



**Submission by the
Financial Rights Legal Centre**

PwC

Review of Privacy (Credit Reporting) Code 2014
V1.2, September 2017

October 2017

Introduction

Thank you for the opportunity to comment on the Review of the Privacy (Credit Reporting) Code 2014 (CR Code). This joint consumer submission has been prepared by the Financial Rights Legal Centre in consultation with the Australian Communications Consumer Action Network (ACCAN), the Australian Privacy Foundation (APF), the Consumer Action Law Centre (CALC), the Consumer Credit Legal Service (WA) (CCLSWA) and Financial Counselling Australia (FCA).

List of Recommendations

1. Consumer Representatives recommend amending the Code so that:
 - a. CPs must get the informed consent of the customer to deliver its notice documents electronically;
 - b. CPs are required to introduce a procedure for consent and notification that covers simple withdrawal of consent, change of email address and a requirement for CPs to verify an email address is still active and valid; and
 - c. CPs are required to introduce procedures to provide documents in a paper format simply and easily if the electronic communication failed.
2. Consumer Representatives recommend amending the Code so that:
 - a. Sections 9.3(e)(i)(1) and (2) as well as section 9.4(b) are amended so that default listings cannot be changed or updated after the Section 6Q notice; and
 - b. A new section under 9.3 should be added to require the section 21D notice to be the same amount specified in the 6Q notice.
3. Consumer Representatives recommend amending the Code so that there is a new section which specifies that where the amount of an overdue payment is the result of the acceleration of the entire liability for the consumer credit, and that amount was not included in the original section 6Q notice, a new section 6Q notice must be issued not less than 60 days after the acceleration has taken place.
4. The CR Code should reinforce the existing legal position that where a CP agrees to an arrangement with a consumer, RHI should reset to zero and remain so while the consumer is complying with the arrangement.
5. The most appropriate way to recognise that new repayment terms have been determined between an individual borrower and a CP is whether an agreement has been made under the *Credit Act*. The consumer has given notice that they are unable to pay (either orally or in writing) and the CP has agreed to a change in payment terms.

6. Consumer Representatives recommend amending section 19.4(a) the CR Code so that free credit reports include credit scoring information or analysis as the legislation intended.
7. There should be a paper application form for consumers to seek access to their credit reporting information that can be printed and posted to CRBs. Consumers should not need to have a valid email address in order to go online and request access to their credit report.
8. Direct marketing consent boxes should not be pre-ticked on online credit report applications.
9. The CR Code should include commitments from CRBs relating to the marketing of their paid services (beyond Australian Privacy Principle 7 and ASIC's RG 234), including that they will not mislead consumers about their right to access their own credit reporting information for free, will not mislead consumers about the value of the information contained in the paid service compared to the free service, or indicate that exerting their right to a free copy of their report will negatively impact their creditworthiness.
10. The CR Code should require CPs that are reporting RHI about their customers to notify those customers on their regular account statements about the information reported to the CRB and its meaning. Section 8.2 could be amended to include this new requirement.
11. The CR Code should establish an independent code compliance committee.
12. Section 9.1 should include a prohibition on credit providers disclosing default information when:
 - a. a credit provider has entered into a binding settlement with the consumer not to disclose the default information, or is in the process of legitimate settlement negotiations with the consumer in regards to the listing; and/or;
 - b. the credit provider is acting in accordance with a recommendation or determination of an EDR scheme in relation to a dispute with the consumer which includes a requirement to remove or not list default information.
13. The CR Code should include a broad commitment to fairness, and give CRBs the ability to not record publicly available information, or remove it upon complaint, where it is not a reflection of a person's creditworthiness.
14. Initiating proceedings and judgments arising from contested proceedings should be clearly excluded from inclusion on a credit file by a provision of the Code.
15. Section 11.1(c) should be redrafted in plain English.

The Corrections and Complaints sections of the Code should be redrafted to allow for:

Corrections

16. The wording in rule 20 must be simplified.
17. The obligations of credit providers and CRB's should be in separate rules and not combined to assist in consumers understanding the provisions;
18. For matter not requiring consultation between CRB and CP's time frames should be less than 30 days, RBs should be required to remove information which can be established as clearly wrong on the face of the evidence provided by the consumer (for example, the information is included on the wrong credit report) within a much shorter period and without reference to the CP – such as 3 business days.
19. Rule 20.10 should be removed. The reality is that all correction requests will be in essence a dispute. There is no good reason why the principles of dispute resolution enunciated in rule 21.1(a)-(e) is excluded from decisions relating to corrections.

Complaints

20. CRB's should have robust time frames to respond to complaints;
21. Access to remedies where a breach of the rules is established.
22. When a CP becomes aware a debt is statute barred they must notify the CRB and any default listing must be removed immediately.
23. 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.
24. The date of default should be used when listing defaults.
25. The CR Code provide for a clear process to deal with fraud matters as described above.
26. Section 23.9 should include specify a more credible 'gradation' of possible sanctions for CRBs to use against non-complying CPs.
27. CPs should identify a reason when accessing a credit report. The Code should identify a range of legitimate reasons and how they will be clearly communicated to consumers when they access their report.
28. The CR Code should prohibit CRBs from acting as debt collectors.
29. In the alternative, (and clearly less desirable than removing the conflict of interest) CRBs that also operate debt collection operations should be subject to the following rules in the CR Code:
 - a. If a consumer has requested access to his or her credit reporting information,

- i. a CRB may not attach any additional information about debts that the CRB is aware of in its debt collection capacity;
 - ii. a CRB may not use the consumer's access request as an opportunity to undertake debt collection activities; and
 - iii. a CRB must ensure that its debt collection communications and debt collecting communications are completely separate and clearly identified.
 - iv. A CRB who is also a debt collector should be strictly prohibited from referencing their CRB activities during debt collection, misleading consumer's about the lawful rights to list information on the consumer's credit report or otherwise leverage their position as a CRB to encourage payment of a debt.
- 30. The CR 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.
- 31. The CR Code should specifically prohibit CP's using an alert system through CRB's to track an individual's 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.
- 32. Section 4 should be amended to require the provision of a KFS to the individual (KFS to be developed between stakeholders and become a mandatory requirement in the CR Code).
- 33. Consumer Representatives recommend CPs and CRBs commit to :
 - b. Ensuring that defaults (and negative RHI) can be removed pursuant to agreed settlements and EDR decisions as above;
 - c. Using a similar process to that recommended above for victims of fraud to assist women in circumstances where their ex-partner may have incurred multiple debts in their name to raise disputes with CPs, pass on evidence and prevent further fraud.
 - d. Enabling women to suppress their address from creditors in appropriate circumstances where their safety is at serious risk.
- 34. Section 7 should be deleted from the Code.

Responses to Issues

Issue 1: Timing and delivery of section 21D Notice

In general Consumer Representatives do not think there is a practical problem with inconsistent timing between Part IIIA of the *Privacy Act 1988* (Cth) (**the Act**) and the CR Code as to when a credit provider (**CP**) can disclose information after notifying the consumer. There is no reason why the CR Code cannot set higher standards of practice than the law.

What practical issues have you faced, if any, as a result of this inconsistency in timing?

None.

What changes to the Code, if any, would you suggest to address this inconsistency? What would be the costs and benefits of any such change?

For clarity the CR Code could be redrafted to say information cannot be disclosed until the 15th day after a section 21D notice has been issued.

Should the Code specifically include reference to the electronic delivery of notices to an email address in this context? What would be the costs and benefits of such a change?

Yes, the CR Code should clarify whether or not notices can be sent to email addresses where the Act requires notices to be sent to an individual's 'last known address at the time of despatch'. However, CPs should only send notices to individuals by email if the individual has nominated email as their preferred method of communication and that is the way the CP usually communicates with the individual. It should not be assumed by CPs that electronic disclosure is the most appropriate means of communication. People on lower incomes, those with disabilities, older clients, culturally and linguistically diverse customers and others should be able to request all communications in a format they can easily accessed and understood¹.

While Consumer Representatives support the use of electronic disclosure² in most circumstances on the basis that it is better for the environment, can be easier and more convenient for many people and can lead to cost savings, we do so subject to the following:

1. CPs should be required to make electronic notices available for a reasonable period, and in a format that allows the electronic notice to be saved to an electronic file and printed.

¹ Reflecting the Gramm-Leach-Bliley reforms in the US where there was an emphasis on intelligibility rather than merely timeliness. *1999 Financial Services Modernization Act (Gramm-Leach-Bliley Act)*

² Ideally, any reform to regulations regarding service of documents would consider the relevant *Acts Interpretation Act* and *Electronic Transactions Act* provisions (if any).

2. CPs should have a reasonable expectation that the intended recipient would be able to access, save and print the electronic notice. It is particularly important that the CP checks that the email address is in use or can be accessed easily. When electronic notification fails there should be a procedure following to contact a customer, update details and provide appropriate notice.

It is important to remember there are many reasons why people may opt for paper communications. For instance, they may not be able to afford access to the internet at home or via their phone, or may live in an area where no reliable internet connection is available. These people tend to be lower income Australians whose sources of income are, for example, Centrelink payments, disability payments or the aged pension. According to the Australian Bureau of Statistics (ABS) only 70 per cent of those not employed were internet users.³ For those in the lowest income quintile almost only 67 per cent were internet users. Households located in remote or very remote parts of Australia were less likely to have internet connections (79 per cent). Among the main reasons given for not accessing the internet at home were a lack of confidence or knowledge (22 per cent), and cost (16 per cent).⁴

There are others who simply cannot access the internet, be it because it is not available in rural and remote areas or they do not have the requisite knowledge or experience to use electronic communications, for example older Australians. According to the ABS only 51 per cent of people over 65 use the internet.⁵

Recommendations

1. Consumer Representatives recommend amending the Code so that:
 - d. CPs must get the informed consent of the customer to deliver its notice documents electronically;
 - e. CPs are required to introduce a procedure for consent and notification that covers simple withdrawal of consent, change of email address and a requirement for CPs to verify an email address is still active and valid; and
 - f. CPs are required to introduce procedures to provide documents in a paper format simply and easily if the electronic communication failed.

