

10 May 2013

Mr Damian Paull  
Chief Executive Officer  
Australian Retail Credit Association  
736/1 Queens Road  
Melbourne Vic 3004

By Email: 'CRCode@arca.asn.au

Dear Damian,

### Credit Reporting Privacy Code

I refer to the current exposure draft of the Credit Reporting Privacy Code ("Code") and enclose our comments on the draft.

If you would like to discuss any of these matters further, please contact or David Niven or by email.

Philip Field  
Ombudsman - Banking & Finance

### Introduction

This is the submission by the Financial Ombudsman Service ("FOS") in response to the current exposure draft of the Credit Reporting Privacy Code ("Code") and the recent consultation with FOS on 1 May 2013. We would like to thank the Australian Retail Credit Association for the opportunity to comment on the Code and for arranging the consultation meeting on 1 May 2013.

This submission has been prepared by the office of FOS and does not necessarily represent the views of the Board of FOS. It draws on the experience of FOS and its predecessors in the resolution of disputes about financial services.

### Information about FOS

FOS commenced operations on 1 July 2008. It is an independent dispute resolution scheme that was formed through the consolidation of three schemes:

- the Banking and Financial Services Ombudsman ("BFSO");
- the Financial Industry Complaints Service ("FICS"); and
- the Insurance Ombudsman Service ("IOS").

FOS is an external dispute resolution ("EDR") scheme approved by ASIC. Membership of FOS is open to any financial services provider ("FSP") carrying on business in Australia including providers not required to join a dispute resolution scheme approved by ASIC. FOS provides free, fair and accessible dispute resolution for consumers unable to resolve disputes with FSPs that are members of FOS.

FOS is governed by a board with an independent chair and:

- four "industry directors" appointed based on their expertise in and knowledge of the financial services industry, independence and capacity and willingness to consult with the industry; and
- four "consumer directors" appointed based on their expertise in consumer affairs, knowledge of issues pertaining to the industry, independence and capacity and willingness to consult with consumer organisations.

## Submission

### FOS engagement with Credit Listing disputes

As you are aware, the Financial Ombudsman Service ("FOS") is an independent, non profit, EDR Scheme. FOS's role is to resolve disputes between Applicants and Financial Services Providers. FOS will seek to resolve disputes by conciliation and negotiation, but ultimately has power to make a binding determination upon Financial Services Providers.

FOS is required by its Terms of Reference to do what is fair in all the circumstances, having regard to legal principles, applicable industry codes or guidance, and good industry practice when determining a dispute.

It is our understanding that FOS is the principal dispute resolution body dealing with credit listing disputes in Australia. FOS received 928 credit listing disputes for the period 1 July 2011 – 30 June 2012.

As at 13 June 2012 FOS had 284 open credit listing disputes, of which 69 were in investigation. Many of the disputes that proceed to investigation ultimately result in a written decision. FOS receives an extensive range of credit listing disputes, including disputes relating to both consumer credit and commercial credit listing. Nonetheless consumer default listing disputes remain the primary source of disputation.

### Our Comments on the Code

#### *Default Listings*

We are concerned that clause 9.2 of the Code conflicts with the requirements of the *Privacy Act* 1988 ("Privacy Act") and the National Credit Code ("NCC"). For the reasons stated below, it is our view that even if clause 9.2 of the Code proceeds in its present form, FOS will continue to apply the legal principles outlined below and not clause 9.2. This is in accordance with our views which were first expressed in Bulletin 57 (March 2008)

The *Privacy Amendment (Enhancing Privacy Protection) Act* 2012 ("Enhancement Act") makes substantial amendments to the Privacy Act. However, it continues the regime under the Privacy Act where a credit provider can disclose 'default information' to a credit reporting agency<sup>1</sup>.

Default information is defined in section 6Q of the Privacy Act as:

"....information about a payment (including a payment that is wholly or partly a payment of interest) that the individual is overdue in making in relation to consumer credit that has been provided by a credit provider to the individual if:

- (a) the individual is at least 60 days overdue in making the payment; and

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<sup>1</sup>S.21D(3)(d) of the Act.

