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By email: paul.eric@afsa.gov.au

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Assistant Director Practice Regulation
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Dear Mr Eric

Revised Inspector-General Practice Guideline 1

The Consumer Action Law Centre (**Consumer Action**), Financial Rights Legal Centre (**Financial Rights**) and Financial Counselling Australia (**FCA**) welcome the opportunity to comment on the proposed changes to the Inspector-General Practice Guideline 1 (**the Guideline**).

There have been a number of positive amendments to the Guideline, particularly in relation to third parties. However, we have suggested a number of amendments to further strengthen the Guideline below, including recommendations to:

- ensure the proposed amendments are expressed in plain English;
- provide further guidance on what specifically amounts to an 'unsuitable debtor';
- provide additional practical examples;
- clarify that telephone conversations are a form of 'advertising and marketing';
- specify that the term 'alternative to bankruptcy' is likely to be misleading;
- address the appropriateness of targeting consumers who have recently have default judgments entered against them.

Our comments are detailed more fully below.

About the contributors

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

Financial Rights is a community legal centre specialising in financial services, particularly in the areas of consumer credit, banking, debt recovery and insurance. It fully integrates telephone assistance and financial counselling with legal advice and representation. Financial Rights also operates the Insurance Law Service, a national specialist consumer insurance advice service.

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FCA's role is to support the financial counselling profession, providing a voice in national debates. FCA also advocates on behalf of the clients of financial counsellors for a fairer marketplace that will prevent financial problems in the first place.

Introductory comments

Our lawyers and financial counsellors provide advice and assistance to thousands of low income Victorians every year, a number of whom have entered into Part IX Debt Agreements (**Debt Agreements**). Often people who are considering entering into a debt agreement are experiencing significant financial stress and may not have a high level of financial literacy. The combination of disadvantage and financial stress makes this consumer segment particularly vulnerable to misleading or deceptive representations by Debt Agreement Administrators (**DAAs**) that overstate the potential benefits of a Debt Agreement, and fail to mention other debt options that may in fact be in the consumer's best interest.

There have been a number of positive amendments to the Guideline. We are particularly supportive of the approach taken to third parties in the Guideline, including clause 5.5 which clarifies that commercial arrangements should not compromise a DAA's independence and overriding fiduciary obligations to debtors. We also welcome clarification of the principles AFSA takes into account when assessing DAA advertising and marketing in clause 8.3.

Recommended amendments

Below are a number of suggested amendments to the draft Guideline:

- 1. Clause 2.1(iv)** - we recommend including reference to section 29(1)(l) of the Australian Consumer Law (**ACL**), which relates to false or misleading representations concerning the 'need' for any goods or services. We are concerned that, in some instances, DAA can overstate the negative consequences of bankruptcy, giving some debtors the impression that they 'need' to enter into a Debt Agreement in order to solve their financial problems.
- 2. Clause 3.6** - we recommend reviewing this clause to ensure that it is drafted in plain English and does not repeat other sections of the Guideline. Some of the general principles in this clause are expressed in technical terms, and have unclear meanings. For example:
 - 'a DAA's conduct should be assessed against all meanings which are reasonably open';
 - 'a DAA's dominant message may (depending on the circumstances) be crucially important';
 - 'relevant evidence from consumers misled by the DAA's conduct may be given weight'; and
 - 'a DAA's conduct has the tendency to lead the audience into error (which may include any omissions creating an unclarified/unqualified impression'.

Other sub-points in this clause are also repetitive. For example, 'a DAA need not have the intention to mislead or deceive consumers by their conduct' repeats the point made in

clause 5.9 of the Guideline. We also query how clause 3.6 relates to clause 8.3, as it appears some general principles are repeated.

- 3. Clause 5.2** - We were pleased to see clause 5.2 amended to clarify that it applies to the activities of third parties working on behalf of DAAs to promote their services. However, we suggest further guidance on what specifically amounts to an 'unsuitable debtor'. We submit that unsuitable debtors include those that do not have an asset to protect, for whom bankruptcy may be a better option. We assist numerous consumers each year who have entered into a Debt Agreement, when declaring bankruptcy was likely to have been their best option.

