



Consumer Credit
Legal Centre NSW



**Australian
Privacy
Foundation**

Joint Consumer Submission regarding the Credit Reporting Privacy Code

Thank you for the opportunity to provide a submission regarding the Credit Reporting Privacy Code (CR Code). This submission has been prepared by the Australian Communications Consumer Action Network (ACCAN), the Australian Privacy Foundation (APF), the Consumer Action Law Centre (CALC), the Consumer Credit Legal Centre (NSW) (CCLC), the Consumer Credit Legal Service (WA) and Financial Counselling Australia (FCA).

General Comments

Objectives of the CR Code

An industry code should be seeking to set standards of best practice and deliver tangible outcomes for consumers. The fact that this is a mandatory code should not diminish those objectives. We are concerned that the Code does not deliver on those objectives as currently drafted. This submission makes recommendations that would (if accepted) assist in meeting the objectives.

Accessibility and readability of the CR Code

Another major concern is the drafting of the CR Code. In our view the Code is difficult to read and understand. It is more difficult to read and understand than the current Credit Reporting Code of Conduct. A key benchmark for the effectiveness of a Code is ensuring that it is accessible and understandable to consumers.

We contend that the readability and clarity of the CR Code needs to be significantly improved. A consumer would find it very difficult to determine how the CR Code could assist them with a dispute.

Regulatory context

A major problem with providing comments on the CR Code is that the following complementary pieces of regulation are not finalised:

1. The Regulations
2. The Code Guidelines
3. Industry Code/Standard

This has led to the very undesirable situation where feedback is being given on the CR Code when other pieces of regulation are still being negotiated. This could lead to the CR Code having inadvertent inconsistencies and loopholes. It is appropriate in those circumstances that a review is conducted by the OAIC to ensure that there are no inconsistencies or oversights. It is also critical that if problems are identified that further consultation with stakeholders ensues.

Structure of this Submission and a note on contributors

This submission has been structured into 5 parts:

Part 1 - Key Issues that have not been resolved by the CR Code and need to be covered

Part 2 – The ten key issues identified in the Consultation Draft

Part 3 – Specific comments on the sections in the CR Code

Part 4 – Specific questions regarding the OAIC Guidelines

Part 5 – Specific comments relating to telecommunications

The Joint consumer submission specifically acknowledges the main authors of this submission: Carolyn Bond, Julia Davis, Katherine Lane, and Nigel Waters.

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Part I

Key Issues that have not been resolved by the CR Code and need to be covered

- 1. The CR Code must make it clear that Repayment History Information (RHI) can only be reported by credit providers licenced under the National Consumer Credit Protection Act and mortgage insurers**

Although the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* ("Privacy Act") is clear on the circumstances where RHI can be accessed, it is not clear on the rights to report this information. It is arguable that any credit provider could report RHI.

In our view, this appears to be an oversight in the drafting of the Privacy Act. The intention was that RHI could only be reported and accessed by licenced credit providers. Allowing the widespread reporting of RHI would undermine the intention of the Privacy Act. The CR Code needs to clarify this matter.

Recommendation:

The CR Code is to be amended throughout to make it clear that the reporting conditions for RHI are the same as for access.

- 2. The CR Code does not cover fairness.**

The CR Code must have a section covering fairness in the circumstances as an overarching principle. As an industry driven code, the CR Code should make a basic commitment to consumers that industry members will act fairly and reasonably towards consumers in a consistent and ethical manner. This is important because it gives consumers access to remedies for general fairness issues that may not fall under other sections of the CR Code.

A commitment to fairness under the Code could look like section 2.2 of the Code of Banking Practice:

"We will act fairly and reasonably towards you in a consistent and ethical manner. In doing so we will consider your conduct, our conduct and the contract between us."

It is noted that external dispute resolution schemes all integrate the element of "fairness in the circumstances" as a matter to consider in making determinations. The CR Code should be consistent with those obligations.

Recommendation:

A commitment to fairness is included in the CR Code.

3. The issue of listing close to the time when the debt would become statute barred is currently not fixed in the CR Code.

The CR Code has not covered the issue of delayed listing of defaults. This is a recurring problem for consumers, particularly where the debt has been sold to a debt collector.

Consumer advocates are aware of numerous cases where a default has been listed on the consumer's credit report many years after the default and sometimes just before the debt became statute barred. This leads to the absurd situation where the consumer is no longer liable for the debt as it has been extinguished but a default listing remains on their credit report for a further 5 or 7 years.

Consumer advocates were led to believe that some of these problems may be solved by introducing reciprocity standards. As we have no knowledge of the contents of the Industry Code it is unclear whether reciprocity would address this issue in any way.

The CR Code needs a section to deal with the unreasonable delay in making a default listing. It is not in the public interest and it also misleading to have a credit report listing still appearing on a consumer's credit report when a debt is now statute barred. The CR Code should specifically provide that where a consumer reasonably claims a debt is statute barred any default listing must be removed unless the contrary is established by evidence.

Recommendation:

A default listing must be removed immediately if the debt has become statute barred.

If the creditor cannot provide evidence that the debt is not statute barred within 30 days of a consumer's request for the removal of a listing then on that basis the listing must be automatically removed.

4. Concerns about credit repair companies

Consumer advocates have long been concerned about the conduct of credit repair companies. It must also be noted that there are also concerns from CRB's, credit providers and dispute resolution schemes about the conduct of credit repair companies. A number of recommendations were made by the Energy and Water Ombudsman NSW to try and address the poor conduct of credit repair companies.¹ In addition, the Credit Ombudsman Service has also identified problems with Credit Repair companies in its submission to the CR Code.²

¹ Research survey Report: Consumers' use and experience of 'credit fix' agents, September 2012, published by the Energy and Water Ombudsman NSW

² Credit Ombudsman Service Ltd; Submission on the Credit Reporting Code 2013

It is noted that credit repair companies are also an identified problem in other jurisdictions including the United States of America. Specific federal legislation has been enacted in the USA³ to provide basic protections for consumers using credit repair companies which includes:

- a. A cooling off period
- b. Enhanced disclosure
- c. Banning advanced payments

Credit Repair companies offer to “fix” your credit report for a fee. They guarantee high success rates of getting credit reports fixed (regardless of whether the listing is inaccurate or not). The fees charged for the service can be around \$1,000 to fix one credit default listing (or a similar non-refundable amount upfront with additional payments for each listing removed). Fees often apply even if the company is unable to remove any default listings from a consumer’s credit report. Credit repair companies use dispute resolution schemes on behalf of consumers to try and get listings removed even if the listing is completely accurate.

In our view, there is more than adequate evidence of ongoing problems with credit repair companies from all stakeholders (excluding credit repair companies). In this situation it is appropriate that the OAIC should undertake a review which includes:

- Putting out an issues paper
- Consulting with stakeholders
- Considering whether a recommendation should be made for specific legislation to address any problems identified.

In any event, the CR Code should require CRB’s to record data on applications and disputes raised by paid credit repair agencies. This would enable the Privacy Commissioner to monitor problems in this area.

Recommendation:

The OAIC/Government is strongly encouraged to consult with stakeholders on the ongoing problems with credit repair companies with a view to consider further regulation.

The CR Code should require CRB’s to record data on applications and disputes raised by paid credit repair agencies, and report this data regularly to the OAIC.

³ Credit Repair Organizations Act (US)

5. The minimum default listing change

The Privacy Act has changed the minimum default listing to \$150. Previously, there was no minimum default listing although at least one major CRB had a minimum default listing of \$100.

To ensure that the CRB data is consistent and accurate we contend that any default listings under \$150 should now need to be purged from CRB databases. The CR Code should specifically require this to be done.

If existing listings less than a \$150 remain on credit reports this will cause consumer confusion. It will also leave some consumers in the very unfair situation that a default could be listed prior to commencement but not after.

Recommendation:

The CR Code specifically requires that all existing listings under \$150 are removed on commencement of the Privacy Act.

6. Double or multiple default listing

Double listing occurs when the same default is listed twice in relation to the debt. It does not matter whether the amount has changed over time; the impression given by multiple listings is that the consumer has defaulted on multiple debts. The key principle is that a default in relation to an overdue debt can only be listed once.

Consumer advocates are aware of numerous cases where double listing occurs. The most common case is where a CP has listed a default, the default has fallen off the credit report after 5 years and the debt is then sold to a debt collector who then lists the same default again. The debt collector often misuses the threat of listing the default again as a debt collection tool. This amounts to serious misconduct and debtor harassment.

