

# Inspector-General Practice Guideline 1

## IGPG 1 – Guidelines relating to advertising and marketing of debt agreements

### 1. Introduction

1.1 The purpose of this document is to outline the Inspector-General in Bankruptcy's expectations and best practice principles in relation to advertising and marketing-promotion of debt agreements.

#### Who this guideline applies to

1.2 This guideline is relevant to debt agreement administrators (DAAs), trustees, brokers and others who act on behalf of a DAA, who promote debt agreements and their related services.

1.3 All DAAs and their agents or representatives should consider the above and this guideline when formulating and implementing their advertising and marketing-promotional strategies.

1.4 This guideline is applicable to all DAAs regardless of the size of their business, ~~and whether or not they are registered.~~

1.5 In reading this guideline and abiding with its principles, it is of paramount importance to keep in mind that advertising or marketing-promotions may be misleading and deceptive even where that is not the intention.

#### What this guideline applies to

1.6 This guideline applies to any communication by promoters of debt agreements and covers advertising and marketing in any form or medium ~~and format~~, including but not limited to:

- magazines and newspapers
- radio and television
- outdoor advertising (e.g. signs and billboards)
- internet (e.g. webpages, banner advertising, video streaming (e.g. YouTube), social networking and blogging sites (e.g. Twitter))
- social media and internet forums
- mobile phone messages (e.g. SMS, MMS)
- brochures and factsheets
- direct mail (e.g. by post, facsimile or email)
- telemarketing activity and audio messaging
- seminars, presentation and advertorials

### 2. Regulatory framework

#### ~~Law and regulatory agencies~~ Legal framework

2.1 While there is no specific legislative duty regarding advertising or marketing in the Bankruptcy Act 1966, there are legislative requirements applicable to advertising and marketing generally in the Australian Consumer Law (ACL).

2.2 The ACL is administered and enforced by the ACCC, in conjunction with State and Territory consumer protection bodies, with the involvement of ASIC on relevant matters. The protections in the ACL are generally reflected in similar provisions in the *Australian Securities and Investments Commission Act 2001* (ASIC Act), so that financial products and services are treated in the same way.

2.3 The Australian Financial Security Authority (AFSA) works with and refers potential breaches of the ACL to ASIC when identified.

## Professional codes and bodies

2.4 Promoters of debt agreements and related services who are members of professional bodies may also be subject to codes of conduct which regulate their activities.

2.5 The main professional bodies representing personal insolvency practitioners in Australia are:

- [the Personal Insolvency Professionals Association \(PIPA\)](#);
- [the Association of Independent Insolvency Practitioners](#) and
- the Australian Restructuring Insolvency and Turnaround Association (ARITA).

2.6 Both [PIPA and ARITA bodies](#) have a code of professional practice which govern the conduct of their members:

- [PIPA Code of Professional Practice](#)
- [ARITA Code of Professional Practice](#)

2.7 These codes provide specific guidance to members on the promotion, advertising and marketing of services. They require members to comply with the consumer laws and not:

- make marketing claims and then substantially change the arrangement without fully informed consent
- make negative remarks about fellow practitioners or their business as to competence, professional practices or fees charged
- claim endorsement of their professional body without consent
- claim association to or endorsement of AFSA
- create false or unjustified expectations of favourable outcomes
- imply the ability to influence any court, tribunal, regulatory agency or similar body or official
- make self-laudatory statements that are not based on verifiable facts or which contain unidentified testimonials or endorsements or contain representations that would be likely to cause a reasonable person to misunderstand or be deceived
- abuse registered names or terms that are trademarks, lawfully registered to other persons or entities.

2.8 The codes also provide that members will be held responsible for the form and content of any advertisement, publicity or solicitation:

- where expressly or impliedly authorised; or
- which is placed or undertaken personally, or by another person on their behalf.

## 3. Inspector-General's expectations

3.1 The expectations of the Inspector-General (IG) directly accords with the professional codes, regarding advertising and marketing of debt agreements.

