

# Guiding Principles

## Debt Management Firms guiding principles

This common principles-based industry approach to dealing with Debt Management Firms (**DMFs**) complements Chapters 39, 40 and 41 of the Banking Code of Practice<sup>1</sup> (the **Code**).

The ABA encourages member banks to use this approach to guide internal processes, procedures, and policies. This approach is not compulsory for member banks.

## Purpose of the guiding principles

This industry common approach:

- outlines a clear set of guidelines for when the banks may consider that a DMF, when representing a bank customer, is not acting in the customer's interests and banks may approach a customer directly;
- provides clarity and consistency in how member banks may deal with DMFs, recognising the importance of preserving a customer's right to engage them, while trying to protect customers where firms may not be acting in their interest; and
- describes an approach that is consistent with competition law obligations, the *National Consumer Credit Protection Act (NCCP Act)* and the Code
- describes an approach that draws on other regulatory guidance, such as the *ASIC and ACCC Debt Collection Guideline (DCG)*<sup>2</sup> and RG 271: Internal Dispute Resolution (**RG 271**)
- reflects banks' general responsibilities to their customers.

## Background

Chapters 40 and 41 of the Code provide that if a bank identifies that a customer is experiencing financial difficulty, it may contact the customer to discuss their situation and options to provide appropriate assistance where available.

Chapter 39 provides that customers experiencing financial difficulty may tell their bank to deal with their financial counsellor or representative, instead of them. However, banks may deal with the customer again where they have unsuccessfully made reasonable attempts to contact, or deal with, that counsellor or representative. Customers experiencing financial difficulty sometimes appoint a DMF to represent them in dealings with the bank.

Banks, consumer organisations, AFCA, ASIC and a Senate Economic Committee have consistently raised concerns regarding some DMFs appointed by customers not acting in the interests of those customers.

## What are DMFs?

A 2016 ASIC report<sup>3</sup> describes DMFs as:

*“a range of firms that promise to help consumers in financial hardship or with listings of payment defaults on their credit reports... They typically promise to help consumers by:*

- *developing and managing budgets;*

<sup>1</sup> Refer <https://www.ausbanking.org.au/campaigns/new-banking-code/>

<sup>2</sup> [https://www.accc.gov.au/system/files/776\\_Debt%20collection%20guideline\\_July%202017\\_FA.PDF](https://www.accc.gov.au/system/files/776_Debt%20collection%20guideline_July%202017_FA.PDF)

<sup>3</sup> ASIC Report 465 Paying to get out of debt or clear your record: the promise of debt management firms (January 2016) <https://download.asic.gov.au/media/3515432/rep465-published-21-january-2016.pdf>

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- *negotiating with creditors, including lenders, telecommunications companies (telcos), utilities companies or debt collectors;*
- *advising and arranging formal debt agreements under Pt IX of the Bankruptcy Act 1966 (Bankruptcy Act); and*
- *‘cleaning’, ‘fixing’ ‘repairing’, ‘removing’ or ‘washing away’ default listings or other information on credit reports.*

*The main selling point for debt management firms providing ‘credit repair’ services is to clear negative information from credit reports so that a consumer is more likely to get credit or access to other services in the future. These firms operate by challenging credit default listings and making complaints on behalf of consumers to external dispute resolution (EDR) schemes.”*

*For the purposes of this document, ‘DMF’ does not include financial counsellors<sup>4</sup>.*

## Key concerns regarding DMFs

The same ASIC report highlighted the following key concerns with DMFs:

- “charge high fees for services of little value;*
- give poor or inappropriate services that can leave consumers worse off;*
- have mis-sold services on the basis of misleading representations about the nature and effectiveness of the service; and*
- have engaged in unfair and, in some cases, predatory conduct in relation to consumers in financial hardship.”*

## Requirement for DMFs to hold credit licenses

In response to concerns about DMFs operating largely within a regulatory void, new regulations were passed which come into force on 1 July 2021. The regulations will require DMFs, as providers of ‘debt management services’, to hold Australian credit licenses under the NCCP Act and meet the ongoing obligations imposed on licensees. These obligations include the requirement for DMFs to meet the ‘fit and proper person’ test, undertake activities ‘efficiently, honestly and fairly’, and be members of AFCA. Consumers will be able to seek redress via the more cost-effective AFCA route.<sup>5</sup>

A DMF provides ‘debt management services’ where it provides debt management or credit reporting assistance to a consumer. This is generally where a DMF suggests or assists a consumer with varying credit contracts, varying guarantees, making complaints (including with AFCA and ASIC), providing hardship notices, instituting proceedings and changing the way information is collected or held by a credit reporting body.

## Principles for banks dealing with DMFs

The common industry approach establishes a clear set of:

- guidelines for when the banks may consider that a DMF, when representing a bank customer, is not acting in the customer’s interests, and
- principles for how banks may deal with a DMF in circumstances where it is not acting in a customer’s best interests and banks may approach a customer directly.

<sup>4</sup> Financial Counsellor means a financial counselling agency entitled to the benefit of an exemption under either the ASIC Corporations (Financial Counselling Agencies) Instrument 2017/792 or ASIC Credit (Financial Counselling Agencies) Instrument 2017/793

<sup>5</sup> Explanatory Memorandum, National Consumer Credit Protection Amendment (Debt Management Services) Regulations 2021, <https://www.legislation.gov.au/Details/F2021L00521/Explanatory%20Statement/Text>

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These principles recognise that customers have the right to appoint a DMF to represent them and that DMFs, in turn, have an obligation to act in the interests of their clients.

