long been concerned about pressure being put on debtors to get a loan to pay out a debt. It is usually not in the best interests of the debtor to do this. The debtor usually ends up with more debt due to extra fees. Another concern is that debtors who have fallen behind in repayments are almost always in financial hardship. A credit provider giving a loan in those circumstances would need to take great care to ensure the loan is affordable and not unsuitable. We consider there is a large risk that any refinance in those circumstances would be unsuitable.

We believe the Code is an opportunity for subscribers to commit to best practice financial hardship arrangements. This means committing to working with people in financial hardship and never suggesting they get a loan. If a debtor wants to get a loan, they are well aware of how to do this.

#### **Recommendation**

The Code makes a commitment to prohibit telling debtors to get a loan to repay the debt claimed.

Some Code subscribers also offer loans. For example, a debt collection letter from Lion Finance offers a “Discount Opportunity!” of a reduction in the debt claimed in full and final settlement. The letter then states “Please keep in mind, if you would like to consider refinance opportunities to secure this offer then please contact our sister company, ThinkMe on 1300 896 397 and speak with a Personal Lending Associate who may be able to assist you.”

We are concerned that this could involve irresponsible lending. It is also an unfair tactic to offer a discount and then suggest a loan from the same group. The obvious question must be why can't the debtor get the discount and a repayment arrangement with the debt collector? The obvious answer is that the debt collection group makes more money this way.

There is a clear incentive (and an ongoing conflict of interest) for debt collectors that also provide finance to pressure or steer a debtor into taking loans with the same group to repay a debt. The conflict of interest is that the debt collector is incentivised to avoid repayment arrangements and instead broker refinances. There is also a potential problem with the intention of the original creditor in selling the debt. At a minimum, debt collectors should be clearly telling the original creditor about these plans as part of acting in good faith.

The Privacy Act is also relevant in these circumstances. Australian Privacy Principle 6.1 states:

*If an APP entity holds personal information about an individual that was collected for a particular purpose (the primary purpose), the entity must not use or disclose the information for another purpose.*

We understand this to mean that the debt collector cannot:

- share the personal information of the debtor with the related finance company unless there has been specific and informed consent from the debtor; and
- use the personal information to market loans to the debtor after any debt has been repaid.

People need to be confident that a debt collector only uses their personal information for debt collection and not sales.

#### **Recommendation**

Debt collection groups must not use debt collection to make finance sales.

#### **Recommendation**

The personal information of the debtor must remain solely with the debt collector and not shared with a credit provider that is a related entity.

## **7.9 Credit reporting**

In our experience, many people are concerned about their credit report. They are concerned about what is on their credit report, including negative listings. As detailed above, we consider it essential to tell people whether a default or repayment history information has been (or continues to be) listed on their credit report.

#### **Recommendation**

The Code makes a specific commitment to tell people whether a default or repayment history information is listed on their credit report.

If a financial hardship arrangement is made, any repayment history information should reset to “0” or paid each month while the repayment arrangement is being complied with. This is because the contract has been varied by agreement and the debtor is no longer in default.

#### **Recommendation**

The Code specifically states that repayment history information will be marked as paid if an agreed repayment arrangement is made and the debtor is complying with this arrangement.

### **7.10 Alternative ways to pay**

A fundamental part of managing financial hardship is being able to determine when and how payments are made. A common problem that financial counsellors and community lawyers see with payday lenders is that direct debits are timed to be the first payment taken from a pay. The timing of direct debits can cause enormous problems for people trying to manage money when in financial hardship. We also acknowledge that some people prefer direct debits. An important part of financial literacy is to find a way to effectively manage repayments. We believe that providing alternative payment methods can be a very important part of setting up a workable system.

It is also critical that the payment methods are provided free of charge. People need to be able to make payments without adding to the debt owed. Making payments easy and free gives people the best opportunity to repay their debt.

#### **Recommendation**

The Code commits to providing people with at least two free different repayments methods including such options as direct debit, BPay and direct deposit. This information should be available on the Code subscriber website and in the hardship policy.

### **7.11 Settlements**

A commitment should be included in the Code that settlements are fair. We suggest the following:

- a) settlements are fair;
- b) the customer is given the option to get legal and/or financial counselling advice;
- c) there is never a requirement to provide a caveat over the customer’s home to settle;
- d) the settlement contains details of:
  - i) the terms;
  - ii) details of any review;
  - iii) when repayments need to start;
  - iv) repayment options; and
  - v) what to do if a payment is missed or cannot be made on time.

#### **Recommendations**

The Code must include commitments to ensure that settlements are fair.

## 8 Part F – How we will deal with any complaint from you

### 8.1 Internal Dispute Resolution (IDR)

We suggest the following additional changes for the section on IDR:

- a commitment to keep people informed about the progress of the complaint, who is handling the complaint and how they can be contacted;
- a written response (if the complaint takes more than a week to resolve) to the complaint that covers the outcome and reasons, the right to go to EDR and the contact details of the EDR scheme; and
- that the complaint will be resolved within 30 days. If this timeframe cannot be met, an explanation for the delay and expected time frame must be included.

