



15 February 2021

By email: CreditReforms@treasury.gov.au

Claire McKay
Manager
Banking and Access to Finance
The Treasury

Dear Claire

Licensing debt management firms: Exposure draft regulations

Thank you for the opportunity to comment on exposure draft regulations that would require some debt management firms (DMFs) to hold an Australian Credit Licence.¹ The following organisations contributed to and endorsed this submission:

- Consumer Action Law Centre
- Consumer Credit Legal Service (WA) Inc
- Financial Counselling Australia
- Financial Counselling Victoria (FCVic)
- Financial Rights Legal Centre
- Uniting Communities Consumer Credit Law Centre SA
- WEstjustice

Executive Summary

While some businesses stepped up to help Australians to recover from the COVID-19 crisis, others have simply sought to profit from people's desperate financial circumstances. Debt management firms (also known as "debt vultures") are among the worst—promising a life free from debt but instead charging large fees, giving bad advice and leaving people in even worse financial strife. It's a dangerous mix: people struggling with bills as a result of COVID-19 but desperate to be debt-free, debt vultures promising to 'help' fix debt and credit report problems but absolutely no rules on how these companies act—even when their bad advice or eye-watering fees make debt problems worse.

We support the Federal Government moving to require some debt management firms to hold an Australian Credit Licence and join AFCA, which will improve access to justice. Predatory operators must be refused a licence to continue operating. We also strongly support the licensing requirement applying to firms that act behind the

¹ <https://treasury.gov.au/consultation/c2021-139564>.

scenes, providing advice and making suggestions but not representing consumers in internal and external dispute resolution.

However, it is critical to complete the job.

Licensing alone will not fix the problems or ensure that people get high quality, competent advice they can trust. Time and again, our services see problems with DMFs *that already hold an Australian Credit Licence*.

The Federal Government must introduce a robust licensing regime with specific conduct obligations to prevent harm. The community expects nothing less. Consumer research from Quantum Market Research, available at **Appendix A**, confirms that Australians overwhelmingly want DMFs subject to a best interests' duty, minimum education and training requirements, and a ban on advance fees.

Australians also want the same obligations no matter the type of underlying debt or credit listing—meaning an extension of these critical reforms beyond credit products regulated by the *National Consumer Credit Protection Act* to the whole gamut of bills and debts that people in financial stress can face: energy and telco bills, school fees, buy now pay later debts, judgment debts, strata fees and more.

We also need a ban on unsolicited selling, obligations on budgeting services, including obligations to place client money in trust, and requirements to signpost to the free services that can help instead, such as financial counselling services.

We recommend ongoing data collection by ASIC to better understand this currently unregulated market and assess the impact of these reforms, ahead of a 2-year review from commencement.

Concerningly, approximately 1.4 to 1.9 million Australians paid a DMF last year. The promise of a 'life free from debt' is particularly appealing when being debt-free is the top sign of success and accomplishment in 2020. DMFs have a ready-made market, with 2 in 5 people struggling to pay everyday bills. With mortgage deferrals and temporary COVID-19 assistance winding up, and high advertising reach by DMFs, the number of people at risk from poor practices in the debt management sector is expected to grow in 2021.

After waiting years for reform of DMFs, now is the time for action. The United Kingdom has already put in place tailored rules for its debt management industry.² There is broad support for reform of DMFs across consumer and industry groups, ombudsman schemes, academia and regulators.³

While licensing of additional DMFs is a positive step, without additional reforms, there is a real risk that licenced DMFs will continue to exacerbate, rather than help, the financial difficulty faced by so many. As the consumer research makes plain, the community expects a comprehensive response to this problem.

A summary of recommendations is available at **Appendix B**.

Information about the contributors is available at **Appendix C**.

This submission contains the stories of people impacted by the conduct of debt management firms – all client names have been changed for privacy reasons.

The harm caused by DMFs

So-called 'debt management' and 'credit repair' target people concerned about bills, debts, home repossession or their credit report. DMFs typically offer quasi-legal and quasi-financial advice often starting with a 'free' consultation and then providing services including negotiating with creditors, repairing credit reports, arranging formal or informal debt agreements or bankruptcy, managing money and budgets, and everything in between.

² Background to the reforms here: <https://www.fca.org.uk/firms/consumer-credit-research-debt-management>.

³ See <https://consumeraction.org.au/debt-management-firms-comm/>.

While the promises made by DMFs can be initially appealing to people in financial difficulty, the reality is very different. Our casework, ASIC Report 465⁴ and academic research⁵ reveal many problems that appear to be common across debt management services, including:

- bad advice that can leave people worse off when firms recommend a debt option that results in a financial benefit to the firm but is not in the person's best interests, or fails to take a holistic approach to the debt problems;
- unfair, predatory and unconscionable conduct;
- mis-selling services based on misleading representations about the nature and effectiveness of the service;
- clever, aggressive and sometimes misleading advertising, which overstates the benefits and understates the consequences of certain debt options;⁶
- no barriers to entry or professional requirements, meaning these firms can employ unqualified and unsuitable staff to provide quasi-legal and quasi-financial advice;
- high, hidden, upfront and non-refundable fees for services of little value;
- conflicted remuneration;
- failure to inform clients of the free options that can assist, such as creditor's hardship programs, ombudsman schemes and financial counselling available through the National Debt Helpline; and
- lack of access to justice for aggrieved clients, with no requirements for internal or external dispute resolution and few practical remedies.

Overall position

We support the draft Regulations and want to see this reform progressed as a matter of urgency.

In particular, we support the definitions of debt management assistance and credit reporting assistance that capture firms acting behind the scenes, giving advice and making suggestions but not necessarily acting as the consumer's authorised representative in internal or external dispute resolution.

Licensing alone is not enough

We strongly support the mandatory licensing of all DMFs. However, licensing alone is not enough. Without specific conduct obligations, the proposed reforms will not ensure that people get advice they can trust on how to resolve debt and money problems.

The proposed reforms will require firms to meet the general conduct obligations of a credit licensee, including that a firm must act 'efficiently, honestly, and fairly' and maintain membership of the Australian Financial Complaints Authority (**AFCA**). This will improve access to justice but will not stop the harm for a number of reasons:

- unlike specific conduct obligations, an Australian Credit Licence does not tell firms how to act, or how to perform debt management services well;

⁴ ASIC, *Report 465: Paying to get out of debt or clear your record: The promise of debt management firms*, January 2016, available at: <http://asic.gov.au/regulatory-resources/find-a-document/reports/rep-465-paying-to-get-out-of-debt-or-clear-your-record-the-promise-of-debt-management-firms/>.