George's story

George entered into a Debt Agreement in March 2014, with debts of over \$45,000. George has a long history of mental health problems. He works part time and has no attachable assets. All of George's communications with the DAA were done online and over the telephone. George cannot recall much about entering the Debt Agreement as he was heavily medicated at that stage. George's mother believes he has been coached through the documents as the narrative in his 'debtor's statement' is not his style.

The DAA is charging over 27% per annum and fees of over \$2,000 to administer the Debt Agreement. George has struggled to make the repayments under the Debt Agreement, and is 'in catch up' all the time. Given that George has such significant debts and no attachable assets, entering into a Debt Agreement was clearly not his best option because he had no asset to protect. We succeeded in getting a full refund for George who has now sought the help of a free financial counsellor to voluntarily bankrupt.

- 4. Clause 7.2** - We agree that it is important that DAAs describe the 'essence' of a debt agreement correctly. However, in our view this could be better expressed as wrongly describing the key features of Debt Agreements, particularly in comparison with bankruptcy. Similarly, we recommend amending the final bullet point to 'inaccurately' comparing a debt agreement with bankruptcy, rather than 'adversely' as both options have positive and negative features depending on the circumstances of the debtor.

We also suggest providing some practical examples demonstrating each of the sub-points in clause 7.3 and clarifying that, unlike a Debt Agreement, debt consolidation does not necessarily result in any consequences for the person's creditworthiness. In our experience in advising vulnerable debtors, there can be a lot of confusion about debt services and the promotion of such services. This is exacerbated by service providers that offer a range of debt services, including credit repair, debt negotiation, debt consolidation and referral to DAAs.

Arjun and Reena's story

According to their financial counsellor, Arjun and Reena contacted a credit repair agency ('CRA') after seeing an advertisement on television as they wanted to 'clean' their credit reports. The CRA also provides a number of other debt services, including debt agreements, debt negotiation and debt consolidation. Their financial counsellor advises that Arjun and Reena were told by the CRA that it offered a 'credit restoration process' and a 'debt solution process'. Although Arjun and Reena sought the first offering, they were eventually entered into two Debt Agreements. Arjun and Reena are renting with no significant assets, and have been struggling to make payments under the Debt Agreements. Arjun and Reena were understandably confused about the services on offer and the best option for them, which in this case was likely to have been bankruptcy. Release from the debt agreements will free up their income to help them provide necessities for their children.

Recommended additions

We recommend the following additions to further strengthen the Guideline:

- 1. Telephone conversations** - We have received complaints from a number of consumers about DAAs (and brokers) engaging in high pressure sales tactics over the telephone. It should be clear throughout the Guideline that telephone conversations are a form of 'advertising and marketing'. In terms of enforcement, we suggest pro-active surveillance (such as shadow shopping) to identify whether DAAs are making misleading statements over the telephone.
- 2. 'Alternative to bankruptcy'** - The use of this term to describe Debt Agreements has created misconceptions about the similarities and differences between Debt Agreements and bankruptcy. We recommend that Debt Agreements be referred to instead as a 'different form of bankruptcy' or a 'form of personal insolvency'.

The term 'alternative to bankruptcy' has great significance to many of our clients. In our experience, many people entering into Debt Agreements do not fully understand the differences—and similarities—with bankruptcy. We therefore also suggest requiring DAAs and brokers to publish a simple comparison between bankruptcy and Debt Agreements on their websites, provided by ASFA.¹ DAAs and brokers should also be required to inform consumers of the similarities and differences when providing advice over the telephone.

At a minimum, consumers should be advised that:

¹ An example comparison table can be found on page 9 of Consumer Action's report *Fresh Start or False Hope* - <http://consumeraction.org.au/wp-content/uploads/2013/05/Fresh-start-or-false-hope-April-2013.pdf>.

