Joint Submission by

Financial Rights Legal Centre

Consumer Action Law Centre

Consumer Credit Legal Service (WA)

Australian Privacy Foundation

Australian Retail Credit Association (ARCA)

CR Code Variation Tranche 2

February 2019

Financial Rights Legal Centre |PO BOX 538, Surry Hills 2010 | Tel (02) 9212 4216 |Fax (02) 9212 4711 |
info@financialrights.org.au | www.financialrights.org.au | @Fin_Rights_CLC | ABN: 40 506 635 273

About the Financial Rights Legal Centre

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps 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, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters. Financial Rights took close to 25,000 calls for advice or assistance during the 2017/2018 financial year.

Financial Rights also conducts research and collects data from our extensive contact with consumers and the legal consumer protection framework to lobby for changes to law and industry practice for the benefit of consumers. We also provide extensive web-based resources, other education resources, workshops, presentations and media comment.

This submission is an example of how CLCs utilise the expertise gained from their client work and help give voice to their clients' experiences to contribute to improving laws and legal processes and prevent some problems from arising altogether.

For Financial Rights Legal Centre submissions and publications go to
www.financialrights.org.au/submission/ or www.financialrights.org.au/publication/

Or sign up to our E-flyer at www.financialrights.org.au

National Debt Helpline 1800 007 007
Insurance Law Service 1300 663 464
Mob Strong Debt Help 1800 808 488

Monday – Friday 9.30am-4.30pm

About the 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.

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 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 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.

Introduction

Thank you for the opportunity to comment on the second tranche of proposed Credit Reporting Code (**CR Code**) Variations. This joint consumer submission has been prepared by the Financial Rights Legal Centre (**Financial Rights**) in consultation with Consumer Action Law Centre (**CALC**), Consumer Credit Legal Centre WA (**CCLSWA**) and the Australian Privacy Foundation (**APF**).

Specific comments on matters within scope

1. Further review of the CR Code
2. Direct marketing practices
3. Inclusion of writ and summons information on credit reports
4. Notification where allegations of fraud
5. Account open date
6. RHI assessment
7. ISO references
8. Corrections issues
9. Payment information

We will respond to ARCA's proposed changes relating to each of these matters in turn.

List of Recommendations

1. Section 24.3 should be amended to read:

   "The Commissioner will initiate an independent review of the operation of this CR Code within 4 years of the date of the commencement of the initial independent review, and thereafter, every 4 years."

2. Section 19.3(c) should instead read:

   "CRBs must not mislead consumers about their right to access their own credit reporting information for free, or about the differences in content between free and purchased reports; or indicate that exerting that right would negatively impact their creditworthiness."

3. The sale of paid credit reports should be banned.

4. All relevant information should be put on consumers' free credit reports; including, at a bare minimum, credit scores.

5. We support the proposed additional section 19.4(c).

6. An additional section 19.4(d) should be added to read:

   "the CRB must not have any pre-ticked consent boxes relating to marketing on its online access-seeking platforms, and forms submitted that have included a pre-ticked consent box neither constitute opting in nor indicate the genuine consent of the access seeker."

7. We support the proposal to explicitly exclude originating processes from credit reports.

8. Paragraph 11 in the Code should be redrafted to be explicit and in plain English such that consumers do not need to cross reference the Privacy Act in order to be aware of which types of publicly available information are allowed to be reiterated on their credit report. The wording should be as follows:

   "11.1 A CRB must only collect publicly available information about an individual:

   (a) from an agency or a state or territory authority; and

   (b) if the content of the information that is collected is generally available to members of the public (whether in the form provided to the CRB or another form and whether or not a fee must be paid to obtain that information); and

   (c) if it relates to activities conducted within Australia or its external territories; and

   (d) if it related to the individual's credit worthiness.

