Safeguarding Australian Consumers from “Debt Vultures”

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Abstract

High levels of personal debt and the rising cost of living have increased the likelihood of Australian consumers engaging with businesses that promise to resolve their debt problems. Such businesses have been highlighted for the risks they pose to consumers, charging fees for services that are available at no cost and at times giving poor advice that exacerbates their financial difficulties. Drawing on a consumer survey, a focus group interview with professionals who assist vulnerable debtors, and experience in other countries, the article proposes reforms to strengthen safeguards against predatory conduct and harmful business practices. The proposals build on the recently introduced licensing regime for debt management firms to channel Australians towards suitable and affordable solutions that aid, rather than impede, their recovery from debilitating debt.

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I Introduction

Businesses that offer to resolve debt problems for a fee have been highlighted as a risk to individuals in financial stress. These risks are heightened in a climate of increased debt faced by many individuals following the COVID-19 outbreak. In a 2021 report, Good Shepherd estimated that 'over 40% of working Australians' have experienced 'negative employment impacts resulting from COVID-19' which affected their household finances, family relationships, housing security and mental health.[1] In light of the rising interest rates and high cost of living,[2] and against the backdrop of rising household indebtedness over the past 30 years,[3] the need for measures to safeguard consumers from predatory businesses that profit from debtors' problems, colloquially referred to as 'debt vultures',[4] is all the more urgent. Overseas experience suggests that appropriate regulatory intervention can play a significant role in curtailing predatory conduct and harmful business practices.[5] This article proposes reforms aimed at curbing harm to consumers in financial stress and fostering the provision of suitable and affordable debt solutions by businesses that offer debt help, channelling Australian debtors towards the road to recovery in the rising tide of debt.

In a joint communiqué issued in February 2016, consumer advocates, financial counsellors, industry associations, researchers and external dispute resolution ('EDR') providers underscored concerns about debt management[6] firms charging consumers in financial hardship 'high up-front fees for services of little value, [or providing] poor or inappropriate services that can leave consumers worse off'.[7] The communiqué underscored the need for law reform to curb the harm from unsuitable debt advice, misleading conduct and predatory behaviour that exacerbates consumers' financial hardship.[8] A Senate inquiry into credit and hardship in 2017 likewise emphasised the detrimental effects of for-profit debt advice on many consumers in its 2019 report.[9]

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1 Good Shepherd Australia New Zealand, *New Vulnerable Research* (Report, April 2021) 4.

2 Peter Hannam, 'Laden with "World-Beating" Debt, Australian Households Are at Increased Risk as Rates Rise, Expert Says', *The Guardian* (online, 5 May 2022) <https://www.theguardian.com/australia-news/2022/may/05/laden-with-world-beating-debt-australian-households-are-at-increased-risk-as-rates-rise-expert-says>.

3 Jonathan Kearns, Mike Major and David Norman, 'How Risky Is Australian Household Debt?' (Research Discussion Paper No 2020-05, Reserve Bank of Australia, August 2020) 1.

4 Consumer Action Law Centre ('Consumer Action'), *Caveat Removals: How Reforms to Caveats Can Help Stop Debt Vultures* (September 2020) ('*Caveat Removals*').

5 Vivien Chen and Candice Lemaitre, 'Regulating a Quick Fix for Debt Problems' (2021) 49(3) *Australian Business Law Review* 154, 167–8.

6 See below nn 66–67 and accompanying text for an explanation of activities that fall within the definition of 'debt management'.

7 Experts Roundtable, *Debt Management Firms: Regulatory Reform* (Communiqué, February 2016) <https://consumeraction.org.au/debt-management-firms-comm/>.

8 Australian Securities and Investments Commission ('ASIC'), *Paying to Get Out of Debt or Clear Your Record: The Promise of Debt Management Firms* (Report No 465, January 2016) ('*Paying to Get Out of Debt*').

9 Senate Economics References Committee, Parliament of Australia, *Credit and Hardship: Report of the Senate Inquiry into Credit and Financial Products Targeted at Australians at Risk of Financial Hardship* (Report, 22 February 2019) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Creditfinancialservices/Report>.

Prior to July 2021, debt management firms ('DMFs') were not required to comply with the *National Consumer Credit Protection Act 2009* (Cth). The financial impact of the COVID-19 outbreak is reflected in the Australian Bureau of Statistics' finding that 21% of Australian family households with children were facing deteriorating household finances by September 2020.[10] In early 2021, licensing requirements were introduced to protect 'consumers from the often predatory practices of debt management firms'.[11] Since 1 July 2021, firms that provide debt help services for a fee[12] have been required to hold an Australian credit licence to carry out activities such as debt negotiation, credit repair[13] and other debt-related advice or assistance specified in the regulations (collectively referred to as 'debt management').[14] Debt management firms must ensure that their activities are carried out 'efficiently, honestly and fairly'[15] and comply with the conditions set out in the Act. As the regulator responsible for the consumer credit licensing regime,[16] the Australian Securities and Investments Commission ('ASIC') has often issued regulatory guidance on what businesses should and should not do to minimise their risk of breaching the law.[17] As such, there is potential for ASIC to issue regulatory guidance to explain how principles of honesty and fairness should be interpreted in the context of debt management activities, and to provide practical examples of how DMFs can fulfil their legal obligations.

This article argues that such regulatory guidance is a necessary step towards realising the underlying purpose of the licensing requirements. The article seeks to contribute to the development of regulatory guidance for the debt management industry in two ways: by identifying the business practices that have led to harmful consequences for consumers who engage DMFs; and by formulating regulatory responses aimed at mitigating risks of harm to consumers.

The article builds on prior research in two ways. First, it provides a more nuanced and contextualised understanding of the risks Australian consumers face when interacting with DMFs by exploring two sets of empirical data collected by

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[10] Australian Bureau of Statistics, *Household Impacts of COVID-19 Survey, September 2020* (13 October 2020) <https://www.abs.gov.au/statistics/people/people-and-communities/household-impacts-covid-19-survey/sep-2020#household-finances>.

[11] 'Licensing Debt Management Firms', *Treasury* (Cth) (Web Page) <https://treasury.gov.au/consultation/c2021-139564>.

[12] *National Consumer Credit Protection Amendment (Debt Management Services) Regulations 2021* (Cth) sch 1 extended the Australian consumer credit licensing regime to firms that provide debt management assistance for a 'fee, charge or other amount': *National Consumer Credit Protection Regulations 2010* (Cth) reg 4B(2).

[13] *National Consumer Credit Protection Regulations 2010* (Cth) reg 4A. Credit repair is a service that some DMFs offer for a fee, purportedly to improve consumers' negative credit records or credit history. These services attract consumers whose credit records are marred by late payments or defaults and who, consequently, experience difficulties in obtaining loans, credit cards, rental accommodation or other forms of credit: Paul Ali, Lucinda O'Brien and Ian Ramsay, 'A Quick Fix? Credit Repair in Australia' (2015) 43(3) *Australian Business Law Review* 179.

[14] *National Consumer Credit Protection Regulations 2010* (Cth) reg 4B. See Part III(A) below for details.

[15] *National Consumer Credit Protection Act 2009* (Cth) s 47(1)(a).

[16] Ibid s 37.

[17] See, eg, ASIC, *Credit Licensing: General Conduct Obligations* (Regulatory Guide No 205, April 2020).

the authors: a focus group interview and a survey of 400 consumers.[18] The data generates new knowledge, contributing to the existing Australian scholarship by producing new insights from the perspective of consumers on their interactions with DMFs including the challenges, outcomes and levels of transparency they experienced. The focus group data sheds light on various ways in which consumers are harmed as a result of engaging DMFs which have not been previously documented.

The second way this article builds on prior research is by drawing on the empirical data and on the international experience of regulating DMFs to develop proposals for a more robust Australian regulatory framework. Various countries have sought to enhance the effectiveness of regulatory interventions through a deeper understanding of the interactions and processes that influence consumers' financial decisions, and the harmful impacts that may ensue.[19] Regulators such as the Financial Conduct Authority ('FCA') in the United Kingdom ('UK') have used such insights to formulate targeted strategies aimed at reducing risks of harm to debtors in financial stress who engage the services of DMFs.[20] The reform proposals put forward in this article are substantially more comprehensive and detailed than the preliminary suggestions contained in the 2019 Senate report on credit and hardship.[21]

Part II of this article contains a review of the prior studies and describes what was previously known about the harm that could result from poor business practices and predatory conduct by DMFs in Australia and overseas. The existing Australian legal framework is discussed in Part III. Part IV explains the methodology adopted in this article while Part V discusses insights from the focus group interview and consumer survey. Proposed reforms aimed at mitigating risks of harm to Australian consumers are considered in Part VI. Part VII concludes.

II Prior Studies on Consumer Harm

A *Australia*

The problems highlighted in the joint communiqué by concerned consumer and industry groups have been canvassed in ASIC and Senate reports. In 2016, ASIC released a report on its investigation of firms that offer consumers who are in financial hardship services such as budgeting, debt negotiation, advice on debt agreements and credit repair.[22] The report, titled *Paying to Get Out of Debt or Clear*

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18 Ethics approval was obtained from the Monash University Human Research Ethics Committee for both empirical studies: Project ID 25394 on 30 June 2020 and Project ID 28211 on 13 April 2021.

19 Anne-Francoise Lefevre and Michael Chapman, 'Behavioural Economics and Financial Consumer Protection' (OECD Working Paper on Finance, Insurance and Private Pensions No 42, Organisation for Economic Cooperation and Development, 15 March 2017) 3; Pete Lunn, *Regulatory Policy and Behavioural Economics* (OECD Publishing, 2014) 9.

20 Kristine Erta, Stefan Hunt, Zanna Iscenko and Will Brambley, 'Applying Behavioural Economics at the Financial Conduct Authority' (Occasional Paper No 1, Financial Conduct Authority, April 2013) 4 <https://www.fca.org.uk/publication/occasional-papers/occasional-paper-1.pdf>.

21 Senate Economics References Committee (n 9) 63–4 [4.39]–[4.42].

22 *Paying to Get Out of Debt* (n 8).

Your Record: The Promise of Debt Management Firms ('ASIC report'), observed that these firms commonly operated as 'one-stop shops' offering a range of services including referrals to others for further credit.[23] The ASIC report also highlighted systemic problems in the industry such as DMFs engaging in high-pressure sales tactics and misleading advertising, failing to provide information about important risks, and giving poor advice which at times caused significant harm to vulnerable consumers. The Senate inquiry into credit and hardship, culminating in *Credit and Hardship: Report of the Senate Inquiry into Credit and Financial Products Targeted at Australians at Risk of Financial Hardship* in 2019 ('Senate report') likewise emphasised the detrimental effects of for-profit debt advice on many consumers.[24]

Both the ASIC and Senate reports expressed concern about a range of conduct including the ways in which DMFs target consumers in financial difficulty to promote their debt help services.[25] Debt management firms are thought to obtain information about individuals' debt problems from court lists[26] or third parties such as payday lenders.[27] The reports also highlight the problem of DMFs engaging in misleading conduct[28] and, in particular, making unrealistic promises or obscuring fees that consumers are required to pay.[29] At times, consumers are not aware that they are dealing with a for-profit business.[30] Debt management firms have been found to refer consumers to 'inappropriate remedies which may be expensive and cause lasting damage'.[31] Unaffordable payment plans leave consumers with inadequate funds for daily necessities, with detrimental consequences.[32] Examples include debtors having insufficient money for childcare, compelling the parent to stop work and compounding their financial problems.[33]

For many consumers in financial hardship, paying substantial fees for services which are available free of charge ostensibly aggravates their financial difficulties. These fees are of greater concern when they are opaque, expensive and heavily front-loaded. Accounts have emerged of consumers not receiving any services, or receiving less than the DMF had promised, following payment of fees.[34] Although various forms of debt help may be obtained from financial counsellors free of charge, typically DMFs do not advise consumers of these options.[35]

Complaints have also emerged in relation to credit repair. Consumers can lodge disputes with EDR providers at no cost to rectify errors in default listings.