Under the DCG and the Code, where the DMF (or other representative) has been authorised by the customer to act on the customer's behalf, and the customer has requested that the bank deal directly with the DMF, the bank may not contact the customer directly unless it is reasonable to do so in the circumstances. For banks to understand the scope of the DMF's authority, the authority provided by the customer should clearly state what actions the DMF is entitled to take as the customer's authorised representative, and for which of the customer's accounts, including whether the DMF can lodge a complaint on the customer's behalf. For matters outside the scope of the authority, the bank is entitled to contact the customer directly.

This ability to appoint a representative to act on the customer's behalf is a right granted to the customer, and not a right granted to the DMF. It is also not an absolute right and needs to be balanced against a bank's obligation to engage with the customer fairly, reasonably and ethically. Accordingly, there may be situations where it is reasonable to contact a customer directly even where a DMF has been appointed. The entitlement of a Customer, under Chapter 39 of the Code, to request a bank to deal with their representative, rather than with them directly, should be understood in this context.

Factors banks may consider in determining whether it is reasonable to contact a customer directly (such as under provisions of the Code) include those outlined below or in relevant regulatory guidance.

## 1. Approach to customers represented by DMFs

1.1. Banks may contact a customer directly where the customer requests direct communication with the bank or the bank has a reasonable belief that the DMF:<sup>6</sup>

- a. does not respond to bank communications within a reasonable time (normally seven days)
- b. is providing a 'debt management service' under the NCCP Act or 'financial services' under the Corporations Act without being licensed to do so
- c. is banned from lodging disputes with AFCA
- d. is acting and making decisions in a manner that is not in the best interests of the customer
- e. has not provided the customer with all communication from the bank and informed the customer of all available options, offers of settlement, offers of hardship assistance, potential risks and consequences of a course of action it is pursuing, or any other key information
- f. has not provided information that is reasonably required by a bank to assess the customer's hardship application or complaint, and has unreasonably refused any such requests
- g. has engaged in a misleading or deceptive manner with either or both the creditor or the debtor, or
- h. has behaved in a way that creates an unsafe work environment for bank staff, including by using aggressive, intimidating or threatening language or behaviour.

1.2. Where a bank determines that it is reasonable to contact a customer directly instead of dealing with the customer's appointed DMF, the bank may, depending on the circumstances, give the DMF notice of its intention to contact the customer directly, explain why the bank considers it reasonable to do so and give the DMF the opportunity to address the bank's concerns. If the bank's concerns are not able to be resolved the bank may:

<sup>6</sup> Note: Banks may also contact a customer directly where any agents of a DMF have engaged in any of the above conduct.

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- a. contact the customer directly and provide clear reasons to the customer why it made this decision
  - b. discuss the customer's situation with them, including the available options to resolve the matter and their preferred means of communication
  - c. advise customers of free alternatives to using DMFs, for example:
    - lodging a dispute on their own behalf or through another authorised representative with the bank's Internal Dispute Resolution service
    - lodging a dispute on their own behalf or through another authorised representative with the Australian Financial Complaints Authority (AFCA), refer to <https://www.afca.org.au/make-a-complaint/financial-difficulty>
    - community legal services, refer to ASIC moneysmart <https://moneysmart.gov.au/managing-debt/free-legal-advice>
    - financial counsellors, refer to ASIC moneysmart <https://moneysmart.gov.au/managing-debt/financial-counselling>
    - National Debt Helpline, refer to <https://ndh.org.au/>
    - how to check and correct their credit score and report themselves, refer to the ASIC moneysmart website <https://moneysmart.gov.au/managing-debt/credit-scores-and-credit-reports>
    - Way Forward Debt Solutions, refer to <https://wayforward.org.au/>
- 1.3. After a bank contacts a customer directly, a customer may confirm that they would like the DMF to continue to represent them and be their point of contact despite the concerns raised by the bank. This does not prevent a bank contacting the customer directly in the future if the bank considers that the DMF is continuing to engage in conduct set out in part 1.1.
- In some cases, a bank may continue to engage with the DMF, at the customer's request, but copy in the customer on all correspondence. Alternatively, a bank may determine, on a case by case basis, that there is a legitimate reason (based on the factors set out in part 1.1) to refuse to deal with the DMF notwithstanding the customer's request that the DMF continue to represent them. In that case, the bank may elect to only deal with the customer or another appropriately authorised representative.
- 1.4. Banks may report instances of unscrupulous or inappropriate behaviour by a DMF to a relevant regulator, or if relevant, an appropriate professional body, for example:
- a. ACCC for general consumer law, which includes prohibitions against misleading or deceptive conduct and unconscionable conduct
  - b. ASIC where the DMF is providing a 'debt management service' under the NCCP Act without an Australian credit license
  - c. the personal insolvency regulator - the Australian Financial Security Authority - for the administration of debt agreements, or
  - d. a relevant professional body (e.g., Accounting or Legal professional bodies<sup>7</sup>).

<sup>7</sup> For example, re Accounting see <https://www.charteredaccountantsanz.com/about-us/complaints/complaints-about-a-member> and re Legal see <https://www.lawsociety.com.au/for-the-public/making-a-complaint/complaint-process>

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2. **Proactive and targeted customer communications regarding the risks of dealing with DMFs**
  - 2.1 In circumstances where the bank thinks the customer is entering or experiencing financial difficulty, the bank may provide information to these customers which:
    - a. alerts customers to the costs and potential risks associated with the possibility that a paid representative may not always act in their interests
    - b. explains to customers that they may request direct communication with the bank at any time or revoke their authorisation of a representative if they wish to do so, and
    - c. outlines assistance available from banks and other organisations (both free and paid).
3. **Customer's experiencing vulnerability**
  - 3.1 The bank will seek to make its communications with its customers as clear as possible particularly when it is aware that a customer is experiencing vulnerability or has limited English.<sup>8</sup>

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<sup>8</sup> In accordance with Chapter 13 of the Code: inclusive and accessible