The CR Code needs to have a clear mechanism in place to ensure double listing is prohibited. The potential for misuse and debtor harassment is very serious. We also contend that the intention of the Privacy Act is clear that there is only one listing and after the retention period the listing is destroyed (section 20V).

Recommendation:

The CR Code must specifically ban:

- **Multiple default listings in relation to one debt**
- **Listing a default again after a debt is assigned**
- **Updating the amount of the debt on the default listing**

7. Interaction of the CR Code with legislation and other Codes

The CR Code is just one Code in various codes and legislation that applies to credit providers. The CR Code needs to specifically acknowledge this and make it clear that:

- The Privacy Act legislation (including the Regulations) prevails in relation to credit reporting matters
- If other legislation and/or Codes apply (and there is no conflict with the Privacy Act) then the CP must still comply with the relevant requirements

If the above issues are not covered in the CR Code this could lead to industry confusion and consumer confusion.

Recommendation:

The CR Code must clarify and acknowledge that CP's are subject to a range of regulatory requirements, including other legislation and Codes of Practice/Industry Codes. The CR Code will identify where the Privacy Act sets certain legislative time limits.

8. Interaction between the Industry Code and the CR Code.

Credit providers are developing a Data Standard and Reciprocity arrangement which appear to be confusingly called an Industry Code. It is our understanding that this Industry Code is not well developed. We contend that the contents of the Industry Code may impact on the content of the CR Code. Further consultation may be necessary once the Industry Code is released.

We would expect that consumer advocates would be consulted in the development of the Industry Code and a less confusing name is chosen for the document.

Part II

Key Issues Inadequately Addressed in the CR Code

This section addresses the 10 key issues raised in the CR Code Consultation Draft produced (April 2013).

1. Ability for Credit Providers to report through a unique identifier

There is no provision for the use of existing account numbers, or any new identifiers, in the Act (none of the definitions where you might expect to find it seem to accommodate numbers). Given that it seems they are in fact already used in credit reporting, it is inexplicable that industry has not raised this as an issue earlier in the law reform process and also questionable how their use is authorised under the existing Part IIIA.

The industry has now raised the need for account numbers/identifiers in the context of the Regulations. It is suggested by industry that it is necessary, or at least desirable, to allow the use of at least two account numbers for each lender (to accommodate internal changes in numbering, e.g. on mergers) and at least one account number for parties to whom debts are transferred. There is also a technical requirement for 'sub-numbers'.

The obvious place to accommodate the use of numbers is in the definition of 'identification information' but this is clearly defined and there does not appear to be any relevant Regulation making power to allow a variation (under the existing Act the Commissioner is able to make a determination varying the identification information that can be used, but this discretion has been removed).

It has been suggested that the Regulations which can be made regarding the definition of 'consumer credit liability information (CCLI)'(s.6(1)) should include 'terms and conditions' which in turn could include 'administrative information' which in turn could include account numbers and other identifiers.

Consumer and privacy NGOs have no objection in principle to the use of existing account numbers and other identifiers (such as CRB record numbers) to facilitate accurate matching of credit information, subject to two important provisos.

Firstly, the exchange of account numbers and other identifiers between participants in the credit reporting system must be lawful, and the necessary authorisation must be provided, either by Regulations or by an amendment to the Act. We are not convinced that it is either possible legally or desirable to use the Regulation making power relating to CCLI to authorise the use of such numbers.

Secondly, it must be clear, and agreed, that any authorisation does not allow the development of a unique credit ID across lenders, or even external pressure on lenders to standardize account identifiers internally. Development of multi-purpose identifiers is a very contentious issue in privacy policy, and there must be no suggestion that the Privacy Act either encourages or allows such a development.

Recommendations:

If credit providers seek to use account numbers the Act needs to be clarified to give power to do so.

If account numbers are going to be used this information can only be disclosed in specified circumstances, for example, to the relevant CP and to the individual but to no other party.

Clause 5.1 of the CR Code needs to clarify what administrative information can be disclosed, including in respect of 'identifiers' and the Code should expressly discourage the standardisation of account numbers across the credit industry.

2. Categories of credit information

It is our understanding that the Regulations are being currently settled and may address the issues regarding what types of consumer credit liability information can be listed on a credit report.

In our view, although there are a lot of different names for products, it is desirable to have as few categories as possible.

Until the Regulations are finalised, this issue remains outstanding and will require further consultation.

3. Preconditions to a default listing

Section 9 refers to meeting the notice obligations in Part IIIA (of the Privacy Act). For the sake of clarity it is important to stress the notice requirements under the Privacy Act prior to listing default information. The requirements are:

- 1) A section 6Q (b) notice informing the individual of the overdue payment and requesting payment of the overdue amount; and
- 2) Section 21D(3)(d) which requires a notice stating that the CP intends to list a default

The intention of the legislation is very clear. The individual needs to be notified of both events separately as there may be a significant lapse of time between defaulting and the CP listing. For example, a default notice may be sent 1 day after the default. The actual default listing could occur anytime between 60 days in default and years later. The individual needs to be notified about the imminent default listing in a reasonable time period prior to that listing in all cases. We contend that the reasonable time period needs to be specified in the CR Code.

The CR Code has not clarified this at all. The individual is entitled to be told about the default listing just before the listing so they have time to take action. In our view, including

this notice of intention to list in a default notice and then listing a default many months later would be a breach of the Privacy Act.

Recommendation:

The CR Code must specifically cover the two notice requirements in the Privacy Act.

The CR Code should state that the notice of an intention to list a default must be issued between 30 days and 14 days before the default is listed.

We support the direction of section 9.1. We believe it is important that default information is not reported while there is a current dispute, or where a request for a hardship variation is being considered.

However, 9.1(b) should be removed. Section 9.1(b) allows a CP to disclose default information, despite a dispute being on foot, if the individual has made a complaint on the same grounds in the last 4 months. If a CP believes that they are entitled to reject a request for a hardship variation because the individual has made a similar request in the last four months, they should reject the request and only then should they list the default.

We disagree with section 9.3. While we understand, and support, the principle of information being accurate and up to date, the legislation appears clear that the actual amount of default is not information which is expected to be up to date. Rather, it is information about the amount of an overdue payment at a particular time. The legislation only allows reporting of an overdue payment if, among other things, the payment is at least 60 days overdue. We don't believe it is appropriate that the credit provider can then report the total of all amounts overdue (whether they are 60 days overdue or not). It is also worth stressing that under no circumstances should there be the capacity for credit providers to update the amount of the default. It is a point in time listing.

The 6Q notice is provided to the consumer after the default has occurred, to ensure that the consumer is aware that there has been an overdue payment and that this will be listed as a default unless the default is remedied. We believe that it is appropriate (and in line with the intention of the legislation) that the amount listed as a default is the amount of payment/s 60 days overdue at the time such a notice is issued, and that this amount should not include any subsequent payments which become overdue during the notice period.

We believe that industry may have some concerns about the original default amount being remedied, and therefore being unable to report the fact that there had been a default, even if subsequent payments have not been made and the account remains in default. If this is of concern, we propose that a better solution is for the Code to specify that the amount which can be recorded is the amount of the overdue payment at the time the 6Q notice is issued or the total amount overdue, whichever is the lesser.

Finally, we understand that industry wants the ability to update the debt for a default listing. As argued above the default listing is the overdue amount as notified to the individual in the

section 6Q Notice. As discussed above in Part I, point 6 individuals can be seriously disadvantaged by multiple default listings. This information can be misused in debt collection practices to mislead the individual into believing the default could get worse.

As individuals rarely, if ever, check their credit report updating the amount owing is of little or no use to individuals. The risk of misuse by CP's unfortunately is very high.

Recommendations:

Section 9.1 of the CR Code is supported

Section 9.1(b) is opposed.

Section 9.3 is opposed. The amount of the default as notified to the consumer must be the amount listed on the credit report.

4. Refusal of credit – disclosure in notification letter

The notification requirement under S21P is an important one for consumers, and for the credit reporting system. Firstly, it is important that those who experience the most personal detriment from the system in that they are denied credit, based in full or part on credit eligibility information, should be informed about how they can obtain a copy of their credit reporting information. Secondly, in ensuring that these individuals have access to this information, there will be broader public awareness of credit reporting and more likelihood that any inaccuracies will be challenged.

We support the obligations under section 17.3 to provide the notice under S.21P(2) in any case where a credit application has been refused, and a credit report has been accessed in the past 90 days.

