Financial Rights
LEGAL CENTRE

Submission by the Financial Rights Legal Centre

O'Shea Lawyers & Credit Repair Australia Pty Ltd

Code of Conduct, December 2015

January 2016

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About the Financial Rights Legal Centre

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumer's understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the Credit & Debt Hotline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. Financial Rights took over 25,000 calls for advice or assistance during the 2014/2015 financial year.

Financial Rights also conducts research and collects data from our extensive contact with consumers and the legal consumer protection framework to lobby for changes to law and industry practice for the benefit of consumers. We also provide extensive web-based resources, other education resources, workshops, presentations and media comment.

This submission is an example of how CLCs utilise the expertise gained from their client work and help give voice to their clients' experiences to contribute to improving laws and legal processes and prevent some problems from arising altogether.

For Financial Rights Legal Centre submissions and publications go to
www.financialrights.org.au/submission/ or www.financialrights.org.au/publication/

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Credit & Debt Hotline 1800 007 007
Insurance Law Service 1300 663 464
Monday – Friday 9.30am-4.30pm

Introduction

Thank you for the opportunity to comment on your draft Code of Conduct for Credit Repair Australia Pty Ltd. The Financial Rights Legal Centre will address the following:

- General comments about Debt Management Firms;
- Best Practice for financial services sector codes of conduct (ASIC's RG 183); and
- Specific comments on sections of draft Credit Repair Australia Pty Ltd Code of Conduct.

General Comments about Debt Management Firms

On 18 January 2016 ASIC released its Report 465 *Paying to get out of debt or clear your record: The promise of debt management firms.*[1] This report presents the findings of research into firms that promise to help consumers in financial hardship or with listings on their credit reports (debt management firms) in Australia. We believe Credit Repair Australia Pty Ltd (CRA) not only fits in the cohort of firms that ASIC describes in Report 465 but it is one of the biggest in Australia.

Along with other consumer advocate groups we strongly believe that debt management firms should be regulated, licensed and comply with the following standards:

- standards relating to online and televised advertisements;
- a strict prohibition on upfront fees
- disclosure requirements (for example, clear disclosure of fees)
- cooling-off periods (for example, two weeks after entering the contract)
- a requirement for firms to inform customer of the availability of free debt advice upon first contact with a debt management firm;
- a requirement that fees and charges:
    - do not have the effect that the consumer pays all, or substantially all, of those fees in priority to making debt repayments; and
    - do not undermine the customer's ability to make significant debt repayments throughout the duration of the plan;
- enforceable rights for credit repair clients, including the right to a refund or compensation if a credit repair company breach their legal obligations;
- a duty to act in the client's best interest;
- a requirement that businesses join an ASIC-approved EDR scheme; and

[1] Report available at: http://www.asic.gov.au/about-asic/media-centre/find-a-media-release/2016-releases/16-011mr-asic-releases-report-on-debt-management-firms/ (January 2016)

- ensuring that ASIC has jurisdiction to exercise its compulsory information gathering powers in relation to commercial debt management firms, and conduct regular risk-based audits.

Although we acknowledge that by drafting its own Code of Conduct CRA is working towards addressing some of ASIC's concerns, we strongly believe that debt management firms should instead belong to an industry-wide and enforceable Code of Practice. Individual Codes of Conduct like the one drafted by CRA will only create inconsistent consumer protections for customers and will not be universally enforceable.

Look to ASIC's RG 183 for Best Practice

Codes of conduct in the financial services sector should be modelled on ASIC's Regulatory Guide 183: *Approval of financial services sector codes of conduct*[2]. Such codes should also include all the key requirements included in RG183.

In particular, we strongly agree with ASIC's RG183 position on the necessary objectives for and industry code:

> *We consider a code to be a body of rules that sets enforceable standards across an industry (or part of an industry), and* ***delivers measurable consumer benefits*** *(*emphasis added). (RG 183.19)

Financial Rights believes those last four words (*delivers measurable consumer benefits*) must be the crux of any financial services code of conduct. If a code does not deliver measurable consumer benefits then there is no point to having a code at all. In any financial services area the legislation sets minimum standards for consumer protections, and then codes of conduct enhance and clarify those protections.

RG 183 sets out minimum standards that Codes of Conduct must adhere to in order to be approved by ASIC. We recognise that this Guide sets out the standards for an *industry* code of conduct, and so may not be applicable to the CRA Code which only applies to a single firm. Nevertheless we believe the criteria set out in RG 183 still serves as a best practice model for the CRA Code to follow.

According to RG 183, the Key Criteria for a code to be approved are as follows:

1. Freestanding and written in plain language
2. Body of rules (not single issue, unless Section E of RG183 relating to ongoing fee arrangements applies)
3. Consultative process for code development
4. Meets general statutory criteria for code approval
5. Code content addresses stakeholder issues
6. Effective and independent code administration

[2] Available at: http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-183-approval-of-financial-services-sector-codes-of-conduct/ (March 2013)

7. Enforceable against subscribers
8. Compliance is monitored and enforced
9. Appropriate remedies and sanctions
10. Code is adequately promoted
11. Mandatory three-year review of code

Unfortunately in its currently drafted form the CRA Code of Conduct does not come close to addressing the above criteria. We are particularly concerned about the absence of numbers 5 (addressing consumer concerns), 7 (enforceability), 9 (remedies) and 11 (3-year review).