3.2 The IG expects DAAs, [trustees](#), brokers and other promoters to ensure that they do not mislead potential (but unsuitable) debtors into debt agreements through their advertising and [marketing promotion](#). This extends to the activities of any third parties working for (or on behalf of) DAAs in promoting debt agreements and/or their services to potential debtors.

3.3 It is also important that advertising or [marketing promotions](#) are balanced in that they represents both the positive and negative consequences of entering into a debt agreement.

3.4 The IG expects DAAs to ensure that any third parties working for or on behalf of them in promoting debt agreements and/or their services are aware of their obligations under the ACL generally and [the expectations of the IG outlined in this guidance document](#).

3.5 DAAs should ensure that any commercial arrangements which they enter with third parties for promoting debt agreements and/or their services do not compromise their independence, certification duties and overriding fiduciary obligations to debtors.

3.6 Upon the IG being informed of any imbalanced or non-compliant advertising that may result in potentially misleading or deceptive conduct, the DAA will be contacted and requested to make amendments to bring the advertisement into line with the professional codes and this practice guideline. The matter may also be referred to ASIC, ACCC and/or PIPA/ARITA for investigation.

3.7 The IG's expectations as outlined here are based upon the need for:

- i. Debtors to have direct and reliable access to AFSA's independent website. In the past some DAAs have used the phrase or acronym 'AFSA' as Google sponsored advertising. This created the potential for users attempting to access the AFSA website to be misled into accessing the DAA's website. Should it come to the IG's attention that this practice is reoccurring, AFSA will take immediate remedial action.
- ii. The duties of a DAA and options under the Bankruptcy Act for debtors in financial distress to be clearly and accurately stated in language that is easily understood by the target audience.
- iii. Ensuring confidence in the personal insolvency system and, in particular, the accurate representation of AFSA's involvement in the debt agreement process.

3.8 DAAs are to ensure that they are aware of and comply with the relevant Commonwealth, State and Territory legislation when developing and implementing their advertising and marketing.

3.9 It is important to acknowledge that advertisements may be misleading or deceptive even when there is no such intention. DAAs, trustees, brokers and other promoters should therefore consider how their advertising and marketing may be interpreted or how it may affect the person receiving the message. This involves understanding the target audience and appreciating their backgrounds, vulnerabilities, circumstances and understanding of the financial environment.

3.10 The IG will hold DAAs responsible under this guideline for any advertising or promotional activities marketing done/undertaken by them (or on their behalf), either individually or jointly, and whether expressly or impliedly authorised by them.

## 4. False representations and misleading or deceptive conduct

### General principles

4.1 Advertising and marketing-promotional activities can amount to conduct which is false, misleading or deceptive.

4.2 DAAs, trustees, brokers and other promoters of debt agreements should be mindful that their target audience may be vulnerable - due to financial hardship or poor financial literacy - and unable to judge what is in their best interests.

4.3 AFSA recommends the regulatory and consumer law guides referred to at the end of this document for specific representations and conduct which has been held to be false, misleading or deceptive. These guides should be read carefully by DAAs, trustees, brokers and other promoters of debt agreements to ensure that they understand their legal obligations under consumer law.

4.4 Common ways in which advertising and marketing of debt agreements and related services may mislead or deceive include (but are not limited to):

- mis-describing the essence of a debt agreement
- conveying that a debt agreement is less serious (and has less significant consequences) than is in fact the case

- implying that the DAA is able to readily facilitate a debt agreement being made that will not be overly onerous on the debtor to satisfy
- representing that the entire debt agreement process is regulated or approved by AFSA (or some other authority/instrument of the Commonwealth government); and
- adversely comparing a debt agreement with bankruptcy (to convey that it does not have certain negative consequences or to understate them).