- (b) the provider has given a written notice to the individual informing the individual of the overdue payment and requesting that the individual pay the amount of the overdue payment; and
- (c) the provider is not prevented by a statute of limitations from recovering the amount of the overdue payment; and
- (d) the amount of the overdue payment is equal to or more than \$150...":

[our emphasis]

The requirements set out in the section repeat the current requirement under section 18E of the Act that a consumer may only be default listed where the consumer "...is at least 60 days overdue in making a payment, including a payment that is wholly or partly a payment of interest."

Most default listing regulated by section 6Q will relate to consumer credit contracts and so will be subject to the NCC. The NCC places restrictions on actions that a credit provider may take when enforcing a credit contract. Relevantly section 93 provides:

"An acceleration clause is to operate only if the debtor or mortgagor is in default under the credit contract or mortgage and-

- (a) the credit provider has given the debtor, and any guarantor, or to the mortgagor, a default notice under section 88; and
- (b) the default notice contains an additional statement of the manner in which the liabilities of the debtor or mortgagor under the contract or mortgage would be affected by the operation of the acceleration clause and also of the amount required to pay out the contract;
- (c) the default has not been remedied within the period specified in the default notice...."

The effect of section 93 is that a credit provider cannot "call up' the outstanding balance of a loan unless:

- a. the consumer is in default under the contract, usually constituted by late payment,
- b. a 30 day default notice under section 88 of the NCC is served, and
- c. the initial default, such as the missed payment, is not remedied within the 30 days.

The effect of the provision is that the requirements set out in section 93 constitute a statutory precondition to the operation of the acceleration clause in the credit contract. Until those requirements are met the outstanding balance does not become due and payable – it is not yet owed. The credit provider cannot list the full amount owing (as accelerated) until 60 days have elapsed since service of the default notice.

In that context FOS is concerned by clause 9.2 of the Code. The clause states:

"A CP must not disclose default information about an individual to a CRB unless:

- (a) the section 60 notice given by the CP to the individual states that the CP intends to disclose information about the overdue payment to the CRB if the amount remains overdue for 60 days or more (thereby also meeting the requirements of paragraph 210(3)(d));
- (b) if the terms of the consumer credit include an acceleration clause, the section 60 notice explains the effect of the acceleration clause and that the default information disclosure to the CRB may include the amount accelerated as a consequence of the acceleration clause; and
- (c) the CP meets the other requirements relating to default information that are set out in Part IIA and this CR Code."

At the recent consultation, ARCA explained that the intent of clause 9.2(b) was to allow a credit provider to default list a consumer for the full outstanding balance of the credit contract 60 days after the initial default eg. the first missed payment.

For example, consumer A enters into a loan for \$15,000 with credit provider B. Under the loan they are required to repay the loan by monthly instalments of \$300. The loan is regulated by the NCC. After 12 months of repayments, A fails to make the monthly repayment of \$300 due on 1 March. After two weeks of reminder letters, B serves a section 88 default notice, which includes a warning under section 93 of the NCC that the outstanding balance of the loan of \$14,500 will become payable if the outstanding \$300 repayment is not made within 30 days. A does not make the \$300 repayment until more than 60 days after it fell due.

The approach taken by clause 9.2 seeks to allow the credit provider to list consumer A with a default of \$14,500 on 30 April. As a matter of law, the outstanding balance of \$14,500 has only been owed at that time for 14 days. Listing of the outstanding balance at that time would be clearly in breach of the Privacy Act, although it would be both permissible and appropriate to list the missed \$300 payment at that time as that amount has been overdue for 60 days- a significantly lesser listing.

FOS in determining default listing disputes must have regard to law. It is clear that the proposed clause in the Code is inconsistent with the provisions of the Privacy Act and NCC. Plainly the Code cannot impose a requirement that effectively amends rights provided by the legislation.

In the course of the consultation it was suggested that there was some uncertainty as to the operation of the NCC and Privacy Act in this regard. FOS is unaware of any basis for a suggestion of any uncertainty in the area. Both the courts and authorities<sup>2</sup> in the area hold the view that expiry of the default notice is a precondition to the acceleration of the outstanding balance under the credit contract.

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<sup>2</sup> See Duggan & Lanyon: Consumer Credit Law 1st Ed.1999 at [10.4.20]. Also see the approach taken to default notices under section 80 of the UCCC - *Permanent Mortgages Pty Ltd v Cook* [2006] NSWSC 1104 at [68] to [70] and *Benjamin v Ashikian* [2007] NSWSC 735 at [86] to [89].

