



Optus Submission
to the ARCA Credit Reporting Code
Public Consultation

May 2013

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Section 1. Overview

- 1.1 Optus appreciates the opportunity to provide this submission to the Australasian Retail Credit Association (ARCA) in response to its consultation on the Credit Reporting Code of Conduct (CR Code) that is required by the *Privacy Act 1988* (the Act).
- 1.2 Optus has over 15 years' experience with the self-regulatory telecommunications regime and takes an active role in the upkeep and development of industry guidelines, standards and codes. We have been supporting the work of our industry association, Communications Alliance, in the development of the CR Code, through their participation in the Code Industry Council.
- 1.3 We are concerned to ensure that the new CR Code will meet the needs of the multiple sectors to which it will apply, many of which (like the telecommunications industry) are already heavily regulated. To this end, we would like to acknowledge the work already done by ARCA and the Code drafters to take into account existing regulation, for example in the area of complaint handling. There remain a few areas where we believe there is overlap or some inconsistencies, and we note these below.
- 1.4 As a general comment, we note that the CR Code is written in a very legalistic manner. It is vital that staff throughout a Credit Provider's (CP) organisation can fully understand the obligations that apply to them. As most of those staff members do not have a Legal background, we encourage ARCA and the Code drafters to amend the Code to use plain language wherever possible.
- 1.5 We understand that it is envisaged that additional guidelines (Explanatory Notes) will be created to clarify the code rules over the coming months. We encourage ARCA to prioritise this activity in order to allow CPs the maximum amount of time available to fully understand the new Code requirements, educate their staff on the new obligations and implement those within their organisations.
- 1.6 Further, in relation to governance processes for finalising the CR Code, we understand that it is intended that ARCA Board will consider the revised Code following the public consultation period. Whilst we understand that the ARCA Board will need to have final sign-off on the Code and whether it can be published and provided to the Office of the Australian Information Commissioner (OAIC) for registration, we recommend that the Code Industry Council be given an opportunity to comment first, to ensure that any amendments made to the CR Code following public consultation are workable for each of the different sectors impacted by the CR Code.

Section 2. Detailed comments

Clause 2.2

- 2.1 In Optus' view clause 2.2 extends beyond what is required by the Act, and imposes an unnecessary restriction on CPs and CRBs.
- 2.2 This clause appears to dictate contractual obligations between CPs and the Credit Reporting Bodies (CRBs), which is inappropriate given it is not required by the Act. In particular, it can be read as impacting a CP's ability to terminate a contract with a CRB. A CP or CRB may need to terminate a contract for commercial reasons or breach of contract.

- 2.3 We understand the explanation provided as to why this has been included, but believe that the mechanism proposed to implement it is unnecessary, as those matters can more appropriately be dealt with via contractual mechanisms which expressly survive termination of the agreement.
- 2.4 Our recommendation is that clause 2.2 be deleted from the CR Code.

Clause 6.2

- 2.5 Optus, like other telecommunications providers, is a credit provider by virtue of a Privacy Commissioner Determination that captures providers of goods and services who allow those goods and services to be used before payment is made. We do not provide discretionary credit such as loans or credit cards.
- 2.6 It is important, therefore, that the requirements of clause 6.2 be tailored to apply to telecommunications providers as well as the traditional financial lenders. The current scenarios listed in clauses 6.2(a) and (b) do not apply to the provision of telecommunications services, as it is not as clear cut for telecommunications providers as to “the day the consumer credit is entered into” (clause 6.2(a)) or “the maximum amount of credit available” (clause 6.2(b)).
- 2.7 Optus recommends that this be addressed in the following ways:
- (a) For clause 6.2(a), add an item to the Explanation which states that for telecommunications services, this will be the date that a supplier approves the customer’s application; and
 - (b) For clause 6.2(b), amend sub-clause (i) to read “where no credit limit applies to revolving credit, a charge card contract or the provision of a telecommunications service or product – no fixed limit”.