## Examples

4.5 The following table represents some examples of unacceptable forms of advertising due to their potential to mislead and/or deceive consumers:

Unacceptable advertising	Why it is unacceptable
<p><i>“STOP DEBT NOW. Commonwealth Government-guaranteed and regulated debt agreement will free you of debt forever.”</i></p>	<p>The advertisement makes two incorrect claims:</p> <p>that the debt agreement is guaranteed by the Commonwealth Government; and that a person who enters into a debt agreement will be released from all of his or her debts.</p> <p>A debt agreement will only release a debtor from unsecured debts incurred up to the time the debt agreement proposal is accepted for processing, and then only if the terms of the agreement are complied with and completed.</p> <p>There are also types of debts that the debtor will not be released from upon successful completion of a debt agreement. These include and are not limited to, penalties and fines, child support and fraud related debt.</p>
<div data-bbox="290 1391 691 1597" style="text-align: center;">  <p><b>Australian Government</b></p> </div> <p style="text-align: center;">Australian Government logo</p>	<p>It is improper for a DAA to use the Commonwealth Coat of Arms in any advertising material to promote their services or debt agreements generally.</p> <p><u>Unauthorised use</u> of the Commonwealth Coat of Arms may breach the CCA, <a href="#">Trade Marks Act 1995</a> (Cth) or the <a href="#">Criminal Code Act 1995</a> (Cth).</p>
<p><i>“Consolidate your debts into one easy repayment through a government regulated debt agreement.”</i></p> <p><u>Use of the terms “Government legislated” and “Government approved”</u></p>	<p>A debt agreement is not a consolidation of debt. It is inappropriate to refer to a debt agreement as debt consolidation.</p> <p>Referring to a debt agreement as “government regulated” implies that each and</p>

	<p>every debt agreement is regulated. This is not the case. It is the industry or Part IX regime that is regulated.</p> <p>The phrase "government regulated debt agreement" should not be used, <u>nor should the terms "government legislated" or "government approved"</u>:-</p>
<i>"If you complete the debt agreement you will get full release from only those creditors listed in the debt agreement."</i>	This is factually incorrect and misrepresents the intention of the Bankruptcy Act.
<i>"All stages of the debt agreement are legislated, monitored and facilitated by AFSA."</i>	This misrepresents AFSA's involvement in the process and again uses AFSA's name <u>in a misleading manner.</u>
<i>"Debt agreements show up more favourably on your credit record than a bankruptcy."</i>	This is actually factually incorrect as there is no difference in the reporting of debt agreements and bankruptcies on a credit report. Also, the lending policies of banks and other credit providers are matters for the individual institutions.
<i>"You can choose which debts to include and which ones to exclude, eg you will want to maintain electricity in your home so it may be best to exclude essential services."</i>	This is factually incorrect and misrepresents the intention of the Bankruptcy Act.
<i>"AFSA compliant – Our system complies with legislation as required by AFSA."</i>	This misrepresents to potential debtors that AFSA has reviewed, approved and/or certified their <u>product-system</u> as 'compliant' when it does not.
<u>"Freeze your interest"</u>	<u>If a debt agreement is terminated at any time the interest on the debt will start accruing again so this statement may give the impression that it is frozen forever, which may not be the case.</u>

## Case study

4.6 The below case study reflect the issues arising from advertising and marketing of debt agreements:

John and Jane contact a broker after seeing a TV advert as they want to 'clean' their credit reports. The broker provides a number of other debt services, including debt agreements, debt negotiation and debt consolidation. John and Jane are told that the broker offers a 'credit restoration process' and a 'debt solution process'.

While John and Jane are interested in the service to 'clean' their credit, they were eventually persuaded to enter into two debt agreements. John and Jane are renters with no major assets and now struggle to make payments and provide necessities for their children under the debt agreements.

John and Jane felt confused by the broker's services and what the best option was for them.

4.7 While this case study does not represent the experience of all debtors with DAAs and brokers, it indicates some typical concerns raised by stakeholders.

