



AUSTRALIAN COLLECTORS &
DEBT BUYERS ASSOCIATION

18 July 2014

The Hon. Mr Bryan Doyle, MLA
The Chair
Committee on Legal Affairs
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Sir,

Inquiry into debt recovery in NSW

With reference to the above Inquiry, the writer's appearance before the Committee on 16 June 2014 and the subsequent further questions from the Committee forwarded under cover of a letter from Inquiry Manager, Mr John Miller dated 23 June 2014 we advise:

Q1. What processes do your members have in place to identify and respond to debtors who are experiencing long term financial hardship?

Hardship triggers or indicators potentially include: natural disasters; unemployment; business failure; injury; illness; bereavement; relationship breakdown; domestic violence/economic abuse; maternity/paternity; over commitment; alcohol or substance abuse; incarceration; gambling; mental health issues; and complaints or aggression.

Members instruct their staff in the event a hardship application trigger is noted to tactfully gather the hardship details from the debtor if he is willing to discuss his situation and then complete a statement of position (income and expenditure details) from the debtor or alternatively leave a blank statement of position form with the debtor for later completion and return direct to the credit provider.

We note the Institute of Mercantile Agents¹ in its Best Practice Guide for Repossessions advises:

“Every member shall ensure its agents when actioning repossession assignments pursuant to NCC regulated agreements watch for and respond immediately and appropriately to any trigger of a hardship application, whether such application is made explicitly or simply implied.”

Under the National Credit Code, loans entered into prior to 1 March 2013 allow three types of variation whereas loans entered into on or after 1 March 2013 allow for any type of variation in response. The three possible responses to a hardship application being:

- approved;
- refused (written response must include EDR details); or
- more information is requested.

When dealing with hardship, the ACCC/ASIC debt collection guideline requires arrangements to be "flexible, fair and realistic" with collectors required to adopt a flexible approach for meaningful and sustainable arrangements that reasonably take into account the debtor's ongoing living expenses. In addition, members when dealing with hardship are mindful of other codes or hardship policies which might have application for the specific debt such as: the Banking Code of Practice; the Telecommunications Consumer Protection Code; Local government rates; or the Office of State Revenue.

Members also have processes whereby their collectors can refer the debtor to a not-for-profit financial counsellor if the debtor is in distress or lacks capacity and especially if hardship is likely to be long-term in nature. [The National Financial Counsellor Hotline number is 1800 007 007: not-for-profit financial counsellors provide free and independent advice and support to consumers in financial difficulty.]

Referral to a not-for-profit financial counsellor will:

- assist the debtor to prepare a budget;
- discuss difficult options with the debtor (including surrender of security, sale of property or bankruptcy);
- identify other issues e.g. mental health/gambling and where appropriate refer the debtor to suitable support services; and
- possibly act on the debtor's behalf in dealing with creditors.

Options traditionally available to debtors experiencing long-term hardship include:

- Hardship variation under the National Credit Code such as a moratorium or repayment arrangement;
- Bankruptcy/Debt Agreement;
- Avoidance;
- Bulk Debt Project (this project has now concluded);
- Approaching each creditor separately for a debt waiver; and
- Seeking the assistance of a for-profit debt mediator or credit repairer.

¹ Best Practice Guide – Repossessions, Institute of Mercantile Agents www.imal.com.au

A further innovative option has recently been made available to vulnerable consumers in long-term and severe financial hardship, being the National Hardship Register (NHR) - a joint initiative of Australian Collectors & Debt Buyers Association and Financial Counselling Australia, currently in a 12 month Pilot operation.

The NHR has a dual purpose:

- Consumer protection:** To protect those consumers experiencing long-term and severe financial hardship from unnecessary debt collection activity; and
- Business efficiency:** To act as an efficient and cost-effective mechanism for industry to avoid futile debt collection activity and trading in debts for this profile debtors.

The way the NHR works is as follows:

1. A not-for-profit financial counsellor identifies the consumer in long-term hardship;
2. The financial counsellor submits an application to the NHR;
3. The consumer is included on the NHR if he/she meets the strict eligibility criteria;
4. The NHR listing is distributed to participating creditors;
5. The participating creditors will provisionally finalise the debts relating to the listed consumer – this means no selling and collecting (an effective moratorium) subject to a right of challenge by the participating creditors; and
6. The participating creditors will unconditionally finalise the debts relating to the listed consumer at the earlier of: the creditor choosing to waive the debt; three years from the date of listing; or in accordance with the statute of limitations period.