The new legislative requirement is similar to the requirement in the previous legislation. We believe that this requirement has been widely ignored by credit providers. It is therefore likely that for many credit providers, this will be a new requirement in practice.

One reason that it has been easy in the past for credit providers to ignore this requirement is that it is not possible for a consumer, or a consumer's representative, to determine whether or not a decision to refuse an application for credit was based, even in part, on the content of a credit report. Therefore, it has not been possible to identify whether or not this provision has been breached in any particular case.

While a consumer may be able to show that the credit provider accessed the credit report, and that credit was refused, it is not possible for a consumer to prove that the credit report contributed to that decision. In practice, consumers who are denied credit based on their credit report don't know they are entitled to such notification, so don't know they can complain. They are also likely to be more concerned with their own issues, than with complaining to the OAIC about the credit provider's breach of the Act. Therefore, while

we believe there have been widespread breaches, it has not been possible to clearly identify those breaches and accordingly there has been a lack of complaints.

If this provision is to be effective at all, it must be easy to identify whether or not a credit provider is complying with the provision. The proposed section 17.3 will make this possible.

5. Access to a free credit report from a credit reporting body

We welcome the inclusion of 20.3 of the CR Code. There has been a long history of credit reporting bodies making the access of a free credit report a lot more difficult than the paid version. This has been a concern for consumer advocates and financial counsellors for many years. The code should provide that consumers have the right to fully complete the application process for a free report online, and this process should be easy and accessible.

In addition to providing services to credit providers, credit reporting agencies provide fee-based products and services to consumers. These fee-based services have become more sophisticated, and marketed more heavily over the years. While consumers generally benefit from an increased availability of products and services, there is a clear conflict between a credit reporting agency's obligation to provide free credit reports and the agency's desire to market a product or service for which it derives direct income.

Some years ago, consumer advocates raised concerns with Baycorp Advantage (now Veda) that there were some difficulties in finding information about the availability of a free copy of a credit report on its website. Advocates were concerned that some individuals may believe that they must pay for a copy of their credit report. Baycorp Advantage responded to our concerns, and made changes to its website.

A few years later, consumer advocates once again became aware of similar problems, which apparently arose following redesign of the Veda website. Our concerns included the following.

On one page, where consumers were likely to arrive following a search, the paid service was promoted (at \$51.95). The words "buy now" appeared on that page 3 times, each time in a red box. At the bottom of the page (after scrolling down) a grey box appeared "Free, find out more". On other pages, the links to the paid services were red, but the links to the free service were grey. Even where the free service was mentioned on the same page, it appeared at the end, and the text was broken by a blue band, which appeared to be a heading, promoting the paid "express" service.

Further, a paid copy of a credit report could be obtained by completing details online, while the free copy required copies of two forms of identification to be sent by post with the other information required.

We raised these concerns informally with Veda staff, and eventually wrote to the CEO. The response noted that Veda had complied with the relevant legislation, but there was a commitment to making changes.

Although the case study above reflects negotiations with Veda Advantage, consumer advocates also had similar problems with other CRB websites.

However, this experience suggests that the tension between CRB's obligations and the desire to sell products to consumers is likely to lead to differences, even subtle ones, in the promotion of free and paid reports, which will confuse some consumers about their right to a free report. Subtle differences in the prominence of the two types of report will lead some consumers to pay for a report in circumstances where they would have preferred a free report. Those who are likely to choose the more obvious option would include those who are simply in a hurry, but would also include those who are less "internet savvy" or those who have language or literacy issues.

It is important that someone looking to obtain a copy of their credit report is not more likely to be drawn to information about the paid service – regardless of the search terms used or the page they access.

We believe the effectiveness of 20.3(b) could be enhanced by inclusion of the words "identify and" as shown below. While we would say that "easy to access" would include that it also be as easy to identify, we believe it would be useful to clarify this in the Code.

"the CRB takes reasonable steps to ensure that its service whereby individuals may obtain their credit reporting information free of charge is as available and easy to identify and access as its fee-based service."

Recommendation:

The code should provide that consumers have the right to fully complete the application process for a free report online.

Section 20.3 is supported subject to the amendments to the wording outlined above.

Section 20.4 of the CR Code

It is likely that we will see ongoing improvements in the quality of information and presentation provided in purchased products, and there is a risk that free reports will contain the minimum amount of information required by law and the Code. It is therefore vital that the Code is very clear about setting obligations in relation to the content of free reports. At a minimum, the actual information held, and information derived from that information, should be provided. It should also be provided in a clear format. We are hopeful that Clause 20.4 will achieve that, but this should be a specific focus of attention in reviews.

Section 20.6 of the CR Code

Section 20.6 provides for CRBs and CPs to withhold or re-present 'derived information' to preserve commercial confidentiality. We are concerned that this exception could be used to undermine the objective of section 20.4, e.g. in relation to credit scores. We submit that the proposed Explanatory Notes to sections 20.4 and 20.6 should go even further than the current draft Explanation to discourage any inappropriate restrictions.

Recommendation:

Sections 20.4 and 20.6 should incorporate the explanatory notes and go even further than the current draft Explanation to discourage any inappropriate restrictions.

6. Credit Reporting Body database environment

Section 21.8 of the CR Code

Subsection 20S(2) of the Act provides that, if a CRB corrects information which is inaccurate, out of date, incomplete, irrelevant or misleading, it must notify recipients of that information of the correction. We submit that there should be guidance in the Code, or at least in the Explanatory Notes, to discourage a wide interpretation of the exceptions from the requirements to give notice in the Act (s. 20S(2)) where it is 'impracticable' (s.20S(3)). A default position that pro-active notification of recipients is too onerous and that merely having corrected information in the credit file so it is 'seen' in subsequent reports satisfies the requirement would not be acceptable.

Recommendation:

The CR Code should include further guidance to prevent a wide interpretation of the exceptions from requirements to give notice.

7. Credit Reporting Body membership of a recognized external dispute resolution (EDR) scheme

Consumer advocates support the requirement in section 22.2 of the Code that a CRB must be a member of a recognised EDR scheme. CRBs play a pivotal role in the credit reporting system and EDR Scheme membership will help to ensure that individuals obtain redress if a CRB fails to meet its obligations under Part IIIA and this CR Code. Without this requirement in the Code, there is no mandated obligation of EDR membership for CRBs. More importantly, this obligation acts as a practical barrier to prevent "fly by night" CRBs entering the credit reporting area.

8. Credit Provider membership of a recognised EDR scheme

All Credit Providers (CP) must be members of a recognised EDR Scheme. There should be no exceptions to this obligation as it is fundamental to a consumers' ability to access justice. If there are some industries outside of the financial services sector that supply goods and services on credit, those industries must be able to join a recognised EDR Scheme before they can have access to the Credit Reporting system.

The drafting of various sections in the CR Code that reference Credit Providers being members of EDR Schemes (15.2, 22.4, etc.) are all extremely confusing. It is not at all clear whether CPs must be members of a recognised EDR scheme in order to access or provide credit reporting information. The confusing nature of the current draft is a critical problem for consumers. The average consumer of credit must be able to understand his or her rights and obligations under the Code, and this must include whether they have access to affordable and independent dispute resolution.

The current draft of the Code seems to allow all CPs access to credit reports whether or not they are members of an EDR scheme. Consumer advocates believe that this is unacceptable. We cannot over-emphasise that this is an access to justice issue, and must be resolved in the Code.

Recommendations:

The CR Code should specifically state that ALL CPs must be a member of an approved dispute resolution scheme that is free for consumers.

9. Auditing of credit providers by CRBs.

We have no difficulty with the principle of a risk based approach to auditing (24.1 & 24.2), but we have two concerns relating to the draft Explanation, and seek to have these addressed either in the Code itself or at least in Explanatory Notes.

Firstly, it would not be acceptable for a CRB to argue that the 'impact of non-compliance' (a legitimate factor mentioned in explanation of 24.2) is so low across the board as to justify little or no auditing activity. One way of preventing such an interpretation and ensuring a minimum level of monitoring and auditing would be a formula to set an annual budget for monitoring or auditing (either industry wide or for each CRB).

Secondly, there is an inference in the explanation of Code 24.2(d) that negative reporting is inherently less risky than the new 'more comprehensive' reporting. We submit that while the use of additional information creates additional risks, and focus on this will be justified at least in the first few years, the substantial residual negative reporting environment will remain an area of concern which should not be neglected. It also has to be noted that the majority of default listings are currently made by Telecommunications companies. As a

consequence there should be targeted auditing of that industry to ensure compliance. It would be helpful for this to be expressly recognized in Explanatory Notes.

