

25 October 2021

Ms Abigail Boyd MLC
Chair
Portfolio Committee No. 6 – Transport and Customer Service
Legislative Council
Parliament of NSW

Dear Chair

Inquiry into road tolling regimes – Post-hearing response

Legal Aid NSW welcomes the opportunity to provide a post-hearing response to the NSW Legislative Council Portfolio Committee No. 6 – Transport and Customer Service (**Committee**) for the inquiry into road tolling regimes (**Inquiry**).

We note that Rebekah Doran, Senior Solicitor, appeared on behalf of Legal Aid NSW before the Committee on 28 September 2021 for the Inquiry.

Transcript corrections

Please see below corrections (underlined) to the transcript of the hearing in relation to the evidence provided by Ms Doran.

- Page 24:
For example, in the credit area the law sets out time frames around responses when you ask for hardship. It sets out the types of arrangements that credit providers should be considering, things like having written reasons, and those are things that are absent in the tolling area.
- Page 27:
A lot of the major industries now not only have hardship policies but they have specific policies around family and domestic violence — telecommunications, the Consumer Protection Code now has family violence policies connected to that.

Answers to questions on notice

Please see below answers to the questions on notice directed to Legal Aid NSW.

Question 1: Are you in a position to provide us with a guide as to which code you think is most appropriate that applies in other industries, or any further detail you wish to add?

There are many examples of industry codes with features that may be applicable or transferrable to the tolling context. Industry codes are industry specific and have been created with extensive consultation with relevant stakeholder groups.

Legal Aid NSW does not seek to provide an exhaustive list of the key features of industry codes. However, through our casework experience, we note that the following are important features of industry code development. Industry codes should:

- be created in consultation with stakeholders
- set out relevant guidelines, standards and practices
- include specific measures for compliance
- include measures for promoting the code and training industry staff about the code
- set out the complaint handling process for disputes
- set out the complaint handling scheme for non-compliance, and
- outline a process for periodic review of the code, including the consultation process.¹

During our casework, Legal Aid NSW refers to a number of industry codes. We urge the Committee to consider the following codes and guidelines.

Prominent industry codes in the private sector

Debt Collection Guideline for Collectors and Creditors

The Australian Competition and Consumer Commission and the Australian Securities and Investments Commission have jointly produced a Debt Collection Guideline,² which aims to assist creditors, collectors and debtors to understand their rights and obligations, and ensure that debt collection activity is undertaken in a way that is consistent with consumer protection laws.

This Guideline sets out basic minimum standards, and any debt collection activity by tolling companies and their representatives should adhere to this Guideline already. It includes minimum standards on topics such as dealing with customer representatives, approach to repayment negotiations and resolving complaints and disputes. Legal Aid NSW considers this Guideline is a starting point only, and an industry code should

¹ For more information, see Lawpath Blog, 'What is an industry code of conduct?' (2021). Available at: <https://lawpath.com.au/blog/what-is-an-industry-code-of-practice>.

² Available at: <https://www.accc.gov.au/publications/debt-collection-guideline-for-collectors-creditors>.

provide a more detailed framework for dealing with financial hardship and vulnerable consumers.

Banking Code of Practice and Industry Guidelines

The Banking Code of Practice³ is a set of enforceable promises outlining how a bank should conduct itself in its dealings with customers, as well as specific requirements for banking services.

The Banking Code of Practice is owned and published by the Australian Banking Association (**ABA**) and forms an important part of the broader financial services consumer protection framework. It is independently monitored by the Banking Code Compliance Committee to ensure Code subscribers are meeting their obligations and achieving service standards the community can trust. The Code Compliance and Monitoring team (**Code Team**) at the Australian Financial Complaints Authority (**AFCA**) provides Code monitoring, secretariat and administrative services to the Committee. The Code Team is a separately operated and funded business unit of AFCA.

While the Banking Code of Practice should be read as a whole, features of this Code of Practice which Legal Aid NSW considers particularly relevant to our clients and transferrable to the tolling context are the:

- commitment to inclusivity and taking extra care with vulnerable customers (e.g. Part 4)
- commitment to minimum standards when things go wrong (e.g. Part 9), and
- commitment to the process for resolving complaints (e.g. Part 10).

