Submission No 9

DEBT RECOVERY IN NSW

Organisation: Australian Finance Conference

Name: Mr Ron Hardaker

Position: Executive Director

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Australian Finance Conference Level 8, 39 Martin Place, Sydney 2000 GPO Box 1595, Sydney 2001
ABN 13 000 493 907 Telephone: (02) 9231-5877 Facsimile: (02) 9232-5647 [redacted]

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Mr Bryan Doyle MP- Chair
Legislative Assembly Legal Affairs Committee
C/- Committee Manager
Parliament House
Macquarie Street
SYDNEY NSW 2001

Dear Mr Doyle,

NSW DEBT RECOVERY LAW INQUIRY

The Australian Finance Conference (AFC) appreciates the opportunity to provide input into the Committee's Debt Recovery Laws Inquiry.

Background
The AFC membership includes a range of credit providers (including debt purchasers) that are involved in providing credit to both the consumer and commercial markets. Debt management is a critical component of our Members' business either as the credit provider that initially entered the contract with the customer and is managing the repayment process, or, as a debt acquirer in the event of the original debt being written off and sold to our debt purchaser Members. For our credit providers, the debt recovery function may be managed internally or via third party debt collection service providers (known as contingent collectors in the industry). Debt purchasers may offer this contingent collection service as a separate business to their debt acquisition business.

The issue of laws relating to debt recovery in the commercial market is also of particular relevance for Members of our affiliated associations, the Australian Equipment Lessors Association (AELA) the national association for equipment leasing and financing industry. And also for our Debtor & Invoice Finance Association (DIFA) Members whose businesses involve the acquisition of debt via factoring or invoice-discounting finance products. In broad terms, these products involve DIFA Members purchasing rights to receivables and managing repayment as a means of facilitating the cash-flow of business customers that may operate in a range sectors (eg manufacturing) that offer trade credit facilities to their business customers. The laws governing debt management, including those that currently operate in NSW, are an important component of the compliance challenge that our Members face on a daily basis. In the main, Members of our associations operate on national basis and a key objective is to endeavour to streamline compliance processes to ensure a framework that operates efficiently with the attendant cost savings that are able to be factored into pricing lending products offered to customers in NSW and the balance of Australia.

Inquiry Regulatory Reform Context

In principle, our Members support opportunities provided by Governments at both the Commonwealth and State level to undertake reviews of debt recovery and other relevant laws. These reviews provide a means of engaging with Government with a view to ensuring the underlying policy objective of the debt recovery or other law remains relevant to current business practices and consumer behaviours. And, where required, the laws are reformed to target areas of identified consumer detriment or market failure, or to streamline compliance processes that are in large measure "red-tape" requirements rather than a necessary adjunct to implementation of clearly defined Government policy.

Therefore, in theory, we welcome your Committee embarking on a review process of the current regulatory framework for debt recovery in NSW. We understand that it provides an opportunity for our Members (and other stakeholders) to raise areas of concern for Government consideration as part of a reform process.

While supporting the process, we are keen to put it in context of the regulatory reviews and reforms that have significantly changed and challenged our industry in the last couple of years, including in the area of debt recovery. Much of this review and reform has stemmed from the COAG agreement that has seen responsibility for consumer credit laws transferred from the States to the Commonwealth and the enactment of the National Consumer Credit Protection Act (including the National Credit Code [NCC]). A raft of new requirements has been imposed on entities that engage in consumer credit activities, including credit providers and debt purchasers, overseen by the regulator, ASIC.

This has included a licensing obligation as a pre-cursor to continuing to be able to engage in that market. Licensing approval by ASIC is contingent on the applicant establishing evidence of an ability to comply with a range of general conduct obligations, including broad conditions of acting honestly, efficiently and fairly together with more specific requirements around documented compliance plans and training requirements. Part of that compliance relates to laws of broad relevance to the primary credit laws and include areas such as debt recovery and privacy. Of particular relevance are guidelines that were developed conjointly by ASIC and the ACCC several years ago and that have been the subject of review and proposed revision in the last six months or so. While the review has yet to be finalised, we understand this should occur shortly.