The explanation of section 24.2 suggests that the monitoring function (preliminary to actual auditing) may be outsourced by CRBs (but implicitly could be in-house). Sections 24.3 and 24.4 require that auditing must be by independent third parties, but allows for auditing of CPs by employees of a CRB or of an industry body, provided there are internal governance arrangements to ensure functional independence. We confirm that these distinctions, and differences, are reasonable.

There should also be a requirement for the OAIC to approve the risk based auditing system. The audit results must be reported to the OAIC.

Recommendations:

Auditing levels needs to be prescribed in the CR Code.

There should be no underlying assumption that negative credit reporting is “less risky”. Auditing should take account of volume of listings in particular industries. The OAIC must approve the audit system and the audit results must be reported to the OAIC.

10. Reporting by CRBs publicly and to Information Commissioner

Section 24.12 is quite specific and detailed concerning annual publication by each CRB of correction requests and complaint and SCI statistics, together with information on the sectoral incidence. We submit that published reports should also include statistics about corrections not arising from complaints, and also the results of the monitoring and auditing programmes. Section 25 deals with the role of the Information Commissioner, including reporting to the Commissioner by CRBs. We note that the OAIC draft Code Development Guidelines specify a range of information that the Commissioner will expect to be included in reports, and the Code should at least cover all this information.

Recommendations:

The information to be reported should be specified in the CR Code.

PART III

Submissions regarding specific Sections of the Code **(not already covered)**

1. Introduction

Section 1.2(g)

This section attempts to redefine the meaning of 'destroy'. The place and time for this issue to be debated was around the table in s.20W of the Act which specifies retention periods in detail. There is a clear statutory requirement to destroy (or de-identify) once these periods have expired, subject to exceptions (in s.20W) for where corrections or disputes are pending. The retention periods are generous. This attempt to deny the plain meaning of 'destroy' in order to allow retention of identifiable personal information by CRBs is unacceptable.

At a minimum, the data destruction must be appropriate to the nature of the information. We also recommend that the OAIC issue guidance on this point.

Recommendation:

Section 1.2(g) be deleted.

OAIC issue guidance on destruction.

2. Credit reporting system arrangements

We have no comments regarding this section of the Code.

3. Open/transparent management of CR information

We support section 3.1, which requires a credit reporting bureau to disclose the management information required by S.20B (4) on its website.

4. Information collection procedures

We contend that disclosure on credit reporting has been very poor to date. It mainly consists of small bunched text, that is difficult to read and very technical. The consent is usually bundled with a number of other documents (for example, an application form). The proposal in the CR Code to bury disclosure matters on websites is very disappointing.

The CR Code represents an opportunity to give individuals clear, concise and relevant disclosure about credit reporting. We contend that based on previous research on disclosure that it would be desirable to have a box of key information the consumer needs to know. This key information could be modelled on other financial services disclosure.

We contend that the CR Code should develop a disclosure document that is provided to each individual at the time the CP collects personal information. This document would be limited to an A4 page, have easy to read print and be in plain language. This form of disclosure is now required in both credit contracts and insurance.

Section 4.3 appears to allow CPs to dispense with notices altogether, except for a reference to a website. It also suggests in the explanation that the policy required by s21B (perhaps amalgamated with an APP notice) would suffice.

We have no difficulty in principle with a layered approach to notice, linking through ultimately to a general privacy policy (Privacy Commissioners have endorsed this general approach) but there must be a minimum level of information conveyed to individuals at the point of collection (unless in some cases it is a repeat collection where notice has already been given). While s21C allows 'otherwise ensure that the individual is aware' as an alternative to notice, similar wording has never been interpreted, either in Part IIIA or NPP 1.3 context as relieving organisations from needing to provide at least a bare bones privacy notice in forms etc. – certainly not as 'bare' as just a link to a website. Reference is made in the draft Code to the EM (p160), but we do not read this as offering them any encouragement for the radically weaker compliance approach embodied in section 4.3.

Recommendation:

Section 4 is amended to require the provision of a Key Facts Statement to the individual. The KFS to be developed between stakeholders and become a mandatory requirement under the CR Code.

5. Types of credit information

See comments in part 1I, point 1.

In Section 5.1 (b)(i) there is a reference to administrative information. This term is undefined and ambiguous. There is a real risk that administrative information could be interpreted widely leading to conduct that is not consistent with wider privacy principles.

Administrative information needs to be defined and we would contend it should be narrowly defined to ensure it is clear what information can be provided. As discussed in part II, point 1 it is unclear whether account numbers are administrative information.

Recommendation:

Administrative information is defined in the CR Code with a list of what would be administrative information for the purposes of the CR Code.

The CR Code needs to set clear limits on the scope and purpose of administrative information.

6. Consumer Credit Liability Information

While we understand that there are challenges for industry in agreeing on classifications for some types of information, such as “type of credit”, we have some concerns that the terms in the legislation are quite broad and that these could be exploited by industry which may want to share more information than was envisaged by the legislation.

As stated in the Explanatory Memorandum, “Only limited and defined kinds of relevant personal information are permitted in the credit reporting system.” The purpose of the system is to “balance an individual’s interests in protecting their personal information with the need to ensure sufficient personal information is available to assist a credit provider to determine an individual’s eligibility for credit following an application for credit ...”

From the point of view of industry, a wide range of information is of assistance in assessing eligibility for credit. Some of that information relates directly to the likelihood that a person may be unable to pay, such as the number of credit accounts, judgments, past defaults or late payments. However, creditor assessment tools are highly sophisticated. We understand that a wide range of other factors such as where the individual lives, where they shop and the types of lenders borrowed from in the past can contribute to risk assessments. We therefore believe that there will be some sectors of industry which will want as much detail as possible – and therefore to want the ability to share significant detail under headings such as “terms and conditions” and “type of credit”.

Section 6.1 appears to be appropriate in relation to descriptors for the type of credit. It is important that there is a limited number of standardised terms allowed in relation to the type of credit, which appropriately reflect the consumer’s credit agreements without unnecessary detail.

We understand that regulations will be made which will limit the information that can be collected and disclosed in relation to terms and conditions. It is important that the Code state that the minimum possible information should be disclosed for each item listed in the regulations.

We support the section 6.2, in particular the clarification of “maximum amount of credit available”. We believed there was a risk that lenders could report this in a way which provided too much ongoing, detailed information. While this should be updated to reflect any credit limit increase which has been granted to the individual, it should not be changed from time to time to indicate spending or repayment behaviour.

We support the obligation in 6.4 to update information to show that credit is terminated within a reasonable time period (45 days).

7. Information requests

This section of the current Code has led to many enquiries on credit reports stating that the amount is not ascertainable or is unspecified. This appears to have sprung up as a common practice and we are concerned it is a dubious practice.

It is unclear why a consumer would apply for credit for an unknown amount and agree to a check of their credit report in those circumstances. In our view, the amount of credit being applied for should be ascertained before a credit report check. In this way, an amount of credit would be noted on the application. If this is later changed, it would not matter because the actual loan would be available information as an outstanding limit on the credit report.

Recommendation:

Section 7 should be deleted.

8. Repayment history information

As noted above in Part I, the definition of RHI in section 8 should clearly state that both access and reporting is limited to licensees under the NCCP and mortgage insurers.

Grace period

While we strongly support the inclusion of a “grace” period in 8.1, we are very concerned that 5 days is not sufficient. The 5 days will definitely prevent a large number of disputes but it will not cover a number of disputes that would genuinely be over 5 days. We contend that 14 days is a fairer amount of days. In particular, this reflects the most common pay period which means the consumer could rectify the missed payment by their next pay to avoid a RHI negative listing.

We contend that there are a range of circumstances where the consumer may have missed a payment (this could be RHI or default) which is the fault of a third party or is no reflection on their creditworthiness. Some examples are:

- Bank payment systems errors (these can take a few weeks to fix in some circumstances)
- Serious illness
- Natural disaster
- Stolen mail
- Fraud by a third party

RHI and disputes

It is essential that a consumer is able to arrange for their credit report to be rectified in the above circumstances. An overarching principle should be that a credit report listing must be removed if:

1. It would be unfair in the circumstances to leave the listing on the credit report and/or
2. The listing was caused by or as a consequence of the actions of a third party (which the consumer had no control over) and/or
3. The conditions that led to the listing are no reflection on the consumer's creditworthiness in the circumstances

While the explanation says "Para (b) prevents a CP from reporting repayment history information where there is an unresolved dispute (whether being dealt with internally by the CP or by an external dispute resolution scheme)" there doesn't appear to be a Para (b) in the draft Code.