Significantly, for banks that are signatories, the Banking Code of Practice is part of the bank's contract with a customer and is enforceable by law.

The Banking Code of Practice should be read alongside the ABA's Industry Guidelines on:

- preventing and responding to family and domestic violence (**FDV Guideline**),⁴ and
- preventing and responding to financial abuse (including elder financial abuse) (**Financial Abuse Guideline**).⁵

³ Available at: <https://bankingcode.org.au/app/uploads/2020/06/Banking-Code-of-Practice-July-2020-with-COVID-19-Special-Note.pdf>.

⁴ Available at: <https://www.ausbanking.org.au/aba-family-domestic-violence-industry-guideline/>.

⁵

Available at: <https://www.ausbanking.org.au/wp-content/uploads/2021/03/ABA-Financial-Abuse-Industry-Guideline.pdf>.

These Guidelines do not form part of the contract with the bank. The FDV Guideline's stated purpose is to explain what financial abuse can look like and outline a framework for banks to manage financial abuse. The Financial Abuse Guideline explains that financial abuse is a form of family and domestic violence, and sets out a more detailed guide to managing industry responses. The Guidelines should be read together, alongside the Banking Code of Practice.

The Guidelines are important in the context of our casework as they outline minimum standards for industry, and failure to adhere to them can form a basis for complaints raised through banks' internal dispute resolution processes or to external dispute resolution bodies. They also clearly set out to consumers and their advocates what to expect when engaging with the banking industry on issues around family and domestic violence.

While these Guidelines are industry specific, there are broad principles and frameworks for approaching financial hardship and family violence that are transferrable to the tolling context. For example, in the case study of 'Sandra' in our submission to the Inquiry,⁶ the car was registered in Sandra's name and toll debt accrued in her name, but she was a victim of domestic violence and her ex-partner had control of the car, preventing Sandra from cancelling the registration. Guidelines such as those produced by the ABA are useful for setting out principles for approaching and understanding the context of Sandra's situation, and requiring an industry response that is sensitive, respectful and compassionate. Solutions should reflect that approach and recognise the vulnerability of the consumer who is a victim of family and domestic violence.

AFCA Approaches

Where disputes cannot be resolved between a customer and their bank, consumers can make a complaint to AFCA, where a decision can be made that is binding on the bank. AFCA has published a number of AFCA Approach papers, which guide decision-making in disputes between consumers and financial firms.⁷

Legal Aid NSW draws the Committee's attention to the:

- AFCA Approach to financial difficulty series,⁸ and
- AFCA Approach to joint facilities and family violence.⁹

⁶ Legal Aid NSW, Submission to the NSW Legislative Council Portfolio No. 6 – Transport and Customer Service, *Inquiry into Road Tolling Regimes* (3 June 2021) 12.

⁷ Australian Financial Complaints Authority, 'AFCA Approaches'. Available at: <https://www.afca.org.au/what-to-expect/how-we-make-decisions/afca-approaches>.

⁸ Ibid.

⁹ Ibid.

Legal Aid NSW urges the Committee to consider the AFCA Approach series of papers on financial difficulty.¹⁰ The papers are useful in setting out best practice for financial firms and have a strong focus on working together to find solutions. We note, however, that the external dispute resolution regime allows AFCA to make a binding determination on financial firms if AFCA considers the financial firm has not met its obligations with respect to the law or behaved in a manner that is fair and reasonable in all the circumstances.

National Consumer Credit Protection Act 2009 (Cth) and National Credit Code

Importantly, the Banking Code of Practice and AFCA Approaches are not the entire debt collection and financial hardship framework in the banking industry. The *National Consumer Credit Protection Act 2009 (Cth)* and the National Credit Code set specific and legally binding requirements for financial service providers to deal with clients in financial hardship and when collecting overdue debts. These include:

- the consumer has a right to seek a hardship variation¹¹
- the credit provider cannot commence enforcement proceedings until 14 days after a notice of refusal following a hardship notice¹²
- responses to the hardship variation must be in writing and be provided within certain timeframes,¹³ and
- specific notice requirements before legal action can commence.¹⁴

This strong and very specific legislative framework means that the Banking Code of Practice expands on and operationalises a bank's legal obligations. Legal Aid NSW submits that minimum legislative requirements of this type would be useful in the tolling industry.