Addressing Consumer Concerns

Many of our concerns as consumer advocates about the operations of CRA have been outlined by the recent ASIC Report 465:

(a) CRA charges high fees for services of little value;

(b) CRA gives poor or inappropriate services that can leave consumers worse off;

(c) CRA may have mis-sold services on the basis of misleading representations about the nature and effectiveness of the service; and

(d) CRA may have engaged in unfair and, in some cases, predatory conduct in relation to consumers in financial hardship.

According to our casework experience, people who contact CRA are often experiencing acute financial stress, meaning that they are vulnerable to high-pressure sales techniques and unrealistic promises of assistance. Many Australians have little understanding of credit reporting law and believe, wrongly, that credit repair companies (CRCs) can expunge legitimate listings from their credit files. While companies like CRA promise to help their clients, we are concerned that they only serve to entrench financial hardship. CRCs charge very high up-front fees, sometimes thousands of dollars, for services that could otherwise be accessed free of charge through an industry ombudsman, financial counselling service or community legal centre. Consumers have the right to request a free credit report, and can speak to the credit reporting body or their creditors directly to remove incorrect listings.

CRCs often fail to advise potential clients of the steps they can take to improve their own credit reports, telling them that they have no option but to pay a CRC or wait five years for the listing to be removed automatically. CRCs sometimes use aggressive tactics to get creditors and credit reporting bodies to remove legitimate default listings, which is harming the integrity of the credit reporting system. Often, this involves threatening to the take the creditor to an external dispute resolution scheme, where the creditor must pay for each dispute lodged.

Recommendation

We would like to see the CRA Code of Conduct respond to consumer stakeholder concerns by raising standards of practice for CRA to ensure consumers are not mis-sold ineffective

services, charged high fees for little change to their credit situation, or subject to aggressive sales tactics.

Enforceability

Enforceability of a code is one of the key threshold criteria for ASIC approval. ASIC asserts that it is essential that code breaches can be dealt with effectively and independently, which means that the CRA Code of Conduct should have an independent person or body that is empowered to administer and enforce its provisions.

The CRA Code of Conduct does include IDR and EDR provisions, which are an important part of Code enforceability, but without an independent administrator they are insufficient to ensure that CRA's commitments in the Code are more than just lip service.

Confidence in the effectiveness of the CRA Code of Conduct will be reliant on consumers being able to seek redress under the code. We do not believe that the Code's singular reliance on enforcement through EDR schemes will be adequate.

CRA should also consider incorporating the Code of Conduct directly into its written terms and conditions in consumer service agreements. This will ensure that consumers have some legal redress options when the Code has been breached.

Recommendation

The CRA Code of Conduct must include the creation of an independent person or body that is empowered to administer and enforce its provisions.

The Code of Conduct should be written directly into the terms and conditions of CRA's consumer service agreements.

Remedies

At a minimum the CRA Code of Conduct should have available remedies for code breaches which include:

- Compensation for any direct financial loss or damage caused to a consumer by the breach of the code; and
- The ability to make binding non-monetary orders obliging CRA to take (or not take) a particular course of action to resolve the breach.

Recommendation

That the CRA Code of Conduct include compensatory and binding non-monetary remedies for code breaches.

Independent Review

Section 10.2 of the Draft Code of Conduct states that CRA will "conduct regular reviews of its Code in consultation with appropriate stakeholders and amend and improve it where appropriate to accommodate the views of those stakeholders." We do not think this commitment is adequate.

The CRA Code of Conduct should be independently reviewed at intervals of no more than three years. This is essential to ensure that the Code remains current and continues to deliver real benefits to consumers. An independent reviewer is necessary for the review to take place without bias and includes a broad range of stakeholder views. The review and implementation of any recommendations should be completed within a reasonable timeframe to maintain confidence in the review process.

Recommendation

The CRA Code of Conduct must be independently reviewed every three years.

Specific Comments on Sections of Draft Code

2. Our Key commitments

- Clause 2.1 – This clause should include a commitment to acting in the best interests of customers or prospective customers.
- Clause 2.3 – This clause should be redrafted in clearer language in order to confirm the purpose of the code is to provide protections beyond what is legally required
- Clause 2.5 – This clause should specifically state that fees and charges are part of the information clients need to make an informed choice about purchasing CRA services.
- Clause 2.6 – 'special needs' should include consumers in financial hardship.
- An additional clause should state that services will be described in a clear and truthful manner. Any contracts agreed via conversation shall be recorded in its entirety (not just the consent but the pre-consent conversation), and clearly demonstrate that the key parts of the agreement are understood by the consumer. Where there is a dispute, this information must be freely available at no cost to the consumer.