³ ABS, 8146.0 - Household Use of Information Technology, Australia, 2014-15, 18 February 2016
<http://www.abs.gov.au/ausstats/abs@.nsf/mf/8146.0>

⁴ ibid

⁵ ibid

Issue 2: Inconsistency in amounts listed in section 6Q and section 21D notices

Consumers regularly find that the amount listed on the 21D(3) notice does not match the figure on the 6Q notice. 9.3(e) of Code allows listing to be the amount on 21D(3) Notice PLUS additional amount to reflect interest, fees and other amounts, LESS any part payments.

We disagree with sections 9.3(e)(i)(1) and (2) as well as section 9.4(b). 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) to a CRB. 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 that is 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 reported to a CRB 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. Individuals can be seriously disadvantaged by updated 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 updated information is also of very limited use to other credit providers, the fact of the default being the pertinent fact, rather than incremental changes in amount. However, the risk of misuse of this information by CP's and debt collectors unfortunately is very high.

Recommendations

2. Consumer Representatives recommend amending the Code so that:
 - a. Sections 9.3(e)(i)(1) and (2) as well as section 9.4(b) are amended so that default listings cannot be changed or updated after the Section 6Q notice; and
 - b. A new section under 9.3 should be added to require the section 21D notice to be the same amount specified in the 6Q notice.
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3.2 Practical operation of the Code

Issue 4: Notification of accelerated debts on section 6Q and section 21D notices

Consumer Representatives submit that a separate 6Q notice is needed 60 days after the CP has accelerated the entire debt. This will be much clearer to any consumer than the current practice of foreshadowing acceleration. This is also consistent with our position above in relation to Issue 2.

Recommendations

3. Consumer Representatives recommend amending the Code so that there is a new section which specifies that where the amount of an overdue payment is the result of the acceleration of the entire liability for the consumer credit, and that amount was not included in the original section 6Q notice, a new section 6Q notice must be issued not less than 60 days after the acceleration has taken place.
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Issue 5: Definition and recording of 'repayment history information'

This is Consumer Representatives' number one unresolved issue. In particular, we are concerned about how Repayment History Information (RHI) will be reported for people in a hardship arrangement, or people requesting a hardship arrangement.

What are your experiences with the operation of paragraph 8 of the Code with respect to the reporting of RHI in circumstances where new repayment terms have been agreed between the individual borrower and the CP?

Consumer Representatives have had very few experiences with the operation of this section of the Code since almost no CPs have been reporting RHI since the inception of the 2014 Code.

However, we have spoken to many consumers that are concerned about how their credit report or credit score will be affected when they apply for, or are granted financial hardship arrangements.

What change to the Code, if any, would you suggest to address the reporting of RHI in circumstances where new repayment terms have been agreed between the individual borrower and the CP? What would be the costs and benefits of any such change?

The Consumer Representative view is that the current law is very clear: Where a credit provider agrees to an arrangement with a consumer, RHI should reset to zero and remain so while they are complying with the arrangement.

In our view the Code should reinforce the existing legal position and clarify that the RHI should reset to zero when an arrangement is made. This position is supported by the Financial Ombudsman Service.⁶ Any change to the status quo should be the subject of law reform and is not the role of this Code Review. Any law reform process would need to incorporate appropriate research and consultation on whether a hardship flag is necessary, and, if so, what other regulatory settings would need to be changed to minimise unintended consequences.

What is the most appropriate way, if any, to recognise that new repayment terms have been determined between an individual borrower and a CP?

The current Code's silence on the interaction of hardship and RHI is unhelpful to all stakeholders. The Code should make it clear that where there is a change to the payment arrangement with a consumer, and the consumer is meeting their payment obligations under this arrangement, then RHI should reset to zero.

Consumer Representatives strongly disagree with the Office of the Australian Information Commissioner's (OAIC's) interpretation of when an amount is 'due and payable' under the *Privacy Act* as per its letter on 14 March 2017 (Attachment A). The OAIC has incorrectly limited its interpretation of 'due and payable' to the legal entitlement to maintain an action for recovery. In making its interpretation the OAIC has not considered the requirements under the *National Consumer Credit Protection Act 2009 (Credit Act)*, nor does it appear to have considered relevant case law relating to the term 'due and payable'.

It is a requirement under the *Privacy Act* that to list repayment history information (RHI) it is necessary to be a licensed credit provider under the *Credit Act*. Accordingly, the operation of the *Credit Act* is a key consideration in determining the meaning of "due and payable".

In our view, if an arrangement has been made under the *Credit Act* then an amount cannot be due and payable.

⁶ Financial Ombudsman Service Australia. Determination 422745, 21 April 2016. Available at: <https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/422745.pdf>

In our view, if an arrangement has been made with a consumer to change their payments, and the consumer is meeting their payment obligations under that arrangement, then the original amount cannot be due and payable.

The operation of the hardship provisions of the *Credit Act*

The hardship provisions of the National Credit Code (**NCC**) (being schedule 1 of the *Credit Act*) are contained in sections 72 to 75. Change on the grounds of financial hardship is a key consumer protection for consumers in financial hardship. It is a key public policy (repeatedly endorsed by Government) that consumers have the ability to ask to vary their credit contract if they can show that they can reasonably repay the loan if the variation was granted.

There is no requirement or mention in the provisions that the hardship is required to be temporary. The requirement is that the consumer must be able to reasonably repay the loan.

The provisions are very straightforward and in summary they operate as follows:

1. The consumer gives notice that they are unable to pay (either orally or in writing) s.72(1)
2. Once the hardship notice is given there is a stay on enforcement (s.89A)
3. The Credit Provider (**CP**) can ask for further information and the consumer is required to supply that information (s.72(2) and (3))
4. The CP either agrees to the change and provides details of the agreed variation OR the CP refuses giving reasons and provides details of the relevant EDR (s.72(4) and s.73)

The OAIC view is inconsistent with the above legislation. The inconsistencies are:

1. There is no concept of a temporary repayment arrangement compared to a variation. There is only an agreed variation. An agreed variation can be of any length of time.
2. Postponement of enforcement is an agreed variation under the NCC. In fact in the previous Uniform Consumer Credit Code (s.68) a postponement of enforcement was a specified option.
3. The test of whether the CP could maintain enforcement action is necessarily affected by s.89A. In the vast majority of circumstances, once the debtor has given a hardship notice, RHI cannot be listed.

Simple Arrangements

Regulation 69A granted CPs relief from giving a debtor notice confirming an agreement to change the credit contract on grounds of hardship if the agreed arrangements reduce the debtor's obligations for a period of less than 90 days. The original relief was until March 2014. This has since been extended by ASIC Class Order CO14/41 to March 2018. This has no impact on the process above. It simply changes whether an agreement must be reflected in writing. It does not change the process or its legal effect in any other way.

The examples in the OAIC view

Two examples are given in the OAIC view.

First example a

If the circumstances of the temporary payment arrangement are such that the credit provider would likely be estopped from enforcing the original consumer credit contract on the basis of a failure to pay in accordance with the original contract, then any missed payment under the original contract would not be 'payable' for the purposes of s 6V(1). For an equitable estoppel to arise, the CP must have represented to the consumer (or otherwise induced the consumer to adopt the assumption) that it would not enforce its rights under the original contract for failure to make the monthly payment(s) when due. In such circumstances, an assessment of whether RHI is 'due and payable' under s 6V(1) should be made by reference to the terms of the temporary payment arrangement.

As stated above, the reference to a temporary repayment arrangement is inconsistent with the *Credit Act*. The example should be reframed to focus on whether the debtor has given notice of hardship. A stay on enforcement would usually follow pursuant to s.89A. There would be no need to consider whether there was an equitable estoppel.

Second example b

If the temporary payment arrangement involves no representation or assumed state of affairs that the credit provider would postpone enforcement under the original consumer credit contract (that is, where there is no giving rise to an estoppel) then any missed payment is 'due and payable' under the original contract, despite the temporary payment arrangement.

Again, we note s.89A which means that for the most part representations are not relevant and the stay of enforcement occurs by operation of the *Credit Act*.

Even assuming that s.89A did not apply (as an exception in the section applied) we would contend that an agreed variation means that the amount isn't 'due and payable' and a listing cannot be made. This is consistent with the reasoning in FOS determination (422745).

We are very concerned that the second example will drive industry to work on an RHI "loophole" (sanctioned by the OAIC view) where the CP tells the consumer:

1. This is not hardship
2. There is no postponement of enforcement
3. RHI will continue to record

There is some evidence that this is already occurring as evidenced by the following cases included in the Joint Consumer Submission to the 2016 Review of the Code of Banking Practice:

Case study – David's story

David had previously had a hardship arrangement with the Bank because he had been unemployed. The original arrangement involved no repayments for three months. The

arrangement was silent as to what would happen at the end of this period. Just before the end of the three-month period David received a demand for \$3,500 in arrears. His next statement required the payment of the arrears plus another minimum payment. This was shortly followed by a default notice. David had recently secured new employment and paid what he could over the next few weeks. Towards the end of the default notice period he realised that he would not be able to pay all the arrears, plus the new minimum payment due, before the default notice expired. He then applied for hardship again via e-mail. He sought further time to pay the arrears. As he was back in employment, it was clear that he would be able to get back on track within a reasonable time as required by the NCC.

The Bank responded by telephone. David agreed to a repayment arrangement that he thought was challenging but reasonable over the phone. The Bank then confirmed the arrangement in writing. The letter said “this arrangement does not constitute a variation of your contract or change to your contractual obligations in any way. In accordance with our entitlement under the terms and conditions, interest, fees and charges (including late fees) will continue to accrue until the balance is cleared, even if you are meeting the terms of the payment arrangement.” At no point does the letter acknowledge the hardship notice, that the provisions of the NCC might apply, or indeed that they have in fact refused to grant a hardship variation under the Code and should therefore have given David their reasons for refusal and information about External Dispute Resolution.

Source: Financial Rights Legal Centre

Case study – Katia’s story

Katia was unemployed. She was behind on her credit card with a major Bank for several months running and she received a call from collections. She explained that she was unemployed and looking for work. The Bank made a verbal arrangement with her to pay \$50 per fortnight for 3 fortnights. When she later complained to the Bank about a misunderstanding about what would happen at the end of the arrangement she received an e-mail from the bank’s Internal Dispute Resolution which said:

“My understanding of your concern is

You are unhappy as you were on hardship arrangement, but later the [bank] Low Rate credit card was referred to an external debt collections agency. You advised that the reason for hardship was unemployment.