## 5. Representing debt agreements as debt consolidation

### What is 'debt consolidation'?

5.1 ASIC issued a report in July 2013<sup>1</sup> which reviewed responsible lending conduct by credit assistance providers. The report defined 'debt consolidation' as:

... a financial service whereby new credit is secured to pay off other existing credit contracts or reduce total payments. Debt consolidation may affect several types of credit contracts including home loans, credit cards, personal loans and payday loans, and frequently involves a lower interest rate over a longer term. Debt consolidation may be facilitated by taking security over what were previously unsecured debts. It is promoted as helping consumers manage their repayment obligations under multiple credit providers or multiple credit contracts.

5.2 Debt consolidation falls under the definition of 'credit assistance' under section 8 of the *National Consumer Credit Protection Act 2009*.

5.3 Debt consolidation is not to be confused with debt agreements, which do not refinance existing loans or consolidate the underlying indebtedness into one new obligation. While most DAAs do not provide credit assistance, many have included the term 'debt consolidation' when advertising or marketing debt agreement services to consumers.

5.4 The ASIC report, which only included entities which offer credit assistance (i.e. arrange new or extra credit for consumers to deal with pre-existing credit obligations) provided examples of advertising language used by credit assistance providers:

- "Debt problems can be solved by simply consolidating existing debts"
- "Help you consolidate and save"
- "Debt consolidation is one of the best 'debt help' solutions"
- "Debt consolidation will help you regain control of your financial situation".

### Are debt agreements 'debt consolidation'?

5.5 In *The Debt Genie Pty Ltd v Kirstein Edwards* (2011) NSWLC, the NSW local court found that an unregistered DAA who advertised debt agreement services as "debt consolidation" had engaged in misleading and deceptive conduct.

5.6 The DAA in that case advertised "no interest debt consolidation" to promote debt agreements to consumers seeking relief from overwhelming debts. The court considered the principles relating to "misleading and deceptive conduct" under section 42 of the [Fair Trading Act 1987](#) (NSW) summarised by Goldberg J in [Telstra Corp Ltd v Cable & Wireless Optus Ltd \[2001\] FCA 1478](#) at [21]-[25].

5.7 Those principles are that a court reviewing an advertisement published to the world at large through the eyes of a reasonable consumer, must consider that:

- It is designed and calculated to be seen and read by a wide range of persons;

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<sup>1</sup> ASIC REP *Review of credit assistance providers' responsible lending conduct relating to debt consolidation*.

- The question of whether or not an advertisement is misleading or deceptive is to be tested by the effect on the class of persons who are likely to consider it.
- No person must be assumed to be able to supply any omitted facts or resolve ambiguities.
- An advertisement may be misleading even though it fails to deceive more wary readers.

5.8 The Court accepted that *“the ordinary understanding of the term ‘debt consolidation’ involves refinancing of one or more high interest debts into a single loan that has the advantage of lower interest rates and often over a longer term to produce a single affordable and regular repayment plan”*.

5.9 The Court also referred to Black’s Law Dictionary (9th ed 2009) which defines 'debt consolidation' as *“The replacement of multiple loans from one or more lenders with a single loan from one lender, usually with a lower monthly payment and a longer repayment period”*.

5.10 The Court noted that the term is not ordinarily used in the context of debt agreements as *“the debtors remains liable to all existing creditors and there is no consolidation of debt”*.

5.11 The concern raised by the Court was that potential customers reading the term could misapprehend the nature of the services offered by the DAA by wrongly assuming the service *“provides the option of financial support through consolidating of multiple debts through a single loan”*.

5.12 Given the findings in this case, the IG expects that DAAs, brokers and others will not include any reference to the term “debt consolidation” in promoting debt agreements.

## 6. Monitoring and investigation

6.1 AFSA regularly monitors the activities of DAAs, trustees, brokers and others who promote debt agreements across the internet, TV, radio, print and social media on a regular basis and will investigate false and misleading representations or misleading and deceptive conduct when identified. Where necessary, corrective action or disciplinary action will be taken.