   11.2 For the avoidance of doubt publicly available information does not include:

   (a) originating process issued by a Court or Tribunal; or

   (b) any judgment or proceedings where the individual's rights have been subrogated to an insurer; or

   (c) any judgment or proceedings that is otherwise unrelated to credit;

   because this information does not relate to the individual's creditworthiness."

9. We support extensions to the current ban period provisions in the Code to offer more protections to victims of fraud.
10. Following allegations of fraud where there is a need to correct credit reporting information, CRBs should have an obligation to act as an information hub, liaise with CPs and seek corrections on behalf of consumers who have been victims of fraud.
11. There should be a specific guide drafted within the next six months outlining the processes for corrections of credit reporting information, including the obligation of CRBs to act as an information hub, liaise with CPs and seek corrections on behalf of consumers who have been victims of fraud. The CR Code should then refer to this guide.
12. "The day the consumer credit is entered into" should refer to the day the credit is approved by the CP.
13. RHI should be assessed based on a point-in-time assessment.
14. The reporting of RHI 180+ days in arrears should remain a 7.
15. There should be a separate specific standard written up for complaints handling by CRBs, similar to RG 165. The CR Code should then refer to this standard.
16. The CR Code should also itself explicitly set out basic principles for Internal Dispute Resolution (IDR) processes for CRBs, similar to how the Code of Banking Practice and the Life Insurance Code of Practice set out basic IDR commitments for their subscribers.
17. In the interim, until a specific standard for complaints handling by CRBs is drafted, the CR Code should include some basic principles for IDR processes for CRBs and can refer to the updated ISO standard.
18. Where a CRB has contributed to a consumer's loss because of a breach of the Code, the CRB should compensate the consumer for the losses caused by the CRB's error. Consideration should be given to ways in which this can be operationalised.
19. We support imposing a timeframe for a consulted CRB or CP to respond to first responder CRB regarding a correction.
20. Sections 20.2 (b) and (c) should be amended to read:

    (c) the consulted CRB or CP has a responsibility to respond to the consultation request as soon as practicable, and not less than five business days before the end of the correction period;

    (d) where the consulted CRB or CP will be unable to respond to the consultation request by the end of the correction period, it must advise the first responder CRB or CP at least five business days before the end of the correction period of the delay (unless the consultation request is made less than five business days before the end of the correction period, in which case the advice must be provided as soon as practicable), the reasons for this and the expected timeframe to respond to the consultation request. The expected timeframe must be reasonable.
21. There should be more specificity in the Code as to the enforceability of section 20.2.

22. Where no communication between the CRB and the CP is required, the timeframe for corrections requests should be three business days.
23. The respective obligations of CPs and CRBs regarding corrections issues should be separated in the Code.
24. In the event that an acquiring credit provider, following a correction request from a customer, is unable to obtain relevant information from the original credit provider within the timeframe required by the Code, the complainant consumer must be given the benefit of the doubt and the listing corrected or removed as appropriate.
25. Section 10.1(c) should not be deleted, but should instead be moved under a separate heading in the Code outlining how new arrangement information is to be recorded.

Responses to Issues

Issue 1: Further review of the CR Code

> *"24.3 The Commissioner will initiate an independent review of the operation of this CR Code within 3 years of the date of the completion of the initial independent review, and thereafter, every 3 years (following completion of each independent review)."*

Financial Rights is supportive of amendments to paragraph 24.3 to stipulate that the CR Code will be reviewed more regularly.

We note the clarification in the consultation paper that:

> *"In each instance, the three-year period will commence upon completion of each independent review which means in practice the review period will be more than three years."*

This means that if each review of the code takes up to a year or even longer, this amendment effectively sets out a four- or five-year time period between the adoption of each new Code. We agree with the assessment in the consultation paper that "a longer timeframe for reviews of the code would hamper efficient processing of CR Code issues," and further posit that an inconsistent timeframe for reviews is not ideal.

We see it as contradictory to state that the Code will be reviewed "every" three years, and yet set out a process by which in practice the Code will not in fact be reviewed and renewed every three years.