What we’ve done about this

I sincerely apologise for any inconvenience caused to you.

As per our conversation on 12 April 2016, I confirm that I have spoken with the Credit Cards Hardship department and was informed that you have not received hardship assistance. The arrangements that were made were with Credit Cards Collections department.”

The hardship provisions of the NCC clearly apply and yet the Bank never mentioned them. Further, the telephone conversation with collections where the customer said that she was unemployed clearly constituted a hardship notice under the law, and yet the Bank did not provide any response, or request for further information. The Bank went on the offer hardship as part of the resolution of this complaint but never explained why they did respond in the way they did to what was clearly a hardship notice in the first place.

Source: Financial Rights Legal Centre

This type of approach would not comply with the *Credit Act* or good public policy on hardship and seek to set back a great deal of work and industry commitment to best practice hardship policies. This would be a profoundly disappointing outcome.

Recommendations

4. The CR Code should reinforce the existing legal position that where a CP agrees to an arrangement with a consumer, RHI should reset to zero and remain so while the consumer is complying with the arrangement.
 5. The most appropriate way to recognise that new repayment terms have been determined between an individual borrower and a CP is whether an agreement has been made under the *Credit Act*. The consumer has given notice that they are unable to pay (either orally or in writing) and the CP has agreed to a change in payment terms.
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Issue 6: Inclusion of credit scores on free credit reports

Consumer Representatives strongly advocate that the CR Code should require Credit Reporting Bureaus (CRBs) to provide credit scoring information in free credit reports whether or not that information is considered to be ‘held’. Credit scores are becoming more and more influential in Australia in lending decisions for consumers as well as rental and telecommunication contracts. If consumers have been denied credit or some other service based on their credit reporting information it is vital that they can get access to credit scoring information along with the credit reporting information they are entitled to for free under the law. That information must be contextualised so that consumers can readily understand the data.

We do not agree with the OAIC's interpretation that credit scores do not constitute credit reporting information that CRBs hold at the time of an access request for a free credit report. We believe this interpretation clearly contradicts the intention behind the legislation which envisioned free access of individuals to their credit reporting information and CRB derived information. The Explanatory Memorandum to the *Privacy Amendment (Enhancing Privacy Protections) Bill 2012* s.20R(1) explicitly mentions credit scoring:

*This provision permits the individual to obtain access to their credit reporting information. This includes both the credit information about the individual and the CRB derived information about the individual (for example, any credit scoring or analysis about the individual).*⁷

Nevertheless, even while the OAIC's interpretation stands, the CR Code should be amended to set a higher standard of practice than the law and the current CR Code requires by clearly stating that a CRB must provide individuals with access to their credit score when they seek access to their credit reporting information free of charge. If CRBs dynamically generate credit scores at the time the information is requested by CPs or individuals paying a fee, there is no reason they cannot dynamically generate a credit score when an individual requests access to their credit reporting information free of charge in accordance with section 20(R) of the Act.

We note that Experian, for example, includes a credit score and an explanation of that score in its free access report.⁸

Recommendations

6. Consumer Representatives recommend amending section 19.4(a) the CR Code so that free credit reports include credit scoring information or analysis as the legislation intended.
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Issue 7: Access to free credit reports

Are there systemic barriers to members of the community accessing free credit reports?

If so, are there identifiable segments of the community who are particularly impacted?

Consumer Representatives recommend that PwC reviews ACCAN's recent report *Breaking Down Barriers to Digital Government*, which attempts to identify the distinct needs of eight

⁷ p147

⁸See <http://www.experian.com.au/credit-services/credit-reports/your-credit-report.html>

vulnerable consumer groups in Australia and the barriers they face to interacting with government and business online.⁹

What changes to the Code would you suggest to address this? What would be the costs and benefits of any such change?

Although the OAIC agreed with our representative complaint that CRBs must ensure that free access to credit reports was as available and as easy to identify and access as paid access to credit reports, Consumer Representatives still see ongoing problems with consumers trying to access their free credit reports. For vulnerable consumers that do not have access to the internet, or don't have an email account, it is still very difficult to get a free copy of their credit report.

Case study –Mary's story

Mary is an Aboriginal woman with disabilities. She called our Aboriginal Advice Service wanting help checking her credit report. She was worried there might be a Foxtel debt on it, but she was not sure. She was trying to get a NILS loan for a washing machine and was rejected.

She had not gotten a free credit report in the last 12 months and she had just had a loan rejected, so she is entitled to a free report, however she does not have credit on her phone to call a credit reporting bureau and she has no access to internet, and no secure email. There have been ongoing domestic violence issues with ex-partner who has taken out debts in her name, and keeps hacking her phone and email.

Financial Rights tried to help her order a report from Equifax while they had her on the phone but Equifax rejected the online form because it said the email she gave was not valid. While there was an option on the online Equifax form to have her free report posted to her address, the form could not be completed without a valid email address. Dun & Bradstreet's online form also insists on entering a valid email before they even let you fill out the form online. There was no paper form online that could be printed and posted to the client to fill out.

Unfortunately the client had to hang up before Financial Rights had a chance to conference call Equifax and try to order the free report over the phone. As she has no phone credit or valid email address we have been unable to contact her since.

Source: Financial Rights

⁹ Chen, J., 2017, *Breaking Down Barriers to Digital Government: how can we enable vulnerable consumers to have equal participation in digital government?* Australian Communications Consumer Action Network, Sydney.

Consumers checking activity on their credit reports is vital to their own financial information security and to the integrity of the system. Ideally consumers would have free, continuous access and appropriate alerts free of charge. See below under Equifax breach.

Recommendations

7. There should be a paper application form for consumers to seek access to their credit reporting information that can be printed and posted to CRBs. Consumers should not need to have a valid email address in order to go online and request access to their credit report.
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Issue 8: Marketing to consumers who have requested a free credit report

Another major concern that Consumer Representatives have in relation to accessing free credit reports is the aggressive marketing made to consumers who have requested a free report. We understand that consumers may have consented to some marketing calls if they tick a direct marketing box when they apply for their free report, but we do not agree that they have knowingly consented to receiving repeated and sometimes misleading calls about needing to pay for the report which they have clearly indicated they want to receive for free. We have talked to consumers that have been called (sometimes 3-4 times in a day) and have been told that 'requesting a free report will mark their file', or the free file will not include the same information that credit providers have seen or have used to make lending decisions.

We believe the CR Code should include commitments from CRBs relating to the marketing of their paid services (beyond Australian Privacy Principle 7¹⁰ and ASIC's RG 234¹¹), including that they will not mislead consumers about their right to access their own credit reporting information for free, or indicate that exerting that right would negatively impact their creditworthiness.

We also strongly argue that direct marketing consent boxes should not be pre-ticked when consumers go online to request a free credit report. Behavioural economics has demonstrated the incredible power of the default option¹². This is also borne out in the consumer stories below where none of the consumers could recall the box they had clearly failed to untick. While pre-ticking the box may be compliant with the law it is hardly best practice in consumer protection. CRBs are already benefitting commercially by trading in what would otherwise be private consumer information. The system allows this in order to facilitate an effective and

¹⁰ Privacy Act 1988 (Cth) – Schedule 1, Australian Privacy Principle 7 direct marketing

¹¹ ASIC Regulatory Guide 234: Advertising financial products and services (including credit): Good practice guidance November 2012. Available at: <http://download.asic.gov.au/media/1246974/rg234.pdf>

¹² See for example <https://www.fca.org.uk/publication/occasional-papers/occasional-paper-1.pdf>, p46

efficient credit market. Free access to the system is essential so that consumers can check the accuracy of information recorded about them and should not be used as a further commercial opportunity. The paid services are clearly promoted on the website already.

Case study –Nerida’s story

Nerida obtained a free credit file from a credit reporting body. Unbeknownst to Nerida, she did not un-tick a box regarding the credit reporting body contacting her for direct marketing purposes. The following day, Nerida was called twice by the credit reporting body and offered the credit reporting body’s premium service which included credit alerts and unlimited access to her credit file for a reduced price. Nerida was shocked that the credit reporting body was contacting customers who had applied for free copies of their credit files only to upsell one of their services.

Source: CCLSWA

Case study –Agnes’s story

Agnes rang her financial counsellor to say that Veda/Equifax had been contacting her regarding a subscription 3 to 4 times a day since she ordered her free credit report with help from her financial counsellor online the week before. She said all the people who have rung her sound as if they are from overseas. Her financial counsellor asked her for the number that was ringing her (a Victorian number) so that the financial counsellor could ring on her behalf. In the mean time the counsellor suggested Agnes should tell them that she is not interested in getting a subscription and to not ring her again regarding this.

When the financial counsellor called Veda/Equifax she identified herself and explained the situation, and was told that Agnes needs to tell Veda/Equifax herself she is not interested and not to ring her in future. The woman at Veda/Equifax then told the financial counsellor that ordering a free credit report marks a consumer’s file (Agnes’s file), and Veda/Equifax are calling customers to have them get a subscription that will protect their credit file better. The woman said the free credit report does not give all the information on the credit report. She was quite insistent.

The financial counsellor told the woman at Veda/Equifax that Agnes was only interested in getting a free credit report and asked that she make a note on Agnes’s file that she does not want any more phone calls regarding purchasing a subscription. The woman at VEDA/Equifax said that was fine, but Agnes would have to tell them that.

The financial counsellor immediately rang Agnes and updated her on her phone call with Veda/Equifax and with Financial Rights. Agnes said that Veda/Equifax told her that if she pays so much money, it can help increase her credit report score. They also said she needs to see the full credit report to protect herself from identity fraud and find out if she has been scammed. She forgot some of what they told her. She did get a missed call from them

the night before.

The next day as the financial counsellor was sending this case study to Financial Rights Agnes rang her again and told her that Veda/Equifax have rung her 3 more times that day. Agnes says she has told them not to ring her, and hung up on them. Next time they call, she plans on asking to speak to a manager to stop the harassment. She told the financial counsellor that she will contact her if Veda/Equifax tries to contact her again

Source: FCA

Case study – Jonathan’s story

Jonathan approached a CRB after being told by a phone company that his credit application for a new phone plan was unsuccessful. He was told the application was unsuccessful based on advice the phone company received from two different credit reference agencies. Jonathan went online and filled out an application to get his credit information free of charge. Jonathan thinks he did not untick the direct marketing box.