The NHR project is an evolution and refinement of the former National Bulk Debt Project and offers relief from collection activity for those vulnerable consumers in long term and severe financial hardship listed on the NHR after demonstrating meeting strict criteria, which in general terms involves:

- Sole source of income is basic Centrelink benefits (Disability Support Pension/Aged Pension)
- No assets other than those protected in bankruptcy
- No likely prospect of the financial situation improving.

Once an applicant is listed on the NHR, details of the applicant and not his/her debts are circulated to the participating creditors to allow them to check their accounts to isolate any accounts relating to the listed applicant – the creditors undertake not to collect or sell debts relating to listed NHR applicants.

The NHR is an industry funded form of self-regulation and follows extensive consultation with stakeholders including industry, financial counsellors, consumer lawyers, regulators and EDR schemes.

Importantly, the NHR is not a credit reporting bureau, similarly it should be understood the inclusion of an applicant on the NHR will not be noted on his/her credit file nor prevent the listing of adverse information on the applicant's credit file nor entitle the applicant to removal of any adverse information from his/her credit file. Further, the NHR is not established as either a publicly searchable register or as a means to be used to restrict access to essential credit such as utilities.

As you will note from the above information, responding to hardship triggers is routinely entrenched in the work undertaken by our members.

Q2. Could you share your views on a proposal to allow licensed commercial agents and private inquiry agents to receive information about the location of debtors in matters that are before a court?

a. What controls would be required to ensure that personal information is used only for appropriate purposes, if such an arrangement was in place?

As will be apparent from the evidence provided by the writer when appearing before the Inquiry the location of debtors is an essential element for all debt recovery processes and unless the debtor can be relocated then a creditor cannot recover monies owing for goods and services or in respect of breached financial agreements.

In the event access to locator information is made available this could be facilitated through information brokers such as credit reporting bureaus (ie Veda, Dun & Bradstreet and Experian).

Credit bureaus only provide information to businesses who have joined their membership, thereby allowing each bureau to confirm the bona fides of the individual business and its entitlement to the range of information sought before any information is released.

All access to the credit bureaus by their members leaves an auditable electronic footprint – this is used for both compliance purposes and billing by the bureau to the customer business for each specific search enquiry.

If locator information of individuals held by a NSW Government entity was provided pursuant to a commercial agreement to the credit bureaus acting as Information Brokers their existing processes would allow for:

- Verification of the bona fides of the applicant prior to commencement of any access;
- Electronic access on a password protected basis with the applicant required to input a file reference for both billing and compliance purposes;
- In the event of any consumer complaint for the verification of who access was provided to and for what stated purpose;
- Sanctions to be imposed upon any applicant found to have made inappropriate access to specific locator information.

Q3. In evidence to the Committee, the Security Licensing and Enforcement Directorate of the NSW Police Force proposed transferring the oversight of commercial agents to NSW Fair Trading, while the Police Force retained regulation of private inquiry agents. Given that many commercial agents may also be licensed private inquiry agents, can you comment on the proposal?

The amendments introduced by the definitions of private inquiry agents and commercial agents under the Commercial Agents & Private Inquiry Agents Act, 2004 were quite deliberate in obviating the need for commercial agents to concurrently hold a private inquiry agent licence for parts of their work.

The 2004 Act replaced the 1963 Act which previously effectively compelled commercial agents to concurrently hold a private inquiry agent licence in order to complete their work.

Under the 1963 Act, the relevant definitions² were as follows:

"Commercial agent" means any person (whether or not the person carries on any other business) who exercises or carries on any of the following functions, namely:

- (a) serving any writ, summons or other legal process,*
- (b) ascertaining the whereabouts of, or repossessing, any goods the subject of a lease, hire-purchase agreement or bill of sale or taking possession of any goods the subject of a mortgage within the meaning of the Credit Act 1984, or*
- (c) collecting, or requesting or demanding payment of, debts,*

on behalf of any other person and for or in consideration of any payment or other remuneration (whether monetary or otherwise), but does not include any employee of a licensed commercial agent.

"Private inquiry agent" means any person (whether or not the person carries on any other business) who exercises or carries on any of the following functions, namely:

- (a) obtaining and furnishing information as to the personal character or actions of any person or as to the character or nature of the business or occupation of any person, or*
- (b) searching for missing persons,*

on behalf of any other person and for or in consideration of any payment or other remuneration (whether monetary or otherwise), but does not include any employee of a licensed private inquiry agent.

² Section 4 of Commercial Agents & Private Inquiry Agents Act, 1963

The effect of those definitions was that whenever a commercial agent was unable to complete one of his licensed functions due to the reason that the location/whereabouts of the party he was to deal with was unknown and therefore required him to undertake some inquiries as to that party's whereabouts such work was then regarded to be a licensed function of a private inquiry agent.