While the ACCC/ASIC Debt Collection Guidelines are not statutorily supported, they have nevertheless been regarded by our Members and others that operate in debt collection as the default compliance obligation to minimise allegations of harassment and other inappropriate behaviour when managing the recovery of either a consumer or a commercial debt. Given the national operations of our Members these Guidelines have provided a framework that has facilitated streamlined compliance. We would be concerned by any proposed additional or different obligations introduced at a state level that might jeopardise that outcome. Any variation in approach brings with it a requirement to revise compliance design. This brings with it the potential that, for national operations, compliance may need to be set to a state-variation as the default minimum to minimise risk of non-compliance. Without a clear, evidence based reason for that variation, the enhanced compliance and increased cost for our Members that would eventuate, is difficult to justify or rationalise. Rather than benefit consumers, the observe is likely through the additional costs reflected in product pricing to ensure profitability.

Equally the pre-approval licensing obligation that sees our Members required to be a member of an ASIC-approved External Dispute Resolution Scheme [EDRS] (eg the Financial Ombudsman Service or the Credit Ombudsman Service) adds a further layer of potential compliance in their management of credit and collection activities. These EDRS provide a facility for a complaint to be made against one of our Members in relation to debt recovery associated with either a consumer credit product or credit offered to a small business. In considering the consumer or small business complainant the EDRS are not confined to decisions based on the legal requirements but are able to take into account broader matters of public interest including what best practice behaviour within the financial services sector is as the minimum benchmark against which to assess the validity of the complaint that has been made. As a consequence, this process adds further weight to the national default compliance that has been the result of the ACCC/ASIC Debt Collection Guidelines. Again, for this reason, we would be concerned should the NSW Government consider reforming its debt recovery laws in a way that would impose a different compliance obligation on our Members and that may be viewed by these EDRS as the "best practice" benchmark. We would also be concerned if NSW should introduce a compliance obligation which did not match words used in the ACCC/ASIC Debt Collection Guideline with the potential, as has occurred in Victoria, that our Members are challenged with questions of legal interpretation to address potential variances to determine whether there was a deliberate policy shift by the state government or an unintended consequence flowing from variation in style or word choice of parliamentary drafts-people. No-one benefits from such a situation.

At a more specific level, new NCC-statutory obligations to manage "hardship" applications by customers of our consumer credit provider Members took effect March 2013. Under the amended provisions, the mere indication of a customer being unable to meet his / her contractual debt repayment obligations for whatever reason sees a compliance process triggered that our Member is obligated to follow to minimise risk of significant sanction in the event of breach. There is a risk that any new NSW specific obligation may not interact seamlessly with the very defined obligations following a hardship application.

The other Commonwealth reform development relevant to this Inquiry relates to the recent implementation of amendments to the Privacy Act, including in relation to the management of debt in the context of consumer credit reporting. Again, these reforms have required significant resourcing by our Members to be compliant from 12 March 2014. The outcome sees a new level of disclosure and process obligations in the management of the recovery, and recording of, overdue payments as part of that system.

It is against this background that we look more specifically at the NSW laws and provide the following observations.

NSW Debt Recovery Laws + State Developments

Again, by way of background and context, while contingent debt collectors remain outside the NCCP Act regime, extensive work has been undertaken at state-level, including NSW, with Commonwealth engagement.