A few days later Jonathan received a call from the CRB asking if he would like to apply for a paid report instead of the free one. Jonathan explained that he was applying for his credit report because of his unsuccessful phone application. The CRB told Jonathan that the free report would not contain the same information that would have informed the phone company’s decision to decline his application. Jonathan was also told that if he applied for the paid report during that phone call he would get it for a reduced price, which would expire at the end of the call. Jonathan said he would explore further options and ended the call.

Later that same day, after speaking to a solicitor at Financial Rights Jonathan called the CRB again to ask what it meant when it told Jonathan that his free report would not contain the same information that the phone company had used to decline his application. The CRB told Jonathan that only by purchasing a \$90 report would he get access to his credit score. The CRB claimed that the credit score was what the phone company would have primarily used to inform their decision to decline his application.

Source: Financial Rights, S173380

Recommendations

8. Direct marketing consent boxes should not be pre-ticked on online credit report applications.
9. The CR Code should include commitments from CRBs relating to the marketing of their paid services (beyond Australian Privacy Principle 7 and ASIC’s RG 234), including that

they will not mislead consumers about their right to access their own credit reporting information for free, will not mislead consumers about the value of the information contained in the paid service compared to the free service, or indicate that exerting their right to a free copy of their report will negatively impact their creditworthiness.

Issue 9: Timely disclosure of RHI to consumers

Do you agree that timely notification of RHI to consumers would improve the system?

Yes. However, we note that we have opposed the inclusion of RHI in any mandatory comprehensive credit reporting regime until the lack of clarity around reporting of RHI during hardship is resolved. See Issue 6 above for more information.

Would you support changes to the Code that require a CP to notify consumers of their RHI via their regular account statements? Is there a better approach? What other costs and benefits might introduction of this regular notification have?

Consumer Representatives believe the CR Code should require CPs who are reporting RHI about their customers to notify those customers on their regular account statements about the information reported to the CRB and its meaning. Regular notifications could also be made in other innovative ways (like SMS nudges), and we are interested in hearing ideas from industry. We contend that there are advantages to credit providers, consumers and CRBs for consumers to receive timely disclosures about RHI:

For credit providers:

- Consumers will have greater confidence that the credit provider is being open and transparent if they are notified in a timely fashion about adverse information being reported rather than finding out about it later when they are either refused other credit, or charged at a higher rate of interest than otherwise would be the case; and
- It will drive consumers who can pay on time to do so. Consumers are extremely protective of their credit report/score and will not want to pay higher interest on credit in the future, or risk credit refusals. If they have the power to pay on time, they will do so to avoid negative information being shared with other credit providers more readily than in response to late fees.

For consumers:

- They will receive timely notification of the consequences of their actions so that they change their behaviour accordingly if it is within their power; and
- They will be able to dispute any adverse listing they disagree with in a timely fashion while memories are fresh and evidence can be easily located – it would be quite a forensic exercise to check the accuracy of repayment information up to 2 years down the track.

For CRBs

- The information they hold will be much more likely to be accurate if consumers are informed and given an opportunity to raise errors and other complaints in a timely manner.

Recommendations

10. The CR Code should require CPs that are reporting RHI about their customers to notify those customers on their regular account statements about the information reported to the CRB and its meaning. Section 8.2 could be amended to include this new requirement.
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Issue 10: Inconsistent listing of the same default information by different CRBs

Is there a systemic issue in respect of inconsistent listing of default information between CRBs?

We have not heard of inconsistent listings of the same default information by different CRBs although we have seen examples of a default listed on a credit file by one CRB and not by another. It is our understanding that this issue should be resolved by the reciprocity requirements of the *Principles of Reciprocity and Data Exchange (PRDE)*.

Issue 11: Identifying breaches of the requirement for CPs to provide refusal notices

What changes to the Code could be made to promote compliance with paragraph 16.3? What would be the costs and benefits of any such change?

Section 16.3 of the CR Code requires lenders to give written notice under s21P(2) of the Act to individuals after refusing their application for credit when the refusal is based wholly or partly on credit eligibility information – but it is impossible for Consumer Representatives to identify these breaches.

The notification requirement under s.21P 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 16.3 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.

This legislative requirement is similar to the requirement in the previous legislation. We believe that in the past this requirement has been widely ignored by credit providers. It is therefore likely that for many credit providers, section 16.3 of the CR Code was 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. Consumer Representatives hope that section 16.3 has made this possible and we are interested to hear responses from CPs and CRBs to this Issue.

Issue 12: Independent governance of the Code

Is there evidence of systemic deficiencies in the administration of the Code that would warrant the appointment of an independent administrative body?

Yes. Most of the issues discussed in this submission point to systemic deficiencies in the administration of the Code which could be investigated, monitored and addressed by an independent administrative body.

Consumer Representatives do not believe that the current governance structure is sufficiently robust to enable stakeholders to have confidence in the credit reporting system. Nor does it sufficiently deal 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.

Consumer Representatives strongly believe there is currently too much risk that oversight of CP and CRB compliance with the CR Code is reduced, systemic problems are not being identified, and industry and consumer awareness of the code is very low.

The current 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 dis-incentivised 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.

Before the current CR Code was drafted it was clear that there was agreement between the OAIC as well as industry and consumer representatives that any new Code should have independent governance arrangements. The current 2014 CR Code does not include an independent Code Governance Administrator or a Code Compliance Committee and we strongly support creating one in the next version of the Code. The Banking Code of Practice CCMC serves as a good example.

In 2011, when the *Exposure Drafts of Australian Privacy Amendment Legislation* were introduced industry representatives supported the idea that an independent committee should be established to 'drive compliance with the Code'. Such a committee would comprise representation from both industry and consumer advocates. The Australian Retail Credit Association's (ARCA's) submission to the Senate's Finance and Public Administration Legislation Committee concluded:

*While we would expect to finalise arrangements in consultation with industry and the regulator, ARCA proposes that this committee would support the work of the regulator, maintain industry focus on compliance with the Code, and to undertake compliance tasks associated with the Code.*¹³

In March 2013, the OAIC released as a consultation draft *Guidelines for developing codes – issued under Part IIIB of the Privacy Act 1988*¹⁴. One of the purposes of the draft Guidelines was said to be to assist the CR Code developer (ARCA) in the development of the CR Code. The draft Guidelines specified requirements as to Code governance.

¹³ ARCA Submission to the Exposure Drafts of Australian Privacy Amendment Legislation – Senate Finance and Public Administration Committees, p. 4 available at: [http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance and Public Administrati on/Completed_inquiries/2010-13/privexpdrafts/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administrati on/Completed_inquiries/2010-13/privexpdrafts/index)

¹⁴ Available at: https://www.oaic.gov.au/resources/privacy-law/privacy-archive/privacy-consultations-archive/guidelines-for-developing-codes-march-2013/Guidelines_developing_codes_consultation_draft.pdf

*The Commissioner generally expects that governance arrangements will include the establishment of a code administrator and/or code administration committee to oversee the regular operation of a code once it has been registered.*¹⁵

What form and powers would such a body have? What would be the costs and benefits of now introducing a Code administrative body in practice?

Consumer Representatives believe there is a sufficiently compelling case for an additional level of governance – a code administrative body – overseeing CPs and CRBs and reporting through to the Commissioner. We do not believe such a body would duplicate the role of the OAIC, only enhance it. Industry, consumers and the OAIC 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. In the financial services sector generally ASIC retains regulatory oversight while the industry codes for each segment (such as banks, life insurance, general insurance etc) each have a Code governance body. The Government recently consulted in relation to moving to a more co-regulatory model, but did not envisage a departure from Code governance in addition to regulatory oversight.

If a Code administrator body is established, the following information covers how it should be constituted, what the body's responsibilities should be, and how it should be funded and operated.

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.

¹⁵ paragraph 2.9

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 code¹⁶;
- 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 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.

¹⁶ Primary responsibility for settling disputes with consumers would remain with CPs, CRBs and the EDR schemes. Both consumers and the EDR schemes could nonetheless report breaches of the Code to the Compliance Committee to inform their work and promote compliance.

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 external dispute resolution (**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.

Recommendations

11. The CR Code should establish an independent code compliance committee.
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Issue 13: Mandatory reporting of default information

Consumer Representatives (which include solicitors, financial counsellors and other caseworkers) regularly include the contents of credit reports in negotiated settlement outcomes. The CR Code should include protections for consumers when legitimate settlement negotiations are reached following disputes about a debt claimed, or when an EDR scheme has made a ruling in favour of a consumer regarding a debt claimed. Section 9.1 should include a prohibition on credit providers disclosing default information when:

- a credit provider has entered into a binding settlement with the consumer not to disclose the relevant default information, or is in the process of legitimate settlement negotiations with the consumer in regards to the listing; and/or

- the credit provider is acting in accordance with a recommendation or determination of an EDR scheme in relation to a dispute with the consumer which includes a requirement to remove or not list default information. .

These prohibitions should be mirrored in the industry's PRDE as another exception to the requirement to contribute credit information under Principle 1, which would provide that a credit provider can delay, remove or choose not to list credit defaults.

The CR Code can and should protect consumers from having default information disclosed on their credit files which do not reflect their creditworthiness. Comprehensive credit reporting (CCR) in Australia should not interfere with legitimate settlement negotiations. It is a matter between the parties to determine how a dispute is settled and interference with settlement negotiations to remove, delay or withhold from listing defaults on credit reports is contrary to the public interest as it hinders the ability of the parties to comprehensively settle a dispute.

Up until now, the comprehensive credit reporting system has been a voluntary system, meaning the relevant legislation has not been needed to address the voluntary removal of default listings. Currently, it is common for a lender to refuse to formally admit that a default listing is inaccurate (for example, due to breaches of responsible lending laws), but nevertheless agree to remove a default listing as part of a legitimate settlement agreement. However, the Government's recent commitment to make CCR mandatory, as well as the industry's PRDE will change the current practice.

We consider this issue is likely to cause a lot of confusion, cost and delay if it is not clarified. In our view, it is important that the CR Code specifically states that it does not override the obligation on CPs and CRBs to remove default listings (or not list defaults) if they have agreed to do so in a binding settlement agreement.