⁵ Chen, O'Brien and Ramsay, 'An Evaluation of Debt Agreements in Australia' (2018) 44(1) *Monash University Law Review*; Ali, O'Brien and Ramsay, 'A Quick Fix? Credit Repair in Australia' (2015) 43(3) *Australian Business Law*.

⁶ Consumer Action Law Centre, *Fresh start or false hope? A look at the website advertising claims of Debt Agreement administrators*, April 2013, available at: <https://consumeraction.org.au/wp-content/uploads/2013/05/Fresh-start-or-false-hope-April-2013.pdf>; See also: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2018-releases/18-148mr-fox-symes-pays-37-800-for-misleading-advertising/>.

- there is a huge gap between what the advertising and early sales interactions promise, and what is actually set out in contracts and in writing. This gap is not understood by consumers—allowing firms to promise the world and deliver very little;
- the existing consumer law protections do not go far enough, or present a very high bar in the case of unconscionable conduct, and it can be hard to make out these claims at AFCA and in courts;⁷
- behavioural science has found that in moments of financial stress, our cognitive bandwidth can be impaired, rendering disclosure obligations entirely ineffective;
- regulators are resource-constrained and cannot monitor every provider effectively, which is of concern given the widespread problems across this industry—it is not simply a few bad apples;
- even when enforcement action is taken by ASIC for breaches of the consumer law, our services continue to see problems with the very same companies.

We know that a licence alone will not stop the harm because some debt management firms already hold an Australian Credit Licence because they provide debt consolidation loans or refinance, or a Debt Agreement Administrator registration, or are voluntary members of AFCA and yet consumers continue to report problems with their services and remedies at AFCA.

Many people contact our advice services about DMFs with either one or both of an Australian Credit Licence and Debt Agreement Administrator Registration, including Debt Fix, MyBudget and Credit Repair Australia. Fox Symes, for example, markets itself as 'Australia's largest provider of debt solutions' and claims to help 100,000 Australians each year.⁸ Fox Symes holds both an Australian Credit Licence from ASIC and Debt Agreement Administrator Registration from the Australian Financial Security Authority (AFSA).⁹ Despite these licences, a recent determination from AFCA against Fox Symes found that:

The financial firm misled the complainant about her options for dealing with her debts when it told her that:

- she could only stop interest accruing on her debts by declaring bankruptcy or entering the agreement;
- she had two options to deal with her debts: to declare bankruptcy or enter the agreement;
- if she applied for hardship assistance, her creditors would not grant her repayment moratoria but would instead require her to continue making some repayments; and
- hardship assistance from her main creditor was unlikely to last longer than a fortnight.¹⁰

The financial firm failed to ensure that the complainant understood the fees payable under the agreement. The financial firm also misled the complainant when it said that she would only pay back 61 cents in the dollar on her debts, when her total payments under the agreement were approximately 96 cents in the dollar.¹¹

Consumers commonly report these types of misrepresentations by various DMFs to our services. ASIC found similar problems in its 2016 report.¹²

⁷ <https://consumeraction.org.au/federal-court-finds-multiple-breaches-of-australian-consumer-law-in-relation-to-credit-repair-but-not-debt-management/>.

⁸ <https://www.foxsymes.com.au/>, accessed 9 February 2021.

⁹ Fox Symes & Associates Pty Ltd ACN 091 225 357 Australian Credit Licence Number 393280; Fox Symes Debt Relief Services Pty Ltd ACN 091 721 845 Registered Debt Agreement Administrator No 1153.

¹⁰ Case No 661320: <https://service02.afca.org.au/CaseFiles/FOSSIC/661320.pdf>, accessed 9 February 2021, p1-2.

¹¹ Ibid

¹² ASIC REP465

While compensation was ultimately payable to the complainant, some of the consequences of bad quality or misleading advice on debt options cannot be undone, even when a consumer is successful at AFCA. For example, the National Personal Insolvency Index will carry a debt agreement listing for years after its completion, which will also be listed on credit reports, impacting a person's ability to obtain credit in future. AFCA will not hear complaints purely about the size of fees, which is a common cause of concern for customers of DMFs. Similarly, options that may have been available at the time of seeking help from the DMF can disappear by the time of the dispute, when the small amount of funds that might have been used to skilfully negotiate full and final settlements are mis-applied on the advice of a DMF.

Below we make recommendations on tailored obligations, beyond mere licensing, that would prevent harm. This is consistent with recommendations of leading academics on reforming credit repair: that Australia should implement a hybrid model of a rule-based regime with licensing.¹³ The most critical additions are a best interests' duty, a ban on upfront fees, and a ban on the use of caveats.

Karen's story

Karen was casually employed on a low income and had a range of listings on her credit record. She also saw an advertisement online by the same firm Georgia used and paid it \$800, in return for which it claimed it could remove the defaults.

Several months later, only one of the several defaults had been removed, at which point Karen came to WEStjustice. We established there was not a legal basis on which the debts could have been removed from her credit report—there were no instructions or evidence to suggest the requirements of the *Privacy Act* or the *Privacy Credit Reporting Code* had been breached in relation to any of the other listings. Accordingly, we believe the firm had engaged in misleading or deceptive conduct when it represented it could remove the listings for a fee.

We had some success arguing on compassionate (rather than legal, per se) grounds for the other listed debts, but were only able to attend a partial refund from the credit repair firm for Karen, who did not want to take the matter further. While the ACL can offer some remedies and solutions in these cases, prescriptive requirements as to conduct under the regulations would confirm the actual expectations as to what these firms can claim to offer.

Case study provided by WEStjustice

John's story

Financial Rights provided legal assistance to John in his dispute against MyBudget. John sought MyBudget's help to pay off his credit cards. He paid a total of almost \$11,000 in fees to MyBudget over a period of four and a half years.

At the time of entering the MyBudget contract, John was working in a supported employment position on account of his disability. John has an intellectual disability as well as severe mental illness. When Financial Rights reviewed John's documents, it alleged that MyBudget:

- prepared a budget for John that was unaffordable from the beginning because it relied on an incorrect income amount;
- provided no meaningful advice;
- failed to review his budget when his financial circumstances drastically changed (he lost his job and got a redundancy payout);
- failed to negotiate with his creditors;

¹³ Ali, O'Brien and Ramsay, *A quick fix? Credit Repair in Australia* (2015) 43 ABLR 179, 204, also available at: <https://financialrights.org.au/wp-content/uploads/2015/06/Ali-O'Brien-Ramsay-Credit-repair-in-Australia.pdf>.