6.2 AFSA also investigates complaints received from stakeholders and the public generally. Anyone with concerns or information about the possible breach of bankruptcy or consumer legislation outlined in this guidance is encouraged to contact AFSA by:

Phone: 1300 364 785

Online: [Feedback form](#) [www.afsa.gov.au](http://www.afsa.gov.au) (website)

[www.afsa.gov.au/about-us/contact-us/contact-us-form](http://www.afsa.gov.au/about-us/contact-us/contact-us-form) (contact us form)

Email: [regulation.enquiry@afsa.gov.au](mailto:regulation.enquiry@afsa.gov.au)  
[regulation.complaint@afsa.gov.au](mailto:regulation.complaint@afsa.gov.au)

6.3 People wanting to contact AFSA and remain anonymous can complete an online ‘tip-off’ form available on our website

Tip-off: [Make a tip-off](#)

## 7. Conclusion

7.1 This guideline outlines the IGs position in relation to advertising and [marketing promotions](#) by DAAs, [trustees](#), brokers and other promoters of debt agreements.

7.2 When there are other specific issues where clarification is required, following consultation with AFSA stakeholders, the IG will continue to develop policy and practice statements to assist and guide practitioners.

## 8. Related information

### Regulatory guides

ASIC RG 234 – Advertising financial products and advice services: Good practice guide

### Legislation

Australian Securities and Investments Commission Act 2001 (ASIC Act): Pt 2, Div 2 s12BAB  
Bankruptcy Act 1996 (Cth): s12(1)(bb), 12(1D), [s186F\(4\)](#), [s186G\(2B\)](#)  
[Bankruptcy \(Registered Debt Agreement Administrator Conditions\) Determination 2019](#)  
Competition and Consumer Act 2010 (Cth) Sch 2 (Australian Consumer Law): s18(1), 29(1)  
Criminal Code Act 1995 (Cth)  
Fair Trading Act 1987 (NSW)  
National Consumer Credit Protection Act 2009 (Cth): s8  
Trade Marks Act 1995 (Cth)  
Trade Practices Act 1974 (Cth)

### Cases

*Telstra Corp Ltd v Cable & Wireless Optus Ltd* [2001] FCA 1478  
*The Debt Genie Pty Ltd v Kirstein Edwards* (2001) NSWLC

### Consumer law guides

ACCC [Avoiding unfair business practices - a guide for businesses and legal practitioners](#) (2010)  
ACL [Compliance and enforcement – how regulators enforce the Australian Consumer Law](#) (2010)  
ACCC [Advertising and selling guide](#) (2014)  
ACCC [Unconscionable conduct](#) (2012)  
ACCC [Don't take advantage of disadvantage - A compliance guide for businesses dealing with disadvantaged or vulnerable consumers](#) (2011)

### Professional Codes

[ARITA Code of Professional Practice](#)  
[PIPA Code of Professional Practice](#)

### Reports

ASIC [REP 229 - Australian national financial literacy strategy](#)  
ASIC [REP 230 - Financial literacy and behavioural change](#)  
ASIC [REP 465 – Paying to get out of debt or clear your record: The promise of debt management firms](#)

### Information sheets

ASIC [INFO 139 - Australian Consumer Law infringement notices: Your rights](#)  
ASIC [INFO 140 - Australian Consumer Law substantiation notices: Your rights](#)  
ASIC [INFO 151 - ASIC's approach to enforcement](#)

### Other information

Black's Law Dictionary (9th edition 2009)

## 9. Acronyms

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
AFSA	Australian Financial Security Authority
ARITA	Australian Restructuring Insolvency & Turnaround Association
ASIC	Australian Securities & Investments Commission
CP	Consultation paper
<u>DAA</u>	<u>Debt agreement administrator</u>
IG	Inspector-General in Bankruptcy
INFO	Information sheet
PIPA	Personal Insolvency Professionals Association
REP	Report
RG	Regulatory Guide
The Act	<i>Bankruptcy Act 1966</i>
The Law	Australian Consumer Law