We do not believe the review schedule should be tied to how long each review takes. This can disincentivise a swift review process.

Regular reviews of the Code are important to ensuring that developments in the finance sector and in the practices of CPs and CRBs can be accounted for through effective, up-to-date regulation.

As such, we suggest an alternative wording of this amendment:

> *"24.3 The Commissioner will initiate an independent review of the operation of this CR Code within 4 years of the date of the commencement of the initial independent review, and thereafter, every 4 years."*

Recommendations

1. **Section 24.3 should be amended to read:**

> ***"The Commissioner will initiate an independent review of the operation of this CR Code within 4 years of the date of the commencement of the initial independent review, and thereafter, every 4 years."***

Issue 2: Direct marketing practices

We note that regarding suggested changes to the Code provisions relating to direct marketing practices, the PwC report states that:

> "*Caution was advised in proposing amendments to the Code which may impinge upon the established regulatory regimes under the APPs or Australian Consumer Law*."

We are pleased that the discussion paper acknowledges that the role of the Code is to strengthen and raise standards beyond existing law. This does not in any way impinge upon law, merely strengthens it.

In 2018 the Federal Court[1] ordered Equifax to pay a $3.5 million penalty for misleading and deceptive conduct and unconscionable conduct in relation to credit reporting services.

Equifax routinely misled consumers by informing them:

- that paid credit reports were more comprehensive than the free reports it was required to provide under the law, when in fact these reports contained the same information; and
- that payment for the report would be a single one-off fee, when in fact its paid credit report packages automatically renewed unless the customer opted out.

According to ACCC Commissioner Sarah Court, "Equifax's conduct caused people to buy credit reporting services in situations when they did not have to. Consumers have the legal right to obtain a free credit report under the law."

We support attempts to strengthen the Code to curb this type of conduct.

Differentiation between the free and fee-based credit reports offered by CRBs

> *"19.3(c) the information made available by the CRB about the **fee-based service** must also identify the difference between the information or service available to the **access seeker** as part of its **fee-based service** compared to that information or service available to the **access seeker** free of charge."*

We acknowledge that this additional clause is intended in part to address consumer advocates' concerns with the severely misleading statements regularly made to consumers by CRBs, regarding fictional negative implications for consumers from seeking their free report. However, we are concerned that this form of words may actually serve to legitimise upselling on the part of CRBs,

[1] Australian Competition and Consumer Commission v Equifax Australia Information Services and Solutions Pty Ltd [2018] FCA 1637

under the guise of explaining the differences: one difference in particular being the inclusion on paid reports, but not on free reports, of credit scores.

We suggest the following form of words as an alternative to the proposed amendment set out above for section 19.3(c):

> *"CRBs must not mislead consumers about their right to access their own credit reporting information for free, or about the differences in content between free and purchased reports; or indicate that exerting that right would negatively impact their creditworthiness."*

This form of words is in line with and builds upon Australian Privacy Principle 7 and ASIC's RG 234, and makes clear that CRBs are to cease the damaging practice of upselling.

We note that several CRBs do not offer paid reports. In our view, CRBs should not offer paid reports at all and should include all relevant information in the free reports, including credit scores, and be able to provide those reports promptly upon request.

Allowing consumers to regularly review their data free of charge is a basic accountability mechanism which would both improve the integrity of the system and recognise consumer's essential ownership of data collected about them. The law permits an exception to privacy to improve the efficiency of the credit market. It does not follow that consumers should be able to be charged to look at their own information.

If the CR Code does not move to explicitly ban the sale of paid reports, at a minimum CRBs should be obliged to include credit scores in all free credit reports provided under the current free access rules.

Pre-ticked consent boxes

> *"19.4(c) the CRB may only provide the **access seeker** with a direct marketing communication where the **access seeker** has provided his or her consent to receipt of this communication by opting in to providing this consent"*

We are supportive of moves to curb aggressive marketing made to consumers who have requested a free credit report. However, we are concerned that the proposed additional clause may still leave open a loophole for CRBs to argue that the submitting of a form that includes a pre-ticked consent box constitutes opting in to providing this consent.