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23 Ibid 4 [3], 19 [72–3], 36 [114–15].
24 Senate Economics References Committee (n 9).
25 Ibid 61–2 [4.30]; *Paying to Get Out of Debt* (n 8) 20 [77]–[81].
26 *Paying to Get Out of Debt* (n 8) 21 [85].
27 Senate Economics References Committee (n 9) 62 [4.31].
28 *Paying to Get Out of Debt* (n 8) 5 [7].
29 Senate Economics References Committee (n 9) 59–60 [4.21].
30 Ibid 56 [4.10], citing Evidence to Senate Economics References Committee, Parliament of Australia, Canberra, 24 January 2019, 2 (David Locke, Chief Ombudsman and Chief Executive Officer, AFCA).
31 Senate Economics References Committee (n 9) 56 [4.11]. See also *Paying to Get Out of Debt* (n 8) 35–8.
32 Senate Economics References Committee (n 9) [4.15].
33 Ibid 58 [4.16].
34 Ibid 61 [4.27].
35 Ibid 67 [4.12]; *Paying to Get Out of Debt* (n 8) 22, 27 [119].

Nonetheless, ASIC's report observed that DMFs were increasingly representing consumers seeking the removal of default credit listings, often charging consumers high fees.[36] Further, the default listing cannot be removed if the records are accurate.[37] The Australian Financial Complaints Authority ('AFCA'), a major EDR provider, suggests that DMFs 'prey on consumers' ignorance', charge 'high up-front fees for services that provide little or no value' and offer 'poor, inappropriate services' that 'can leave consumers worse off in terms of actually negotiating a settlement'.[38]

A survey commissioned by Consumer Action in 2020 found that 27% of Australians have paid for such services at least once in their lifetime, and 8% had paid for debt management or credit repair services in the previous year.[39] Consumer Action estimated that approximately 55% of Australians saw or heard DMFs' advertisements in 2020.[40] The survey did not investigate consumers' experiences with DMFs and problems of harm highlighted in the joint communiqué and the ASIC and Senate reports.

This article builds on these reports and extends the knowledge of systemic weaknesses that underpin consumer harm by more closely investigating the interactions between consumers and DMFs, and the outcomes that ensued.[41] The empirical research conducted by the authors to bridge the gap in knowledge is discussed in Part V. The analysis then draws on the empirical data and the experience of regulating DMFs in the UK, Canada and the United States ('US') to inform the proposals examined in Part VI. These countries provide valuable lessons for Australia as they have experienced similar problems of consumer harm and have implemented reforms in attempting to deal with them.[42]

B *International Experience*

Reports from the UK, Canada and the US indicate that the risks posed by DMFs to consumers in these countries are in many respects very similar to the challenges faced in Australia.[43] In its 2015 review of DMFs, the FCA stated that 'debt management is one of the highest risk activities' in the UK's consumer credit

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36 *Paying to Get Out of Debt* (n 8) 29–33.

37 Senate Economics References Committee (n 9) 61 [4.28].

38 Ibid 60 [4.23], 61 [4.26], quoting Evidence to Senate Economics References Committee, Parliament of Australia, Canberra, 24 January 2019, 9 (David Locke, Chief Ombudsman and Chief Executive Officer, AFCA).

39 Consumer Action, *Debt Management Firm Research* (Report, December 2020) 12 <https://consumeraction.org.au/wp-content/uploads/2020/12/CALC_Debt-Management-Firms-Research_Report_7Dec20.pdf> ('*Debt Management Firm Research*').

40 Ibid 14–15.

41 See Part IV below for a description of the methodology.

42 Chen and Lemaitre (n 5).

43 Union des consommateurs, *Debt Settlement and Financial Recovery Companies: Too Risky an Option?* (Final Report, June 2017) <https://uniondesconsommateurs.ca/wp-content/uploads/2020/12/R06-redresseurs-financiers-V2-Eng.pdf>; United States Senate, *The Debt Settlement Industry: The Consumer's Experience*, Hearing before the S Comm on Commerce, Science, and Transportation, 111th Cong, 2 April 2010; *Paying to Get Out of Debt* (n 8); All Party Parliamentary Group, APPG on Debt and Personal Finance, *Summary Report on Fee Charging Debt Management and High Cost Credit Services* (February 2012).

industry.[44] Problems of poor advice, misleading advertising and misrepresentation of services as 'free when they were not' have been highlighted by UK regulators.[45] Consumers being channelled towards unsuitable debt 'solutions' that exacerbate their financial difficulties, high up-front fees and a lack of transparency have all been decried.[46] Similar problems have been underscored in Canada where Union des consommateurs,[47] a non-profit organisation that advocates for consumer rights, observes frequent complaints of 'negative experiences with debt settlement and financial recovery companies' across Canada.[48] In the US, problems have persisted despite regulatory intervention to curb predatory conduct by businesses offering various forms of debt help since the 1950s. A US Senate report observed that 'debt settlement companies are kicking people when they are down', that 'these companies keep the fees, but don't keep their promises' and that, in reality, 'these companies usually make [the position of] struggling consumers financially worse'.[49]

One of the key challenges in the US and Canada is the avoidance of regulation by predatory businesses. Although legislation in various US states prohibits or regulates debt adjusting or debt pooling,[50] and federal laws regulate credit repair, mortgage relief and telemarketing sales of debt relief,[51] firms have been adept at changing their business models to circumvent the laws.[52] Brock likens attempts to regulate the industry in the US to a 'game of whack-a-mole: as soon as a statute is enacted to strike down one business model, another business model pops up'.[53] Likewise, Canadian consumer groups observed that firms 'mutate regularly',[54] and 'redefine themselves to continue their practices with the same lack of transparency and high fees' in response to regulatory reforms or negative media reports.[55] Businesses avoid regulation by moving their operations to provinces where the industry is unregulated or laws are less stringent, taking advantage of exemptions by collaborating with professionals who are excluded from the regulations, and circumventing technical definitions relating to fees.[56] While the Canadian and US experience reflects the ongoing challenges in attempting to curb predatory behaviour, reports from the UK

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44 FCA, *Quality of Debt Management Advice* (Thematic Review No TR15/8, 2015) 5 [1.7].

45 Office of Fair Trading, *Debt Management Guidance Compliance Review* (Report No OFT1274, September 2010) 7 [1.14].

46 Ibid 5–6; All Party Parliamentary Group (n 43).

47 Union des consommateurs is comprised of several ACEFs (Associations coopératives d'économie familiale), the Association des consommateurs pour la qualité dans la construction (ACQC), and individual members.

48 Union des consommateurs (n 43) 6.

49 United States Senate (n 43) 2.

50 Ibid 56.

51 *Credit Repair Organizations Act*, 15 USC §§ 1679–1679j (2012); *Mortgage Assistance Relief Services (Regulation O)*, 12 USC § 1015; *Telemarketing Sales Rule*, 16 CFR § 310 (2018).

52 Matthew Brock, 'As Cats Are Drawn to Cream: Expanding Debt Settlement Regulation to Traditionally Exempt Entities' (2014) 47(3) *Columbia Journal of Law and Social Problems* 385, 389.

53 Ibid 416.

54 Union des consommateurs (n 43) 19.

55 Ibid 54, 100.

56 Ibid 100; Leslie Parrish, 'A Roll of the Dice: Debt Settlement Still a Risky Strategy for Debt-Burdened Households' (2016) 18(2) *Cityscape* 55, 58; Justin P Nelson, 'Federal Oversight of the Debt Relief Industry: A More Effective Means of Deterring Illegal Debt Settlement Schemes' (2014) 75 *Ohio State Law Journal* 41, 44.

are more optimistic. Following substantial regulatory intervention, the FCA found significant improvements in the quality of debt advice.[57]

Experience in the UK, the US and Canada indicates that regulations that target specific risks of harm are required if consumers are to be effectively protected from predatory business conduct.[58] The FCA underscores the importance of enforcing the rules, attributing improvements in the standard of debt advice to robust supervision and enforcement.[59] British consumers have access to free EDR to seek redress against DMFs that breach the rules.[60] The reforms enacted in Australia in 2021 allow consumers to seek redress from DMFs for breaches of the rules, examined in Part III, through AFCA. As discussed in Part VI below, were ASIC to introduce the proposed regulatory guidance, tangible and significant improvements in consumer outcomes through applications to AFCA, such as has been seen in the UK, could be achieved, particularly if accompanied by robust regulatory enforcement and supervision. The next Part examines Australia's existing regulatory framework.

III The Australian Regulatory Framework

Currently, Australian DMFs are subject to three sources of regulation: the consumer credit licencing regime which was extended to cover DMFs in 2021; the *Australian Consumer Law* ('*ACL*') which is sch 2 of the *Competition and Consumer Act 2010* (Cth); and pt IX of the *Bankruptcy Act 1966* (Cth) ('*Bankruptcy Act*') which regulates debt agreements.

