

Ripple effect of the new Banking Code of Practice to Debt Collectors

Georgina Wu | December 2019 | Commercial

Summary

If you think the new Banking Code of Practice only affects the banks, think again! The code has far wider reach than the banking industry and may even lead to amendments to the *Bankruptcy Act*, causing ripples in the debt collection industry.

The Banking Code of Practice 2019 ('Code') commenced on 1 July 2019.

It is the first banking code considered and approved by ASIC. The Code is not compulsory upon the banks and it is up to the individual banks to adopt it. At present, 25 banks including all major banks have voluntarily adopted the Code.

Chapter 43 of the Code sets out requirements which the banks must adhere to when recovering debts. Of significance for the debt collection industry, paragraph 182 of the Code requires a bank to only sell a debt to a third party who has agreed to comply with the ACCC's and ASIC's Debt Collection Guideline: For Collectors and Creditors ('Debt Collection Guideline') and the Department of Human Services' Code of Operation: Recovery of Debts ('Code of Operation').

The Debt Collection Guideline and the Code of Operation are non-legally binding statements of practices. They will only have legal effect if a party contractually agrees to adhere to their provisions.

The effect of paragraph 182 of the Code is to give the Debt Collection Guideline and Code of Operation a legally binding effect upon those who undertake recovery of bank debts.

Industry Guideline: Sale of unsecured debt

On 19 November 2019, the Australian Banking Association ('ABA') released its Industry Guideline: Sale of unsecured debt ('Industry Guideline') to complement the Code. The Industry Guideline will commence on 1 March 2020 and is intended to provide additional safeguards for debtors when banks sell unsecured debts to another party. The following provisions of the Industry Guideline operate beyond the banking industry and extend into the debt collection industry:

- Banks are asked to consider how to include aspects of the Industry Guideline in their contractual arrangements with debt buyers.
- Banks should include the following minimum selection criteria for debt buyers in their policies:
 - debt buyers are required to agree to comply with the Debt Collection Guideline and Code of Operation;
 - debt buyers are required to be customer-focused and the member bank's corporate values and those of the debt buyer need to align;
 - banks are to audit their debt buyers;
 - banks are to reassess their relationship with debt buyers if there is significant evidence of misalignment between the bank's corporate values and the behaviour of the debt buyer;
 - debt buyers are required to agree to comply with ASIC Regulatory Guide 165; and
 - debt buyers are required to be members of the Australian Financial Complaints Authority or another external dispute resolution scheme.
- Banks are required to have processes in place to monitor how debt buyers are undertaking their

collection activities when contracting with debt buyers for the sale of unsecured debt, these processes should include the following minimum mandatory reporting:

- Volumes of and types/nature of complaints and targeted audit (by the bank) of complaints handling.
- The volume and types of actions being taken by the debt buyers including litigation, enforcements (specifying the number and type of action such as sequestration orders, garnishee orders, charging orders, instalment orders, writs of possession of goods, writs of possession of property etc.) and bankruptcy applications.
- Results of annual audits to ensure compliance with regulatory and contractual obligations.
- Results of due diligence activities (e.g. internal and/or independent audits customer surveys/ NPS, internal quality control) undertaken to meet and monitor compliance with regulatory and contractual obligations.
- When a debt is sold, the bank is required to provide the debt buyer with a copy of the following documents within 30 days of request from the debt buyer:
 - The entire contract under which the debt arose.
 - Statement of account evidencing outstanding debt.
 - Details of any hardship arrangements in the preceding 12 months.
- If a debt buyer believes that commencing bankruptcy proceedings is necessary to recover the debt, the debt buyer will be required to consult with the banks prior to commencing these proceedings. The debt buyer is required to explain to the bank why they believe bankruptcy is the most appropriate option and what they know about the customer's circumstances.
- If the bank identifies a vulnerability, the banks have the option to buy back the debt from the debt buyer. The Industry Guideline has provided the following

examples of circumstances:

- elderly debtor
- debtor suffering from a form of financial abuse
- a debtor who is homeless
- a debtor who is terminally ill
- a debtor who has a serious disability or mental illness.
- The banks are required to determine and document their own appropriate threshold amount of unsecured debt for the purposes of commencing bankruptcy proceedings for inclusion in their contractual arrangements with the debt buyers. The Industry Guideline is suggesting that banks should set a higher threshold amount than the statutory minimum of \$5,000.
- If a bank becomes aware that a debt which has been sold to a debt buyer involved family and domestic violence, the bank is required to work with the debt buyer to provide the best outcome for the customer, including repurchasing the debt.
- Banks need to ensure that debt buyers protect identified scheme payments under the National Redress Scheme (payment for people who have experienced institutional child sexual abuse) and not to use these scheme payments to repay bank debts, unless the debtor wishes to do so. For example, garnishee orders cannot be issued against these scheme payments.

What this means for the debt collection industry

The effect of the Industry Guideline upon the debt collection industry can be summarised as follows:

- a number of voluntary practices and guidelines will become legally enforceable upon third party collectors;
- third party collectors will need to follow the bank's collections policy;
- third party collectors will be subject to more

mandatory reporting requirements and auditing by the banks;

- banks will need to be consulted prior to commencing bankruptcy proceedings;
- banks may impose a higher minimum threshold debt than the statutory minimum of \$5,000 which third party collectors are required to adopt before bankruptcy proceedings may be commenced;
- care needs to be taken when issuing garnishee notices to exclude scheme payments under the National Redress Scheme; and
- debts may be repurchased by the banks.

Changes to the Bankruptcy Act

As part of the Industry Guideline, the ABA along with a number of other bodies have written to the Federal Attorney General requesting a review of the current statutory minimum threshold of \$5,000 for triggering bankruptcy proceedings.

If they are successful in lobbying the government, the minimum threshold could be set to a much higher amount. The end result of a threshold increase will mean small debts will be harder to enforce as bankruptcy proceedings would not be available.

**For more information,
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