The PwC report states that:

> "*Consumers have specific avenues of redress available under the Act and the Australian Consumer Law when subject to misleading or aggressive marketing*"

However, there is no redress for consumers whom CRBs can claim have consented by submitting a form that includes a ticked consent box, even in cases when that box has been pre-ticked and consumers may be completely unaware that they have supposedly provided their consent.

As outlined in our previous submission, the usage of pre-ticked consent boxes raises significant concerns over aggressive marketing from CRBs to consumers who have requested a free report.

If this clause indeed is intended to outlaw the practice of CRBs including pre-ticked consent boxes in their request forms for free credit report, then it should be explicitly stated as such in the Code. It is our understanding that no CRBs are currently using pre-ticked consent boxes. There is therefore no impediment to enshrining this position clearly in the Code to ensure that there can be no change to this practice in the future.

We recommend an additional clause:

> *"19.4(d) the CRB must not have any pre-ticked consent boxes relating to marketing on its online access-seeking platforms, and forms submitted that have included a pre-ticked consent box constitute neither opting in nor indicate the genuine consent of the access seeker."*

Recommendations

2. **Section 19.3(c) should instead read:**

   > ***"CRBs must not mislead consumers about their right to access their own credit reporting information for free; the differences in content between free and purchased reports; or indicate that exerting that right would negatively impact their creditworthiness."***

3. **The sale of paid credit reports should be banned.**
4. **All relevant information should be put on consumers' free credit reports; including, at a bare minimum, credit scores.**
5. **We support the proposed additional section 19.4(c).**
6. **An additional section 19.4(d) should be added to read:**

   > ***"the CRB must not have any pre-ticked consent boxes relating to marketing on its online access-seeking platforms, and forms submitted that have included a pre-ticked consent box neither constitute opting in nor indicate the genuine consent of the access seeker."***

Issue 3: Inclusion of writ and summons information on credit reports

> *"11.1(d)* ***Publicly available information*** *does not include originating process issued by a Court or Tribunal because this information does not relate to the individual's creditworthiness."*

We are supportive of the explicit exclusion of originating process from credit reports. The Explanatory Memorandum for s6(1) of the Privacy Act is very clear on this matter:

> *'the definition expressly refers only to judgements, not any other form of, or stages in, court proceedings. This means that, for example, an originating summons cannot be included in an*

individual's credit information as court proceedings information because it is not a judgement (even though it is part of the proceedings of the court)'.

We are aware of some opposition to this amendment on the basis that information relating to originating proceedings is already publicly available elsewhere. In our view, this is irrelevant. The explicit inclusion of this information in a person's credit report for the purposes of informing the credit assessment processes of potential creditors fundamentally changes the impact of the information. Such an interpretation also defeats the clear intent of the legislation as outlined in the Explanatory Memorandum above.

There may be other examples of where publicly available information relating to court proceedings should not be included in credit reports as a result of the requirements of section 6N(k)(i). The exception in s6NK(ii) specifically refers to "court proceeding information" which is defined in section 6 as relating to credit only. Other judgment and information may still be "publically available" [2] and not relating to credit (and therefore not excluded in s6N(k)(ii)). For example, where an individual's rights have been subrogated to an insurer and the insured no longer has any control over whether to initiate or contest the proceedings and whether or not any resulting judgment is paid by the insurer. The information proceedings were issued or a judgment was entered may be publically available, such as open access information in NSW and are unrelated to credit. Similarly other civil matters, for example, resulting from a building dispute may be publically available information but should be similarly excluded. To do otherwise is to deny access to justice by creating a disincentive for individuals to defend any matter in court in case they are fully or partially unsuccessful and end up with a judgment on their credit report.