3. Payments and Agreements

- Clause 3.1 – This clause should include a commitment that CRA will not charge any fees unless the services are suitable for that particular customer and in the client's best interests.
- Clause 3.2 – It is more appropriate for the customer to agree to the terms and conditions of the service in writing before CRA charges any fees. CRA is proposing

the service and understands what the service is, it is the client who needs to confirm they understand and wish to buy the service. People shouldn't be able to sign up over the phone, they should be provided with the information then required to contact CRA again to engage their services.

- Clauses 3.1 and 3.2
    - In regards to credit restoration services, Financial Rights submits that any fees charged (minus a reasonable administrative fee) should be refunded to the customer if CRA is not able to remove any credit listings.
    - In regards to Insolvency services, Financial Rights submits that the practice of getting the consumer to pay their fees first at the exclusion of creditors is inappropriate. CRA's fee should instead be paid as part of any approved Debt Agreement and any fee charged up front should be fully refundable (minus a reasonable administrative fee) if the Debt Agreement is not approved.
- Written and verbal agreements should state the exact date the client has to invoke their cooling off period, to make it user friendly

4. Cooling Off Period

- Clause 4.2 - Financial Rights believes three days is an insufficient cooling off period. The cooling-off period should be a minimum of seven days
- This section needs to be expanded to be very clear what a cooling off period is – ie you can cancel the contract within x businesses days and we won't charge you or provide a refund for any money paid. Also clarify whether the refund is full or partial where some or full services have already been provided.

5. Our Services (This number seems to be a typo, and should be '5' not '6')

- Clause 5.2 (a)- Financial Rights believes the onus should be on CRA to ensure the product is suitable, as opposed to 'not unsuitable' .
- Clause 5.3 – this clause should also apply to 'Credit Restoration Services'.

6. Credit Restoration Services

Clause 6.6 – CRA should also commit to explicitly itemising the listing or items on the credit record that it has <u>not</u> agreed to have amended".

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- Clause 6.7 – Financial Rights submits that 12 months is too long to begin the refund process. We submit that the time frame should instead be nine months, and then the consumer is entitled to a refund without having to apply for it. This guarantee should also appear on the CRA home page of its website.

- Additionally, Financial Rights does not agree that "credit report improved" should be the relevant standard for refunds. Consumers want to get access to credit not an improved credit report. The standard should instead be around getting access to the credit the customer wanted to get access to.
- In the alternative, 'improved' should be defined; this could mean even a very minor change that has little impact on credit worthiness.
- This clause should also include a prominent warning that if there are multiple listings on a customer's credit report, removing only one listing is unlikely to improve the consumer's ability to get credit.

- An additional clause should also make a specific commitment that CRA will not promise to remove or be involved in the removal of judgment listings on a credit reports. This is because a judgment is a public listing based on a court decision and cannot be removed without a Court order either by consent or on application. Such a motion moving the Court for such an order requires legal advice. CRA should not be providing legal advice without the relevant qualifications or professional indemnity insurance.

7. Insolvency Services

- Financial Rights has concerns about the way fees are charged for customers having Part IX Debt Agreements arranged by CRA. In our casework experience CRA customers have been told to stop paying their creditors and instead to pay a fee to CRA. Financial Rights submits that this conduct should be specifically banned in the Code of Conduct. If the customer is not already insolvent then CRA should not be triggering the insolvency by advising customers not to pay their debts in this way. As there is a risk that the Debt Agreement will not be approved it is appropriate that the customer keeps paying his/her creditors, pay a nominal fee to CRA for arranging the Debt Agreement ($150 max) and then any additional fees to CRA are paid as part of the approved Debt Agreement. If the Debt Agreement is rejected then the remaining fees are not owed.

- The total cost of a Debt Agreement must be disclosed, including any fees payable to the Debt Agreement Administrator in addition to CRA, and the fact that those fees will be forfeited in the event that the Debt Agreement is not completed.

- Consumers must explicitly be told if a Debt Agreement is not completed all debts are reinstated including all accrued interest.

- Clause 7.5 – CRA should only refer customers to Debt Agreement Administrators when this is a better option than bankruptcy, or negotiating with the creditor directly. In particular, those customers whose assets and income are below the bankruptcy threshold, or those whose debt may be considered 'unrecoverable', should not be referred to Debt Agreements. If bankruptcy is the best option, the customer should be referred to a financial counsellor for independent advice. CRA also shouldn't be entering customers into Debt Agreements where the amount repayable plus fees

exceeds 100 cents in the dollar, nor should they do so if there is only one creditor involved or ne creditor and a family member

8. Privacy

- We would like to see CRA commit to not participating in hard selling and cold calling, and other types of unsolicited marketing (e.g. unsolicited mail-outs and emails). Marketing communications should be easy to opt out of in customer agreements.
- Clients should be advised who their information has been provided to upon request, and this should be noted on their files

9. Complaints and Dispute Resolution

- Clause 9.1 – CRA should commit to making complaints policy available on website
- Clause 9.3 –CRA should also commit to the IDR process being at no cost to the customer.
- Clause 9.5(a)(ii) – CRA should also consider referring customers to 1800 financial counselling number or legal aid

10. This Code

- Clause 10.2 – Independent Reviews of the Code must be every 3 years.

Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please do not hesitate to contact the Financial Rights Legal Centre on (02) 9212 4216.

Kind Regards,

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