We believe that negative repayment information should not be disclosed while there is an unresolved dispute, in the same way that a default should not be reported in these circumstances. We have no objection to the continued reporting that payments are being made (positive information) if the CP reports this information. Consumer advocates have had experience of some credit providers using the threat of reporting a default when the consumer has had a legitimate claim or defence. While industry may argue that the resolution of a dispute may eventually involve amending negative repayment history, it is not appropriate for the consumer to be pressured to pay an amount in dispute by the threat of negative repayment history.

Defining a month

We also understand there is a proposal by industry to define a month as 29 days. This is opposed. The average length of a month is 30 days. The overdue listing period is a multiple of 2 x 30 days being 60 days. The default notice period in the National Credit Code is 30 days. We contend that there really is no sensible argument for a 29 day month. We contend that a month should be defined as:

1. The actual length of the month depending on the month in question; or
2. 30 days

Notification of RHI

We contend that it is a matter of procedural fairness that individuals are notified of negative report listings on their credit reports. We believe that account statements should be used to provide notification to consumers about negative RHI on their account statements. We contend that this would benefit both industry and consumers. Industry would benefit because a consumer may be more likely to make contact to make sure they keep a

reasonably good credit history. Individuals would benefit as they can raise a dispute if the listing is inaccurate.

Recommendations:

The grace period should be extended from 5 days to 14 days

A separate section is to be included in the Code to cover a mechanism to have a listing removed when:

- 1. It would be unfair in the circumstances to leave the listing on the credit report and/or**
- 2. The listing was caused by or as a consequence of the actions of a third party (which the consumer had no control over) and/or**
- 3. The conditions that led to the listing are no reflection on the consumer's creditworthiness in the circumstances**

Para 8.1 (b) should be included (as per the explanatory notes)

A month is defined as 30 days for the purpose of RHI

Individuals to be notified about RHI listings on account statements

9. Default information

See Part II, point 3 above.

10. Payment information

Whether or not an overdue amount has been paid can be of significant importance for consumers, and it is vital that the Code clarifies what is meant in this context by "paid". We believe that 10.1 does this appropriately. We also support 10.2, which ensures that when this information is required urgently, as is sometimes the case (for example if approval of a mortgage is at stake), there is an obligation on the credit provider to respond quickly.

11. New arrangement information

The CR Code is not very clear on this point. Section 11 allows the CP to disclose new arrangement information. This section needs to be limited to significant and relevant new arrangement information. We assume that this provision may be used when a consumer enters into an arrangement with a credit provider to vary the contract, including on grounds of financial hardship. However, without further clarification it is difficult to comment on how this section will be used in practice and whether there are unforeseen negative ramifications for consumers.

Section 11.1 (a) refers to the disclosure of changes to the terms and conditions of the consumer credit. It is unclear what this means. For example, credit card terms and conditions change regularly. Variable interest rates change. There are a whole range of changes to terms and conditions which can be very minor or very major.

Consumer advocates have argued strongly in relation to the consultation on the Regulations on this point that terms and conditions should be excluded or at the very least narrowly defined. As the Regulations are not settled it is difficult to comment on how terms and conditions will be defined.

However the Regulations define terms and conditions, the CR Code should strictly reflect those limitations and this section redrafted accordingly.

It is also unclear what “new consumer credit” means. Again, we recommend that the CR Code provide parameters on what this means.

Recommendation:

Section 11.1 of the CR Code is drafted to include precise details of the new terms and conditions to be listed and the precise circumstances when new consumer credit is listed.

12. Publicly available information

Section 6N(k)(i) of the Privacy Act requires that publicly available information must relate to the individual’s creditworthiness. An ongoing concern is that there is some publicly available information which we would contend does not relate to the individual’s creditworthiness. An example is court judgments which stem from a dispute between people who were in a relationship. There can often be fights about shared household possessions that result in a judgment. This has nothing to do with creditworthiness. Similarly, a dispute between insurance companies conducted in the name of the insured under rights of subrogation is no reflection of the creditworthiness of the relevant individuals.

It is recommended that the CR Code is amended at section 12 to require that the publicly available information must relate to their creditworthiness.

Recommendation:

An addition subsection should be added at 12.1(c) that states:

(c) if the content relates to their creditworthiness.

13. Serious credit infringement

We strongly support section 13.1 (a) and (b), which ensure that a credit provider cannot list a SCI on the basis of fraud, unless there are clear grounds to support such a listing. In relation to section (c) we believe that a SCI should be removed at any time once the credit provider and consumer have made contact (not just within the 6 months).

Over the years, serious credit infringement (SCI) listings have been a major cause of consumer detriment and dispute. The current legislation is similar to the previous legislation, albeit with some additional pre-requisites to listing a SCI. An SCI remains on a credit report for 5 years – the same as bankruptcy. However, it is the only credit information which is based on the opinion of a credit provider, although we note that the opinion must be ‘reasonable’.

The key problem faced by consumers in relation to SCIs is that the legislation can lead to grossly disproportionate outcomes in some cases. Examples include an individual who went overseas for an extended period who was shocked to find a SCI listing in relation to a credit card account he believed to have been closed, an individual who had been hospitalised for a serious accident and been out of contact, and of course many people who only found they had an SCI relating to a share house many years later, because they failed to change the name on a utility account when they moved out.

We support the intention behind section 13(1)(b) in clarifying the obligations of the credit provider, including obligations to try various means of contact.

14. Transfer of rights of credit provider

Consumer advocates have experienced problems in the past in relation to credit reporting and the purchase of debts. These include listing a default in circumstances where the original credit provider had already listed a default, and failure to list information in a way which makes it clear that a disclosure relates to an old debt. We support provisions in the Code in relation to the transfer of rights (section 14), and obligations to update credit reporting information.

However, we believe that the Code could be clearer about which party has committed a breach of the Code should there be a failure in making the required disclosure. We don't believe that the explanation is useful, as this envisages in some circumstances an agreement between the credit provider and acquirer in relation to who makes the disclosure. It should be clear that should there be such an agreement, both parties continue to be responsible if there is a breach.

We propose that in relation to the actual transfer, that both parties should be responsible for making the disclosure. If the disclosure is not made at all, then both parties have breached the Code.

In relation to section 14.2, we believe that in most cases the original credit provider would not have access to up to date information. It would therefore be appropriate for the Code to state that the acquirer has the responsibility.

15. Permitted disclosures

As detailed above, we are strongly opposed to any access to the credit reporting system unless that CP is a member of an approved dispute resolution scheme.

In the lesser alternative, if information access is granted the CR Code must specify that:

- 1) Access only is granted, not rights to disclose information
- 2) The individual must have provided consent
- 3) Listing of any information is not permitted

Recommendation:

The CR Code clearly states that no information can be listed or disclosed to a CRB if the CP is not a member of a dispute resolution scheme.

16. Security of credit reporting information.

We note that the security obligation on CRBs (s20Q) and on CPs (s21S) only applies to credit reporting information (CRI) and credit eligibility information (CEI) respectively – not to all credit information (CI). CRBs would be subject to same requirement for CI under APP11, but CPs are expressly exempted – s21S displaces APP11.

The draft CR Code section 16 uses the term CR data which is not a defined term in the Act but is in the Code (1.2(e)) meaning ‘credit information, credit reporting information, credit eligibility information or regulated information as applicable in the context’ Unless the intention is to voluntarily apply the obligations to all CI, this section needs correcting to refer only to CRI and CEI.

In the current draft Code, section 16 does little more than repeat the obligation in the Act. We support the general intention that the Code should give additional interpretation or guidance. Matters such as encryption are mentioned in the explanation. While the Code should not go into detail on specific technologies, we submit that consideration be given to a little more guidance on appropriate security measures (We assume that there will also be more detail on security in the proposed Industry Code and/or Standard).

17. Use and disclosure of credit reporting data by CPs and affected information recipients

We are concerned to ensure that the right balance is achieved between the desire on some parts of industry to obtain as much information as possible and use it for a wide range of uses, with the desirability (and intention of the legislation) to place limitations on the information which can be obtained and shared, and the uses to which it can be applied.