Consequently the problem for the industry and its clients was that there were then a lot of individuals who were licensed as private inquiry agents who apart from the expertise of locating missing persons lacked the necessary expertise for a wider range of inquiry work.

When the 1963 Act was reviewed via a consultative process commenced in or about 1999 the industry argued the definitions for the functions of a commercial agent and a private inquiry agent in any revised legislation ought to be suitably amended to remove the need for dual licences to be held in order to legally undertake the complete duties related to specific licensed functions.

Amended wording for the definitions of commercial agent and private inquiry agent were subsequently incorporated into the 2004 Act - to highlight the difference in approach to the definitions of the licensed functions, we have included below the current definitions³ as follows:

"commercial agent" means the holder of a master licence or operator licence with respect to one or more commercial agent activities.

"commercial agent activity" means debt collection, process serving or repossession of goods.

"debt collection" means:

- (a) any activity carried out by a person on behalf of a second person (not being his or her employer) in the exercise of the second person's rights under a debt owed by a third person, or*
- (b) any activity carried out by a person on his or her own behalf in the exercise of rights acquired from a second person (otherwise than in the course of an acquisition or merger of business interests) under a debt owed by a third person,*
being an activity that involves finding the third person or requesting, demanding or collecting from the third person money due under the debt.

"investigation of persons" means any activity carried out by a person on behalf of a second person (not being his or her employer), being an activity that involves finding a third person or investigating a third person's business or personal affairs.

"private inquiry agent" means the holder of a master licence or operator licence with respect to one or more private inquiry agent activities.

"private inquiry agent activity" means investigation of persons or surveillance of persons.

³ Section 4 of Commercial Agents & Private Inquiry Agents Act, 2004

"process serving" means any activity carried out by a person on behalf of a second person (not being his or her employer), being an activity that involves serving legal process on a third person in relation to legal proceedings to which the second and third persons are, or are intended to be, parties, regardless of which jurisdiction the legal proceedings are, or are intended to be, held in.

"repossession of goods" means any activity carried out by a person on behalf of a second person (not being his or her employer), being an activity that involves finding goods held by a third person or requesting, demanding or seizing such goods.

"surveillance of persons" means any activity carried out by a person on behalf of a second person (not being his or her employer), being an activity that involves the surveillance of a third person.

As highlighted by the text underlined above, under the 2004 Act the commercial agent's function included location of the person or goods relating to the specific commercial agent activity. Upon this introduction of amended definitions, the number of persons concurrently holding both a commercial agent licence and a private inquiry agent licence in NSW dropped.

Over the past two decades the industry in NSW has changed greatly driven by technology changes and also compliance expectations of clients with many firms maturing from the previous wide spread business model of general practice (attending to collections, process serving, repossessions and investigations) to specialist practice in one of those industry functions. Increasingly, the industry is now made up of larger specialist delivery businesses.

Specialisation together with the improved definitions under the 2004 Act has seen a reduction in industry participants holding both a commercial agent and private inquiry agent licence. Firms operating under a general practice model are now more likely to be found in regional or country locations where volumes of available work dictate a need to offer a wide range of services as opposed to a specialist service delivery.

Whilst the splitting of the regulatory oversight such that commercial agents move to NSW Fair Trading whilst private inquiry agents remain with the NSW Police Force may mean some firms who hold both licences will need to deal with two regulators, the upside of those arrangements is that the regulators with oversight responsibility will be more appropriately aligned to the area of industry endeavour.

The move to NSW Fair Trading for the regulatory oversight of commercial agents will be welcomed by operators providing debt collection, process serving and repossession services in NSW.

Further the splitting of the regulatory oversight of commercial agents and private inquiry agents such that it creates the need to deal with two regulators, we expect will result in further rationalisation of the industry such that some businesses will critically examine whether they continue to maintain both licences as we understand some businesses which currently hold both licences only undertake licensed activities in one area of industry endeavour.

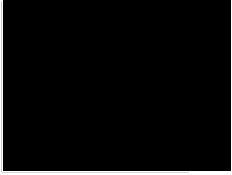
18 July 2014

**Letter from Australian Collectors & Debt Buyers Association
To Inquiry into Debt Recovery in NSW**

We trust this additional information is of assistance to the Committee – please do not hesitate to contact the writer if any further assistance or clarification is required.

Yours faithfully

AUSTRALIAN COLLECTORS & DEBT BUYERS ASSOCIATION



Alan Harries

CEO