Clause 9.1

- 2.8 The Explanation for this clause refers to requests for financial hardship assistance, yet the Code rule itself does not make this distinction. The wording of the Code rule therefore needs to be amended to specifically refer to financial hardship scenarios, to ensure that other scenarios where a customer requests new payment terms (e.g. once-off, short-term payment extensions) are not inadvertently captured by this clause.
- 2.9 The Explanation also refers to the National Credit Code, but does not take into account that the National Credit Code does not apply to all CPs, and non-financial lenders have their own regulated financial hardship obligations. For example, the telecommunications industry is subject to the financial hardship requirements in the Telecommunications Consumer Protections (TCP) Code.
- 2.10 Optus therefore recommends that this clause be amended to:
- (a) Specifically refer to financial hardship requests in the Code rule;
- and that the Explanation clarify that:
- (b) the National Credit Code does not apply to all providers; and

- (c) other existing regulatory obligations may apply to some industries, for example the TCP Code for telecommunications providers.

Clause 14.1

- 2.11 There appears to be a slight inconsistency between the wording of the Code rule and the Explanation for this clause; the Code rule states that both the original CP and the acquirer need to take action in respect of disclosing the transfer event to the CRB, whereas the Explanation provides for the acquirer and the CP to agree between themselves as to who will undertake the task.
- 2.12 We therefore recommend that the Code rule be amended to require a single disclosure to the CRB. The decision as to which of these two parties undertakes this task can form part of the contractual agreements between them – this can be referenced in the Explanation as needed.

Clause 14.2

- 2.13 Similar to our comments on clause 14.1 of the CR Code, there appears to be a slight inconsistency between the wording of the Code rule and the Explanation for this clause too; the Code rule states that both the original CP and the acquirer need to take action in respect of disclosures to the CRB, whereas the Explanation provides for the acquirer and the CP to agree between themselves as to who will undertake the task.
- 2.14 We therefore recommend that the Code rule be amended to require a single disclosure to the CRB. The decision as to which of these two parties undertakes this task can form part of the contractual agreements between them and this can be detailed in the Explanation.

Clause 17.1

- 2.15 Optus believes that this requirement is already addressed by section 21G of the Act, and therefore it is unnecessary to repeat it in the Code.
- 2.16 The definition of CP derived information (which is part of credit eligibility information) and the associated statements in the Explanatory Memorandum to the Act make it clear that the prohibition in s21G already prevents conduct of this nature. Hence, we recommend that this clause be deleted.

Clause 20.1

- 2.17 Whilst neither the Code rule itself nor the Act requires it, the Explanation which accompanies this clause states that “written authorisation” is required from the individual. Optus requests that references to “written” notifications be removed unless specifically required by the Act.
- 2.18 Optus interacts with its customers in a multitude of ways, including by phone and face-to-face in our retail outlets, and therefore requiring written notice would often prove an unnecessary burden on our customers.

Clause 23.1

- 2.19 The record keeping obligations in the Code substantially exceed the requirements of the Act and will prove particularly onerous for larger telecommunication providers, with no

discernible consumer benefit. We therefore request that the record keeping obligations are aligned with what is required by the Act.

- 2.20 The record keeping rules as currently drafted are excessive both in terms of the range of information CPs must retain, as well as in relation to the level and quality of that information (a full audit trail of all consents, all Data Integrity and destruction steps, all notifications, all other requests, and so on).
- 2.21 Optus suggests that:
- (a) the range of information that must be retained should be limited to what is expressly contemplated in the Act or is necessary for compliance. The Act expressly contemplates making a written record of disclosures of credit information to a CRB (section 21D(6)) and uses and disclosures to third parties of credit eligibility information (Section 21G(6)).
 - (b) such an obligation is inconsistent with other laws relating to consumer protection, which tend to require only documented systems and processes. For a CP to show they are taking adequate steps to comply with the various obligations under Part IIIA and the new CR Code, it should not be necessary for them to record every type of handling of regulated information. It should be sufficient to adequately document (and implement – of course!) adequate compliance systems and processes, as per the Australian Standard on Compliance Programs AS3806:2006.
- 2.22 We therefore request that this clause be re-written to better align with the requirements in the Act, and consistent with the usual requirements for compliance programs.