A *Licensing Regime*

Firms that provide debt management or credit repair services to consumers are required to have an Australian credit licence.[61] These firms must satisfy the 'fit and proper person' test, undertake their activities 'efficiently, honestly and fairly', and ensure that their representatives are adequately trained and competent.[62] They must also be members of AFCA.[63] This membership enables aggrieved consumers to access EDR services to seek compensation against debt management and credit repair firms for breaches of regulations. The firms must also have internal dispute resolution procedures that meet approved standards, adequate resources, risk management systems, and arrangements to ensure that clients are not disadvantaged by any conflict of interest.[64] Individuals who carry on unlicensed credit activity are subject to civil penalties of up to $1.11 million; for companies, civil penalties may

[57] FCA, *Debt Management Sector Thematic Review* (Report No TR19/1, 15 March 2019).
[58] Chen and Lemaitre (n 5) 167–70.
[59] FCA, *Debt Management Sector Thematic Review* (n 57) 3.
[60] *FCA Handbook*, 'Dispute Resolution: Complaints' ('DISP') [2.3] <https://www.handbook.fca.org.uk>.
[61] *National Consumer Credit Protection Regulations 2010* (Cth) reg 4A.
[62] *National Consumer Credit Protection Act 2009* (Cth) ss 37A, 47(1)(a).
[63] Ibid s 47(1)(i).
[64] Ibid ss 47(1)(b), (h), (k), (l).

be up to $11.1 million, three times the benefit obtained or detriment avoided, or 10% of annual turnover up to $555 million, whichever is greater.[65]

The definition of 'debt management service' covers a range of activities relating to debt negotiation and credit repair. 'Debt management services' include a recommendation by a DMF to a consumer that they apply for a change to a credit contract, apply for a deferral or waiver of amounts owed under a credit contract, or apply for a postponement relating to a credit contract.[66] Suggestions that consumers make a complaint to credit providers or regulators, give a hardship notice, institute proceedings or take any other action relating to a credit contract likewise fall within the definition of 'debt management services', and providers of these services must be licensed. The licensing requirements extend to credit reporting assistance, capturing a range of activities relating to credit repair.[67]

Experience in other countries suggests that for-profit businesses that offer debt help services commonly engage in avoidance strategies to circumvent regulation.[68] Consequently, framing laws to capture a broader range of debt-related activities leaves less room for avoidance. The Australian definitions are framed to include situations where credit reporting assistance or debt management assistance is provided on behalf of someone else, or fees and charges are paid to a third party.[69] These appear to provide some protection against the use of third-party arrangements to avoid regulations, as seen in the US and Canada. Nonetheless, consumer advocates argue that the potential for avoidance remains, as non-credit products and services such as energy, telecommunications, council rates, school fees and buy now pay later do not come within the licensing regime.[70]

B *Australian Consumer Law*

Debt management firms are required to comply with prohibitions in the *ACL* against conduct that is misleading or deceptive or likely to mislead or deceive.[71] The *ACL* also prohibits unconscionable conduct[72] and provides consumer guarantees such as

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[65] Ibid ss 29, 166, 167, 167B; 'Fines and penalties', *ASIC* (Web Page) <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/fines-and-penalties/>.

[66] *National Consumer Credit Protection Regulations 2010* (Cth) reg 4B.

[67] Ibid reg 4A(2)(b). These include suggestions that consumers apply for a change to information collected or held by a credit reporting body in relation to a credit contract; assistance in applying for a change to such information; and suggestions that consumers make complaints or claims to credit providers or regulators regarding such information. They also include suggesting that consumers institute proceedings or take action regarding such information, and assisting consumers in these matters: ibid reg 4C.

[68] Union des consommateurs (n 43); United States Senate (n 43).

[69] *National Consumer Credit Protection Regulations 2010* (Cth) regs 4B, 4C.

[70] Consumer Action, Consumer Credit Legal Service (WA), Financial Counselling Australia, Financial Counselling Victoria, Financial Rights Legal Centre, Uniting Communities Consumer Credit Law Centre SA and WEstjustice, Joint Submission to Treasury: Licensing Debt Management Firms: Exposure Draft Regulations (15 February 2021) <https://www.financialcounsellingaustralia.org.au/fca-content/uploads/2021/02/DMFLicensing_JointSubmission.pdf>.

[71] *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*') ('*ACL*') s 18; *Australian Securities and Investments Commission v Malouf Group Enterprises Pty Ltd* [2018] FCA 808.

[72] *ACL* (n 71) ss 20, 21.

the requirement that services should be fit for their purpose.[73] However, these provisions have been of limited use in protecting debtors in financial difficulties. This is because, in practice, these debtors face several challenges in relying on the *ACL* to seek compensation against DMFs for loss. These challenges include the prohibitive cost of litigation, the time and effort involved, and difficulties of proving misleading or deceptive conduct, or unconscionable conduct.[74]

C *Debt Agreement Administration*

Among the debt solutions offered by DMFs, debt agreements are subject to the most stringent regulation aimed at protecting vulnerable consumers. For example, DMFs that administer debt agreements must comply with pt IX of the *Bankruptcy Act*. Debt agreement administrators must be registered, comply with restrictions on advertising, and disclose risks and other important information to debtors before they enter into a debt agreement proposal.[75] Reforms were introduced in 2018 to address problems of unsuitable debt agreements that exacerbated debtors' financial difficulties.[76] These reforms included limiting debt agreements to three years unless the debtor owns or has an equitable interest in their principal place of residence,[77] and requiring a more rigorous affordability test to compare the debtor's payments with their income.[78]

The licensing requirements introduced in 2021 are a step towards better regulation of the industry. However, international experience and the empirical research discussed in Part V of this article indicate that more is needed. In particular, targeted measures aimed at mitigating specific risks of harm are critical to safeguarding consumers from the detrimental consequences described in Parts I and II. This article proposes targeted reforms in Part VI which may be implemented by way of regulatory guidance. The proposals are informed by empirical research conducted using the methods described below.

IV Methodology

This study adopts a dual-method approach to facilitate a deeper understanding of the business practices that lead to harmful outcomes for consumers who engage DMFs.

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73 Ibid s 55.

74 See, eg, *Wade v J Daniels & Associates Pty Ltd* [2020] FCA 1708.

75 *Bankruptcy (Registration and Cancellation of Registration of a Debt Agreement Administrator) Guidelines 2020* (Cth) [3.1]; *Advertising and Promotional Activities of Personal Insolvency Practitioners* (Inspector-General Practice Direction No 4) [3.1]–[3.20] <https://www.afsa.gov.au/resource-hub/practices/practice-guidance/advertising-and-promotional-activities-personal-insolvency-practitioners>; *Debt Agreement Administrators' Guidelines to Certification Requirements* (Inspector-General Practice Direction No 13) [3.1]–[3.5] <https://www.afsa.gov.au/resource-hub/practices/practice-guidance/debt-agreement-administrators-guidelines-certification-requirements>.

76 Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Bankruptcy Amendment (Debt Agreement Reform) Bill 2018* (March 2018); Vivien Chen, Lucinda O'Brien and Ian Ramsay, 'An Evaluation of Debt Agreements in Australia' (2018) 44(1) *Monash University Law Review* 151, 188.

77 *Bankruptcy Legislation (Debt Agreement Reform) Act 2018* (Cth) sch 2.

78 Ibid sch 1.

These methods are an online survey of 400 consumers who have engaged DMFs, and a focus group interview with professionals who assist consumers.

The online survey was conducted with the assistance of Pureprofile, a company that specialises in internet-based consumer research. The invitation to participate in the survey was circulated to Pureprofile's database of consumers throughout Australia, and 400 participants who had engaged the services of DMFs were recruited from May to June 2021. To undertake the survey, consumers had to confirm at the start of the survey that they had, at some time in the past, engaged paid services to reduce or manage their debts, negotiate with creditors, stop the repossession of their home, fix their credit report, or assist with budgeting, a debt agreement or bankruptcy.[79] Respondents were recruited from across Australia,[80] with the cohort having close to equal proportions of males and females[81] and a range of age groups.[82]

Pureprofile required survey respondents to agree to its terms and conditions prior to undertaking the survey. These emphasised the importance of providing 'thoughtful and correct' answers as the research would be used by organisations to make important decisions. Respondents were provided with a statement explaining the survey and research, and were informed that the information gathered from the survey would be used by researchers from a university to consider how legal protections for consumers may be improved.

The 10 professionals who participated in the focus group were staff from not-for-profit organisations, including financial counsellors, community lawyers and EDR providers. The participants had experience assisting consumers who had engaged DMFs. Some of the participants specialised in consumer policy and had practical knowledge of how the law operates as well as avoidance strategies commonly employed by predatory businesses.

The focus group discussion took place using online conferencing software Zoom in September 2020. The interview was guided by open-ended qualitative questions. The authors interviewed the professionals to gain further details of the problems encountered by consumers who had engaged DMFs, and to investigate additional challenges not canvassed in the Senate and ASIC reports.[83] The focus group format was chosen by the authors because it allows participants to interact

[79] Survey respondents reported that they had paid for assistance with debt negotiation (45%), advice on how to reduce or manage their debts (41%), budgeting advice (36%), credit repair (32%), to arrange a debt agreement or bankruptcy (21%), and to stop the repossession of their home (7%).

[80] The respondents were from New South Wales (33%), Victoria (27%), Queensland (20.5%), South Australia (8.2%), Western Australia (8%), Tasmania (2.2%) and the Australian Capital Territory (1.2%).

[81] Of the respondents, 50.6% identified as female, 49.2% as male, and 0.2% as non-binary.

[82] The age ranges, and proportion of respondents in each range, were 18–24 years (12.8%), 25–34 years (19.3%), 35–44 years (19%), 45–54 years (17.8%), 55–64 years (15.4%) and 65+ years (15.7%).

[83] The focus group method allows a 'less-well-understood problem, situation, or context' to be clarified: Jane Sutton and Zubin Austin, 'Qualitative Research: Data Collection, Analysis, and Management' (2015) 68(3) *Canadian Journal of Hospital Pharmacy* 226, 226.

with, and react to the views of, other participants.[84] One of the objectives of the focus group was to explore potential reforms aimed at alleviating the risks of harm to consumers, and to test those ideas with all participants. In seeking to develop a robust regulatory framework, the discussion considered the practical challenges of implementing the proposed reforms and strategies to curb avoidance behaviour by predatory businesses.

The focus group Zoom session was recorded and later transcribed. The comments of individual participants were tagged with descriptors so that comments could be attributed to de-identified individuals. The authors manually coded the transcripts, revealing themes and identifying similarities and differences in the participants' views.[85] The coded transcript was synthesised, and the conclusions drawn by the authors in this article are supported by direct quotations from the focus group participants.[86]

Parts V(A) and V(B) below examine the two empirical datasets. The discussion in Part V(C) then introduces the reform proposals which will be explored in Part VI. The proposed reforms, which are informed by the empirical data, extend the protection afforded by the licensing regime and mitigate risks consumers face in an Australian context.

V Empirical Research

A *Consumer Survey*

Prior to this study, the first-hand perspectives of consumers who have engaged DMFs' services were largely absent from existing reports. Much of the information on harm caused by DMFs was derived from reports by consumer advocates, industry stakeholders, government agencies and EDR services.[87] The survey conducted by the authors bridges this knowledge gap and facilitates a more nuanced understanding of the risks of harm that arise in these contexts. It does this by shedding light on consumers' interactions with DMFs and the outcomes that ensued. The survey also enabled perspectives to be gained from a broader range of consumers, including consumers who did not seek assistance from consumer advocates and who may not

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[84] This is an advantage of the focus group method identified by Acocella who argues that 'value of [the focus group] technique lies in the kind of interaction that emerges during the debate': Ivana Acocella, 'The Focus Groups in Social Research: Advantages and Disadvantages' (2011) 46(4) *Quality & Quantity* 1125, 1125.

[85] Terry Hutchinson, *Research and Writing in Law* (Thomson Reuters, 4th ed, 2018) 143–4; Herbert M Kritzer, *Advanced Introduction to Empirical Legal Research* (Edward Elgar, 2021) [5.2]; Sutton and Austin (n 83) 228–9.

[86] Sutton and Austin (n 83) 229.