#### Recommendation

Further commitments are added to the Code as set out above.

### 8.2 External Dispute Resolution

We recommend a separate point is made that all Code subscribers must be a member of an EDR scheme that can consider all complaints.

### 8.3 Irresponsible lending

The Financial Services Royal Commission has reported on systemic problems with irresponsible lending. This means that the debtor may have an arguable case that the loan breached the responsible lending laws. Debt collectors need to have a process to fairly resolve these cases. There needs to be a process where the original creditor that may have breached the responsible lending laws must buy back the debt.

#### Recommendation

The Code specifically recognises that there may be systemic misconduct by the original creditor and a process must be in place for the debt to be bought back by the original creditor.

### 8.4 Enforcement

We are concerned that some debt collectors are far more litigious than others. This indicates either a poor dispute resolution process or a poor approach to being reasonable about financial hardship requests.

There is a vast difference in approach among debt collectors, with some lodging creditor's petitions at a much higher rate than others to force bankruptcy. This can happen over relatively small debts and can see people lose their homes.

This is a serious concern. Some Code subscribers are treating debtors much more fairly than other debt collectors. The CMC should be reviewing this conduct. The Code needs to introduce specific commitments to deal with the subscribers that consistently fail to make reasonable repayment arrangements.

We consider that the Code needs to urgently tackle these specific issues to meet community expectations. The following commitments are needed:

- a) A process needs to be in place to genuinely make contact about hardship before legal action is considered;
- b) Forced bankruptcy is a last resort and other enforcement options must be used before bankruptcy is considered; and
- c) The Code subscriber must agree to an EDR scheme reviewing disputes after a court judgment has been obtained. This is to ensure people get genuine access to justice.

#### **Recommendation**

Code subscribers must ensure that litigation and forced bankruptcy is not an entrenched process. The Code must include commitments to protect people from aggressive and litigious debt collection.

## **9 Part G – How this Code is administered**

### **9.1 RG183 – Code administration**

A Code must have an effective administration process in place. In our view, this Code should comply with the administration requirements set out on pages 18 and 19 of RG183.

#### **Recommendation**

The Code must comply with the requirements in RG183 for Code administration.

### **9.2 The effectiveness of the CMC**

According to the most recent Code Monitoring Committee (CMC) Annual Report<sup>13</sup> there was only one complaint. This is not consistent with our experience with clients dealing with debt collectors. There are many complaints including numerous systemic issues. Financial counsellors and community lawyers lodge many complaints with ASIC. We would suggest there are two problems:

- a) people do not know about the Code; and
- b) the CMC does not undertake any significant own motion investigations.

The CMC must ensure it is publicised and undertake own motion investigations at least twice a year.

Additionally, if outcomes from complaints fail to address the issues raised or prompt a broader look at potential systemic issues it is unlikely that consumer advocates and financial counsellors will engage with the code.

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<sup>13</sup> Available at <http://www.acdba.com/images/acdba/FY2018-CMC-Annual-Report.pdf>.



### **Recommendations**

The visibility of the Code must be improved.

Own motion investigations need to be undertaken at least twice a year after consultation with consumer advocates.

Complaints and outcomes should be available on the ACDBA website.

Sanctions for breaching the Code must comply with ASIC RG183.

Sanctions could be applied in any of the circumstances below:

- any breach of the Code, serious, systemic or otherwise;
- failure to address a breach,
- any breach of an undertaking given to the Committee
- not taking reasonable steps to prevent a breach from continuing to occur or reoccurring.

The following additional sanctions should also be included (in addition to the sanctions already listed at 15.3 of the Code):

- fines;
- suspension or expulsion from the industry association and/or subscription to the Code; and
- requiring the Code subscriber to provide information to customers that may be affected by the breach.

### **Recommendations**

Both the circumstances where a sanction could be applied and the range of sanctions should include additional measures that comply with ASIC RG183.

## **10 Finance companies**

As outlined above, we are aware that some debt collection groups also run finance companies. On the face of it, this presents a gross conflict of interest. Signatories to the Code should commit not to market loans to individuals whose debt is currently or has been previously collected.

At the very least, this Code should provide adequate protections for people accessing this finance. We recommend that the Code includes a new section to cover this that includes the following additional commitments:

- a) the loan must be not unsuitable as set out in the National Consumer Credit Protection Act;
- b) the lender will comply with the requirements set out in ASIC RG209;
- c) for joint loans, if one borrower will not receive a substantial benefit s/he will not be approved as a co-borrower.

### **Recommendations**

The Code contain commitments to lend responsibly in line with the National Consumer Credit Protection Act 2009 (Cth) and ASIC RG209.