- prioritised payment of its own fees;
- did not cancel his junk consumer credit insurance; and
- continued to pay minimum repayments on his credit cards rather than negotiate lump sum full and final settlement offers using his redundancy payment.

John's debt actually increased over the period he was receiving personal budgeting services from My Budget.

With assistance from his social worker and local Financial Counsellor (both free to him), John eventually cancelled his MyBudget contract, obtained debt reductions and hardship variations on his debts, as well as getting pensioner rates for utilities and found an alternate source of income, which assisted his financial situation enormously. None of these steps were attempted by My Budget.

With help from a Financial Counsellor and Solicitor at Financial Rights, disputes were raised with MyBudget's IDR section and later AFCA, alleging that MyBudget: failed to provide the benefits to John in accordance with the terms of the contract; breached the guarantees as to quality of services under the Australian Consumer Law; engaged in misleading and deceptive conduct; and failed to provide regular account statements. A refund of the fees paid to MyBudget was sought.

John supplied AFCA with evidence from a psychiatrist and psychologist that post-dated his entering the MyBudget contract. The psychiatrist found that John suffered from, among other things, schizoid personality disorder which he had from birth. This severely impacts John's communication skills and academic abilities. John was found to be in the extremely low range and it was noted his conditions are permanent and untreatable.

Nevertheless, AFCA decided that John had not shown he was at special disadvantage at the time he entered into the contract as the evidence was obtained after the contract was entered into (although John had suffered from the condition from birth). AFCA also found that John had provided specific instructions to MyBudget in respect of his finances. This was based on MyBudget's notes. Throughout the dispute, MyBudget refused to supply the recordings of its dealings with John which, we believe, was crucial evidence as to John's understanding of MyBudget's service. AFCA did not require MyBudget to produce the recordings.

In its initial recommendation, AFCA recommended that a portion of the fees taken by MyBudget be refunded to John. Because of his disabilities and mental illness, John found the IDR and AFCA process very difficult. Finding his participation in the dispute a harrowing process, John accepted AFCA's initial recommendation rather than continue the dispute.

Case study provided by Financial Rights Legal Centre (Class No S189089)

Best interests' duty

A best interest's duty must be introduced for all DMFs immediately to meet community expectations and ensure that people seeking advice following mortgage deferrals and struggling with the impacts of Covid-19 get advice that helps them—not just the DMF's bottom line.

Problems that a best interests' duty can fix

People struggling with money and debt problems have a number of options that may be available depending on their individual circumstances. These can include hardship and repayment arrangements, debt waivers, 'do not contact' letters and judgment proof options, and insolvency options such as bankruptcy and debt agreements, or legal claims relating to the underlying debt where the lender has breached the credit laws. Financial counsellors and community lawyers can provide impartial, competent advice on these options, and assist and empower people to choose the best option.

It is essential that people in financial difficulty can trust their advisors. People are often at their most desperate when they seek advice from a debt management firm. They may be facing home repossession proceedings, bankruptcy, or other enforcement action by creditors, or have been refused credit due to listings on their credit report. The UK Financial Conduct Authority found that people are unlikely to shop around for debt management services and once the firm offers the prospect of help, people are susceptible to influence or make choices that are not in their best interest.¹⁴

Unfortunately, time and again, we see conflicted or poor-quality advice from DMFs in Australia:

- recommending the options that the firm itself delivers in-house but ignoring or downplaying options that the firm doesn't deliver in-house;
- recommending the option from which the DMF will earn larger fees—such as recommending a Part IX debt agreement instead of negotiating hardship arrangements;
- failing to inform customers of all the relevant options, particularly options like requesting no more contact, 'judgment-proof' options (for people with no assets and low income), and debt waivers; or
- failing to consider the pros and cons of each option and whether it meets the consumer's needs and individual circumstances.

These issues can be seen in through our casework, ASIC Report 465, and in AFCA Determination 661320 against a firm that holds an Australian Credit Licence and a Debt Agreement Registration.¹⁵ Excerpts from the determination at pages 10-12 below show some of the misleading statements made by the DMF's consultant (based on call recording transcripts) and the true position, as found by AFCA:

Date	Representation	True position
23 January 2017	<p>That the complainant had two options for satisfactorily resolving her debts – bankruptcy or a debt agreement.</p> <p>Consultant – "So right now you've got two options – you can either consider bankruptcy, walk away, give yourself a fresh start. Or if you morally want to</p>	<p>The complainant had the option to negotiate directly with creditors for interest freezes, repayment holidays and debt reductions.</p>
	<p>repay your debts, you can consider a debt agreement. It really just comes down to where you mentally and emotionally are, as to whether you can deal with a payment plan."</p>	

¹⁴ Financial Conduct Authority, *Quality of Debt Management Advice*, June 2015, available at: <https://www.fca.org.uk/publication/thematic-reviews/tr15-08.pdf>.

¹⁵ AFCA Determination, Case Number 661320, 9 June 2020, p11-12: <https://service02.afca.org.au/CaseFiles/FOSSIC/661320.pdf>.

24 January 2017	<p>That the complainant's main creditor would not agree to a repayment moratorium if the complainant sought one whilst she looked for a new flatmate after evicting her previous violent flatmate.</p> <p>Consultant – "I can go in and apply for financial hardship ... but that means I need payments from you to go and start paying your debts... I can maybe squeeze it out for two weeks... But they're not going to say we need no more repayments for a month or two months. It doesn't work like that."</p>	<p>The complainant could have sought a repayment moratorium due to her short-term hardship caused by her personal circumstances. The creditor may have agreed.</p>
17 August 2017	<p>Consultant - "The only way to stop interest on your debts is in two avenues – by applying for a debt agreement and waiting for it to get approved, or bankruptcy, okay?"</p>	<p>The complainant could have asked her creditors for an interest freeze.</p> <p>Given that the complainant's two largest debts were a Centrelink debt and a shortfall debt from sale of a secured asset which she surrendered, it is possible the complainant could have entered interest-</p> <p>Centrelink has a standing policy that it does not charge interest on repayment plans.</p>

A best interests' duty applies to other credit licensees

A best interests' duty already applies to financial advisors, mortgage brokers and is in the process of being extended to other finance brokers. Applying a best interests' duty to DMFs is consistent with the Federal Government's extension of the duty to mortgage brokers and other finance brokers, which is 'intended to improve outcomes for consumers.'¹⁶

Like credit assistance providers, DMFs should be able to weigh up the variety of options people have with debts and make recommendations in the customer's best interests. Indeed, this is what DMF customers expect. It would be a simple drafting exercise to apply the existing requirements to debt management assistance' and 'credit reporting assistance', as the proposed new forms of prescribed credit activity.