Clause 24

- 2.23 This clause imposes on CRBs extensive obligations relating to auditing the CPs with which they do business, and also extensive discretion and rights they can exercise in doing so.
- 2.24 Optus is concerned that a commercial entity with which it has arms-length contractual arrangements would be given such discretion, without appropriate limitations and oversight also being explicitly explained.
- 2.25 We are also concerned at the potential impact on CPs of such rights for CRBs in the current, multi-CRB environment. Where a CP has contractual arrangements with more than one CRB, this potentially exposes it to information and audit requests from several entities at any one time. This could lead to significant resourcing and financial impacts for CPs.
- 2.26 There is a need for tighter controls and “reasonableness” tests in regard to the audit requests by CRBs, as well as an ability for CPs to challenge audit outcomes or conclusions, and escalate disputes with a CRB to another entity should the matter be unable to be resolved bilaterally.
- 2.27 The Communications Alliance submission goes into some detail on additional matters that telecommunications providers would like to see included in this section of the CR Code, and Optus supports those proposals. (Please see the Communications Alliance submission for details.)

Clause 24.9

- 2.28 Optus believes that it is inappropriate to include this clause in the CR Code.
- 2.29 The OAIC Data Breach Notification Guidelines are not currently mandatory for any industry or sector to our knowledge. Mandating compliance with those Guidelines for only CRBs, CPs and affected information recipients introduces a regulatory burden on those entities which does not apply to any other entity dealing with personal information – even those dealing with sensitive personal information such as health records.
- 2.30 Further, there is currently an exposure draft of a Bill for Data Breach Notifications (the Privacy Amendment (Privacy Alerts) Bill) which would indicate that the Government seeks to propose legislation for such an obligation. If passed, the legislation would apply more broadly and it would be unnecessary repetition to have it in the Code.
- 2.31 Due to the above, Optus requests that this clause be deleted from the CR Code.

Section 3. Summary of recommendations

Clause	Recommendation
2.2	Delete Code rule
6.2(a)	Add an item to the Explanation which states that for a telecommunications services, this will be the date that a supplier approves the customer's application
6.2(b)	Amend sub-clause (i) to read "where no credit limit applies to revolving credit, a charge card contract or the provision of a telecommunications service or product – no fixed limit"
9.1	<ul style="list-style-type: none">• Amend the clause to specifically refer to financial hardship requests in the Code rule; and• Amend the Explanation to clarify that:<ul style="list-style-type: none">(a) the National Credit Code does not apply to all providers; and(b) other existing regulatory obligations may apply to some industries, for example the TCP Code for telecommunications providers.
14.1	Amend the clause to require a single disclosure to the CRB. (Add supporting information to the Explanation if needed that advises that the decision as to which party will undertake this can form part of the contractual arrangements between the parties.)
14.2	Amend the Code rule to require a single disclosure to the CRB. (Add supporting information to the Explanation if needed that advises that the decision as to which party will undertake this can form part of the contractual arrangements between the parties.)
17.1	Delete Code rule
20.1	Remove reference to "written" authorisations unless expressly required by the Act.
23.1	Amend this clause to better align with the requirements in the Act, and

	consistent with the usual requirements for compliance programs.
24	Introduce tighter controls and “reasonableness” tests in regard to the audit requests by CRBs, as well as an ability for CPs to challenge audit outcomes or conclusions, and escalate disputes with a CRB to another entity should the matter be unable to be resolved bilaterally.
24.9	Delete Code rule

Ends.