This included in 2011 the release of a Discussion Paper "*Debt Collection Harmonisation Regulation Options Paper"* through the Consumer Affairs Victoria on behalf of the Members of what was then named the Ministerial Council of Consumer Affairs (now known as the Legislative & Governance Forum on Consumer Affairs). The Paper included a broad overview of the debt collection regulatory framework with a view to endeavouring to arrive at proposed options for reform for national take-up. The Paper acknowledged the context of the various State Governments' reform objectives; namely (1) to develop an understanding

of the new NCCP Act credit regulation model and what it means for debt collection regulation and (2) to develop consistent regulation for debt collection having regard to the NCCP Act and the National Occupational Licensing System. The Paper acknowledged that the issues being considered encompassed a broader debt collection context than just NCC-regulated debt and the need to take account of variation in business models adopted to collect debt (eg in-house vs external collectors; contingent vs assignee collectors). Two significant problems in relation to the current regulatory framework, were identified:

- legislative inconsistency across jurisdictions; and
- the ineffectiveness of the consumer protection elements of the current regulatory framework (eg relating to the use of physical force, undue harassment or coercion; misleading or deceptive conduct; a lack of consumer and industry education; inaccurate, incomplete or misinformation).

A range of options to address these were proposed. Topics covered include: licensing, conduct, complaint handling, administration/appropriate regulator. information standards and educational requirements.

AFC together with other stakeholders made submissions in response to the Paper. The focus of our submission was on the regulation of the collection of debts by the creditor/debt owner itself or via contingent collectors. By way of summary, based on the feedback of Members, our submission noted that the debt collection laws regulating the collection of debts represent an equitable and flexible regulatory framework for the collection of both consumer and commercial debts.

The AFC supported:

- Harmonised debt collection laws across Australia, provided that there is no extension to the current regulation of debt collection under State, Territory and national laws such as the *National Consumer Credit Protection Act 2009* (the "National Credit Act"); and the general provisions of the Australian Consumer Law.
- As part of any harmonisation process, a review of debt collection laws to ensure consistency with other legislation such as the National Credit Act, *the Personal Property Securities Act 2009* and the *Corporations Act 2001* which may impact on the collection of secured debts and enforcement against the property of debtors.
- The carrying forward into any national harmonised debt collection laws of all exemptions under current State and Territory laws (for example licensing exemptions for collection of one's own debts and debt collection by a related group company).
- The continued availability of the *ASIC/ACCC Debt Collection Guideline* (or equivalent) updated to reflect legislative changes since its original publication.

On the more specific issues raised we made the following comment which remain equally relevant to this Inquiry:

3.1 Licensing
We supported a negative licensing option. In doing so we noted that Victoria had already introduced a negative licensing regime in 2011. We understand that this represented the results of recent research on the necessity for, and appropriateness of, the licensing of debt collectors. We would support a negative licensing approach under harmonised laws, or deemed licensing under the NCCP Act for consumer debts.

3.2 Conduct
We understand from our members that the *ASIC/ACCC Debt Collection Guideline* is widely used and has proved to be a useful tool for the financial services industry particularly in relation to collecting debts from individual debtors. We would support the updating of the

Guideline to reflect legislative and other developments since its release in October 2005, without changing its fundamental scope or content.

Debt collectors are subject to conduct requirements under the consumer protection provisions in various State, Territory and national legislation. We submit that this legislation adequately protects individual debtors in relation to the activities of debt collectors.

3.3 Trust accounting
If a negative licensing or deemed licensing option is implemented, trust account keeping provisions would no longer be appropriate.

3.4 Complaint handling
Entities which are regulated under the NCCP Act are already required to have internal and external dispute resolution processes in place. We submit that this regime provides appropriate protections for consumers when dealing with debt collectors.

3.5 Administration
We submit that, absent strong evidence that indicates that there is a need for a separate regulator, ASIC should continue to be the regulator of the collection of debts regulated under the NCCP Act. Either ASIC or the ACCC could regulate non-consumer debt collection to the extent it is covered under harmonised national laws.

3.6 Educational requirements
We are not aware of any need for the imposition of statutory training or educational requirements beyond those which may already apply to debt collectors under the NCCP Act.

Our position remains largely unchanged, again noting the principal objective is a harmonised national approach to debt collection laws.