A best interests' requirement has already been usefully applied to debt management firms in the United Kingdom. Section 138G of the *Financial Services and Markets Act 2000* (the **FSMA**) confers power on the Financial Conduct Authority (**FCA**) to make binding rules. The rules in relation to debt advice include that:

A firm must ensure that: (1) all advice given and action taken by the firm or its agent or its appointed representative: (a) has regard to the best interests of the customer; (b) is appropriate to the individual circumstances of the customer; and (c) is based on a sufficiently full assessment of the financial circumstances of the customer.¹⁷

¹⁶ National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020, Explanatory Material, para 1.27: https://treasury.gov.au/sites/default/files/2020-11/c2020-124502_explanatorymaterialsforbill.pdf.

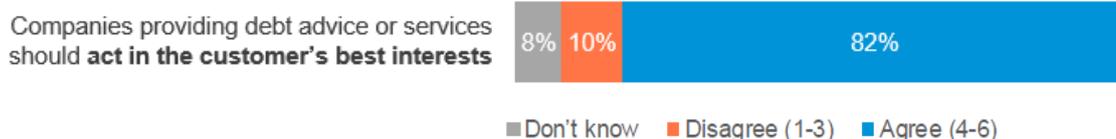
¹⁷ Financial Conduct Authority, Consumer Credit Sourcebook, CON C 8: Debt Advice, Rule 8.3.2: <https://www.handbook.fca.org.uk/handbook/CONC.pdf>.

These requirements enabled the UK Financial Conduct Authority (after taking over responsibility for DMFs in 2014) to undertake useful reviews of the quality of advice in the debt management industry in 2015¹⁸ and take action with underperforming firms to improve firms' practice and outcomes for consumers. The follow-up market review in 2019 found that, although some problems remained:

The culture in most commercial firms was now more focused on customer outcomes, acting in customers' best interests in the provision of advice and managing customer risks from within firms' businesses.¹⁹

Australians want a best interests' duty

Unsurprisingly, people are shocked when they discover the lack of rules and obligations on firms providing debt management services. People overwhelmingly support a best interests' duty being introduced for debt management firms. Consumer research found that 82% of people agreed with that DMFs should act in the customer's best interests:²⁰



Q514. To what extent do you agree or disagree with the following statements about companies that charge money for advice or services to help people deal with debt problems or repair credit reports? (Scale of 1-6)

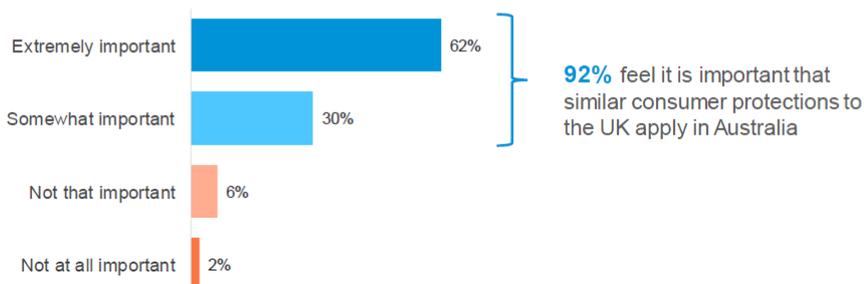
Support was even stronger for the UK requirements, with 92% of people responding that it was important or extremely important that the Federal Government introduce similar consumer protections to the UK requirement, where DMF advice and services must be in the customer's best interests but also tailored to their individual circumstances and based on a full assessment of their financial position.²¹

Perceived importance of UK-style consumer protections for the debt management industry in Australia

Base: All respondents, n=2,005

In the United Kingdom, a company providing debt advice or services must make sure the advice it gives to people is: a) in their best interests; b) appropriate to their individual circumstances; and c) based on a full assessment of their financial circumstances. These protections do not currently apply in Australia.

How important do you feel it is for similar consumer protections to apply in Australia?



- Once Australians are aware that there are no consumer protections in place for companies providing debt management advice, as many as 92% feel that it is important for protections (similar to those in the UK) to apply here in Australia.
- Those with a lower household income (<\$50K) are more likely to feel that these protections are *extremely* important (68%).

Clearly, any licensing regime without a best interests' duty will fall well short of community expectations.

¹⁸ Financial Conduct Authority, TR15/8: Quality of debt management advice, 25 June 2015, <https://www.fca.org.uk/publication/thematic-reviews/tr15-08.pdf>.

¹⁹ Financial Conduct Authority, TR19/1: Debt management sector thematic review, 15 March 2019: <https://www.fca.org.uk/publications/thematic-reviews/tr19-1-debt-management-sector-thematic-review>.

²⁰ See page 16 of Appendix A.

²¹ See page 15 of Appendix A.

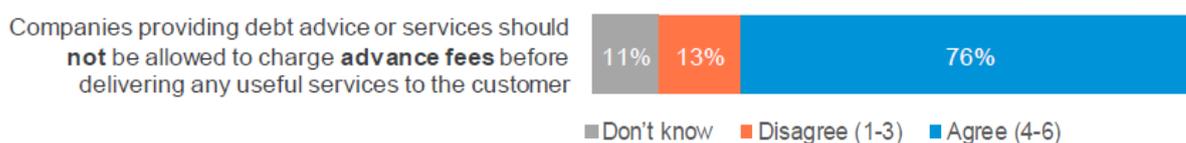
RECOMMENDATION 1. Introduce a requirement that all action and advice by DMFs be in the customer’s best interests, appropriate to their individual circumstances, and based on a sufficiently full assessment of their financial circumstances.

Advance fees

A recurrent problem with DMFs is the use of high upfront or advance fees before services are provided. These fees, often thousands of dollars, exacerbate rather than help people in financial hardship. They create perverse incentives for the firm, which does not need to do any further work—a common complaint about credit repair firms. Upfront fees get in the way of shopping around for another firm. High upfront fees also get in the way of paying creditors.

We routinely hear from people who paid upfront fees after hard-sell tactics by DMFs, particularly for credit repair. This includes people signed up on the phone, while driving or tending to their children, without the paperwork before them. Many people report trying to get a refund almost immediately, after realising they were pressured into a service they don’t want or that is too expensive, but the firm refuses, even when no work has been done. These problems will remain even after licensing. In most cases AFCA does not hear disputes about fees.