We also note that the Australian Competition and Consumer Commission (ACCC) has indicated that it expects to see this issue (along with the RHI and financial hardship issue) resolved in order to address consumer concerns before it will assess any application for re-authorisation of ARCA's PRDE.¹⁷

Recommendations

12. Section 9.1 should include a prohibition on credit providers disclosing default information when:

¹⁷ Determination Application for authorization lodged by Australian Retail Credit Association Ltd in respect of the Principles of Reciprocity and Data Exchange Date: 3 December 2015 Authorisation number: A91482. Available at: <http://registers.accc.gov.au/content/index.phtml/itemId/1184971/fromItemId/278039/display/acccDecision>

- c. a credit provider has entered into a binding settlement with the consumer not to disclose the default information, or is in the process of legitimate settlement negotiations with the consumer in regards to the listing; and/or;
- d. the credit provider is acting in accordance with a recommendation or determination of an EDR scheme in relation to a dispute with the consumer which includes a requirement to remove or not list default information.

Issue 14: Reporting of Court judgements unrelated to creditworthiness

Consumer Representatives are concerned about the potential for court judgments and other publicly available information to be included in credit reports which has no real bearing on credit worthiness.

We recognise that 11.1(c) of the CR Code means that CRBs can only collect publicly available information that relates to creditworthiness, however this section of the code is hardly in plain English. A consumer would need to cross reference section 6N(k)(i) of the *Privacy Act* to understand that any publicly available information on his or her credit report by law must reflect creditworthiness. Most consumers will not understand nor be able to enforce this protection which makes them vulnerable to threats from debt collectors that any and all judgments could end up on their credit reports. It also means that if publicly available information that does not reflect creditworthiness is going on reports, consumers do not know to contest it with the CRB.

Judgments that are entered because there is an ongoing dispute about liability do not reflect a person's creditworthiness. The most obvious example is a court judgment arising from a motor vehicle accident where liability has been disputed. A determination about who is responsible for causing an accident has no relevance to a person's credit worthiness. Worse, the litigation may have been between two insurance companies acting under subrogation rights and the named defendant has no say in the proceedings (including whether or not the matter is settled or proceeds to hearing). Consumer Representatives understand that currently the NSW Courts only report default judgments to CRB's but we have no systemic means of verifying this across all jurisdictions (See Catherine's story below where the writ was reported rather than the judgment in ultimately discontinued proceedings). Further, even in NSW this limitation seems to be part of a policy agreed between the Courts and the CRBs and is not reflected in any public policy document or rule that could be referred to in the event of a dispute.

Case study

Legal Aid Queensland has recently helped someone where it was just the Writ listed on the credit report. It had not progressed further than a claim stage. The CRB said that to remove it they required a Notice of Discontinuance.

Case study –Sanjeev’s story

Sanjeev’s former employer overpaid him on two separate occasions and the client was unable to make repayments for a temporary period of time. Sanjeev’s former employer obtained a court judgment against him. The judgment was listed on Sanjeev’s credit file.

Source: CCLSWA

Case study –Kim Thi’s story

Kim Thi was trying to buy a home when she was held up by a judgment listed on her credit report. The judgment was for a strata debt in a similar name. It was not her debt and she had never lived at the address in relation to which the strata fees had accrued. When she pointed this out to the CRB and provided evidence of her actual name, and her address at the relevant time, they told her she would need to get the creditor to lodge a Notice of Discontinuance. This did not make any sense – she was not even a party to the proceedings. When she went back to the CRB again after getting advice they told her it would take 30 days to remove the listing. She needed finance approved in a shorter period. Eventually she provided the mortgage lender with proof that it was not her debt directly from the judgment creditor.

Source: Financial Rights Legal Centre

Case study –Justine’s story

Justine had a dispute regarding a debt for the provision of legal services. The dispute settled and an agreement was signed between the parties stating that the debt was paid. However, Justine became aware that a judgment in relation to the dispute appeared on her credit file.

Source: CCLSWA

Case study –Catherine’s story

Catherine and her partner were sued by a person who sold them a business. Due to alleged breaches of the business sale agreement by the seller, Catherine and her partner stopped making monthly repayments to the seller. The seller sued the client and her partner. Shortly after, the seller discontinued her claim. The writ (rather than any judgment) was listed on both Catherine and her partner’s credit file. It was later removed from the partner’s file but not Catherine’s credit file.

Source: CCLSWA

Allowing any judgment or initiating proceedings to appear on a person's credit report is a deterrent to people pursuing their rights at law and potentially undermines the civil justice system. If the court judgments are being appropriately reported, then this should be reflected in the Code so that the rules are clear, not left to opaque behind the scenes arrangements between the Courts and the CRBs.

We believe the CR Code should include a broad commitment to fairness, and give CRBs the ability to not record publicly available information, or remove it upon complaint, where it is not a reflection of a person's creditworthiness. Further, initiating proceedings and judgments arising from contested proceedings should be clearly excluded from inclusion on a credit file by a provision of the Code. The fact that such information is publicly available elsewhere is irrelevant. Including this information in a credit report for the specific purpose of informing the credit assessment processes of potential creditors fundamentally changes the impact of the information. Given the information is included by virtue of its public availability and not because of a specific provision of the Privacy Act and Regulations means that it is quite possible and appropriate to deal with issue under the Code.

Recommendations

13. The CR Code should include a broad commitment to fairness, and give CRBs the ability to not record publicly available information, or remove it upon complaint, where it is not a reflection of a person's creditworthiness.
 14. Initiating proceedings and judgments arising from contested proceedings should be clearly excluded from inclusion on a credit file by a provision of the Code.
 15. Section 11.1(c) should be redrafted in plain English.
-

Issue 15: Determining the 'maximum amount of credit available'

Should the Code include a mechanism for dealing with the manner in which CPs determine the 'maximum amount of credit available' in situations where there is overlap in the types of credit being provided?

It is important that potential credit providers can obtain an accurate picture of the total amount of credit available to a consumer whether or not they are using those facilities to their maximum potential, or at all, at a particular point in time. This is vital to conducting a reliable responsible lending assessment. We assist many consumers who may have carried unused limits for long period and then "maxed out" all accounts in a period of financial stress such as illness or unemployment. The credit report must clearly reflect the total amount of credit available to the borrower under any facilities, or linked facilities.

The problem identified in the Issues Paper is a little unclear. If there is an issue with overlapping limits (such as that a credit card and an associated home loan have a maximum combined limit but some flexibility about from which facility that limit is accessed), then the system should feasibly be able to accommodate linked facilities with the total maximum available made clear. The main stipulation should be that the maximum potential liability is clear.

Issue 16: Determining ‘the day credit is terminated or otherwise ceases to be in force’

As above, it is important that total amounts now owing, or potentially owing, under each credit facility are clearly disclosed for responsible lending purposes.

Issue 17: Scope of prohibition for developing a ‘tool’ to facilitate a CP’s direct marketing

It is imperative that there be an open and robust consultation process regarding the framework for the development of direct marketing tools and for oversight of their application. It is inappropriate, for example, that transparency and therefore accountability be reduced through adoption of tools by organisations that claim intervention is impractical because decisions are made by algorithms rather than individuals. Such claims are evident in practice overseas and have been rightly contested by both consumer groups and regulators.

Consumer groups have historically opposed credit pre-screening on the basis that it is just as likely to be used to target consumers in financial stress with higher cost products, or to give lenders comfort to dispense with more personal and tailored responsible lending processes, as it is to promote responsible lending.

Issue 18: Correction of information mechanism

What experiences have you had, if any, that suggest the mechanism enshrined in paragraph 20 of the Code is unclear or not operating as intended in practice?

What changes to the Code, if any, would you suggest to address any deficiencies in the adherence to timeframes, clarity of obligations and reasonable steps taken to correct information in practice? What would be the costs and benefits of any such change?

Should the Code impose additional requirements on CRBs regarding their complaints handling and internal dispute resolution practices? What would be the costs and benefits of introducing these additional requirements?

The commitments in the CR Code regarding the Correction of Information (Rule 20) are inadequate and need to be extensively amended. These commitments are not best practice when it comes to dispute resolution in financial services. Not only are the timeframes currently set out in Rule 20 weak, but they are not adhered to in practice. We also recommend:

Rule 20.3 should be the first rule instead of rule 20.1. Rule 20.1 is incredibly confusing for a consumer to understand, if the code is a consumer facing document it should be easier to understand.

Rule 20.3 of the Code seeks to combine the obligations of credit providers (s21V Privacy Act) with those of credit reporting bodies (s20T Privacy Act). The difficulty with combining these obligations in the code at rules 20.3 to 20.10, is that it is confusing and not clear that a consumer can go to the credit provider or the CRB.

Consumer Representatives have assisted consumers where the consumer representative has clear and cogent information of an inaccuracy. The requirement to involve the credit provider is not a necessary requirement in all cases. Time frames could be considerably shorter in circumstances where no consultation between CRB's and CP's are required. The rules should reflect that shorter timelines should apply for these matters. In more complex matters, where consultation is required, those time frames should be 30 days.

The standard wording from a CRB when a correction request is made is:

"Please allow up to 30 days for this correction request to be investigated and a response to be provided. If an extension or further information required we will contact you within 30 days"

We rarely see CRB's or credit providers send notices in accordance with 20.3(a) to (d).

Case study –Harry's story

Harry was a client of Financial Rights Legal Centre. He received assistance in surrendering his vehicle and being relieved of a shortfall with a financial service provider (FSP) on grounds of responsible lending breaches. Part of the agreement was that any default listing would be removed and the FSP would not list a default. Harry was trying to move on with his life however some months later he got knocked back for credit. When he did, it was apparent that the FSP had listed some months after the dispute was resolved even though they had agreed not to. Harry was advised to complete a corrections online form with the CRB, and he provided the evidence of the agreement with the FSP. Harry was frustrated he got an email advising him it would take 30 days. The CRB had all information required to investigate from the complainant. The time frame of 30 days in this instance seemed excessive.

Source: Financial Rights

Complaints handling Rule 21

Furthermore, consumer representatives have seen examples where the substance of responses from CRBs to consumer complaints has been very poor. Similarly we have seen examples where the internal investigation into complaints done by CRBs has been inadequate.