[87] *Paying to Get Out of Debt* (n 8) 5–6 [11]–[17]; Senate Economics References Committee (n 9) 55–64 [4.1]–[4.45]. See also Consumer Action's survey in 2020 which considered matters such as the proportion of Australians who use DMFs' services and whether consumers support having 'UK-style consumer protection', a duty to act in the client's best interest, and a ban on up-front fees: *Debt Management Firm Research* (n 39). Notably, the survey did not investigate details of interactions between consumers and DMFs, such as the level of transparency and the outcomes of the interaction.

fall within the disadvantaged communities often assisted by the consumer groups cited in the Senate report.[88]

The survey of 400 consumers who had engaged DMFs[89] was funded by the authors' institution. It sought to gain a deeper understanding of consumers' interactions with DMFs, the extent to which they received the promised outcomes and any challenges they encountered. It also sought consumers' views regarding transparency of fees and risks. The survey asked respondents approximately 40 questions which were formulated by the authors based on the reports examined in Part II(A) and, to a lesser extent, the focus group discussion considered in Part V(B). These questions included how respondents initially came into contact with the DMF, the affordability of payment plans, and the effectiveness of the services in resolving their debt problems.

1 *Initial Contact*

The survey results suggest that many respondents were approached by DMFs who knew that they were experiencing debt problems. Slightly over a quarter (25.5%) of respondents indicated that the DMF initiated contact with them. When asked how the DMF obtained their contact details, 43% stated that the DMF found out about them because they were applying for credit, and 30% indicated that the DMF found out about them because they had been to court about their debts. Of the respondents who were contacted by DMFs, 80% said that the DMF knew they were in debt. In close to a third (31%) of those cases, the DMF knew the details of their debts such as to whom they owed money or how much they owed. These findings are consistent with claims that DMFs are accessing sources of information about debtors' financial difficulties such as court lists, or that third parties may be passing information on to DMFs.[90]

Nonetheless, in the majority of cases (59.5%) respondents took the initiative to contact the DMF.[91] Most commonly, respondents reported that they found out about the DMF through online searches (36%), although this may to some extent reflect behavioural biases of respondents who participated in an online survey.[92] Other respondents said that the DMF was recommended by friends or acquaintances (31%), that they had come across advertisements on television or radio (11%), that an accountant had recommended the DMF (8%), or that advertisements had popped up while they were online (7%). One respondent mentioned that they found out about the DMF through advertising material they received while attending court.

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[88] See, eg, 'Eligibility for Assistance', *Consumer Action* (Web Page) <https://consumeraction.org.au/eligibility-for-assistance/>.

[89] The consumers had engaged paid services to reduce or manage their debts, negotiate with creditors, stop the repossession of their home, fix their credit report, or assist with budgeting, a debt agreement or bankruptcy.

[90] *Paying to Get Out of Debt* (n 8) 21 [85]; Senate Economics References Committee (n 9) 62 [4.31].

[91] Fifteen per cent of respondents could not recall who made the first contact.

[92] Notably, respondents to Consumer Action's survey listed advertisements on television as the most common source of advertising: *Debt Management Firm Research* (n 39) 14.

2 *Many Did Not Know of Free Debt Help*

The survey findings also indicate that the majority of respondents (61%) were not aware when they engaged the services of a DMF that they could get free debt help or credit repair. Close to two-thirds (65%) of these respondents said that they would not have paid for debt help if they had known they could get such services for free. The survey results support the proposition that there is some demand for paid debt assistance among consumers (39%) who are prepared to pay fees for someone else to deal with the problem. Common reasons expressed for this demand were that the DMFs 'saved the hassle' (21%), that 'they were helpful and friendly' (18%), that 'I had no time' (10%), that 'they were recommended by my regular credit provider (10%), and that the DMF 'told me the financial counsellors who offer free help are no good' (5%). Respondents also commented that they had been willing to pay for DMFs' services because they were desperate, confused and needed help; they were 'not confident with financial transactions'; and they thought they would receive 'better service quality'.

3 *Fees*

The survey findings indicate a lack of transparency around fees, with a significant percentage of respondents (48.5%) saying that they were not told before they signed up the total amount of fees they would have to pay for the DMF's services. These respondents comprised 34.2% who were aware that there were fees but didn't know the amount; 8% who knew there were some fees, but were later told by the DMF that they had to pay more; and 6.3% who had no idea before they signed up of how much they would have to pay.

Accounts of front-loaded fees also emerged from the survey, with 19% of respondents saying that they had to pay all the fees before the DMF would perform any services, and a further 16.4% noting that they had to pay 'a lot' of the fees before work commenced and regular fees after that. Nonetheless, another 28% said that they had to pay 'some' of the fees up-front and some later; 14.5% paid all the fees after the work was completed; while 13.7% paid regular fees but did not have to pay anything up-front. Notably, 6% said they were told to pay the DMF money, but did not know how much was taken as fees and how much was used to pay off their debts. Two per cent of respondents did not choose any of the above responses.

Responses to the survey reflect concerns (which were also expressed by the focus group participants, and discussed below) about DMFs using caveats and taking security for fees. Sixteen respondents (4%) stated that when they stopped paying the DMF's fees, the firm prevented them from selling their house. Forty-five respondents (11%) said the DMF took some of their property when they didn't pay its fees.

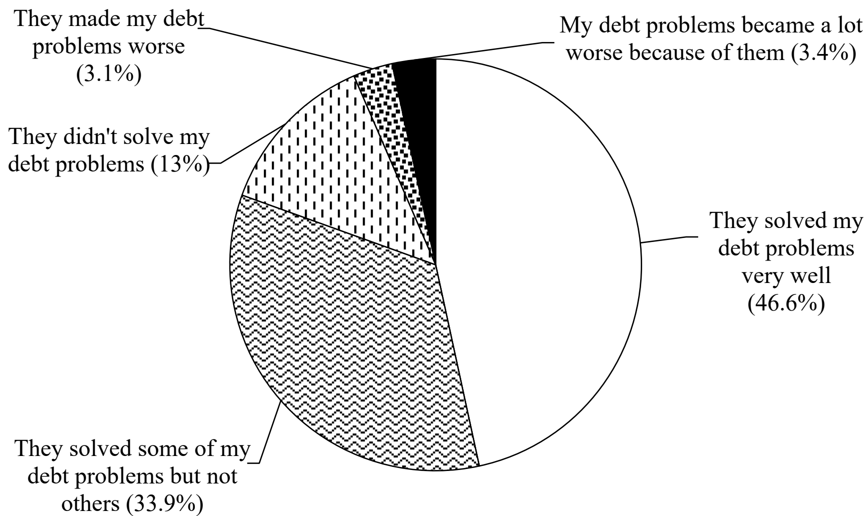
As for the amount of fees paid, respondents commonly paid in the range $500 or less (28.2%), $501–1,000 (21.2%), $1,001–5,000 (16.4%), $5,001–10,000 (8.4%) and $10,001–20,000 (5.5%). Only 1.7% paid more than $20,000. More than 12% (12.3%) of respondents did not know the amount they paid, while some (6.3%) elected not to answer the question.

4 *Outcomes*

Of the survey respondents who entered into payment plans recommended by DMFs, 43.9% said that the payments were unaffordable; they did not have enough money after paying the DMF and, consequently, struggled to pay their bills. The survey results also reflect problems of poor advice, with 26.3% of respondents indicating that their DMF told them to stop paying their creditors and to send the money to the DMF instead.

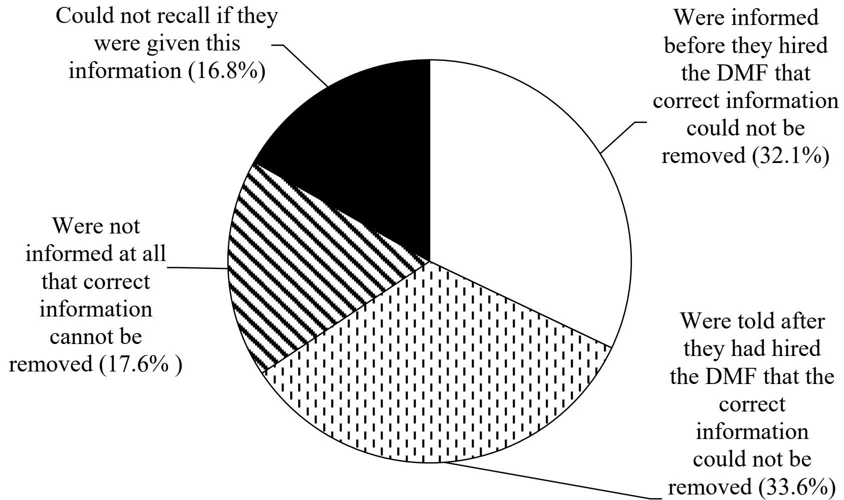
Overall, the survey responses indicate a mix of experiences, as shown in Figure 1. While 46.6% of respondents indicated that the DMFs solved their debt problems very well, 33.9% said they solved some debt problems but not others, and 13% said the DMFs didn't solve their debt problems. Some respondents (6.5%) reported that their debt problems became worse (with slightly more than half of those (3.4%) stating that their debt problems 'became a lot worse because of them').

Figure 1: Consumers' perspectives: The impact of DMF's services



The majority (51.2%) of respondents who paid for credit repair services reported a lack of transparency about the limitations of the outcomes that could be achieved, as shown in Figure 2. Less than one-third (32.1%) of respondents were informed before they hired the DMF that the DMF could not remove correct information from their credit record; slightly over one-third (33.6%) were told of the limitation after they had hired the DMF; and 17.6% said they were not informed of this limitation at all. The remaining respondents (16.8%) could not recall if they were given this information.

Figure 2: Credit repair services: Disclosure of limitations



The extended comments reflected the mix of experiences. Respondents observed: 'I was lucky to find an honest person'; '[I]t was a bit expensive but it took all the worry'; '[There's a] need [for] better promotion of free debt help'; 'I would never had [sic] paid if I had known there was free advice that wouldn't impact my credit rating. When your [sic] desperate you listen to anyone'; and 'The credit repair agency I used promised me all these things and never delivered on them leaving me in a worse financial position'.

B *Focus Group*

Focus group participants elaborated on problems that had been briefly canvassed in the Senate report such as targeted advertising, consumer harm and fees. They highlighted the ways in which risks arise across various stages of engagement with a DMF, from initial contact, through unsuitable recommendations that leave debtors worse off, to opaque fees and caveats that further impede debtors' recovery.

1 *Targeting Individuals with Debt Problems*

Several participants underscored concerns over unsolicited advertising that targets debtors in financial difficulty. In particular, significant concerns were raised about predatory advertising by DMFs who appear to have obtained details of debtors' legal problems from court lists:

> Three or four letters coming in a row, different entities all identifying that 'we think you're in financial difficulty' and 'we know that you are in court'. A lot of people get this before they even know that they are in court, before they even receive the paperwork themselves.
>
> Sometimes the wording suggests that they're lawyers, so they might use 'and associates' in the descriptor and a lot of consumers take that to mean that they may be lawyers or legally trained. And the consumer will instruct them to appear in proceedings before courts.