We submit that clause 11.1 should be amended further so that a consumer does not have to cross reference section 6N(k)(i) of the Privacy Act in order to be aware of their rights. Consumers should be immediately aware upon reading this section of the Code which types of publicly available information are allowed to be reiterated on their credit report.

We suggest the following amendments:

*"11.1 A CRB must only **collect publicly available information** about an individual:*

*a) from an **agency** or a **state or territory authority**; and*

*b) if the content of the information that is **collected** is generally available to members of the public (whether in the form provided to the CRB or another form and whether or not a fee must be paid to obtain that information); and*

c) if it relates to activities conducted within Australia or its external territories; and

d) if it related to the individual's credit worthiness.

*11.2 For the avoidance of doubt **publicly available information** does not include:*

(a) originating process issued by a Court or Tribunal; or

(b) any judgment or proceedings where the individual's rights have been subrogated to an insurer; or

(c) any judgment or proceedings that is otherwise unrelated to credit;

[2] Section 5 Court Information Act 2010 (NSW) 'open access information' includes originating proceedings in civil matters

because this information does not relate to the individual's creditworthiness."

Recommendations

7. **We support the proposal to explicitly exclude originating processes from credit reports.**
8. **Paragraph 11 in the Code should be redrafted to be explicit and in plain English such that consumers do not need to cross reference the Privacy Act in order to be aware of which types of publicly available information are allowed to be reiterated on their credit report. The wording should be as follows:**

> ***"11.1 A CRB must only collect*** *publicly available information* ***about an individual:***
>
> ***(e) from an agency or a state or territory authority; and***
>
> ***(f) if the content of the information that is collected is generally available to members of the public (whether in the form provided to the CRB or another form and whether or not a fee must be paid to obtain that information); and***
>
> ***(g) if it relates to activities conducted within Australia or its external territories; and***
>
> ***(h) if it related to the individual's credit worthiness.***
>
> ***11.2 For the avoidance of doubt publicly available information does not include:***
>
> ***(d) originating process issued by a Court or Tribunal; or***
>
> ***(e) any judgment or proceedings where the individual's rights have been subrogated to an insurer; or***
>
> ***(f) any judgment or proceedings that is otherwise unrelated to credit;***
>
> ***because this information does not relate to the individual's creditworthiness."***

Issue 4: Notification where allegations of fraud

> *"17.1 Where an individual believes on reasonable grounds that the individual has been, or is likely to be, a victim of fraud and the individual requests a CRB not to use or disclose their* ***credit reporting information****, the CRB must immediately*
>
> *(c) explain to the individual that they may request a* ***ban period*** *with other CRBs, and that the individual can consent to the CRB (the first CRB) notifying the CRBs nominated by the individual (the notified CRBs) that the individual has requested that the notified CRB/s not use or disclose the individual's* ***credit reporting information*** *(additional ban period request). Where this additional ban period request is made by the individual:*
>
> *(i) the first CRB must, as soon as reasonably practicable, provide the notified CRB/s with the information request provided by the individual to the first CRB;*

(ii) The notified CRB must treat the additional ban period request provided by the first CRB as if it had been provided by the individual directly to the notified CRB."

We support additions to the Code to require CRBs provide more consumer protection in the event of fraud. However, ban periods alone have limited application to assist victims of fraud. Very little is stipulated in the Code regarding steps other than a ban that CRBs and CPs are obliged to take to protect consumers from fraud and/or to investigate allegations of fraud.

Ban periods may be useful for consumers who become aware that new accounts are being fraudulently opened in their name, while this is happening. However, ban periods are not sufficient protection for consumers who have already been victims of fraud and need to report as such to their CPs and seek corrections. We far more commonly assist people who become aware that they have been a victim of fraud when they apply for credit and are rejected or are contacted by a credit provider relating to repayment of a debt that has been fraudulently incurred, and as such as are in need of multiple corrections from CPs, than we do people who may benefit from a ban period.