Complaints handling includes:

- Disputes over a CRB not removing a listing;
- Requiring unnecessary information to remove a listing;
- Other service standards, including provision of credit reports.

Better complaints handling procedures by CRB's would go a long way to dissuading people from going to debt management firms (like credit repair companies) to help them fix inaccurate listings on their credit file.

The CR Code should strive to commit CRBs to best practice in dispute resolution, not simply to meet the minimum requirements set by Part IIIA of the Act. Poor IDR processes by CRBs are providing predatory debt management firms, especially credit repair companies, with customers as people feel like they can't navigate the system themselves.

Where a CRB has contributed to a consumer's loss because of a breach of the Code, consideration is needed to the CRB compensating the consumer for the losses caused by the CRB's error.

Case study –Fiona's story

Fiona called the Financial Rights Legal Centre for advice because she wanted her free credit file as she likes to check her file every year. She also wanted her insurance file and was prepared to pay the fee. She applied for both reports in August 2016 but the CRB said it did not get the application. Fiona sent another application as well as a cheque which the CRB deposited. By January 2017 Fiona had still not received her credit file but was sent someone else's insurance report. Fiona complained to the CRB's internal dispute resolution (**IDR**) department and to the Privacy Commissioner who said will take 12 weeks to get back to her because it had too many complaints at the moment.

By February 2017 Fiona had chased the CRB's IDR team but had still not received a response as to why she had never received her credit file and why she was sent the wrong insurance file. The CRB had not responded to her complaints at all. She is considering whether to keep waiting for the OAIC or to take her complaint to the Credit and Investments Ombudsman (**CIO**).

Finally in March Fiona got a letter from the CRB acknowledging the delay in correcting her files. They are improving their processes. They say they cannot send her the insurance file because that operation is now being done by another CRB (no explanation as to why they took her fee for the insurance report back in 2016 if they were no longer in control of that service). Eight months after Fiona first asked for her reports she finally got a response from the OAIC telling her to check with the second CRB as to her insurance file, that's it.

Source: Financial Rights S174212

Case study – Nikki’s story

Nikki’s former family law solicitor had a judgment against her which was recorded on her credit report. However, this debt has since been resolved and a Notice of Discontinuance was filed. Nikki sent the filed copy of the Notice to a CRB which told her the Notice was not enough to remove the credit listing, and she would need to file a Notice to Set Aside the Judgment. Nikki took the advice from the CRB to the local court and the registrar told her that the court was not going to look at this judgment because this matter had been finalised.

Nikki went back to the CRB who only repeated (on three occasions) that she needs to set aside the default judgment before it will remove the credit listing. Financial Rights advised Nikki that the Notice of Discontinuance should be enough as it shows that the other party acknowledges that she no longer owes the debt, and she should contact the CRB’s internal disputes resolution department.

Source: Financial Rights S155602

Case study – Jenny’s story

Jenny and her partner wanted to get a home loan. Jenny obtained a credit report for free in her name and noted her maiden name. Jenny received her credit report which she received stated her name as “Mr” and she went back to the CRB and completed a “corrections” request, which she received quickly. The report was fixed it and the report came back clear again. Jenny and her husband applied for finance, and paid \$4,000 in fees, conveyancing, and other costs for the house purchase.

The lender then rejected as listing on CRA in her maiden name. The listing led to the finance being withdrawn and they lost the house and the \$4,000; Jenny raised this with the CRB who advised her they had undertaken a “periodic review” which had linked the two files. Jenny had a default under her maiden name from 4 years earlier. Jenny had changed her name 3 years ago, and had applied for a phone account in her new name 2 years after. It was unclear why the files had never been linked before.

She raised a dispute with Veda. The dispute resolution involved her exchanging a number of correspondence over several months. The CRB denied wrong doing and in correspondence blamed the lender and Jenny. The CRB provided no information about how regularly files were “reviewed”. Jenny was offered \$2,000 as a goodwill gesture. Shortly after Jenny accepted the sum, she received confirmation in writing from the CRB that they had not correctly linked her credit report.

Jenny was furious they withheld this admission until after they had offered the goodwill amount had been accepted.

As an aside, the original default was remedied there was an error. Had she known from get go, she could of fixed it before expending money and applying for credit.

Source: Financial Rights

Recommendations

The Corrections and Complaints sections of the Code should be redrafted to allow for:

Corrections

16. The wording in rule 20 must be simplified.
17. The obligations of credit providers and CRB's should be in separate rules and not combined to assist in consumers understanding the provisions;
18. For matter not requiring consultation between CRB and CP's time frames should be less than 30 days, RBs should be required to remove information which can be established as clearly wrong on the face of the evidence provided by the consumer (for example, the information is included on the wrong credit report) within a much shorter period and without reference to the CP – such as 3 business days.
19. Rule 20.10 should be removed. The reality is that all correction requests will be in essence a dispute. There is no good reason why the principles of dispute resolution enunciated in rule 21.1(a)-(e) is excluded from decisions relating to corrections.

Complaints

20. CRB's should have robust time frames to respond to complaints;
 21. Access to remedies where a breach of the rules is established.
-

Issue 19: Listing of statute barred debts

Is there evidence of systemic late reporting of default information?

The CR Code does not address 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 Representatives 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 Representatives were led to believe that some of these problems may be solved by introducing reciprocity standards because all CPs will be required to list defaults without delay. However we do not know whether or not those standards are being enforced.

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 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.

Case study – Georgio's story

Georgio had a listing placed on his credit file in 2010. The listing was subsequently removed when the 7 year retention period ended. However, in 2016 the same default was listed again for the same amount, by the same company and with the same reference number. Georgio had not had any communication with the company since the original credit listing. Therefore, it appeared that the company had both listed a statute barred debt and the same default twice.

Source: CCLSWA

Case study – Casey's story

Casey recently applied for a loan with ANZ to consolidate some debts. She was declined because a default was listed on her credit history in March 2017.

Casey had flexiloan with Westpac over 7 years ago. Westpac told her that they had 'written off' the debt in May 2011. Casey says that the listing was made by 'Westpac collections'.

Casey asked Westpac for all statements and any letters they had sent her. Westpac sent statements but there were not any since about September 2016. Last payment Casey made was in April/May 2011. Casey called the National Debt Helpline to find out if there is any way to get this listing off her credit report.

The listing was dated in March 2017. So even if you go from April 2011 to March 2017, the debt is still within the 6 years and so not statute barred, but very close. The listing will now stay on Casey's credit report for another 5 years even though it could not have been listed a few months after it was in March.

Source: Financial Rights S180556

Should default information be immediately removed once a consumer has asserted a debt has become statute barred, with the onus on the CP to prove that it is not?

Yes. The onus should be on the CP, as they are in a position to know when a debt is statute barred better than any other entity as they have account statements and access to all relevant information.

We would further recommend that CP's should have a positive obligation to remove default listings once a debt becomes statute barred, irrespective of the individuals request or assertion. Most CP's, including debt collectors, have sophisticated systems that indicate when a debt is close to or about to become statute barred. It would not, in our view, be difficult for this system to include a notice to the CRB to remove the listing.

What changes to the Code, if any, would you suggest to address the listing of statute barred debts? What would be the costs and benefits of any such change?

Currently only 20.6 talks about statue barred, and the obligation only arises when the individual makes a request for correction. Disputes often arise with credit providers about collection of the debt, not just in circumstances of correction of a default listing.

The rule should be amended to include circumstances not limited to correction situations.

As a debt is statute barred it no longer reflects the creditworthiness of the person, as the debt is no longer owing. We would recommend the Code is amended to include a positive obligation on credit providers to notify the CRB when a debt becomes statute barred due to no payment or acknowledgement of a debt in the required time frames. This information is known to CP's as they would no longer be entitled to collect the debt. If they become aware, during a dispute about the debt, review of their accounts, or in the ordinary course of business, they should have a positive obligation to notify the CRB.

Recommendations

22. When a CP becomes aware a debt is statute barred they must notify the CRB and any default listing must be removed immediately.
 23. 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.
-

Issue 20: Date applied when listing defaults

What changes to the Code, if any, would you suggest to address any ambiguity in the date on which defaults should be listed? What would be the costs and benefits of any such change?

It would be most beneficial for consumers if the date of the default is the date that is listed on the credit report (not the date of listing). The date of the default is much more reflective of the time in which the consumer was demonstrating an inability to meet his or her payments as they became due, whereas the date of listing might be any arbitrary date in the future when the consumer's creditworthiness may have significantly improved. Listing the default as the date of default would ensure a more accurate credit reporting system and would avoid the problems of defaults listed very close to the date that a debt becomes statute barred (Issue 19 above).

Recommendations

24. The date of default should be used when listing defaults.

Issue 21: Notification where allegations of fraud

Consumer Representatives are concerned that the ban period in Section 17 of the CR Code 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 enquiries, and default listings;
- c. the CRB notifies all affected CPs that an allegation of fraud has been made for a particular account;
- d. appropriate steps are taken to protect the consumer against further fraud.
- e. the CP then accepts this as a dispute and investigates;
- f. the CP provides a documentary evidence relating to the investigation to the CRB; and
- g. the CRB keeps track of responses/documentation, and regularly reports to the consumer.

We recognise that this would be a big change to current practice, and would be an added cost to CRBs. Nevertheless we contend that CRBs are in a much better position to streamline this process than individual borrowers, and they could play a very critical role for people who might be facing serious hardship.

Case study – Legal Aid Qld Case

Currently I am running a matter where the fraudster has entered into over 20 loans with various credit providers. Equifax did not seek any information from individual lenders to establish sufficient to establish that they had the authority of the named person to access her file. Consequently we are running over 20 separate complaints as well as continuing with a complaint in the CIO in relation to the actions of Equifax. It is a large investment of resources by LAQ but also extremely draining on the consumer who has some slight capacity issue.

Source: Legal Aid Qld

Recommendations

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

Issue 22: Insufficient range of sanctions available to CRBs

What experiences have you had, if any, with the enforcement or lack of enforcement of sanctions by CRBs against CPs?

Consumer Representatives have not heard or any sanctions or enforcement that has taken place by CRBs against CPs. This leads us to conclude that no serious enforcement has taken place against CPs that fail to comply with the CR Code or meet their obligations with *Privacy Act IIIA* or the *Regulations*. Alternatively, such actions are not reported (even in broad terms), which means the system lacks transparency. We reiterate the need for an independent code compliance monitoring committee that is empowered to take strong enforcement action in response to breaches of the Code.