There is strong support for a ban on advance fees before delivering useful services. Consumer research found that Australians also want this practice stamped out, with 76% of respondents agreeing with the statement that:²²



Q514. To what extent do you agree or disagree with the following statements about companies that charge money for advice or services to help people deal with debt problems or repair credit reports? (Scale of 1-6)

The United States has already banned upfront fees for credit repair firms. The *Credit Repair Organization Act* makes it illegal for credit repair companies to lie about what they can do for consumers, and to charge consumers before the firm has performed the service.²³

A ban on upfront fees would stop the fees-for-no-service rip-offs, incentivise timely services that actually help, and prevent additional financial stress on people already struggling to make ends meet.

RECOMMENDATION 2. Ban upfront fees.

Caveats

We have also seen some debt management firms lodge caveats over a person’s home to secure payment of the firm’s fees—including for debt management services of little or no value. Sadly, these are homes that will inevitably need to be sold due to the severe financial distress of the owner, despite the firm’s promises to avoid repossession and help them keep their home. The caveat puts the homeowner in an impossible position—pay the firm’s fees, or see the sale fall through.

Much like the problems with advance fees, it also creates a perverse incentive for the DMF – once the contract with a caveating clause is signed, there is little incentive to complete the work. Few if any people would understand a caveating clause.

²² See page 16 of Appendix A.

²³ <https://www.consumer.ftc.gov/articles/0225-credit-repair-scams#Know>.

It creates additional stress and risks for the consumer when attempting to have the caveat removed. Despite the relative ease of lodging a caveat, it is exceedingly difficult for a homeowner to remove a caveat without the caveator's consent. The process is complex and varies between states and territories. In Victoria, for example, under the *Transfer of Land Act 1958 (the Land Act)*, the homeowner has two options to remove a caveat lodged by a DMF with both involving complex and costly court proceedings. Under section 89A of the Land Act, the homeowner can lodge an application to the Registrar of Titles requiring the caveator to commence proceedings to substantiate the caveator's claim within 30 days. If the caveator fails to substantiate their claim or the proceedings are discontinued, the caveat lapses. Alternatively, the homeowner can commence summary proceedings in the Supreme Court to remove the caveat via section 90(3) of the Land Act. Court proceedings are complex, costly and take time, and require legal representation. This makes them generally unsuitable options for vulnerable, financially stressed homeowners with very few resources.

This practice of using caveats to secure a DMF's own fees is of huge concern to consumer advocates, and to consumers. Between July 2016 to July 2020, Consumer Action received over 75 complaints to its legal practice and financial counselling service referring to one debt management firm alone that is known to use caveating clauses in its contracts.

There is no reason in principle for a DMF to use caveats to secure its fees. A competent firm providing a service that actually helps resolve financial difficulty will have its fees paid in due course. This practice is akin to taking a 'blackmail' security, which is already banned in parts of the credit laws.²⁴ This practice of using the caveats system to secure the DMFs own fees should be banned, either directly or as a condition of holding a licence.

RECOMMENDATION 3. Ban the use of taking security for the DMF's own fees, either in the Regulations or as a condition of holding a licence.

Chan's story

Chan arrived in Australia in her adulthood as a refugee, and has limited financial and legal literacy. She fell into severe mortgage hardship after being out of work following an injury, and built up about \$5,000 in mortgage arrears. She first found out that the situation had escalated when she received a letter from a debt management firm telling her lender was taking her to court, before she had even been physically served with any documents. This was followed up by an unsolicited knock at the door by one of the firm's salespeople.

Chan rang the firm's number and, believing they could help stop the bank from moving on her home, completed online documents signing her up for its services. She did not fully understand everything in the contract, which was densely worded, and later discovered that the fees in the contract were higher than what she had been led to expect on the phone.

When she stopped receiving updates from the firm, she approached WEstjustice for assistance with her mortgage matter. We immediately contacted the firm and demanded they cease performing work for Chan and deal directly with us. Instead, they tried to ring her directly a number of times to pressure her to keep using their service. Chan was never provided with an explanation of exactly what work, if any, they had performed for her.

Chan eventually had to sell her house to avoid repossession. However, days before settlement it was discovered that the debt management firm had placed a caveat over her property, and they refused to remove this until the amount they had invoiced was paid in full. Although it is likely that Chan had strong arguments under the ACL about the firm's conduct and the performance of its services, she did not have time for her financial situation to deteriorate and paid what the firm was asking.

²⁴ Section 50(2) *National Credit Code*.

Chan described a feeling of being held 'hostage' by the firm's conduct. She says if she had realised the DMF would be given the ability to place a caveat over her home like it did she would have never made an agreement with it. Our concern is that even if these firms are required to be licensed, opportunistic tactics such as allowing for a charge over property in contracts will continue unless expressly outlawed.

Case study provided by WEstjustice

Advertising and unsolicited selling

DMFs have proven adept at clever, aggressive, and occasionally misleading advertising and marketing tactics. Too often, the reality falls far short of the promise of a 'life free from debt,' or a 'clean' credit report that will enable access to credit.

Some firms have used Google adwords to grab attention—so that their own DMF turns up in the search results when people search for the 'National Debt Helpline' or 'credit report' online.

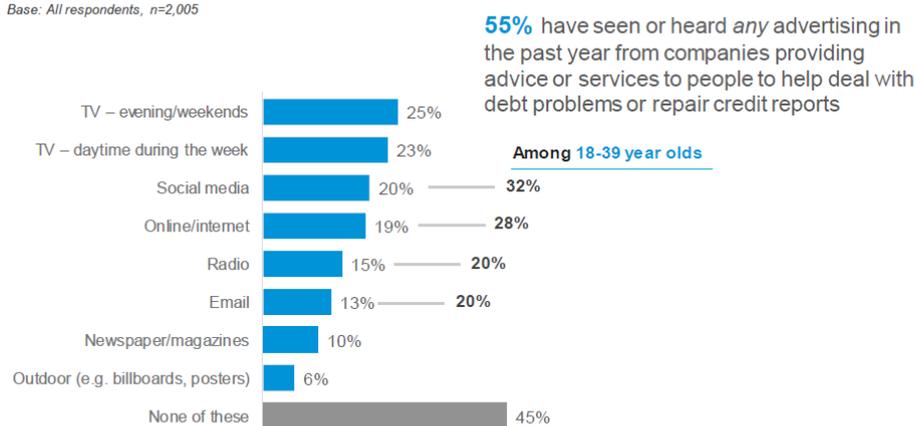
Others appear to use court marketing lists to find people defending home repossession proceedings by the lender and then target market to the individual, as Miki's story below demonstrates.