One participant reported that when they were in a support scheme for people in the repossession list, there were 'routinely people who also sat in the registry of the Supreme Court, handing out business cards and flyers on buying your house and renting it back to you or representing you in the Supreme Court'.

Participants observed that DMFs advertise on television, radio, the internet and social media. One strategy employed by some DMFs is to offer a 'free credit report', encouraging consumers to 'ring to get a sense of what's on their credit report':

> Sometimes [consumers] think they're ringing Equifax or one of the actual credit reporting agencies, but it's, in fact, not a credit reporting bureau. It's a sort of similarly named organization. And it's not free because they face high-pressure sales tactics to get them to purchase some sort of product or service to repair [their credit record].

Participants raised issues of advertising on the internet and the use of algorithms that cause unsolicited offers of debt help to 'pop up' on social media and other websites. They noted that consumers are targeted when they are vulnerable and searching for information on managing debt problems, highlighting the issue of overpromising and underdelivering:

> A couple of my colleagues have told me that they're getting people [clients] who are finding out about debt agreements and credit repair through social media … and then not returning [to financial counselling]. And the reason is because they found something on social media … [W]e know that algorithms are a really good way to find clients.
>
> The common problem across all the advertising is that it's often misleading. It sells this false hope about what they [DMFs] can do. The promise is really appealing. They sound friendly, approachable, and they're going to help you to turn your life around, take away the stress. What our casework routinely shows is that problems come later when the person realizes that the services provided don't really live up to that promise.

2 *Consumer Harm*

The focus group highlighted negative outcomes such as 'matters not being dealt with properly' and 'significant costs being incurred' and harmful consequences that leave debtors worse off. They described examples such as an arrangement set up by a DMF that was not affordable or sustainable, prolonging the consumer's financial stress, with the result that the consumer was ultimately declared bankrupt:

> One of the worst harms is when [consumers] get bad advice at the beginning … [T]hey start off down one path and it turns out to be the wrong one …

> Some of the consequences of these debt options … can't be undone under our current laws, for example, some of the insolvency options under Pt IX Bankruptcy.

Likewise, EDR providers highlighted the detrimental consequences for consumers who are represented by DMFs. A common problem is that consumers are excluded from dispute resolution processes as a result of engaging DMFs. A representative from an EDR provider commented that DMFs

> don't add any value at all. They can't do anything for the customer that we can't do ourselves and very often, we can actually do it a lot more effectively than they can. We find more often than not they are an obstruction to us in attempting to get a good result.
>
> Our understanding is that … no conversations around managing expectations are being had … By the time [consumers] get an outcome, when they're expecting it to go in their favour, for example, to be able to retain their home, the impact to them is even worse, than [for those consumers for whom we've] been able to manage expectations along the way.

Consumers who engage DMFs are often not present at conciliations where sometimes reasonable offers are made that are more advantageous for the consumer. Although the EDR provider makes efforts to contact consumers, many consumers don't want to speak to EDR providers, because they have hired a DMF to deal with the issue on their behalf.

In addition, the lack of engagement by consumers means that EDR personnel dealing with the matter have no confidence that they have a full understanding of the consumer's true position. This makes it particularly difficult for the EDR provider to determine an appropriate outcome that is both tenable and sustainable. The representative went on to say:

> We're hearing what their agent is telling us but that may be very different from what their actual position is.
>
> What you worry about … is, have we really got to the right outcome that's going to actually bring finality to this complaint, to this consumer, because do we have the proper story in the first place?

These concerns were echoed by a participant from a different EDR scheme who said, '[I]t's a frustration for us because we know we could do the work on behalf of that customer if they just got in touch with us directly, and we can do it for free'.

3 *Unaffordable Fees for Services which are Available at No Cost*

Participants observed there is a tendency for DMFs to recommend to clients 'solutions' that the DMF can earn fees from, instead of identifying the best long-term solution for clients. They noted that, in their experience, there are often many more effective ways of resolving underlying debt that can be arranged at no cost. For instance:

> [The DMFs] don't look to things like let's challenge whether the loan was a breach of responsible lending requirements. If they're judgment proof in

> Victoria, in many cases, a good advocate can negotiate and [the client can] walk away [from the debt].[93]

A number of the participants raised issues of opaque and unaffordable fees that are often required to be paid up-front. One financial counsellor observed that some fee structures are not easily understood, and the dollar cost of fees may be obscured through the use of formulas. For instance, debtors may not realise initially that fees expressed as a percentage of the debt may amount to a few thousand dollars. Another participant said that the DMFs' fees they came across ranged from $4,601 to $22,206.

Concern was expressed about DMFs' use of caveats and other forms of security for their fees which lead to harmful consequences for consumers. Some DMFs

> lodge caveats against people's homes as a tool to ensure their fees are paid, even when the promised services are not provided. In Victoria, it is extremely difficult for a homeowner to have a caveat removed without paying the debt vulture's fees … This puts the homeowner in an impossible position — pay the debt vulture's fees, or see the sale fall through.[94]

Participants observed that there is likely to be a spectrum of business models, with some being more predatory than others. While some middle-class consumers who can afford to pay fees may wish to outsource the labour, reforms that promote transparency and strengthen safeguards against predatory conduct are needed. One participant commented that reforms to the debt agreement regime in 2018 appear to have resulted in a significant reduction of complaints relating to unsuitable debt agreements, but noted that 'it's still a little bit too soon to know the full effect' of the reforms.

The second part of the focus group interview considered a range of proposed reforms put forward by the authors. The proposals were based on an analysis of regulations in the UK, Canada and the US for DMFs.[95] The authors also drew on previous research and reforms relating to the regulation of debt agreements,[96] and suggestions briefly canvassed by the Senate inquiry into credit and hardship.[97] Part VI examines the proposed reforms for Australian DMFs in detail and, where relevant, discusses the focus group participants' views about the proposals.

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93 The term 'judgment proof' refers to the principle that individuals cannot be compelled to repay debts out of their social security income by means of a court order: *Social Security (Administration) Act 1999* (Cth) s 60. See also *Judgment Debt Recovery Act 1984* (Vic) s 12(1).

94 *Caveat Removals* (n 4) 1. This document was sent to the authors by a participant following the focus group discussion. Consumer Action suggests that the problem may be alleviated by reforming Victoria's caveat system to allow caveats to lapse after a period, as permitted in Queensland, South Australia and New South Wales. It proposes that s 89A of the *Transfer of Land Act 1958* (Vic) should be amended to 'enable a homeowner to serve notice on the caveator that the caveat will lapse within 21 days unless they obtain a court order substantiating the interest claimed': at 2.

95 Chen and Lemaitre (n 5).

96 See Part III(C) above; Chen, O'Brien and Ramsay (n 76); Senate Legal and Constitutional Affairs Legislation Committee (n 76); *Bankruptcy Amendment (Debt Agreement Reform) Act 2018* (Cth).

97 Senate Economics References Committee (n 9) 63–4 [4.37]–[4.42].

C *Summary of Empirical Findings*

The findings of the consumer survey and focus group discussion reflect the concerns raised in the ASIC and Senate reports[98] including concerns about opaque and heavily front-loaded fees,[99] unsuitable advice and, at times, poor outcomes.[100] The survey findings foster a more nuanced understanding of the nature and extent of these problems as experienced by the respondents. Notably, 48.5% of survey respondents were not informed of the total amount of fees before they signed up. Over a quarter were advised to stop paying their creditors and to pay the DMF instead. Of those survey respondents who entered into payment plans, 43.9% reported that the DMFs' recommended plans were unaffordable, resulting in them subsequently struggling to pay their bills.

In addition, the empirical study adds to the existing knowledge by shedding light on several ways in which consumers have been harmed. These include the dispute resolution providers' observations of poor outcomes that ensue when consumers are excluded from dispute resolution processes as a result of engaging DMFs. Focus group participants highlighted the challenges in gaining a full understanding of consumers' circumstances, and in managing their expectations. Consumers are often not present at conciliations which results in them missing out on offers that may be more advantageous. The focus group discussion also highlighted the problem of caveats being used as security for fees, and the hardship that follows when DMFs do not perform the services as promised.

The survey findings provide insights into the extent to which respondents encountered a lack of transparency around the limitations on what credit repair services could achieve. The majority of respondents who engaged credit repair services were not told before they hired the DMF that correct information could not be removed.

Further, the survey responses provide perspectives from a broader range of consumers than previous studies have, facilitating a deeper understanding of the positive and negative aspects of experiences with DMFs' services. The positive outcomes include 47% of respondents who engaged debt help services reporting that the DMF resolved their debt problems. The survey found some demand for paid debt help reflected in the responses of 39% who were willing to pay for DMFs' services for reasons such as their being helpful and friendly, and saving the respondents 'hassle' and time.

Several limitations of the empirical findings should be noted. The 400 survey respondents drawn from Pureprofile's panel of consumers located across Australia cannot be said to be representative of Australian consumers more generally. An online survey is less likely to be representative of demographic groups that experience higher rates of digital exclusion such as the elderly and Indigenous

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[98] *Paying to Get Out of Debt* (n 8); Senate Economics References Committee (n 9) 56–62 [4.10]–[4.31].

[99] *Paying to Get Out of Debt* (n 8) 22 [89]–[90]; Senate Economics References Committee (n 9) 57 [4.12].

[100] *Paying to Get Out of Debt* (n 8) 35–8; Senate Economics References Committee (n 9) 57–8 [4.14]–[4.16].

Australians.[101] Nonetheless, the empirical findings discussed in Parts V(A) and V(B) are largely consistent with the observations made in the ASIC and Senate reports.[102] The focus group largely comprised consumer advocates and financial counsellors who assist low-income individuals who have experienced problems with DMFs, and their views would tend to reflect the experiences of the demographic they represent. At the same time, the inclusion of EDR providers as part of the focus group together with the survey of 400 consumers provides a broader range of perspectives that inform the empirical findings of this study. As the focus of the study was the perspectives of consumers and their advocates, representatives from the debt management industry were not included in the focus group.

By fostering a more nuanced understanding of the concerns raised in the ASIC and Senate reports,[103] the empirical findings underscore the need for regulation of the industry as briefly canvassed in the Senate report on credit and hardship.[104] The second part of the focus group interview discussed potential reforms to alleviate these problems. These included prescriptive standards to curb targeted advertising, transparency to facilitate informed consumer decisions, fairer fee structures and measures to ensure that debtors are channelled towards suitable debt solutions. To an extent, the proposed reforms resonate with measures adopted in the UK and, to a lesser degree, Canada. In the UK, the FCA's rules draw on insights from consumers' interactions with DMFs and the risks that arise to enhance the effectiveness of regulatory safeguards.[105] Similar approaches have been used by policymakers in other parts of the world.[106]

Experience in the UK, the US and Canada suggests that licensing regimes are more effective when coupled with prescriptive measures aimed at specific problems, robust supervision and enforcement, and affordable dispute resolution for consumers.[107] To maintain their authorisation, UK firms must comply with a raft of rules set out in the *FCA Handbook* including ensuring that advice is suitable and customers are informed of the risks, cost and potential disadvantages;[108] treating customers fairly;[109] referring customers to not-for-profit debt advice if they cannot afford the fees;[110] and not engaging in misleading advertising.[111] Enforcing the rules and enabling consumers to seek a remedy for breaches of the rules through EDR have collectively led to improvements in the level of consumer protection from

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101 Daniel Nunan and MariaLaura Di Domenico, 'Older Consumers, Digital Marketing, and Public Policy: A Review and Research Agenda' (2019) 38(4) *Journal of Public Policy and Marketing* 469, 477; Dawn Burton, 'Digital Debt Collection and Ecologies of Consumers Overindebtedness' (2020) 96(3) *Economic Geography* 244, 260.