Should the Code specify additional sanctions available to CRBs to enforce against CPs where they fail to meet their contractual obligations to CRBs? What would be the costs and benefits of introducing these additional specified sanctions?

Yes. Consumer Representatives would like to see CRBs empowered with more delineated sanction to use against CPs that breach the CR Code. In section 23.9 the only specified

sanction that CRBs can use against CPs is termination of access. We think that is too heavy a weapon and so is unlikely to ever be used except in extreme circumstances. If there was a more credible gradation of sanctions CRBs might actually take action against CPs which fail to ensure credit information is accurate up-to-date and complete or fail to protect credit information from misuse, interference, loss or unauthorised access.

Although we want to emphasise that our preferred solution to ensure credit reporting system integrity is to create an independent code compliance committee, as discussed above at Issue 12. Such a committee would be empowered with a range of sanctions, and would not suffer the same conflicts of interest that CRBs do when faced with sanctioning their paying CP customers.

Recommendations

26. Section 23.9 should include specify a more credible 'gradation' of possible sanctions for CRBs to use against non-complying CPs.
-

Issue 23: Disclosure of information regarding access to credit reports

What uncertainties have you faced in practice, if any, caused by the lack of clarity around the nature and implications of the access audit trail on a credit report?

What changes to the Code would you suggest to address this? What would be the costs and benefits of any such change?

There is little transparency around how and when existing credit providers access their customers' credit report apart from the audit trail that shows that they have done so. Consumer Representatives have been receiving increased requests for advice about why long audit trails appear on their credit reports. Although the reports say that this information is not available to other credit providers, it is not clear to consumers (or some financial counsellors/solicitors for that matter) why that access has been made and it makes consumers worried and confused. There also appears to be access that is listed as a CP when it was actually the credit reporting bureaux apparently doing some sort of data washing.

There could be better communication around this for consumers. Why do existing credit providers access their reports? What are they allowed to do with this information? Is this information affecting an individual's CRB generated credit score? How would consumers know if it was? To ensure transparency the access noted on credit reports needs to contain more information.

Recommendations

27. CPs should identify a reason when accessing a credit report. The Code should identify a range of legitimate reasons and how they will be clearly communicated to consumers when they access their report.
-

Issue 24: General drafting of the Code

Are there specific areas in which the drafting of the Code may lead to difficulty in interpreting and applying the Code in practice?

Currently the CR Code is completely unintelligible to an average consumer. To engage constructively with the CR Code a reader needs to look at the legislation, the regulations, the CR Code and the explanatory memorandum in order to make sense of these rules. However this is not just an accessibility issue but also goes to the effectiveness of the Code. If CPs, CRBs and their staff are not clear about what is expected, or if there is room for ambiguous interpretation, then the effectiveness of the CR Code will be diminished.

We acknowledge that the reviewers have said “it is beyond the scope of this Review to recommend wholesale drafting changes to the Code.” If that is the case, when would major redrafting changes ever be recommended? We note that the ABA is currently undertaking wholesale redrafting of the Banking Code in order to make that code more accessible and in Plain English.

Nevertheless, one specific suggestion for changing the CR Code is that wherever possible to replace any references in the text referring to specific legislative requirements with those actual requirements. Readers should not have to reference the *Privacy Act* in order to make sense of every other provision of the CR Code.

Issue 25: Other

Equifax Data breach in the USA

The data breach in the USA by Equifax is enormous and far reaching. The data of 143 Million consumers were compromised in the USA. There are understandably calls for law reform. The effects have been catastrophic in undermining consumer trust and there are real concerns of enormous increases in identity theft causing consumers serious harm.

Australia needs to ensure it has appropriate consumer protections in place to ensure this does not happen in Australia but more importantly that if it does happen (as security breaches regularly do) that consumers have appropriate protections. This review needs to specifically consider and incorporate consumer protections including the following:

1. Enhanced guidelines to improve security and prevent data breaches

2. All consumers should be entitled to free life- long credit monitoring services. Consumers need to know about activity on their credit report regardless of whether they check.
3. The identity theft remedies need to be streamlined including ensuring credit reporting bureaux have a responsibility to resolve mistaken identity complaints (as noted above)
4. Better consumer control to freeze their credit report for free and for longer than 14 days

Credit Repair Companies

Consumer Representatives have long been concerned about the conduct of credit repair companies, and in recent years there has been an unprecedented consensus between consumer and industry groups on the need to better regulate these and other debt management firms. Following an experts roundtable in February 2016 attended by 40 representatives of consumer groups, industry associations, regulators, and ombudsman schemes, a Communique¹⁸ was released calling for action.

Credit repair companies offer to “fix” your credit report for a fee. Credit Repairers are also purporting to provide services or products to “improve” credit ratings/scores. 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.

The CR Code could include certain requirements that would enable the OAIC to monitor problems caused by credit repair companies in the credit reporting space. For example, Credit Reporting Bodies could be required to record data on applications and disputes raised by credit repair companies, and report this data regularly to the OAIC and ASIC.

The CR Code could also address inappropriate referral arrangements between creditors, CRBs and credit repair companies and require CRBs to inform consumers represented by credit repair companies of their right to dispute inaccurate listings, or listings made in breach of the law, for free and of the free services available to assist in this process. Better promotion of free reports and complaint rights more generally by CRB’s would assist with preventing consumers from falling for credit repair company pitches in the first place – we note that some credit repair companies are using “get a copy of your credit report for free” or “get your creditscore for free” as bait to sign consumers up for other services. More robust rules around access to credit scores, and general transparency about what does and does not impact on credit scores, could also alleviate or prevent some potentially harmful practices.

¹⁸ Available at: <http://www.arca.asn.au/docs/1262/joint-communique-on-regulatory-reform-of-debt-management-firms>

Case study – Jeff’s story

Jeff had a default listing for a fuel card for \$700. Jeff paid the debt but he wanted the listing removed from his credit file. Jeff went to a credit repair company to help him remove the listing.

Jeff was told that he would need to pay \$990+GST for removing the listing, and an additional \$990+GST for administrative services. Jeff had a number of calls with the credit repair company, and at some point he was told the credit repair company could remove the credit listing. Jeff was told this would give his credit score a massive boost, and that most people need a credit score between 600-650 to be able to apply for credit and that once his listing is removed and his credit score boosted, then he could reapply for credit.

The credit repair company did succeed in removing the listing but this did not boost his credit score to 600-650, which is what he felt had been represented to him. After listening to the phone recordings the credit repair company said that they didn’t believe that they misrepresented anything but the client believes they did.

Source: Financial Rights S177412

Case study – Joanne’s story

Joanne went to a credit repair company in 2014 to remove a telco default listing. She agreed to pay \$2178, half was an admin fee and the other half a success fee. The credit repair company negotiated with the telco, who agreed to remove the listing if she paid the full \$1420 owing to telco within a reasonable time, but it was up to her to negotiate repayments. She was working at the time but had a lot of other debt. When she contacted the telco, she was told the debt had been sold to a debt collector who refused to remove the listing if she negotiated a repayment arrangement.

By March 2016, the debt to the credit repair company had grown from \$2178 to \$6978. The company had continued to direct debit her account unsuccessfully every 3-4 days for around one and a half years, and was adding on a \$50 dishonour fee each time. She contacted us after getting a letter from the credit repair company’s solicitors

The complaint went to the CIO. The phone recording was very helpful, because she was promised a full refund after 12 months if the listing could not be removed. There was also nothing about written terms and conditions being sent out later, or that these terms said any negotiated outcome is considered a successful outcome. The written terms say ‘this is a copy of your previously agreed to terms of agreement’, even though the voice recording doesn’t reflect the written agreement. The credit repair company tried to rely on other conversations where they claimed the client agreed to pay the telco and they assessed that she could afford the repayments, but did not produce any voice recordings or file notes to confirm that. Finally the company agreed to waive the whole amount.

Problems stemming from CRBs acting as debt collectors

Consumer Representatives strongly believe the CR Code should include a prohibition against CRBs acting as debt collectors. The following case study demonstrates some of the problems we see around this issue.

Case study – Camilla’s story

Camilla called the Insurance Law Service in late 2016 after obtaining a credit report from Tasmanian Collection Services (TCS), which she needed to provide in support of an application for a rental property. The report provided included the following at page 3:

Debt Information:

Our Client: Insurance Company *Original Amount:* \$2500.00

Name: Camilla

Date Lodged: 12/04/2013 *Current Balance:* \$2500.00

Last Payment Date:

Last Legal Action: Status: Debtor is disputing account

Camilla had been in an accident with a person insured by INSURER back in 2012. INSURER sent a letter of demand, but Camilla disputed that she was at fault, and heard nothing further. She was distressed and angry that this debt was on her TCS report, and concerned that it would affect her credit rating and, in particular, her ability to secure rental accommodation.

We raised a dispute with TCS. TCS asserted that page 3 of the report is in fact a separate report of personal information it holds with respect to Camilla, in its capacity as a debt collection agency. TCS asserted that no one other than Camilla would be provided with the information on pages 3 of the document.

We lodged a dispute with the Office of the Australian Information Commissioner, alleging TCS was in breach of the Privacy Act by including unproven debts lodged with TCS for collection in credit reports sent to consumers.

The OAIC exercised its discretion not to investigate the complaint on the basis that there was no interference with privacy as defined by the Act. The OAIC essentially accepted TCS’ argument that there were two separate reports, one being an Act-compliant credit report, and the other being a listing of personal information (despite the way the reports were presented i.e. in a single PDF consecutively paginated).

Given the limited scope for seeking review of the OAIC’s decision (Federal Circuit/Court review for legal and jurisdictional errors only), we advised Camilla there were insufficient prospects of success to warrant the risks and costs of taking the matter further. Over the

course of the dispute, TCS agreed to issue the report(s) as two separate, separately paginated documents, which at least allowed Camilla to provide an accurate credit report to prospective landlords.