Many consumers are not aware of their existing right to get errors on credit reports fixed for free. This can be done by complaining to the organisation that made the listing (such as the lender, energy retailer or telco), or to the credit reporting bureau, or by lodging a dispute with industry ombudsman schemes—all for free. Too often, people only find out about these free options after paying exorbitant fees to a credit repair agency. This problem has been described with concern by the Energy and Water Ombudsman in Victoria²⁵ and in NSW.²⁶

DMFs have a staggering advertising reach. Research from November 2020 found that 55% of survey respondents had seen an ad for a DMF in the prior 12 months:²⁷

Seen or heard any advertising in the past year from debt management companies

Base: All respondents, n=2,005



²⁷Based on 55.15% among a population of 19,752,086 Australian adults aged 18+ years (Australian Bureau of Statistics) and a margin of error of +/-1.19% Q513. Have you seen or heard any advertising in the past year from companies providing advice or services to people to help deal with debt problems or repair credit reports?

- Over half of Australians (55%) have seen or heard advertising in the past year from companies providing advice or services to people to help deal with debt problems or repair credit reports.
- This represents approximately 10.5 to 11.3 million Australians[^]
- This proportion increases to 65% among 18-29 year olds, who are comparatively more likely to have seen or heard advertising on social media, online, radio or via email.

The advertising is clearly effective, with 8% of Australians paying for debt management or credit repair services in the last year. This represents approximately 1.4 to 1.9 million Australians.

The proposed reforms won't go nearly far enough to tackle these practices or prevent harm and confusion for consumers from DMFs wide advertising reach. Behavioural science shows us that people are highly unlikely to shop around for debt help, and once engaged with a firm, will be susceptible to the salesperson's influence.

²⁵ Cynthia Gebert, Energy and Water Ombudsman Victoria, on ABC RN Law Report from 15:01 onwards: <https://www.abc.net.au/radionational/programs/lawreport/elder-abuse-and-covid19/12939054>.

²⁶ <https://www.ewon.com.au/page/media-center/blog/supporting-regulatory-reform-for-debt-management-firms>.

²⁷ See page 14 of Appendix A.

Infringement notices for misleading advertising are not a sufficient deterrent—the fines are paltry, and the harm is already done. In an age of in-app and targeted advertising, it is very hard for regulators to even know what and how the firms are representing their services to consumers beyond television and radio ads.

Similarly, including links in contract documents arrive far too late. It is the first, early interactions with a DMF, through its advertising, and the first phone call, that shape a person's understanding of the firm's services. This is where the harm starts, and where it can be prevented.

We recommend:

- **Requirements to meaningfully signpost to free services:** In the United Kingdom, DMFs must signpost the availability of independent free debt advice in their first oral or written communication with a consumer (Rule 8.2.4). Registered Debt Agreement Administrators must give people information about free financial counselling services 5 days before entering a Part IX debt agreement.²⁸ We strongly recommend similar requirements here as a bare minimum—pointing to the National Debt Helpline,²⁹ and industry ombudsman schemes, or ASIC MoneySmart.gov.au as appropriate.
- **Extend the ban on unsolicited selling:** The Federal Government has just reformed the anti-hawking laws for all financial products—implementing a critical reform recommended by the Financial Services Royal Commission that should stamp out hard sell tactics like cold-calling and other forms of unsolicited selling in insurance and superannuation. This important reform should be extended to debt management firms.

RECOMMENDATION 4. Require DMFs to meaningfully signpost to free services in their advertising and during the firm's early contact with consumers.

RECOMMENDATION 5. Extend the ban on unsolicited selling in financial services to DMFs.

Miki's story

Miki had a lengthy period of unemployment after a severe workplace accident in which she incurred an acquired brain injury. During this time she accrued significant mortgage arrears and other legal problems.

She came to WEstjustice when she received notice that her bank was taking her to court for her default. At her appointment, she also provided us with twelve different pieces of correspondence she had received in the past month from different debt management firms. The level of sophistication varied—some were handwritten or typed 'notes' from 'investors in the area' who claimed they could help her financially with the bank and organise a fast sale of the house – others on letterhead gave the appearance of being from professional services firms and promised to help her stay in her home or 'rescue her mortgage'. None provided information on financial counselling or ombudsman schemes. All appeared to have obtained her information from Court registry lists when the lender first filed in court.

Miki was relieved given her circumstances that she was referred to our services before she had contacted any of the firms. Our concern is that prescriptive processes need to be in place for how debt management firms advertise their services and what those ads include so that people in hardship don't inadvertently pay for a service they could access themselves for free.

Case study provided by WEstjustice

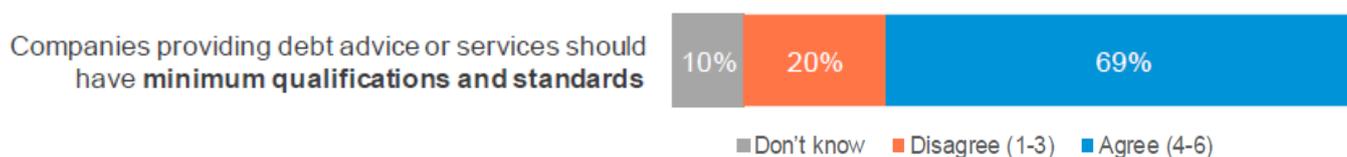
²⁸ S4(3)(c), Bankruptcy (Registered Debt Agreement Administrator Conditions) Determination 2020, 24 August 2020: <https://www.legislation.gov.au/Details/F2020L01098>.

²⁹ Similar signposting exists in the credit laws. Providers of small amount credit contracts (payday loans) are required to advise potential borrowers about the existence of financial counselling via warning notices. See for example Schedules 7 and 9 of the National Consumer Credit Protection Regulations 2010 for the warning notice required for on the premises and websites respectively.

Training requirements

Our casework would suggest that many, if not most, DMFs fail to understand the full suite of debt options available for consumers and their consequences, and the complexities of the credit reporting system.

Given the concerns about the competence and skill of existing DMFs, it is important they hold and maintain relevant skills and meet minimum competency and ethical standards. This could also be achieved by requiring a best interests' duty (discussed above). Without specific training requirements, we will continue to see poor quality advice. Australians expect no less, with 69% of survey respondents agreeing that DMFs should meet minimum qualifications and standards:³⁰



Q514. To what extent do you agree or disagree with the following statements about companies that charge money for advice or services to help people deal with debt problems or repair credit reports? (Scale of 1-6)

RECOMMENDATION 6. Require minimum training standards for all DMFs.

Gaps in the reform

While we support the Government taking steps to license some debt management firms, we are concerned that the proposed licensing regime falls far short of a robust, fit-for-purpose licensing framework. Below we identify some gaps that require a second tranche of reforms.