102 *Paying to Get Out of Debt* (n 8); Senate Economics References Committee (n 9) 56–62 [4.10]–[4.32].

103 *Paying to Get Out of Debt* (n 8); Senate Economics References Committee (n 9) 56–62 [4.10]–[4.32].

104 Senate Economics References Committee (n 9) 63–4.

105 Erta et al (n 20).

106 Organisation for Economic Co-operation and Development, *Improving Online Disclosures with Behavioural Insights* (OECD Digital Economy Papers No. 269, April 2018) 11–12; Lunn (n 19).

107 FCA, *Debt Management Sector Thematic Review* (n 57).

108 *FCA Handbook* (n 60) 'Consumer Credit Sourcebook' ('CONC') [8.3].

109 Ibid 'Principles for Businesses' ('PRIN') [2.1.1].

110 Ibid CONC [8.3.7(3)].

111 Ibid CONC [3.3], [3.9].

predatory conduct and generally increased the standard of debt advice provided to consumers in the UK.[112]

Australia's consumer credit licensing regime requires licensees to be fit and proper persons and to act honestly and fairly.[113] As noted in Part I, there is potential for regulatory guidance to prescribe how DMFs should conduct their businesses to fulfil these conditions.[114] Such regulatory guidance could be used to address systemic problems in the debt management sector and to strengthen safeguards for consumers.[115] As licensees must be members of AFCA,[116] Australian consumers have the advantage of access to free EDR to seek a remedy against DMFs that fail to comply with the required standards. Against this backdrop, the introduction of regulatory guidance for DMFs could promote higher standards of debt advice to assist debtors in times of financial difficulty.

Early indications of improved consumer outcomes following reforms to the debt agreements framework in 2018 lend strength to the argument that regulatory safeguards addressing transparency, affordability and restrictions against harmful advertising are likely to benefit Australian consumers.[117] Statistics from the Australian Financial Security Authority indicating that the number of new debt agreements has decreased since the reforms came into effect[118] are also consistent with the observation by a focus group participant that the problem of large numbers of unsuitable debt agreements, prior to the reforms, appears to have abated. The improvements generated by these reforms suggests the value of implementing the proposals discussed in Part VI for the broader debt management industry. Part VI discusses a range of safeguards to reduce the risks to consumers, drawing on the focus group discussion of potential reforms, the survey data and the experience of regulating DMFs in other countries.

VI Reform Proposals

The risks to consumers that arise in their interactions with DMFs as revealed by the empirical data,[119] and more briefly canvassed in the ASIC and Senate reports,[120] underscore the need for reforms in Australia. In light of the rising cost of living,[121]

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[112] Chen and Lemaitre (n 5) 167–70.

[113] *National Consumer Credit Protection Act 2009* (Cth) ss 37A, 47.

[114] See nn 15–17 and accompanying text.

[115] *National Consumer Credit Protection Act 2009* (Cth) ss 37A, 47. The specific rules in the UK's *FCA Handbook* are premised on broader principles such as acting fairly and meeting fit and proper standards which resonate with requirements for Australian consumer credit licensees.

[116] Ibid s 47(1)(i).

[117] The debt agreements framework is discussed in Part III(C) above.

[118] 'Debt Agreement Law Reform Statistics', *Australian Financial Security Authority* (Web Page) <https://www.afsa.gov.au/about-us/statistics/debt-agreement-law-reform-statistics>.

[119] Discussed in Part V above.

[120] *Paying to Get Out of Debt* (n 8); Senate Economics References Committee (n 9) 55–64.

[121] Australian Bureau of Statistics, *Selected Living Cost Indexes, Australia, September 2022* (2 November 2022) <https://www.abs.gov.au/statistics/economy/price-indexes-and-inflation/selected-living-cost-indexes-australia/latest-release>.

high levels of personal debt among Australian households[122] and warnings of an impending 'avalanche in debt collection',[123] the need to strengthen safeguards for consumers is all the more urgent.

The claim that debtors are more vulnerable to DMFs' misleading promises in pressing circumstances is supported by research in consumer psychology. When in a state of heightened anxiety, consumers are less likely to evaluate the accuracy of promises to resolve their problems, especially when confronted with prospects of financial ruin and decisions involving complex financial knowledge.[124] In such situations, they are more likely to take risks in the hope of becoming 'debt free'.[125] Their vulnerability to misleading promises is ostensibly greater when debt help is offered along with a friendly, helpful demeanour. Both the survey respondents and the focus group participants noted the appeal of 'friendly, approachable' help offered by DMFs.[126] Scholars warn that businesses that portray their services as 'a friend in need' may pose a risk, as consumer vigilance is often reduced by the trust such businesses engender and consumers may be lulled into a false sense of security.[127] The recent introduction of licensing requirements for DMFs is a step towards better regulation of the industry, but more is needed.

Targeted measures are needed to address problems such as the lack of transparency, misleading conduct, and harm from unsuitable and unaffordable recommendations.[128] Both the survey respondents and focus group participants highlighted the opacity of fees and limitations on what credit repair services can achieve.[129] The adverse consequences are reflected in the levels of dissatisfaction among the consumers surveyed.[130] Part VI(A) examines the need to curtail unsolicited targeted advertising, while Part VI(B) considers signposting free advice. Part VI(C) canvasses the importance of transparency, while suitable, affordable debt solutions are discussed in Part VI(D). Restrictions on fees and cooling-off periods are investigated in Parts VI(E) and VI(F) respectively.

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[122] Marina Trajkovich, 'One in Four Aussies Struggling with Rising Cost of Living', *Nine News*, 12 May 2022 <https://www.9news.com.au/national/one-in-four-aussies-struggling-due-to-rising-cost-of-living/72629c56-7394-4554-b9fe-024261914226>; Kearns, Major and Norman (n 3).

[123] Lucinda O'Brien, Vivien Chen, Ian Ramsay and Paul Ali, 'An Impending "Avalanche": Debt Collection and Consumer Harm after COVID-19' (2021) 49(2) *Australian Business Law Review* 84. See also Australian Taxation Office, 'ATO Prioritising Support and Assistance for Debt Collection Efforts' (Media Release, 13 May 2022) <https://www.ato.gov.au/Media-centre/Media-releases/ATO-prioritising-support-and-assistance-for-debt-collection-efforts/>.

[124] Stevie Watson, Cassandra D Wells and Elania Jemison Hudson, 'The Effects of Idealized Advertising Imagery on Social Comparisons, Psychological and Emotional Outcomes, and Consumer Vulnerability: A Conceptual Model' (2011) 17(4) *Journal of Promotion Management* 407, 413–14; Cass R Sunstein, 'Empirically Informed Regulation' (2011) 78(4) *University of Chicago Law Review* 1349, 1359.

[125] Lefevre and Chapman (n 19) 9.

[126] Part V(A)(4) (consumer survey) and Part V(B)(1) (focus group) above.

[127] Shmuel I Becher and Sarah Dadush, 'Relationship as Product: Transacting in the Age of Loneliness' (2021) 5 *University of Illinois Law Review* 1547, 1579.

[128] *Paying to Get Out of Debt* (n 8); Senate Economics References Committee (n 9) 55–64.

[129] Part V above.

[130] Part V(A)(4) above.

A *Unsolicited Targeted Advertising*

Targeted advertising using court lists to obtain details of debtors' financial difficulties was highlighted by the focus group as among the most egregious forms of predatory conduct.[131] As noted above, studies suggest that consumers who are highly stressed over the prospect of losing their home, entering bankruptcy or experiencing other severe financial loss are more susceptible to unrealistic promises by DMFs.[132] Evidence of court lists being used to market DMFs' services[133] and findings of systemic issues of poor advice with detrimental outcomes for consumers[134] underscore the need for regulatory intervention.

The common practice in Australia of DMFs targeting individuals facing legal proceedings using information obtained from court lists ostensibly goes against the obligations of credit licensees to act efficiently, honestly and fairly. The element of 'fairness' has been described as 'precluding "a degree of calculated sharpness", conduct that was "sufficiently egregious", "systemic sharp practice", and behaviour that "undermined informed decision-making" by consumers'.[135] Some focus group participants noted that, as court lists are essentially public information, it would not be possible to prohibit DMFs from accessing the information. They recommended introducing a prohibition on the use of information obtained from a court register to make unsolicited contact with consumers. While the focus group participants acknowledged that it would not always be possible to determine which party made the first contact, they supported the introduction of a general prohibition on DMFs making unsolicited contact with consumers.

Prohibitions of unsolicited contact are already used to safeguard Australian consumers from risks of harm associated with specific financial products. Examples include prohibitions against unsolicited hawking of particular financial products[136] and unsolicited credit cards.[137] When the prohibition of unsolicited hawking was introduced, its rationale was described in Parliament as 'ensuring that Australian consumers receive the information they need to make informed financial decisions' and that restrictions on unsolicited contact would protect consumers from 'unsavoury' behaviour.[138] The authors recommend the introduction of a prohibition against unsolicited contact that precludes DMFs and their agents from communicating with consumers in any manner unless the consumer has first requested information on DMFs' services. The prohibition should encompass all means of communication whether post, email, other forms of electronic messaging

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131 Similar concerns were briefly raised in ASIC's report, *Paying to Get Out of Debt* (n 8) 21.

132 Watson, Wells and Hudson (n 124) 413.

133 *Paying to Get Out of Debt* (n 8) 21 [85]; Parts V(A)(1), V(B)(1) above.

134 *Paying to Get Out of Debt* (n 8) 35–8; Senate Economics References Committee (n 9) 56–62 [4.10]–[4.31]; Parts V(A)(3), V(B)(2) above.

135 JM Paterson and E Bant, 'Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online' (2021) 44(1) *Journal of Consumer Policy* 1, 11 quoting the Full Federal Court decision in *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170 [174], [289], [290], [398].

136 *Corporations Act 2001* (Cth) s 992A.

137 *Australian Securities and Investments Commission Act 2001* (Cth) s 12DL; ASIC, *Unsolicited Credit Cards and Debit Cards* (Regulatory Guide No 201, July 2010) 4.