- both Debt Agreements and bankruptcy are an act of bankruptcy under the Bankruptcy Act;
- both are listed on a credit agency listing for five years;
- both result in a permanent listing on the National Personal Insolvency Index (NPII); and
- both result in restrictions under the *Bankruptcy Act 1966* for the period of the bankruptcy or Debt Agreement.²

Jessica's story

Jessica recently appeared on A Current Affair.³ She has a significant amount of debts and no assets. During the story, Debt Cutters advises Jessica that a Debt Agreement is a 'government initiative and its to just help people to consolidate their debts into one payment and it freezes all the interest that's owing'. While Debt Agreements are a form of personal insolvency under the *Bankruptcy Act 1966*, this does not make it a 'government initiative', nor are Debt Agreements the same as debt consolidation. There is also no mention of the significant fees charged to administer the Debt Agreement.

Debt Cutters then advises Jessica that 'if you didn't want to do the Debt Agreement, your next option would have to be bankruptcy... it's obviously not [the option] you would choose initially'. Given that Jessica has no assets and significant debts, it is in fact possible that bankruptcy should be Jessica's first option.

- 3. Bait and switching** - We are concerned by advertising that offers 'free' services (such as a free credit report or free debt consultation), but ends in a high pressure sales pitch aimed at convincing consumers to sign up to Debt Agreements. We have received reports of debtors contacting debt businesses that offer a range of debt services for one purpose, for example to 'repair' their credit rating, but are eventually sold a Debt Agreement that may be unsuitable for them (see Arjun and Reena's story above). Guidance on using the term 'free' and marketing Debt Agreements when debtors have called for other services would enhance the Guideline. We refer AFSA to the ASIC guideline on financial services and credit advertising, which provides significant guidance about the use of the term 'free' and advertising complex products.
- 4. Referrals to free financial counselling services** - our financial counsellors regularly receive calls from clients who have first sought the assistance of DAAs or others businesses that profit from those in financial difficulty. We believe there is merit in requiring Debt Agreement advertisements to include contact details for free financial counselling services. Similar requirements have been introduced for payday lenders,

² Consumer Action Law Centre, 'Fresh start or false hope? A look at the website advertising claims of Debt Agreement administrators', April 2013, available at: <http://consumeraction.org.au/wp-content/uploads/2013/05/Fresh-start-or-false-hope-April-2013.pdf>.

³ A Current Affair, 'How to get out of your credit crisis', 16 June 2015, available at: <http://aca.ninemsn.com.au/article/8998367/how-to-get-out-of-your-credit-crisis>.

who are required under the *National Consumer Credit Protection Act 2009* to provide the contact details of free financial counselling services in store and online.

Target marketing by DAAs and brokers

We wish to raise our concerns about a number of DAAs and brokers that appear to be targeting consumers who have recently had default judgments entered against them. We have seen numerous instances where consumers have been bombarded by letters from various debt businesses advertising their services following a default judgment. The letters specifically refer to the court reference number and amount of the debt. It appears from the content of the letters that these companies are collecting consumers' details from judgment listings. It is our understanding that debtors' addresses are compiled from Magistrates Court judgments, and sold to debt businesses who in turn contact debtors.

Some of the letters we have seen promoting Debt Agreements state that:

- the business can make the process of getting into a Debt Agreement "smooth and effortless";
- consumers can repay their debts "on their own terms, not at the unreasonable demands of creditors";
- "when [creditors] receive notification that we are acting on your behalf, they will usually place all legal action on hold and wait for us to sort out a mutually beneficial solution for all involved"; and
- a sheriff or bailiff may come to their home to "physically take your personal possessions" away.

We are concerned about how this vulnerable group of debtors would respond to this type of targeted marketing, as often people who are considering entering into a debt agreement are experiencing significant financial stress and may not have a high level of financial literacy. These services are not independent and they may direct people to less suitable options that will return them a fee, but consumers are unlikely to be cognisant of this. We would prefer debtors experiencing financial stress be directed to free and independent financial counselling.

We anticipate that the complaints we receive represent only a sample of the problems consumers who have been targeted in this manner. The broad and potentially misleading claims being made by some of these companies, combined with the vulnerability of this class of debtor, makes this an issue of great concern to us.

We recommend addressing the appropriateness of this type of marketing in the Guideline, including a requirement that DAAs (or their brokers) inform consumers of free financial counselling services and provide a comparison between bankruptcy and Debt Agreements.

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

Yours sincerely

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