We have little doubt that industry is likely to 'push the boundaries', and use credit reporting information in ways that the public, and the regulator will be unaware. This is unlikely to be in blatant breach of the law, but may be based on gaps in the law which haven't been identified by Government or the regulator, or on industry's 'creative' interpretation of the law.

Past use of pre-screening is an example of this. While pre-screening is permitted under the new legislation, we don't believe it was a permitted use under the old legislation (and the Australian Law Reform Commission agreed⁴). However, this practice appeared to be widely used and well known within the finance industry, but consumers and consumer advocates were unaware of this use. We believe that the OAIC was also unaware of this use of credit reporting information. This practice only became widely known during law reform commission consultations, when industry needed to disclose this practice in order to advocate for clear legislative approval. Pre-screening no longer presents this type of issue; however we don't know what other practices may emerge as a result of gaps in the new legislation or different interpretations of the provisions.

One area where the legislation is unclear, and where we believe that industry may try push the boundaries is in relation to the use of credit reporting information for marketing to current customers. For example, the exact meaning of "internal management purposes" and "assisting the individual to avoid defaulting" are unclear.

Direct marketing is not only aimed at non-customers. Financial institutions can spend hundreds of millions of dollars on customer management systems⁵, which collate a wide range of details about customers to identify likely behaviour, profitability, or likelihood of taking up a particular offer. These systems can also help businesses "develop strategies to reduce the likelihood that profitable customers will close their accounts"⁶.

For example, RBC Financial Group noted a small segment of customers who, according to their financial information, were likely to escape the winter for a warmer climate. RBC created a package for these customers including travel insurance and easy international funds access. Westpac's Program Reach focused campaigns on particular customer

⁴ ALRC, 2008, Report No 108, For Your Information, paragraph 57.91

⁵ Deakin University and Consumer Action Law Centre, Profiling for Profit, Published by Consumer Action Law Centre, February 2012 (page 28)

⁶ Coyles, S, and Gokey TC 'Customer Retention is Not Enough' The McKinsey Quarterly, 2002

segments, where outbound calls made offers which the particular customer was likely to be interested in, based on his or her profile⁷.

There is usually nothing illegal about lenders doing this, however there would be significant financial value in including credit reporting information, or even information derived from credit reporting information, in these customer relationship management data bases. Therefore we believe it is a risk which must be addressed in the Code.

A prohibition on direct marketing in the legislation is not enough.

Prohibition on use for Marketing (Section 17.1).

We support section 17.1 but believe it should be amended. Firstly, to ensure that derived information cannot be used for marketing purposes by including the text (in italics) into the section:

Notwithstanding anything in Part IIIA (other than Section 20H) or any other provision of this CR Code (other than paragraph 17.1(b)), a CP or an **affected information recipient** must not use or disclose **credit reporting information** or **credit eligibility information or any information derived (in full or in part) from credit eligibility information or credit reporting information** for the purposes of:

Secondly, the types of invitations and offers in 17.1 (i) and (ii) should include all financial products.

Recommendation:

Section 17.1(b) should be amended as recommended above.

Assisting the Individual to Avoid Defaulting

Consumer advocates are concerned about the lack of any clarity in relation to the purpose of assisting an individual to avoid defaulting (S21H), given that any current credit provider has the right to access the credit report (S20F). Without further clarification in the Code, this purpose could be used as a “fishing trip”, or to obtain regular information about current customers for a range of purposes which may be vaguely related to assisting an individual to avoid defaulting. We don’t believe that the intention of the legislation is to allow broad access to credit reporting information for all current credit providers at any time.

The proposed section 17.2 ensures that a current credit provider who wishes to access credit reporting information for the purpose of assisting an individual to avoid defaulting,

⁷ Deakin University and Consumer Action Law Centre, Profiling for Profit, Published by Consumer Action Law Centre, February 2012 (page 22)

must have a reasonable basis for believing the individual is at significant risk of defaulting. We believe this is an appropriate step to ensure that this purpose isn't a "loophole" which allows broad access to, and use of, credit reporting information.

However, we believe the Code could do more to address this issue. We still have some general concerns about the purpose defined in S21(h), of assisting an individual to avoid defaulting. It is unclear what type of activity would be caught by this description, and what activity wouldn't. For example, would a decision to foreclose on secured property on the basis of information obtained from a CRB mean that the information had been used to "assist the individual to avoid defaulting"? Would offering to refinance a loan which was in arrears fit that definition, or offering a debt consolidation loan? In our view, this purpose is problematic, as there appears to be a lack of restriction on the type of use industry could argue was assisting the individual to avoid defaulting.

We believe that the Code should clarify that assisting the individual to avoid defaulting should be limited to reducing a credit limit, entering into discussions with the individual about their financial situation and offering a repayment variation.

The CR Code should make it clear that alert systems (for CP's to be alerted of new information disclosures by the individual e.g. applying for credit) can only apply in the case of where a serious credit infringement has been listed. It is a serious breach of the individual's privacy for CP's to track their credit applications. An individual would never reasonably expect their credit report to be used as an alert system for credit providers.⁸

We believe that the Code should also ensure that information obtained for this purpose is not used for any other purpose, and that no information which is derived from that information is used for any other purpose.

Recommendations:

The Code should clarify that assisting the individual to avoid defaulting should be limited to reducing a credit limit, entering into discussions with the individual about their financial situation and offering a repayment variation.

The CR Code should specifically prohibit CP's using an alert system through CRB's to track and individuals credit information. The alert system can only be used for Serious Credit Infringements and only in relation to updated contact information for the purposes of locating the individual.

⁸ Australian Law Reform Commission, Australian Privacy Law and Practice Report 108 (May 2008), Recommendation 57-2 (p1897).

18. Protections for victims of fraud

Consumer advocates are concerned that the ban period has limited application to assist consumers that are the victim of fraud. Many consumers have no idea they have been the victim of fraud as the fraudster has taken and returned the information or duplicated the information. Even if a ban period is utilised it is no guarantee that further fraud may not occur.

Consumers are very inconvenienced by fraud. It requires raising a dispute in relation to all of the credit providers and proving the fraud each time. Consumers need a mechanism to streamline this process and this process should be documented in the CR Code. The process should involve:

- a) The consumer obtains a copy of their credit report
- b) The consumer notifies the CRB they have been a victim of fraud and identifies the fraudulent transactions
- c) The CRB notifies all affected credit providers that an allegation of fraud has been made for a particular account
- d) The credit provider then accepts this as a dispute and investigates
- e) The CRB keeps track of responses and regularly reports to the consumer

Recommendation:

The CR Code provide for a clear process to deal with fraud matters as described above.

19. CPs direct marketing

See comments above under Section 17 – “Prohibition on use for Marketing (section 17.1)”

20. Access

See comments on sections 20.3 and 20.6 under Key Issue 5 above

21. Correction of information

Section 21.1 is designed to clarify that a CP that does not participate in the credit reporting system can fulfil its “reasonable steps” obligation in relation to a correction request by simply informing the individual that it cannot assist with the correction request. Consumer advocates submit that 30 days is too long of a time period for a CP to tell a consumer that it does not participate in the credit reporting system. This time period should be shortened to 10 business days.

Section 21.2 could be improved by requiring a CRB or CP who has been consulted about a correction request to respond within a maximum time, we suggest 30 days. We note that

the draft explanatory notes could provide 'guidance that a 10 business day response time should be aimed for'. However a firm deadline should also be in the code.

The drafting of section 21.3 is a poor example of dispute resolution. It is possible under section 21.3 to never have the dispute resolved. The expected time frame could simply be given as 5 years when the listing is due to be removed! Worse still, in 21.3 (b) there is a requirement to seek the individual's consent to the extension; however, if they refuse the extension their correction request is refused. Quite simply, the drafting of this section represents worst practice in dispute resolution.

We contend that in accordance with the original ALRC recommendations that the section be redrafted to require that:

- Within 30 days of the request the CP must either:
 - correct the listing as requested; or
 - if the CP contends that the listing is correct:
 - provide evidence of this including relevant account statements covering the default and copies of required notices
 - advise the individual that they may complain to a recognised external dispute resolution scheme.
- If the CP is unable to provide evidence of the accuracy of the listing, it must be removed or corrected (as per the original request) by 37 days after the correction request was made.

It is essential that consumers have certainty about time frames when their dispute will be resolved.