138 Commonwealth, *Parliamentary Debates*, Senate, 22 August 2001, 26309 (Stephen Conroy).

including text messages and social media, telephone calls, door knocking or handing out flyers. The prohibition should be aimed at preventing DMFs from misusing information on debtors' financial problems to sell them high-cost services at a time when debtors are vulnerable, in need of debt solutions, and susceptible to false promises.[139]

The Senate report highlighted concerns that payday lenders may be forwarding to DMFs information on debtors whose loan applications may have been rejected, and that information gained from screen-scraping technology on consumers' indebtedness could potentially be misused to target debtors with advertising.[140] In light of such concerns, framing the prohibition against unsolicited contact broadly could potentially help minimise advertising being directed at individuals whose debt problems have been discovered by DMFs through covert methods. There are, however, limitations to the effectiveness of such a prohibition. As noted above, consumer advocates in the focus group observed that it may at times be challenging to prove that contact was unsolicited, particularly as referrals among related businesses appear to be common in the industry and consumers may at times respond to offers of free credit reports or other incentives.[141] In addition, the use of artificial intelligence to target internet and social media users with advertising based on their internet browsing habits would seem to be more challenging to rein in. Consequently, it is important that advertising by DMFs should not be misleading. In particular, reforms should be introduced to require advertising to clearly state the cost of services and inform consumers of the availability of free debt advice. These proposals are further considered in Parts VI(B) and (C) below.

The increasing use of digital platforms has heightened concerns over targeted advertising, particularly as artificial intelligence enables DMFs' offers of debt help to emerge when debtors are potentially vulnerable.[142] Social media advertising is thought to be relatively intrusive and may reach viewers at times when they are less on guard against predatory advertising. Regular posts from DMFs that consumers 'follow' are interspersed between posts from trusted family and friends.[143] Presenting advertising material in a 'high trust' environment such as social media and blogs may cause consumer confusion,[144] particularly where DMFs' Facebook pages share 'life hacks' on managing finances, blurring the distinction between advertising and helpful advice. Viewing posts by family and friends of successes, holidays and happy moments has been found to foster a sense of inadequacy and

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139 Restrictions on advertising by DMFs are found in the UK: *Consumer Credit Act 1974* (UK) s 154. In November 2019, Google announced restrictions on advertising by DMFs along with other high-risk financial products and services on the grounds of potential harm to consumers. Credit repair services are no longer permitted to advertise, while other debt management services must comply with local laws and industry standards: Google, 'Update to Financial Products and Services Policy (November 2019)', *Google* (Web Page, October 2019) <https://support.google.com/adspolicy/answer/9508775?hl=en-AU>.

140 Senate Economics References Committee (n 9) 62 [4.31].

141 Part V(B)(1) above.

142 Senate Economics References Committee (n 9) 62 [4.31]; Evidence to Senate Economics References Committee, Parliament of Australia, Canberra, 12 December 2018, 39 (Corinne Proske).

143 See further Vivien Chen, 'Online Payday Lenders: Trusted Friends or Debt Traps?' (2020) 43(2) *University of New South Wales Law Journal* 674, 699–700.

144 ASIC, *Advertising Financial Products and Services (Including Credit): Good Practice Guide* (Regulatory Guide No 234, November 2012) 38 [RG 234.136].

perceptions that others have better and happier lives, giving rise to emotional vulnerability.[145] Studies demonstrate that 'likes' on social media have significant influence over consumer choices, further underscoring the need for regulatory guidance to ensure that social media advertising is not a source of consumer harm.[146]

The approach adopted by the FCA in its social media guidance provides useful strategies for Australia where regulatory guidance for social media advertising is less developed. At the very least, reforms should be introduced to require DMFs to signpost the National Debt Helpline on their social media pages and ensure that customers are given fair and prominent indication of the cost of the DMF's services. This is especially important where offers of 'free consultations' from DMFs potentially give rise to misleading impressions that the business may be a not-for-profit organisation offering free debt help. Specific guidance given by the FCA on how warnings of risks should be prominently displayed on social media to safeguard consumers against misleading impressions is also helpful in this context.[147]

B *Signposting of Free Advice*

The ASIC and Senate reports discussed in Part II raised concerns over the substantial fees imposed on consumers in financial difficulty for services which they could have obtained free of charge.[148] Unaffordable fees exacerbate debtors' financial stress and, as observed in Part V(A), 61% of survey respondents were not aware that free debt help or credit repair was available when they signed up with a DMF. Close to two-thirds (65%) of these respondents said that they would not have paid for debt help if they had known that free services existed.[149] To alleviate the problem, DMFs should be required to inform customers of the availability of free debt advice and prominently display a link to the National Debt Helpline on their websites and social media sites. In the UK, DMFs must inform customers where they can obtain free debt advice, debt negotiation and credit repair services.[150] Likewise, payday lenders are required by Australian law to provide information on their websites about alternative low-cost measures for dealing with debt such as financial counselling, and payment plans with utilities providers.[151]

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[145] Edson C Tandoc Jr, Patrick Ferrucci and Margaret Duffy, 'Facebook Use, Envy, and Depression among College Students: Is Facebooking Depressing?' (2015) 43 *Computers in Human Behavior* 139, 142–3.

[146] David C Edelman, 'Branding in the Digital Age: You're Spending Your Money in All the Wrong Places' (December 2010) *Harvard Business Review* <https://hbr.org/2010/12/branding-in-the-digital-age-youre-spending-your-money-in-all-the-wrong-places>; M Nick Hajli, 'A Study of the Impact of Social Media on Consumers' (2014) 56(3) *International Journal of Market Research* 387; Simon Hudson and Karen Thal, 'The Impact of Social Media on the Consumer Decision Process: Implications for Tourism Marketing' (2013) 30(1–2) *Journal of Travel & Tourism Marketing* 156.

[147] FCA, *Social Media and Customer Communications: The FCA's Supervisory Approach to Financial Promotions in Social Media* (Finalised Guidance No FG15/4, March 2015).

[148] *Paying to Get Out of Debt* (n 8) 22; Senate Economics References Committee (n 9) 57 [4.12].

[149] Part V(A)(2) above.

[150] *FCA Handbook* (n 60) CONC [8.2.4].

[151] *National Consumer Credit Protection Regulations 2010* (Cth) regs 28XXB(a), (b); *National Consumer Credit Protection Regulations 2010* (Cth) sch 9.

At a time when many are facing financial difficulties, there are grounds for requiring information on the availability of free debt advice and a link to the National Debt Helpline to be prominently displayed on all advertisements by DMFs of their services. The vulnerability of consumers to promises of debt help, as they are exposed to advertising on television, radio, internet or other media, arguably warrants stronger intervention to alert them to free sources of debt advice. Australian laws restrict the advertising of gambling, alcohol and smoking, and require warnings of health risks to be displayed on cigarette packages.[152] These suggest that signposts directing debtors to free debt advice, particularly when they may not be able to afford to pay for debt solutions, would be consistent with standards of responsible advertising required of other businesses that pose a risk to consumers.

At the same time, steps should be taken to ensure that the prominence of signposting of free alternatives is not diminished through layout, such as by placing the link to free advice at the end of webpages with miscellaneous information while placing eye-catching promotional material much more prominently.[153] Rules in the UK require prominent signposting of free debt help, and are supplemented by guidance aimed at countering avoidance strategies. Signposts of free debt advice must be proportionate in size to the promotional material, be 'clearly stated within the main body of the advertisement and ahead of the "small print"', 'remain fixed on the screen even when the customer scrolls up and down respective web pages', and be 'contained within their own distinct border, thus drawing the reader's attention to them'.[154]

C Disclosure: Costs, Risks and Limitations

The need for greater transparency is highlighted by the empirical data and in the ASIC and Senate reports.[155] Issues of opaque fees and unrealistic promises may potentially be mitigated through a requirement that DMFs clearly disclose their fees and the risks or limitations of their services in their initial communication with customers. Information on fees and limitations should also be clearly and prominently presented on DMFs' websites. Mandatory risk warnings have been introduced to alleviate risks of harm to vulnerable consumers from payday loans, another sector of the consumer credit industry known for the risks it poses to consumers in financial difficulty.[156] Payday lenders must clearly display warnings about some of the limitations of high-cost credit on their websites.[157]

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[152] *Broadcasting Services (Online Content Service Provider Rules) 2018* (Cth); *Broadcasting Services Act 1992* (Cth) s 123; *Tobacco Advertising Prohibition Act 1992* (Cth) s 15; *Competition and Consumer (Tobacco) Information Standard 2011* (Cth).

[153] Chen (n 143) 674.

[154] FSA, *Financial Promotions: Guidance Prominence* (Finalised Guidance, September 2011) 2 <https://www.fca.org.uk/publication/finalised-guidance/fg-fin-proms-prominence.pdf>.

[155] *Paying to Get Out of Debt* (n 8) 7 [21]; Senate Economics References Committee (n 9) 59–60 [4.21]; Parts V(A)(3), V(A)(4).

[156] Revised Explanatory Memorandum, Consumer Credit Legislation Amendment (Enhancements) Bill 2012 (Cth) 54.

[157] *National Consumer Credit Protection Regulations 2010* (Cth) regs 28LCB(a), (b), sch 8.

To promote better transparency, DMFs could be required to provide a 'key facts sheet' during their initial communication with customers, disclosing the costs and limitations of DMFs' services, the availability of free debt advice, and self-help measures such as negotiating a financial hardship variation with credit or utilities providers. The key facts sheet should use plain, everyday language to explain limitations or risks of the services offered by the DMF in a readable format.[158] For example, in relation to credit repair, the key facts sheet could say:

> If you wish to dispute inaccurate information on your credit record, you may seek help from the Australian Financial Complaints Authority free of charge. You do not need to hire a credit repairer, or anyone else, to exercise this right.
>
> Credit repair services cannot remove negative information that is accurate from your credit record. To find out more, call 1800 931 678 (free call).

An example of a statement that could apply more generally to debt management services is:

> Using this service will not necessarily improve your credit rating, deter the efforts of a creditor to collect a debt, or prevent legal action to repossess your house or other assets. For more information on debt solutions, please contact the National Debt Helpline at https://ndh.org.au/debt-solutions/ or call 1800 007 007 for free advice.

The key facts sheet should clearly explain the fees charged by DMFs in dollar terms. It should avoid costs being obscured through formulas which may be challenging for some consumers to work out. The key facts sheet should set out the total cost of services as well as when payments must be made. It should disclose any additional fees which may be incurred such as fees for late payments or bounced cheques. While disclosure documents may have limited efficacy for some vulnerable consumers who may struggle to make sense of the information,[159] the requirement to provide consumers with a key facts sheet is likely to help mitigate deliberate attempts at obscuring the facts to mislead consumers.

Warnings of limitations on what credit repair or debt negotiation services can achieve are used in Canada.[160] Debt management firms in the UK are required to clearly disclose the risks of the product they are advertising in sufficient detail to enable potential customers to make informed decisions.[161] The risks must be presented in a way that is easily understood and must not be diminished or obscured.[162] Firms must also clearly disclose the cost of the services in advertising

[158] Chen, O'Brien and Ramsay (n 76) 193; Therese Wilson, Nicola Howell and Genevieve Sheehan, 'Protecting the Most Vulnerable in Consumer Credit Transactions' (2009) 32(2) *Journal of Consumer Policy* 117.

[159] Literacy levels and emotions such as the 'humiliation of admitting an inability to understand' are thought to play a role in risk-taking by vulnerable consumers in financial difficulty: Wilson, Howell and Sheehan (n 158) 123–4, 134.