Source: Financial Rights S169827 and S169829

We assert that the OAIC's decision not to investigate the above activities as a breach of the *Privacy Act* was unsatisfactory (or reflects a problem with the narrowness of the law/OAIC's powers), because:

1. The OAIC failed to deal with the actual consumer experience of receiving a document in the form attached in response to a request for their credit report. TCS's technical arguments that there are two separate reports do not address the underlying fact that the presentation was misleading; and
2. The OAIC failed to deal with the commercial reality that TCS's business model (being both a credit reporting body and debt collector) creates a perverse incentive to confuse consumers: TCS wants people like Camilla to think the debts lodged with TCS for collection are already listed on their credit reports, because this provides an incentive to pay!

Case study – Jane's story

Jane was involved in a car collision, was not insured, and believed that Tim (who was insured) caused the accident. Tim's insurance company disagreed with Jane and proceeded as if the accident was her fault. The insurance company had Tim's car repaired but Tim went to a separate car hire company for a rental car. Tim told the hire car company that Jane was at fault and so she was billed for Tim's car hire.

Jane refused to pay for Tim's hire car and although no court action taken, Dun and Bradstreet debt collections told her that they had listed this debt on her credit report. It turned out that there was no listing on Jane's official credit report but Dun & Bradstreet had threatened this in their debt collection letter.

Source: Financial Rights S156953

Recommendations

28. The CR Code should prohibit CRBs from acting as debt collectors.

29. In the alternative, (and clearly less desirable than removing the conflict of interest) CRBs that also operate debt collection operations should be subject to the following rules in the CR Code:

- e. If a consumer has requested access to his or her credit reporting information,
 - i. a CRB may not attach any additional information about debts that the CRB is aware of in its debt collection capacity;
 - ii. a CRB may not use the consumer's access request as an opportunity to undertake debt collection activities; and
 - iii. a CRB must ensure that its debt collection communications and debt collecting communications are completely separate and clearly identified.
 - iv. A CRB who is also a debt collector should be strictly prohibited from referencing their CRB activities during debt collection, misleading consumer's about the lawful rights to list information on the consumer's credit report or otherwise leverage their position as a CRB to encourage payment of a debt.
-

Assisting Individuals to Avoid Defaulting

Consumer Representatives 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 CR 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 16.2 ensures that a current CP who wishes to access credit reporting information for the purpose of assisting an individual to avoid defaulting, 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 CR Code could do more to address this issue. We still have some general concerns about the purpose defined in section 21(H)(Item 5), 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 CR 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.

We believe that the CR 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

30. The CR 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.
 31. The CR Code should specifically prohibit CP's using an alert system through CRB's to track an individual's 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.
-

Key Factsheets

Section 4 should be amended to require provision of Key Fact Sheets (**KFS**) to individuals.

KFS are used in other parts of financial services to help inform consumers about financial products. For credit products the information in the KFS would include the total amount to be paid back over the life of the loan, repayment amounts, fees and charges. The benefits of the KFS is that they are simple, concise and relatively standardised.

The CR Code represents an opportunity to give individuals clear, concise and relevant disclosure about credit reporting, and Section 4 has already set out a list of information that CPs must ensure that an individual is aware of.

CR Code should require CPs to develop an information document that is provided to each individual at the time the CP collects personal information. It is critical that this document be developed with the use of extensive consumer testing and stakeholder feedback to ensure that it is effective at achieving the aims of Section 4.

Recommendations

32. Section 4 should be amended to require the provision of a KFS to the individual (KFS to be developed between stakeholders and become a mandatory requirement in the CR Code).
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Family Violence

Consumer Representatives urge the reviewers to consider whether any specific obligations should be included in the CR Code to guide CRBs and CPs in dealing with family violence. This is particularly relevant to the necessity of being able to remove a default listing as part of a settlement (where it has incurred as a result of duress or fraud on the part of a partner for example), but there may be other issues such as problems with access and identification.

Consumer Representatives note that the ABA has recently drafted Industry Guidelines with respect to helping customers who may be experiencing family and domestic violence. The Guidelines build on existing financial hardship and financial abuse guidelines, and aim to raise the level of awareness across banks about financial abuse in the context of family violence, the impacts of financial abuse and to improve the policies and practices needed to help bank staff help their customers.

Consumer Representatives strongly support that the reviewers consider incorporating the central elements of this Guideline into the CR Code.

One of the more challenging issues that women subject to abuse face is dealing with jointly held loans and debts. These difficulties have a significant impact upon economic and emotional lives.

Consumer Representatives direct the Review to the Women's Legal Service Victoria's (WLSV's) 2015 report titled *Stepping Stones: Legal Barriers to Economic Equality after Family Violence*.¹⁹ This comprehensive report provides extensive details on the key issues women in an abusive relationship face with respect to dealing with banks. They include:

- 25 per cent of the women provided counselling by WLSV's Stepping Stone project have accrued a debt for the benefit of an abusive partner against their wishes, without their knowledge, without understanding the loan contract or as a result of coercion.

¹⁹ Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence*, Women's Legal Service Victoria September 2015
[http://www.womenslegal.org.au/files/file/Stepping%20Stones%20Report\(1\).pdf](http://www.womenslegal.org.au/files/file/Stepping%20Stones%20Report(1).pdf)

- Joint finances become a tool of control when the perpetrator can no longer reach their victim in the form of physical or psychological abuse. Even though it may not be in the abuser's best interests to stop payment or default on the debt, they do so knowing that it will cause further pain for their victim.
- Women subject to abuse are unable to deal with a joint debt because the abuser or the bank withholds consent to removing her name, entering a hardship agreement or dividing the debt. They often have to assume the responsibility for the entire joint debt. This can lead to increased debt; exacerbating the financial situation for the abused.
- Women are commonly subject to duress and threats of violence to induce them to enter into joint loan contracts or loan contracts in their sole name which give them no benefit, and are often not fully understood by them.

The Code could play a vital role in assisting women affected by family violence to take steps to rehabilitate their position by:

- Ensuring that defaults (and negative RHI) can be removed pursuant to agreed settlements and EDR decisions as above;
- Using a similar process to that recommended above for victims of fraud to assist women in circumstances where their ex-partner may have incurred multiple debts in their name to raise disputes with CPs, pass on evidence and prevent further fraud.
- Enabling women to suppress their address from creditors in appropriate circumstances where their safety is at serious risk.

Recommendations

33. Consumer Representatives recommend CPs and CRBs commit to :

- f. Ensuring that defaults (and negative RHI) can be removed pursuant to agreed settlements and EDR decisions as above;
 - g. Using a similar process to that recommended above for victims of fraud to assist women in circumstances where their ex-partner may have incurred multiple debts in their name to raise disputes with CPs, pass on evidence and prevent further fraud.
 - h. Enabling women to suppress their address from creditors in appropriate circumstances where their safety is at serious risk.
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3.3 Non-compliance with provisions of the Code

Issue 26: Meaning of ‘prominently’ when advertising the right for individual to access a free credit report

Does the Code provide sufficient guidance on what is required by CRBs to satisfy the obligation under paragraph 19.3 of the Code?

Consumer Representatives believe CR Code is actually pretty clear about the meaning of ‘prominently’ but in reality we suspect CRBs know their obligations and simply aren’t complying.

We could recommend that as a start the OAIC could issue more guidance on how CRBs can better satisfy their obligations under 19.3 of the CR Code. However, what is really needed is a well-resourced and proactive regulator that takes enforcement action to support the Code. OAIC should audit all the CRBs according to a robust and measurable standard and then enforce compliance.

Issue 27: CRBs keeping credit information accurate, up to date, complete and relevant

Is there evidence of systemic non-compliance with this requirement imposed on CRBs?

Most consumers that reach out to Consumer Representatives for advice are looking for information about how to obtain a credit report, how to interpret a credit report once obtained, and how to remove listings from a credit report. While we advise consumers with seemingly legitimate listings and those with errors, we are not in a position to state the extent of errors in any statistically significant way.

We are also concerned that very few consumers ever check their credit report, meaning that inaccuracies may not be picked up. Further, we often do not hear back from individual consumers or follow them up after advising them on how to contact the credit reporting body to have the information on their credit report corrected.

The real information about whether credit information held by CRBs is accurate, up to date and complete would be held by the CRBs themselves and whichever dispute resolution scheme they are members of. How many consumers contact them to fix inaccurate credit listings? How many turn out to be inaccurate and why?

One thing the CR Code could do is empower an independent compliance committee to do audits, investigations and analysis on complaints data and then issue guidance to CRBs on how to achieve better compliance.

Issue 28: Information requests for an unknown amount of credit

Are there any situations in practice in which a consumer would apply for credit for an unknown amount?

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.

We propose that the amount of credit should be ascertained in all cases as part of the creditors' responsible lending assessment in any event to ensure that the amount granted meets the consumer's requirements and objectives.

Recommendations

34. Section 7 should be deleted from the Code.

Issue 29: Inconsistency between the definition of 'month' and practices of CPs

We 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 the actual length of the month depending on the month in question; or 30 days.

Issue 30: Compliance with transfer of rights requirements

In your experience, does the current drafting of paragraph 13 lead to non-compliance with the requirement notify CRBs of transfer events in practice? Should the Code be amended to clarify the requirements of the original CP and acquirer in situations of a debt transfer?

Consumer Representatives are happy for Section 13 to be redrafted to simplify the first three sub-sections of 13.1. However we want to ensure the Section 13 still maintains obligations on CPs and acquirers to update credit reporting information to ensure that it reflects the current CP and does not create the impression of a duplicate default (fore example). Consumer

advocates have experienced problems in the past in relation to credit reporting and the purchase of debts. These include listing a further default in circumstances where the original credit provider had already listed the same default, and failure to list information in a way which makes it clear that a disclosure relates to an old debt. It would also be helpful if the previous CP was noted as such beside the new CP so that the consumer can follow the genesis of the debt.

We agree that the CR Code could be clearer in its drafting; particularly about which party has committed a breach of the CR Code should there be a failure in making the required disclosure. We support the section that states that in relation to the 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 CR Code.

Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please do not hesitate to contact the Financial Rights Legal Centre on (02) 9212 4216.

Kind Regards,



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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.

Financial Rights Legal Centre



Financial Rights Legal Centre is a community-based consumer advice, advocacy and education service specialising in personal credit, debt, banking and insurance law and practice. Financial Rights operates the National Debt Helpline, 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. Financial Rights took over 25,000 calls for advice or assistance during the 2016/2017 financial year.

A significant part of Financial Rights' 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. Financial Rights 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.