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NSW Fair Trading
Fair Trading Amendment (Commercial Agents) Regulation 2021
Better Regulation Division, Regulatory Policy
NSW Government
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New rules for commercial agents in NSW

Thank you for the opportunity to comment on the *Fair Trading Amendment (Commercial Agents) Regulation* which will support the Amending Act. The 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.

Every day Financial Rights takes dozens of calls from consumers across NSW struggling with debt and debt collection. We regularly hear examples of poor debt collection practices from lenders, debt buyers and commercial agents engaging in debt collection and repossession activities.

We have over 100 legal information fact sheets and sample letters across our various websites and Dealing with Debt Collection, the Recovery of Old Debts and The Sheriff and Seizure of Goods have always in the top ten of the most viewed fact sheets on our financialrights.org.au site. In the recent NSW Lockdowns (July-Oct 2021) our Dealing with Debt Collection fact sheet has been downloaded over 2000 times. Worryingly this has been a period of time when much of the normal debt enforcement activity has been on hold. Financial stress and debt are clearly issues that much of our community is dealing with as we emerge from lockdown and Financial Rights expects debt enforcement activity to ramp up as payment, disconnection and eviction moratoriums come to an end.

Financial Rights supports the responsibility for the oversight and licensing of commercial agents and private inquiry agents being transferred from the NSW Police Force to NSW Fair Trading.

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Poor debt collection practices in NSW

While many of the poor debt collection practices we hear about are from lenders directly or debt buyers who have been assigned the rights of the original lenders, some of these poor behaviours are perpetrated by commercial agents.

Collecting old debts

In recent months Financial Rights has helped multiple clients that were being harassed into paying statute barred (or nearly statute barred) debts. Debtors get convinced over the phone to make a small payment which resets the six year collection clock. We have also seen examples of debt collectors listing the collection amount as a new credit account on a credit report seemingly as a way to harass the debtor into paying the debt, even when it is very old.

Never-ending payment plans

Financial Rights has helped several clients that have come to us after attempting to pay off the same debt for years and years only to realise the principal has never reduced. We have had multiple disputes with debt collectors that have arranged repayment plans with very low income debtors where interest charges outstripped repayments for years.

Unaffordable payment plans

Related to perpetual payment plans is the problem of unaffordable and unsustainable payment plans. We regularly hear from debtors who have been harassed into agreeing to pay fortnightly or monthly payments which are simply unaffordable. Debtors will try desperately to stretch their modest incomes and rely on family members to pay for living expenses while paying down debts, but inevitably these arrangements fall over. Being set up to fail is psychologically harmful for consumers in financial stress, and it makes it that much harder to try again to start to pay down old debts.

Debtor Harassment

Financial Rights has seen plenty of examples of very poor debt collection conduct. Just in 2021 we have heard the following examples:

- A debt collector trying to find the debtor by phoning his wife's 12-year-old daughter's personal mobile and saying the call was about a debt.
- A debt collector pretending to be a sheriff and threatening to arrest the debtor for "financial fraud".
- A person getting repeatedly harassed for a debt that is not hers. The debt collector is up front in saying it is her cousin's debt, but he continues to call her multiple times a day until she connects him with her cousin.
- A debt collector contacting person's manager by email (five separate times) disclosing the personal details of the debt.

Comments on Schedule 2 - Commercial Agent Rules

The rules of conduct set out in Schedule 2 (**Rules**) are very important. As described above, we do see poor debt collection conduct on a regular basis in NSW. While many Commercial Agents and debt buyers may be subscribers to the Australian Collectors & Debt Buyers Association Code of Practice (**ACDBA Code**), we find compliance with that Code to be pretty inconsistent. We are

hopeful that industry compliance with these Rules will be higher as a breach would result in being issued with a restriction or exclusion order and possibly also a civil penalty.

Clause 9 – Requirement to provide evidence of debt

Clause 9 says that a Commercial Agent must provide to the person from whom collection of a debt is sought evidence of the grounds on which the commercial agent holds the belief that the person is liable for the debt when requested by the person to do so. Financial Rights submits this Clause should also require that debt collection activity be suspended until the account information have been provided to the debtor. We note this requirement is included in the ASIC/ACCC Debt Collection Guidelines (s11(f)).

Financial Rights regularly receives calls from consumers indicating that they were not aware of any debt in their name until third party debt collection has started, having never received any collection notices from the original creditor. This is because people move between rentals, may have been fleeing violence, or live in areas where post regularly goes missing or gets stolen – a situation that disproportionately affects debtors from lower socioeconomic backgrounds.