For example the Victorian Court of Appeal recently stated in *Chapman v Commonwealth Bank of Australia*:<sup>3</sup>

"Section 85 (1) of the Code is also relevant. It provides that an 'acceleration clause' – of which Clause 9.3(d) of the 'Usual Terms and Conditions' is an example- is to operate only if the debtor is in default. and if three other preconditions are met."

[our emphasis]

Further, the policy of the Privacy Act and the NCC has the effect of ensuring that consumers have additional time to arrange their affairs to repay the outstanding balance of a loan that has been accelerated. Usually a consumer can only do this by arranging refinance. This can take some time.

### ***Commercial Listings***

Currently the Privacy Act provides some limited regulation of commercial credit listings. The requirements relating to default listings and serious credit infringements contained in section 18E of the *Privacy Act* 1988 apply only to consumer credit listings.

The Enhancement Act and the Code do not appear to deal with commercial credit listings, and, in particular, provide no guidelines on when it is appropriate to list a default relating to a commercial credit contract.

FOS receives a significant number of complaints relating to commercial credit default listings.

We note that the Privacy Commissioner's Office in its *Credit Reporting and Advice Summary- April 2001* stated that where there was to be a listing of an individual with respect to an overdue commercial credit payment, the notification of the prospect of listing was a desirable business practice. FOS agrees with, and has adopted, that position.

In circumstances where the Privacy Commissioner has taken this view it is appropriate that the position be incorporated into the Code. Certainly, it is in the interest of all stakeholders that the requirements with respect to commercial credit listings be clearly stated.

### ***Access to Credit Reports***

FOS requests that applicants obtain copies of their credit reports in order to assist us to determine their dispute as a routine aspect of determining credit listing disputes. Access to credit reports is central to an applicant's ability to dispute inaccurate or misleading listings.

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<sup>3</sup> [2012] VSCA 162 at [11] (31 July 2012).

Clause 20 of the Code states that a credit reporting body is not to charge a consumer for access to a credit report if that consumer has not made a previous request for access in the previous 12 months. In this regard the Code reflects the principle set out in section 20R of the Enhancement Act.

As a matter of fairness and good industry practice, consumers who are disputing an error with respect to a listing on their credit file should not be charged for access to that report, unless there are exceptional circumstances. Accordingly, it is FOS's view that where a consumer has lodged a dispute with an EDR Scheme relating to a disputed credit listing, the consumer should obtain free access to their credit file.

In that context it is noted that section 20R of the Privacy Act does not mandate that a fee may be charge but is only permissive. Accordingly the Code is able to place additional limits on when a fee for access to a report may be charged.

Such an approach is consistent with the position taken by the Privacy Commissioner in the current Code of Conduct where at clause 1.12 he states:

"A credit reporting agency may not charge a fee for access by an authorised agent of an individual unless the agency believes on reasonable grounds that the agent has requested a copy of the individual's credit information file while acting as a business intermediary between the individual and the credit provider."

A second issue is that it is important that consumers have access to both credit reports and information as to their ability to dispute inaccurate information in those reports. Although clause 21.3 of the Code requires a credit provider or credit reporting agency to advise a consumer about their right to lodge a complaint about their credit report with an EDR Scheme, that notification only occurs where the consumer has:

- a. already lodged a complaint with a credit provider or credit reporting agency, and
- b. the complaint has not been resolved within the prescribed time limit.

As such it presupposes the consumer has knowledge about what matters can be listed on their credit file and their right to have inaccuracies corrected. For this to be achieved it is important that a consumer should be provided with information at the time that they receive their credit report, as it will be at this time that any potential concerns will arise.

In our view, the Code should prescribe that credit reports contain information about a consumer's rights to have any inaccuracies in their credit report corrected. Credit reports should also include a clear reference to the ability of a consumer to access an EDR Scheme free of charge. That information should be in a prescribed form.

In that context FOS is increasingly aware of credit repair agencies, some of which offer to correct consumers credit records for a considerable fee. It is our view that it is important that consumers are aware that they can approach EDR Schemes to investigate credit reporting complaints free of charge.



To ensure that consumers make an informed choice as to how to progress a complaint about their credit file, credit reporting agencies should also be required to provide information on their websites and in complaint publications about a consumer's right to access **EDR** Schemes free of charge.

**Financial Ombudsman Service**  
10 May 2013