Approaches to debt collection and financial hardship in the NSW public sector

Revenue NSW

Of particular relevance to the tolling industry is the commitment of Revenue NSW to mitigate the unintended impacts of the fines enforcement system on vulnerable clients.¹⁵ Strategies include:

- a write off protocol with Legal Aid NSW, now expanded to community legal centres and the Aboriginal Legal Service
- flexible payment options at any stage
- 50% discount on some types of penalties for people on certain benefits
- Work and Development Orders, and

¹⁰ Ibid.

¹¹ *National Consumer Credit Protection Act 2009 (Cth)* Sch 1 (National Credit Code) s 72(1).

¹² Ibid s 89A(2)(b).

¹³ Ibid s 72.

¹⁴ Ibid s 88.

¹⁵ Revenue NSW, 'Hardship Policy'. Available at: <https://www.revenue.nsw.gov.au/help-centre/resources-library/hardship-policy>.

- Advocacy Hotline.¹⁶

Revenue NSW has an entire program of work that assists clients in financial hardship.¹⁷ Its Hardship Support Program includes a team of specialist staff, a First Nations hotline, and a community project team whose objectives are to improve relationships between the community and Revenue NSW. The Hardship Team proactively engages with the community and develops plans to assist individuals to address their fines debt. Among other things, the Hardship Team considers individual applications for affordable payment arrangements, debt write off applications, and approves applications for participation in the Work and Development Order Scheme.¹⁸ The leadership team in the Fines and Debt Division has negotiated mutual recognition protocols across the legal assistance sector to streamline applications for a debt write off to make it easier for clients and lawyers who support them.

Office of Local Government Debt Management and Hardship Guidelines

The Office of Local Government Debt Management and Hardship Guidelines¹⁹ were recently introduced to set out best practice approaches for local councils to manage ratepayer debt and respond to financial hardship. Some principles of the Guidelines that are particularly relevant to the tolling context are:

- fair and equitable treatment of ratepayers, including those facing hardship
- how to identify and work with ratepayers in hardship when collecting money, and
- reduced use of expensive court processes to recover debts.

The Guidelines also promote a range of strategies and actions that councils can use to help ratepayers pay on time, including:

- a 'stop the clock' approach to suspend debt recovery, legal action and interest accrual while a ratepayer's hardship application is awaiting determination or while they are complying with a payment plan
- tailored plans and flexible payment options, including weekly, fortnightly and monthly instalments
- greater discounts for pensioners facing hardship
- options for ratepayers to receive their rates and pay their rates electronically, and
- simplified rates notices, including information in relevant languages.

¹⁶ Revenue NSW, 'Advocates'. Available at: <https://www.revenue.nsw.gov.au/fines-and-fees/advocates>.

¹⁷ Revenue NSW, 'Difficulty with payment'. Available at: <https://www.revenue.nsw.gov.au/fines-and-fees/cant-pay-your-debt>.

¹⁸ Legal Aid NSW, 'Work and Development Orders'. Available at: <https://www.legalaid.nsw.gov.au/what-we-do/civil-law/work-and-development-order-service>.

¹⁹ Available at: <https://www.olg.nsw.gov.au/councils/council-finances/financial-guidance-for-councils/debt-management-and-hardship-guidelines/>.

Question 2: Is there a transparent policy as to when debt collectors will be sent in or when legal action will be taken?

No. There is no consistent, industry-wide approach to debt collection practices, including when legal action will be taken.

TransUrban sets out a summary of its approach on its website.²⁰ Legal Aid NSW was not able to readily identify this information on the E-Toll website.

Thank you for the opportunity to contribute to the Inquiry. Should you require any further information, please contact [REDACTED], [REDACTED], on [REDACTED] or [REDACTED], or at [REDACTED].

Yours sincerely

Brendan Thomas
Chief Executive Officer

²⁰ Linkt, 'Haven't paid your Sydney tolls?'. Available at: <https://www.linkt.com.au/linkt-assist/downloads/diagram-what-happens-if-i-dont-pay-nsw/sydney>; Linkt, 'Why have I received a letter from a debt collection agency?'. Available at: <https://www.linkt.com.au/help/toll-notice/why-have-i-received-a-letter-from-a-debt-collection-agency/sydney>.