We also note that Queensland has recently undertaken a review of its debt recovery laws that has seen the development of the Debt Collectors (Field Agents and Collection Agents) Bill 2013. We understand that similar to the position in Victoria that while the proposed new laws retain licensing for fields agents - those agents that engage in face-to-face contact with consumers when performing debt collection, repossession or process serving activities, a negative licensing scheme has been proposed for collection agents - those who only perform debt collection activities and do not contact debtors in person when performing debt collection function. The will still be required to meet suitability criteria (for example, a minimum age limit and criminal history criteria) and will continue to be subject to the conduct provisions that field agents are subject to. Other red-tape reduction measures have also been proposed (eg the requirement for an employment register to be maintained by industry will be removed; the requirement for agents to display their name, licence or other particulars at their place of business will be removed).

NSW CAPIA Act Review
In submissions AFC has made in relation to the review by NSW of its Commercial Agents and Private Inquiry Agents Act 2004 (CAPIA Act) conducted in 2008, we have advanced a position similar to our response to the MCCA Discussion Paper.

In general, our financier members are not regulated by the NSW CAPIA Act or under equivalent legislation in other Australian States and Territories when collecting their own debts. However there were some areas of concern for our Members in relation to the regulation of debt collection activities, that we noted in our submission. Again, by way of summary, these were:

- the collection of one's own debts should be outside the scope of the Act;

- in order to create a level playing field for all financiers, the ADI exemption should be expanded to include corporations whose sole or principal business activities are the borrowing of money and the provision of finance.
- the Act should be amended to clarify that securitisation and other wholesale funding arrangements are not covered by the definition of "commercial agent activity".
  It may be more appropriate for the New South Wales Office of Fair Trading to be the regulator of the commercial agency industry rather that retaining within the NSW Police function.
- A national regulation model for the commercial agency industry is supported.

We understand that the review culminated with a range of recommendations being proposed by the Ministry of Police that largely aligned with the AFC feedback. These included recommendations for:

- A nationally consistent regime;
- A new Commercial Agents Act administered by the Office of Fair Trading to regulate commercial agents;
- Removal of licensing requirement for supervised call centre operators;
- Clarification that in-house debt collecting is excluded (although debts purchased from another party would be included);
- Exclusion of loan managers, loan servicers, debt factoring and invoice discounting;
- Extension of the ADI exemption to all financial service organisations regulated under the Corporations Act and/or the Financial Sector (Collection of Data) Act; and
- Exemptions for off-shore call centres if their contract requires compliance with the ACCC/ASIC Debt Collection Guidelines.

We understand those recommendations were not taken forward by the former Government. For reasons outlined, in our view, they remain valid for consideration by this Government through this Inquiry. In noting that, we also indicate that regardless of which agency has the responsibility for the regulation of debt recovery professionals, a critical component is that its resources are adequate for it to fulfil its functions and that a move to a negative licensing regime facilitates the streamlining of process and cost for that agency while maintaining the overall policy of having a facility to inhibit inappropriate or unacceptable behaviour on the part of the regulated population.

Conclusion

By way of an overall conclusion, as a matter of principle, any regulation of debt collection activities should not impede reasonable collection activities by creditors, their agents or debt purchasers. Nor should a credit provider be subject to any licensing obligations in relation to its in-house debt recovery function. The AFC acknowledges that the regulatory framework for debt collection in Australia at present is a patchwork approach characterised by intra-state inconsistencies for laws designed with the same aim of protecting both creditors and debtors. Such inconsistencies can lead to unnecessary costs for creditors and confusion for both debtors and creditors as to their rights and obligations in relation to debt collection. While overall, the current State, Territory and national laws together with tools such as the *ASIC/ACCC Debt Collection Guideline* provide appropriate protection for debtors, in the view of the AFC it would be appropriate for regulatory inconsistencies to be addressed by the promotion of harmonised national debt collection laws.

We would be happy to assist the Committee further, as required, to assist inform its consideration of the debt recovery laws the subject of the Inquiry. Please feel free to contact me via [redacted] or our Corporate Lawyer, Helen Gordon, via [redacted] or both through [redacted]

Kind regards.

Yours truly,

[redacted]

Ron Hardaker
Executive Director