Trust and confidence in the DMF industry cannot be achieved with a piecemeal regime. Consumer research found that under a scenario in which protections or regulations are introduced for some debt management services and companies (e.g. covering loans but excluding energy bills, phone or internet bills, buy now pay later debts, school fees), 57% of Australians indicate they would feel more confident. However, this proportion increases significantly to 72% in a scenario where protections cover the whole industry:³¹

³¹ See page 17 of Appendix A.

Impact of changes to protections on perceived confidence in the industry

Base: All respondents, n=2,005

	Don't know	Less confident	A little more confident	Much more confident	TOTAL MORE CONFIDENT
Protections/regulations are introduced for some debt management services and companies (e.g. covering loans but excluding energy bills, phone or internet bills, buy now pay later debts, school fees)	23%	20%	43%	14%	57%
Protections/regulations are introduced for all debt management services and companies	17%	10%	31%	41%	72%



Q515. At present in Australia, these debt management companies are mostly unregulated. This means anyone can advertise and provide debt advice and credit repair services without a licence, professional qualifications, or being required to act in their clients' best interests. To what extent would your confidence in the debt management industry change under the following circumstances...?

Non-credit products: energy, telco

We know from our casework experience that people struggling to make ends meet usually have a range of debts and bills: mortgage and credit cards but also buy now pay later debts, energy, telephone and internet bills, council rates, school fees, body corporate fees, judgment debts and more. Consumer research found the same, with 2 in 5 Australians concerned about their ability to pay everyday bills in the next 3 months. This includes regulated credit products such as loans and credit cards, but also non-credit products and services energy bills (22%), groceries (19%) and council rates (11%).³²

Too often we see a debt management firm cherry pick a "solution" that earns the firm fees, but does not provide a holistic, realistic solution to the consumer's overall financial difficulty. We are concerned about the lack of competent and strategic advice on the consumer's overall financial position, with debt negotiation companies often undertaking ad hoc negotiations which reduce individual debts and entitle the firm to fees under its contract, without regard to whether there is a net benefit to the consumer. For example, the family home will still be at risk of repossession even where an arrangement is negotiated with the bank, if the energy company, private school, or body corporate start bankruptcy proceedings.

Similarly, credit reports contain information beyond credit products—energy and telco defaults, judgment debts and insolvency information. Credit repairers purport to help with the entire credit report, not just the listings that link to regulated credit products.

While most current DMFs will likely need to apply for an ACL based on their current operating model, there is a real risk of avoidance once these reforms pass. We can easily foresee DMFs adapting their offering to avoid licensing obligations. For example, a credit repair company could incorporate a separate business tailored to "telco credit repair" or "energy credit repair", which would not be captured by the draft Regulations.

³² See page 7 of Appendix A.

While AFCA's terms of reference may be broad enough to capture such services, it is less clear how any other obligations would apply to advice and action on non-credit products.

It would be preferable to put beyond doubt that the obligations apply to, and ASIC has remit over, all debt management and credit repair activity, regardless of the type of underlying debt or credit listing.

Without clear obligations on firms to look at the person's entire financial position and individual circumstances – as required in the United Kingdom—people will continue to receive cherry-picked "solutions" that do not improve their financial wellbeing overall.

RECOMMENDATION 7. Clarify that advice and action by licenced DMFs must have regard to the consumer's overall financial position and individual circumstances, including on products beyond those regulated by the National Consumer Credit Protection Act.

Georgia's story

Georgia was attempting to clear her credit record after escaping from a violent relationship. She had a range of utility debts (energy, water, and telecommunications) which had defaulted and been listed. She responded to an ad on social media from a firm which promised to clear her credit record. After an initial call she paid a total of \$1,100 (all of her savings at the time) to the firm.

When Georgia came to WEstjustice two years later, none of the debts had been removed and it was not clear what, if anything, the credit repair firm had done. Ultimately, we were able to get the debts waived promptly on the basis of the family violence circumstances by advocating for Georgia through the respective companies' policies.

When we wrote to the firm demanding a refund for the money Georgia had paid, they offered only a partial refund as settlement. With ongoing family law proceedings occurring, Georgia felt she did not feel able to deal with another legal matter and reluctantly agreed to the partial refund.

We are concerned that a licensing requirement that only covered credit reporting assistance in the course of suggesting or assisting in regards to an amount under a credit contract, would inadvertently fail to give protection in cases like these, or encourage avoidance behaviour by market participants.

Case study provided by WEstjustice

Budgeting and money management services

Personal budgeting services usually operate on the promise that they will manage your income to ensure the payment of bills and debts on your behalf, while providing you with an allowance for daily expenses. Some personal budgeting services will also claim to provide other services, such as reviewing your financial position on a regular basis and negotiating future repayment arrangements with your creditors. In managing your payments, they will often charge you periodic 'maintenance' or management fees. This is often in addition to, up-front 'establishment' fees charged to set up accounts with them. Set-up fees can be around \$1,900 and the ongoing fees can be around \$38 per fortnight. Firms usually pay themselves from consumers' money before they pay creditors, and keep the interest earned on consumers' money sitting in the firm's account.

We have several concerns: budgets that are unsustainable, with bills that are left out or are not paid; ongoing and upfront fees that make the person's existing financial difficulty worse; no protections for the consumer's money sitting in the bank account of the budgeting service; and little accountability from the firm when things go wrong, such as defaults or services disconnected when the budget or payments are insufficient.

These debt management services will continue to sit in a regulatory gap after the proposed reforms. Where a debt management firm only provides budgeting services (as opposed to credit assistance) there is no requirement to hold a licence. As such, there are no requirements or laws that apply to their handling/holding of client monies.

The existing consumer protections and AFCA membership are not sufficient protections, as **John's story**, above, demonstrates.

RECOMMENDATION 8. Include personal budgeting services in the DMF licensing regime, with obligations including mandatory trust accounting to protect client funds and a prohibition on retention of interest earned from client accounts

Priya's story

Priya is in her 70s and lives with a number of health conditions. Priya has been unemployed since the 1990s and, her sole source of income is the disability support pension. Priya has been using a personal money managing service for many years.

Priya reports that she told the DMF that she wanted to pay off her credit card debts, to be able to live without having to pinch pennies and increase her savings. The DMF reviewed her financial circumstances and advised that they could create a plan that could help to achieve her goals.