Recommendation:

Section 21.3 is redrafted as specified above.
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22. Complaints

We support section 22.2. It is vital to the complaints handling processes that CRBs are members of an approved industry external dispute resolution scheme. While it is likely that most disputes will arise with credit providers, we have had experiences in the past where it is not clear whether the dispute lies with the credit provider or the CRB. In some cases it may be both. For example, a credit provider may argue that it has acted appropriately based on the CRB's member agreement, or advice provided by the CRB. Confusing or misleading information could be based, at least in part, on the CRB's systems.

Consumer advocates have complained for years about the "merry go round" that consumers have often faced in having their credit reporting disputes addressed. CRB membership of an external dispute resolution scheme will ensure that gaps are closed, and disputes can be resolved appropriately.

23. Record Keeping

See comments regarding reporting obligations in Section 24, below.

24. Credit Reporting System integrity

See submissions above under Key Issue item 9.

Sections 24.9 and 24.10:

We submit that section 24.9 should be updated to reflect the status and content of any Commonwealth policy on data breach notification. Proposed criteria may vary from that contained in the Privacy Commissioner's voluntary Guide.

Section 24.10 addresses CRB action in the event of CP non-compliance. We submit that it is not satisfactory to have termination of access as the only specified sanction – it is such a heavy weapon that it is unlikely to be used in all but extreme circumstances. We invite the CRB's to specify a more credible 'gradation' of possible sanctions.

25. Information Commissioner's Role

The experience of consumer representatives in the past has been that the office of the privacy commissioner has not demonstrated an understanding of issues arising for consumers as a result of industry conduct in credit reporting. This can be compared, for example, to the value placed on complaints and issues raised by consumer representatives with other federal regulators such as the ACCC and ASIC. We are very pleased about the involvement of industry ombudsman schemes in the new credit reporting regime, as they can provide accessible dispute resolution for consumer and they do have a role in reporting systemic issues. However, these bodies are not regulators and should not be relied on to fill the role of a regulator.

Part IV

Specific Questions regarding the OAIC Guidelines

1. Is the proposed governance structure sufficiently robust to enable stakeholders to have confidence in the credit reporting system? Does it sufficiently deal with conflicts of interest?

Consumer advocates do not believe that the proposed governance structure is sufficiently robust to enable stakeholders to have confidence in the credit reporting system, nor do we believe that it sufficiently deals with conflicts of interest. The CR Code should be monitored by an independent CR Code Compliance Committee, established under the Code. This Committee should:

- a. Be independent of the Credit Reporting industry (with a balance of industry representatives, consumer representatives, and an independent chair); and
- b. Have adequate resources to fulfil the relevant functions and to ensure that code objectives are not compromised.

Without this independent compliance committee there is too much risk that oversight of CP and CRB compliance with the CR Code will be reduced, systemic problems will not be identified, and industry and consumer awareness of the code will be low.

The proposed governance structure relies almost entirely on CRBs monitoring CPs' compliance with their part IIIA obligations, incorporated in their agreements with the CRBs. This structure presents an unacceptable conflict of interest. CPs are the paying clients of CRBs, and CRBs will necessarily be disincentivised to report their incidents of non-compliance under the Code. Even if each CRB establishes a documented, risk based program to monitor CPs' compliance, there will inevitably be less thorough reporting of all non-compliant activity than there would be under an independent administrative body. Less thorough reporting means that systemic problems will either not be identified or will continue for longer.

2. Is there a sufficiently compelling case for an additional level of governance – a code administrative body – overseeing credit providers and credit reporting bodies and reporting through to the Commissioner? Would the costs justify the benefits?

Yes. This is necessary because the proposed governance structure is unacceptably conflicted. Industry and consumers will benefit from an industry-funded independent Code Compliance Committee because non-compliance will be reduced, systemic problems can be identified more quickly and industry and consumer awareness of the code will be higher.

- 3. Given that Part IIIA of the Privacy Act entrusts credit reporting bodies with signing up credit providers to agreements and with auditing credit providers' compliance with their agreements, would it be workable to have a code administrator with responsibility for auditing or investigating serious or repeated interferences with privacy or systemic issues?**

Yes.

- 4. If a Code administrator body were to be established, how should this be constituted (bearing in mind the OAIC's draft Guidelines that state the body needs to be representative of those bound by the Code)? What should the body's responsibilities be? How should the body be funded and how should it operate?**

Constitution of Committee representatives

The independent CR Code Compliance Committee should be made up of:

- 1 person with relevant experience at a senior level in a Credit Provider organisation as an industry representative, to be appointed by ARCA on the industry's behalf;
- 1 person with relevant experience at a senior level in a Credit Reporting Body as an industry representative, to be appointed by ARCA on the industry's behalf ;
- 2 people with relevant experience and knowledge as a representative, to be appointed by the consumer representatives; and
- 1 person with experience in industry, commerce, public administration or government service as the Independent Chairperson of the CR Code Compliance Committee, to be appointed jointly by the OAIC and ARCA on the industry's behalf.

Committee Responsibilities

The CR Code Compliance Committee should be responsible for:

- a. Establishing appropriate data reporting and collection procedures for CPs, CRBs and itself;
- b. Monitoring compliance with the code;
- c. Publicly reporting annually on code compliance;
- d. Hearing complaints about breaches of the code;
- e. Own-motion investigations
- f. Investigating and making determinations on any allegation from any person about industry breaches of the code;
- g. Imposing sanctions and remedial measures as appropriate for determinations of non-compliance;
- h. Reporting systemic code breaches and serious misconduct to the OAIC;
- i. Recommending amendments to the Code in response to emerging industry or consumer issues, or other issues identified in the monitoring process;
- j. Ensuring that the code is adequately promoted, including but not limited to:
 - i. Providing training for community sector case workers on code provisions

- ii. Ensuring that all subscribers have copies of the code at public offices
 - iii. Communicating code information via call centre hold messages or in Product Disclosure Statements
- k. Ensuring that staff are appropriately trained in the code and that subscribers make provision for this training; and
- l. Ensuring that there is a regular, independent review of the content and effectiveness of the code and its procedures.

The Committee must arrange a regular independent review of its activities and to ensure a report of that review is lodged with the OAIC. This review is to coincide with the periodic reviews of the CR Code

There must be clear communication channels between the industry, Committee and the OAIC. CRBs should regularly inform the Committee about incidents of CPs' non-compliance with the Code and the CR Code Compliance Committee should report regularly to the OAIC those issues.

There is also an important role for the OAIC to play in administering and monitoring the CR Code. The OAIC must be an active regulator that regularly follows up on issues of Code non-compliance that are reported by the Committee, CRBs, CPs or consumers. Without an active regulator that is able and willing to enforce sanctions for non-compliance, stakeholders will not have confidence in the CR Code.

Committee Funding & Operation

The Committee will be funded by Code Subscribers. Industry must ensure that the CR Code Compliance Committee has sufficient resources and funding to carry out its functions satisfactorily and efficiently. The CR Code must empower the Committee to carry out its functions and to set operating procedures dealing with the following matters, first having regard to the operating procedures of any relevant EDR Schemes and then consulting with the OAIC:

- a. receipt of complaints;
- b. privacy requirements;
- c. civil and criminal
- d. timeframes for acknowledging receipt of a complaint, its progress, responses from the parties to the complaint and for recording the outcome;
- e. use of external expertise; and
- f. fair recommendations, undertakings and reporting.

PART V

Response to the CR Code Regarding Telecommunications

1. Executive Summary

Telecommunications providers are currently included under the credit reporting laws due to a determination by the Office of the Australian Information Commissioner. Schedule 2, cl 69 of the Privacy Amendment (Enhancing Privacy Protection) Act 2012 will introduce text similar to that found in the determination into the definition of 'credit provider' in the Privacy Act 1988, and it is expected that the credit reporting provisions will continue to apply to telecommunications providers.

1.1. The draft CR Code and the Telecommunications Consumer Protection Code

The Telecommunications Consumer Protection Code (the TCP Code) offers a range of protections to consumers in the telecommunications industry, including in relation to credit assessment, credit management and financial hardship. As such, there are several points of overlap between the TCP Code and the draft CR Code.

For consumers in the telecommunications sector, there are several key questions that need to be addressed:

- Are the types and levels of rights and protections offered under the draft CR Code adequate in general?
- Are the rights and protections offered under the draft CR Code consistent with those offered under the TCP Code?
- Will the existence of two codes governing the use of credit information by telecommunications providers lead to unnecessary complexity and confusion for consumers, or make it more difficult for consumers to exercise their rights?

Our view is that the first of these questions will be sufficiently addressed by other groups in this consultation process who work more directly in consumer finance and consumer credit. ACCAN is, however, in a position to comment on the effects on consumers of having two codes in operation. These issues are discussed below.