[160] O Reg 17/05, reg 46; RRO 1990, Reg 74, reg 27(1); 'Settling Debt: What You Need To Know', *Consumer Protection Ontario* (Web Form) <http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/11351E~1/$File/11351E.pdf>.

[161] *FCA Handbook* (n 60) 'Conduct of Business Sourcebook' ('COBS') [14.3.2].

[162] Ibid COBS [4.5.2R(3)], [4.5.2R(4)].

material,[163] stating the total price to be paid by the customer including all additional fees and expenses.[164]

D *Suitability of Advice*

The evidence examined in Parts II and V underscores the problem of DMFs giving unsuitable advice which at times exacerbates debtors' financial difficulties.[165] This indicates the need for regulation requiring DMFs to give customers suitable advice and recommend affordable solutions. The obligation could be based on Australian credit licensees' existing responsibilities to carry out their activities 'efficiently, honestly and fairly' and to ensure that their representatives are adequately trained and competent.[166] The Senate report canvassed proposals that DMFs should be required to act in the client's best interests and to treat customers fairly.[167] Debt management firms in the UK must ensure that all advice given has regard to the best interests of the customer, is appropriate to their individual circumstances, and is based on a sufficiently full assessment of their financial circumstances.[168]

The regulations would ideally require DMFs to do the following: provide information about the available options identified as suitable for the customer's needs; explain the actual or potential disadvantages, costs and risks of each option; ensure that the debt solution and payments are affordable; and explain the reasons why the recommended option is suitable and others are unsuitable. The advice should be put in writing and given to the customer. This suitability statement should explain the reasons for the recommendation, clearly highlighting the risks. In seeking to ensure that payments are affordable, the DMF should set out in the suitability statement the calculation of affordability based on the customer's individual financial circumstances and needs. In the UK, the *FCA Handbook* states that recommending a debt solution which a firm 'knows, believes or ought to suspect is unaffordable for the customer' is likely to contravene principles of skill, care and diligence, and treating customers fairly.[169] The UK rules also require DMFs to warn customers of the consequences of failing to continue making repayments to creditors; ignoring correspondence from lenders, which could result in repossession of the customer's home; and failing to pay taxes, child support and fines.[170]

There was support from some focus group participants for the introduction of a requirement that DMFs provide consumers with a suitability statement that sets out how the initial contact with the consumer was made, the consumer's circumstances on which the DMF's proposal was based, and the details of the DMF's proposal. A representative from a community legal centre noted that the requirement would be helpful in enabling consumers to seek redress 'through EDR without a

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[163] Ibid COBS [4.7.1R(1)].
[164] Ibid COBS [6.1.9].
[165] *Paying to Get Out of Debt* (n 8) 35–8; Senate Economics References Committee (n 9) 56–9 [4.10]–[4.18]; Parts V(A)(4), (V)(B)(2) above.
[166] *National Consumer Credit Protection Act 2009* (Cth) s 47.
[167] Senate Economics References Committee (n 9) 63 [4.39], 64 [4.42].
[168] *FCA Handbook* (n 60) CONC [8.3.2].
[169] Ibid CONC [8.2.2].
[170] Ibid CONC [8.3.4].

complicated chunk of analysis needed'. Another participant said that a suitability statement would be useful in situations where it provided evidence of misleading conduct, especially where there was evidence that the DMF misled the consumer about the likely outcome of entering into a recommended arrangement.

The authors recommend the introduction of requirements that DMFs act in the client's best interest, make suitable and affordable recommendations based on a full assessment of the circumstances, and give consumers a suitability statement. Aggrieved consumers who wish to seek compensation against DMFs through AFCA would be able to use the statement as evidence to support their claim. Accountability in the form of a suitability statement may potentially militate against the more overt forms of unsuitable advice highlighted in the Senate report on credit and hardship, and in the consumer survey, such as telling customers to stop paying creditors.[171]

E *Restrictions on Fees*

The focus group and survey participants echoed ASIC's concerns over high, opaque and heavily front-loaded fees.[172] At the lower end of the scale, close to half (49.4%) the survey respondents paid fees of $1,000 or less. At the same time, some respondents reported paying more than $10,000 in fees, with 6% paying between $10,001 and $20,000, and 3% paying more than $20,000. Substantial fees are likely to exacerbate financial hardship, particularly for debtors experiencing entrenched disadvantage. Anecdotal evidence from a whistle blower was also cited during the focus group's discussion of a predatory business model which purported to offer credit repair but took fees without any intention of carrying out the services promised. To protect consumers against risks associated with high up-front fees, reforms should restrict the amount of fees and specify when they can be charged.

In Canada, for example, fees cannot be charged for credit repair until there is material improvement to the consumer's credit rating or record.[173] Fees must not be charged for debt negotiation until creditors have agreed to the arrangement and received the first payment.[174] There are also fee caps of 10–15% of total repayments for debt negotiation services.[175] Likewise, a schedule of fees for credit repair was suggested at the focus group discussion, and there was general agreement that there should be a requirement that the service must have been provided by the DMF before any fee could be charged. Restricting fees has been used in relation to payday loans in Australia to protect consumers from becoming further entrenched in disadvantage.[176] Similar restrictions on DMFs' fees are justified on similar grounds, and should be introduced.

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171 Senate Economics References Committee (n 9) 59 [4.18]; Part V(A)(4) above.
172 *Paying to Get Out of Debt* (n 8) 7; Parts V(A)(3), V(B)(3) above.
173 *Consumer Protection Act*, 2002, SO 2002, c 30, sch A, s 50(1)(b).
174 RRO 1990, Reg 74, reg 27(2)(ii); *Consumer Protection Regulation*, Man Reg 227/2006, reg 28(1).
175 In Canada, where payments are made to creditors in accordance with a schedule, fees are often capped at 15% of each payment. Where one-off payments are made, fees are capped at 10% of the total debt.
176 Revised Explanatory Memorandum, Consumer Credit Legislation Amendment (Enhancements) Bill 2012 (Cth) 62–4.

Consumer advocates have raised issues relating to caveats lodged by DMFs on consumers' property which have caused significant hardship. If DMFs are concerned that a customer may not be able to afford their fees, there are grounds for requiring them to refer the customer to free financial counselling, as is required in the UK.[177] Recommending a debt 'solution' that requires payment of fees which customers cannot afford is arguably not in keeping with a credit licensee's obligation to act efficiently, honestly and fairly. Focus group participants took the view that DMFs should not be permitted to take security over debtors' assets for fees, given the hardship caused to debtors when DMFs fail to deliver the services promised. Further, if DMFs are prohibited from taking security over the assets of consumers for their fees, they may have fewer incentives to recommend unaffordable 'solutions', and be more likely to refer consumers who cannot afford to pay fees to free sources of debt help. Such a prohibition would also be consistent with the requirement that DMFs should act fairly.

F *Cooling-off Period*

Cooling-off periods have been introduced as a form of consumer protection in several areas of Australian law. They are available to consumers in relation to unsolicited contracts under the *ACL*,[178] financial products under the *Corporations Act 2001* (Cth)[179] and a range of products and services under state legislation.[180] The right to cancel a contract without penalty within the cooling-off period is thought to allow consumers time and opportunity to reconsider their decision. These rights are usually given in situations where consumers are vulnerable to making decisions based on emotions or a lack of information, or are subject to unsolicited contact or high-pressure sales strategies.[181] Against the background of DMFs engaging in targeted advertising and unrealistic promises,[182] providing consumers with cooling-off rights would seem to be an appropriate response.

Such a reform could give consumers the right to cancel a contract with a DMF without penalty, and without giving any reasons, within 14 days of receiving a copy of the contract or other specific period. Some focus group participants noted that the limitations of cooling-off periods include consumers at times not being aware of their right to cancel the contract or how to exercise it. They believed that providing longer cooling-off periods is one way of increasing their effectiveness giving consumers the opportunity to extricate themselves from a poor decision. Regulatory frameworks for DMFs in Canada give consumers cooling-off rights, and DMFs in the UK must give consumers who enter into contracts online or over the phone a cooling-off period. A less common, but more protective alternative is to use opt-in clauses which require consumers to contact the business within a period of time to

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177 *FCA Handbook* (n 60) CONC [8.3.7(3)].
178 *ACL* (n 71) s 82.
179 *Corporations Act 2001* (Cth) s 1019B.
180 See, eg, *Motor Car Traders Act 1986* (Vic) s 43; *Sale of Land Act 1962* (Vic) s 31.
181 Consumer Affairs Victoria, 'Cooling-off Periods in Victoria: Their Use, Nature, Cost and Implications' (Research Paper No 15, January 2009) 1 <https://www.consumer.vic.gov.au/resources-and-tools/research-studies>.
182 Parts II(A), V above.

confirm that they wish to continue with the contract.[183] Opt-in clauses are used in France where consumers cannot formally accept an offer of a debt consolidation contract within the first 10 days.[184]

VII Conclusion

The financial impact of the COVID-19 pandemic and rising costs of living have left an increasing number of Australians struggling with debt. The recent introduction of licensing for DMFs is a step towards better regulation of the industry. However, more is required to curb risks of harm to consumers in financial stress from predatory and unfair business practices. The licensing regime requires DMFs to undertake their activities 'efficiently, honestly and fairly',[185] and regulatory guidance on how these principles should be interpreted in the context of debt management has the potential to strengthen consumer protection significantly. This article investigates proposals for such regulatory guidance. The proposals are informed by empirical data collected by the authors through a survey of 400 consumers, and a focus group. The study is underpinned by two complementary goals: to gain a more nuanced understanding of the risks that arise in DMFs' interactions with Australian consumers with debt problems, and to develop the regulatory framework for DMFs to mitigate these risks.

Regulatory guidance should require DMFs to ensure that their recommendations are suitable and affordable, and that fees are transparent, reasonable, and payable only after substantial progress has been made towards the promised outcomes. Steps should also be taken to ensure that consumers are directed by signposts to free sources of debt help such as the National Debt Helpline on advertising material, websites and social media sites. Debt management firms should clearly disclose the limitations of what their services can achieve; they should be required to act in their client's best interest; and allow substantial cooling-off rights. Debt management firms should be prohibited from making unsolicited contact with consumers to prevent them from targeting debtors in difficulty through information obtained from court lists and third parties.

Experience from other countries that have developed regulatory frameworks for DMFs illustrates the benefits that such reforms engender, particularly when coupled with robust enforcement. As the Australian credit licensing regime allows consumers to seek redress against errant DMFs through EDR, such regulatory guidance could make significant strides in channelling financially stressed consumers towards debt solutions that help rather than harm them.

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[183] Paul Harrison, 'Cooling-off Periods for Consumers Don't Work: Study', *The Conversation* (online, 28 November 2016) <https://theconversation.com/cooling-off-periods-for-consumers-dont-work-study-69473>.

[184] *Code de la consommation* [Consumer Code] (France) art L313-34. After 10 days have lapsed, consumers may accept the offer which is valid for 30 days.

[185] *National Consumer Credit Protection Act 2009* (Cth) s 47(1)(a).