It is therefore unsurprising that where first contact is made by a debt collector, a consumer may need to see proof of the debt so that they can have time to investigate its origins, to obtain advice, and to look at what options they might have to either dispute or pay the debt. If the debt collector does not have the necessary documentation available, the debtor should at least not need to worry about further debt enforcement activity until the information or documents they have requested have been provided.

Clause 11 – Honesty, fairness and professionalism

Financial Rights notes this clause doesn't actually require any positive duties related to honest fair or professional conduct. While the prohibitions against misinforming or misleading people are important, we think the Rules could go further.

The Rules include a range of behaviours, including both positive duties (such as the requirement to act in accordance with client's instructions and the law) and prohibitions on certain behaviours. We believe Clause 11 should require the positive duties to deal with debtors in an honest, fair and professional way. Subscribers to the ACDBA Code have already committed to "*act fairly and reasonably towards You in a legal, equitable, transparent and respectful manner...*" (1.1.)

Clause 16 – Records to be kept for at least 3 years.

Financial Rights simply queries why the trust account record retention period is only 3 years and not the usual 6 or 7 years.

Payment arrangements

Financial Rights recommends that the Rules include an additional prohibition against knowingly accepting payment arrangements for an indefinite period which do not reduce the principal balance outstanding. This commitment has been made by ACDBA Code subscribers where financial hardship of a debtor has been demonstrated (9.3). As described above, we regularly see non-compliance with this provision by ACDBA members, and we believe the provision should now carry the weight of NSW law.

Examples of recent cases we have had involving Commercial Agents

Case study – Janine’s story – C208428

Janine signed up to a credit card and struggled to make her repayments. There may have been responsible lending problems with the original credit card application.

She was contacted by a Commercial Agent who:

- contacted her sister and disclosed she had a unpaid debt;
- told Janine her wages would be garnisheed
- sent emails implying they were imminent to commence legal proceedings

The Agent is not a member of external dispute resolution, despite collecting a regulated credit facility. They did not explain who they were collecting on behalf of, in any of the correspondence and did not respond to Financial Rights when a dispute was raised about their conduct and information was requested.

Eventually, it was discovered the debt had been assigned to a Debt Collector and the Commercial Agent was acting on their behalf, even though the Agent shares some of the same directors as the Debt Collector.

Financial Rights was only able to resolve the matter by lodging against the Debt Collector in AFCA

Case study – Andrew’s story – C213426

Andrew had a personal loan account with a Lender (original loan amount was around \$3,000). As he was frequently overseas for work he had mail redirection set up with his local post office. At some point the mail redirection ceased and he either missed or was not notified which meant that he failed to receive correspondence from the Lender.

His personal loan account with the Lender was sold to a Debt Collector who engaged an agent. Once Andrew realised this he made regular contact with them, explaining his circumstances including that he was temporarily not working and receiving treatment for an illness.

Andrew offered a payment arrangement of two equal payments of \$2,000. He sent a further email to confirm the payment arrangement and a representative of the Debt Collector responded that they agreed to the payment arrangement.

Some days later he was served with a Statement of Claim by the agent. It had been filed on the same day he sent his confirmation email after the payment arrangement had been confirmed. The SOC was claiming around \$10,000 including legal fees which was substantially more than what had been agreed between the parties.

When Andrew contacted the Debt Collector about this, he was advised that legal proceedings had commenced because he had previously broken several payment arrangements (although not the most recent arrangement) and that he was now required to pay the outstanding balance in full.

Case study – Simone’s story – C214052

Simone took out a loan with a payday lender in 2013 which she thinks is now statute barred. In the years since, the payday lender or its debt collecting agent has contacted Simone’s manager at her place of employment with details of Simone’s alleged debt with the payday lender at least 5 times.

In 2013 there were two occasions the agent contacted Simone’s manager by email. The first occasion was an overdue notice that was sent to him as well as to Simone. Although she felt embarrassed and humiliated Simone was not aware of her rights and believed that it was normal for a creditor to do this.

The agent also contacted Simone’s manager by email in 2014 and 2019. The agent’s email correspondence to her employer included her personal details including her address, the interest charged to her account and outstanding balance.

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 our Senior Policy Officer Julia Davis at Financial Rights on (02) 8204 1384.

Kind Regards,



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