Despite this, while the DMF was managing her money, Priya reports that there were many occasions where:

- Priya did not have sufficient money in her account for her everyday living expenses;
- The DMF did not allocate sufficient funds to pay her bills and she was charged late fees;
- The DMF did not notify Priya that her bills were overdue, and she would only find out information about her bills when she called them; and
- Even when she requested details, the DMF would only provide limited information, leaving her confused about what she owed and to whom.

Priya has paid over \$14,000 in fees to the DMF, which exacerbated her financial hardship.

Case study provided by Consumer Action Law Centre

Technical amendments

Guarantors

The definition of 'credit reporting assistance' in proposed section 4C of the Regulations refers to conduct in relation to a credit contract "for which the consumer is the debtor". Credit reporting information may be recorded in respect of a consumer's credit history as a guarantor. Based on the current wording, credit reporting services that relate to such credit reporting information may not be captured. We recommend that the definition be changed to capture DMF activity in relation to guarantors. For example, the wording could be amended to "for which the consumer is the debtor or a guarantor".

Suggesting

It is not clear whether the definition of 'credit reporting assistance' in the draft Regulations would capture the activities of credit repair firms that merely provide a 'how to' guide in return for receiving significant fees. It would be helpful to put beyond doubt that such services are captured.

Review

While we support swift action to licence DMFs, there is much work left to be done. We recommend a review of the proposed reform 24 months from its commencement to assess its effectiveness and fix any outstanding issues. To improve transparency in this sector and assist in the review, we recommend ongoing data collection by ASIC about the operation of DMFs and their conduct.

RECOMMENDATION 9. Review the impact of the proposed reforms 2 years from commencement.

RECOMMENDATION 10. Require ongoing data collection and publication by ASIC.

Conclusion

Overall, we support the draft Regulations and encourage the Federal Government to proceed with these much-needed reforms without delay. With rising financial difficulty, it is more important than ever that DMFs are held to high standards, and predatory operators denied a licence.

However, it is critical to complete the job to stop the harm. In the short term, bans on upfront fees, caveats, and signposting could easily be built into the current reforms. The further recommendations we make above should be built into a second tranche of reforms. As the consumer research makes plain, Australians expect a comprehensive response to this problem.

Please contact Policy Officer **Cat Newton** at **Consumer Action Law Centre** on 03 9670 5088 or at cat@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,



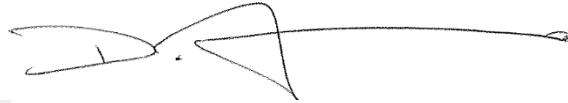
Gerard Brody | CEO
CONSUMER ACTION LAW CENTRE



Fiona Guthrie | CEO
FINANCIAL COUNSELLING AUSTRALIA



Roberta Grealish | Managing Solicitor (Acting)
CONSUMER CREDIT LEGAL SERVICE (WA) INC



David Ferraro | Managing Lawyer
CONSUMER CREDIT LAW CENTRE SA



Karen Cox | CEO
FINANCIAL RIGHTS LEGAL CENTRE



Melissa Hardham | CEO
WEstjustice

On behalf of:

Dr Sandy Ross | Executive Officer
FCVic

APPENDIX A – Debt Management Firm Research

Quantum Market Research, 'Debt Management Firm Research,' Report, December 2020, commissioned by Consumer Action Law Centre.

Attached and also available at: https://consumeraction.org.au/wp-content/uploads/2020/12/CALC_Debt-Management-Firms-Research_Report_7Dec20.pdf

APPENDIX B – Summary of Recommendations

RECOMMENDATION 1. Introduce a requirement that all action and advice by DMFs be in the customer's best interests, appropriate to their individual circumstances, and based on a sufficiently full assessment of their financial circumstances.

RECOMMENDATION 2. Ban upfront fees.

RECOMMENDATION 3. Ban the use of taking security for the DMF's own fees, either in the Regulations or as a condition of holding a licence.

RECOMMENDATION 4. Require DMFs to meaningfully signpost to free services in their advertising and during the firm's early contact with consumers.

RECOMMENDATION 5. Extend the ban on unsolicited selling in financial services to DMFs.

RECOMMENDATION 6. Require minimum training standards for all DMFs.

RECOMMENDATION 7. Clarify that advice and action by licenced DMFs must have regard to the consumer's overall financial position and individual circumstances, including on products beyond those regulated by the National Consumer Credit Protection Act.

RECOMMENDATION 8. Include personal budgeting services in the DMF licensing regime, with obligations including mandatory trust accounting to protect client funds and a prohibition on retention of interest earned from client accounts

RECOMMENDATION 9. Review the impact of the proposed reforms 2 years from commencement.

RECOMMENDATION 10. Require ongoing data collection and publication by ASIC.

Appendix C – About the Contributors

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 marketplace for all Australians.

Consumer Credit Legal Service (Inc) WA

Consumer Credit Legal Service (WA) is a not-for-profit charitable organisation which provides legal advice and representation to consumers in WA in the areas of banking and finance, and consumer law. We strengthen the consumer voice in WA by advocating for, and educating people about, consumer and financial, rights and

responsibilities. In the 2018/2019 financial year, we represented over 100 clients in their disputes, and participated in over 40 law reform activities.

Financial Counselling Australia

FCA is the peak body for financial counsellors in Australia. We are the voice for the financial counselling profession and provide support to financial counsellors including by sharing information and providing training and resources. We also advocate on behalf of the clients of financial counsellors for a fairer marketplace.

FCVic

Financial Counselling Victoria (FCVic) is the peak, professional body for financial counsellors in Victoria, and a member organisation of Financial Counselling Australia. FCVic advocates on behalf of financial counsellors and their clients on systemic issues that cause and exacerbate poverty and hardship.

Financial Rights Legal Centre

Financial Rights is a community legal centre that specialises in helping consumers 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 National Debt Helpline, 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, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters.

Uniting Communities Consumer Credit Law Centre SA

The Consumer Credit Law Centre South Australia (CCLCSA) was established in 2014 to provide free legal advice and financial counselling to consumers in South Australia in the areas of credit, banking and finance. The Centre also provides legal education and advocacy in the areas of credit, banking and financial services. The CCLCSA is managed by Uniting Communities who also provide an extensive range of financial counselling and community legal services as well as a large number of services to low income and disadvantaged people including mental health, drug and alcohol and disability services.

WEstjustice

WEstjustice provides free legal advice and financial counselling to people who live, work or study in the cities of Wyndham, Maribyrnong and Hobsons Bay, in Melbourne's western suburbs. We have offices in Werribee and Footscray as well as a youth legal branch in Sunshine, and outreach across the West. Our services include: legal information, advice and casework, duty lawyer services, community legal education, community projects, law reform, and advocacy.