1.2. Operation of the CR Code and other industry codes

The TCP Code sets out a number of requirements on CPs in the telecommunications industry that go beyond the requirements of the CR Code, and in this respect telecommunications consumers receive a range of protections which may be unavailable in other contexts. It is important, however, that the operation of the CR Code with other industry codes such as the TCP Code is clear. For instance, where the deadline for

responding to a complaint is shorter under the TCP Code than under the CR Code, it should be made clear which deadline takes effect. A natural reading of the two codes suggests that a CP would be required to satisfy the shorter deadline (thereby satisfying the longer deadline as well), but this should be made clear in the CR Code.

1.3. Response times for complaints

After its amendment by the Privacy Amendment (Enhancing Privacy Protection) Act 2012, s 23B of the Privacy Act 1988 will prescribe the times by which certain milestones must be met in response to a consumer complaint to a credit reporting body or credit provider. The relevant times and milestones are:

- Within 7 days, written notice acknowledging receipt of the complaint and setting out how the CRB or CP will deal with the complaint;
- Within 30 days, provide the complainant with a written notice setting out the decision about the complaint and informing the complainant of their options of accessing external dispute resolution or complaining to the Commissioner.

By contrast, the TCP Code sets much shorter times for similar milestones:

- Immediate acknowledgement of complaints made in person or on the telephone (cl 8.2.1(a)(i)(A));
- Where possible, resolving the complaint on first contact (cl 8.2.1(a)(ii));
- Within 2 days, acknowledgment of receipt of the complaint (cl 8.2.1(a)(i)(B));
- Within 2 days, inform the complainant of a proposed resolution to an urgent complaint and implement that proposed resolution if it is accepted by the complainant (cl 8.2.1(a)(viii));
- Within 15 days, advise the complainant of the proposed resolution of their complaint (cl 8.2.1(a)(vii)).

While the requirements of the amended Privacy Act 1988 will be written into legislation rather than a code, we suggest that they are relatively weak when compared to the requirements under the TCP Code. The draft CR Code would provide a greater benefit to consumers generally by, at a minimum, encouraging CRBs and CPs to acknowledge and resolve complaints in shorter times than the minimal requirements of the amended Privacy Act 1988.

1.4. External dispute resolution

The TCP Code requires suppliers to inform consumers about EDR options in a number of situations:

- As part of a general transparency requirement for all complaints (cl 8.1.1(a)(x));

- When the consumer expresses dissatisfaction with the timeframes of a complaint process (cl 8.2.1(b));
- When the consumer expresses dissatisfaction about the progress or resolution of a complaint (cl 8.2.1(c)); and
- When the complaint is considered to be frivolous or vexatious, with reasons for this conclusion provided in writing (cl 8.2.1(d)).

The draft CR Code, on the other hand, appears to set out relatively few requirements along these lines:

- A CRB is required to be a member of an EDR scheme (para 22.2); and
- The CRB or CP is required to inform the complainant of EDR options if a complaint cannot be resolved within the 30 day period (para 22.4(b)).

We suggest that there would be a consumer benefit in the CR Code setting out additional situations in which a consumer must be informed of their EDR options. For example, the consumer could be informed of EDR options at the beginning of a complaint, on the understanding that EDR is an option if they are dissatisfied at some point in the complaint resolution process.

1.5. Identification of systemic issues

Under the TCP Code, suppliers are required to analyse their received complaints in order to identify and respond to any systemic issues:

- Suppliers must regularly analyse complaints to identify systemic and emerging issues (cl 8.3.1(a)).
- Suppliers must have a process for notifying senior management of any identified issues (cl 8.3.1(b)).

The draft CR Code does not appear to have any equivalent requirements (although s 24 on credit reporting systems integrity introduces various audit requirements to determine whether the requirements of any contracts between CPs and CRBs are being met). There may be business motives for conducting analysis even without a regulatory requirement, but an explicit requirement to identify any systemic issues represents a consumer benefit and should be introduced into the CR Code.

1.6. Financial hardship

The TCP Code contains a number of provisions relating to financial hardship; most importantly:

- Credit management should be suspended while a financial hardship policy is in discussion or in place (cl 6.14.1).

The draft CR Code recognises that credit reporting proceedings should be halted where the terms of the credit change:

- A CP must not disclose default information for overdue payments if the individual has requested new payment terms (either through a variation of the terms and conditions or through new credit) (para 9.1).

It is not clear, however, that a financial hardship policy introduced by a telecommunications supplier (or any other CP) will always be a matter of new terms and conditions or a new credit arrangement. We suggest, therefore, that the text of the CR Code at para 9.1 should recognise the possibility of other arrangements for handling financial hardship.

1.7. Dispute resolution and multiple regulators

Consumers may wish to avail themselves of multiple avenues of dispute resolution or multiple regulators. Telecommunications consumers wishing to complain about credit reporting, for instance, might approach their telecommunications service provider, the Telecommunications Industry Ombudsman, their credit provider (where this is not the same organization as their service provider), and any additional EDR scheme to which their CP or CRB belongs. The draft CR Code is silent on the status of the consumer's rights in this context. We suggest that the CR Code should make clear that consumers will not be prejudiced in any further dispute resolution process for having engaged in early rounds of dispute resolution.

Concluding Remarks

Consumer representatives and consumer organisations welcome the opportunity to comment on the Credit Reporting Privacy Code. Should you require further information, please contact:

- Kat Lane,
Principle Solicitor
Consumer Credit Legal Centre
- Gerard Brody
CEO
Consumer Action Law Centre

Who We Are

ACCAN



The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of communications services for all Australians.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will activate its broad and diverse membership base to campaign to get a better deal for all communications consumers.

Australian Privacy Foundation



**Australian
Privacy
Foundation**

The Australian Privacy Foundation is the primary association dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions.

The Privacy Foundation plays a unique role as a non-government organisation active on a wide range of privacy issues. It works with consumer organisations, civil liberties councils, professional associations and other community groups on specific privacy issues. The Privacy Foundation is also a participant in Privacy International, the world-wide privacy protection network. Where possible, it cooperates with and supports official agencies, but it is entirely independent - and often critical - of the performance of agencies set up to protect our privacy.

The Privacy Foundation is an entirely voluntary organisation. It is involved in a wide range of privacy issues. The following are regarded as the matters of highest priority:

- ensuring that the Commonwealth Government's changes to privacy legislation to cover the private sector give Australians real privacy safeguards
- contributing to the development of industry codes
- highlighting privacy risks in emerging technologies including biometrics
- participating in global efforts to make the Internet safe for personal privacy

Consumer Action Law Centre



Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria.

Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Consumer Credit Legal Centre



Consumer Credit
Legal Centre NSW

Consumer Credit Legal Centre (NSW) Inc ("CCLC") is a community-based consumer advice, advocacy and education service specialising in personal credit, debt, banking and insurance law and practice. CCLC operates the Credit & Debt Hotline, which is the first port of call for NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. We provide legal advice and representation, financial counselling, information and strategies, referral to face-to-face financial counselling services, and limited direct financial counselling. CCLC took over 18,000 calls for advice or assistance during the 2011/2012 financial year.

A significant part of CCLC's work is in advocating for improvements to advance the interests of consumers, by influencing developments in law, industry practice, dispute resolution processes, government enforcement action, and access to advice and assistance. CCLC also provides extensive web-based resources, other education resources, workshops, presentations and media comment.

Consumer Credit Legal Service (WA)



Consumer Credit Legal Service (WA) Inc. (CCLSWA) is a not-for-profit charitable organisation which provides legal advice and representation to consumers in WA in the areas of credit, banking and finance. CCLSWA also takes an active role in community legal education, law reform and policy issues affecting consumers.

CCLSWA is active in community legal education. Through the use of the media, seminars and publications, we aim to raise general public awareness of consumer rights in the area of credit, banking and financial services.

CCLSWA provides a consumer voice in Western Australia in relation to policy issues and proposed reforms of Western Australian legislation, and nationally on issues such as reforms to the National Consumer Credit Code. Other key policy activities are directed at lobbying for changes to unfair industry practices. In such policy activities, CCLSWA aims to work with other consumer groups to present a consolidated consumer voice.

Financial Counselling Australia



Financial Counselling Australia (FCA) is the peak body for financial counsellors in Australia. Financial counsellors assist people in financial difficulty by providing information, support and advocacy. They work in non-profit, community organisations and their services are free, independent and confidential.