Consumers are significantly inconvenienced by the multiple corrections often required after instances of fraud. At present, the pressure is on consumers themselves who have been victims of fraud to approach and initiate conversations with each CP individually and to repeatedly provide the same evidentiary material to seek corrections. This can be a drawn out and exhausting process for consumers, who may be significantly disadvantaged. Consumers are further inconvenienced by incorrect information remaining on their credit report for extended periods due to the drawn out process for seeking corrections; with implications for consumers' applications for credit.

The additional data now being supplied as part of CCR will further complicate this process for consumers as there may be both credit liability information and repayment history information that is inaccurate or misleading as a result of fraud, in addition to inquiries and negative data.

It is necessary that consumers are able to access a mechanism that can streamline the process of reporting and corrections following instances of fraud. It is vital that in instances of fraud, the CRB acts as a hub of information throughout the corrections process, communicates with all relevant CPs and works with them to take action to protect the consumer, keeps track of responses and documentation and regularly reports back to the consumer.

In order for CRBs to reliably comply with such a process we suggest a specific guideline be drafted in the next six months on the protocols CRBs and CPs must follow in assisting in consumers' requests for corrections, including the specific guidelines for CRBs in instances of fraud.

We are aware that CRBs taking on a greater role to properly assist consumers who have been victims of fraud may create a cost, but it is our position that as CRBs are in a far better position to streamline this process than individual borrowers, they can and should play a critical role for people who may be facing serious hardship.

This position is shared by PwC, whose report states:

"*it was apparent that the consultation feedback indicated that the mechanism dealing with fraud could be bolstered and some of the default responsibility placed on affected consumers could be shared by other parties*"

and

> *"Given CRBs and CPs are fundamentally better placed to investigate, address and alleviate situations of fraud, shifting part of the obligation on consumer onto CRBs and CPs is conceptually supported."*

The development of a specific guide stipulating the obligations of CRBs and CPs through the corrections process can help to ensure compliance and fair outcomes for consumers following instances of fraud.

Case study –Ian's story

Ian has been an ongoing victim of identity theft since 2016, and has reported 16 separate incidents to the police, including fraudulent loans, credit cards and phone plans. The police are not acting sufficiently to solve the problem and the existing fraud protection mechanisms of CRBs and CPs have not fixed things. Each time an incident has arisen, Ian has had to take it upon himself to sort out the situation directly with the relevant CP, and to get in touch with each of the three major CRBs. He came to Financial Rights for assistance in clearing his credit report. He continues to receive very little assistance from CPs and CRBs either to solve the underlying problem or to more proactively assist when incidents arise.

Source: Financial Rights Legal Centre

Case study –Lara's story

When Lara contacted us, she had been separated from her ex-partner for a month, after three years of marriage. At the time, she was receiving assistance from a social worker and a counsellor due to domestic violence throughout the relationship.

Throughout the relationship, Lara's income of approximately $5,000 per month was deposited into a joint account, which only her husband was able to access. He would give her one card to use, telling her the max limit was $200, and if she asked for more money he would only provide small amounts of cash. Lara never knew how to access the joint account or see statements.

The separation was a result of Lara becoming aware that her ex had gambled away $200,000 of their joint savings. After the separation, she went to the bank to find out if there were any credit cards or account in her name, and found there was a credit card debt of about $4,500.

On advice from Financial Rights, Lara then obtained a copy of her credit report and found several fraudulent enquiries listed, and several debts incurred by her ex, including one that had been sold on to a debt collector. Lara is now in the process of contacting each relevant CP

directly to resolve the issues and make corrections to her credit report. She is still unsure if there are further debts she is unaware of.

Source: Financial Rights Legal Centre

Case study –Alex's story

Alex had his wallet and business cheque book stolen in 2003. He reported this to the police at the time. A few years ago, he applied for credit and was refused and told he had a very poor credit score. He accessed his credit report and had a large number of credit infringements which he knew nothing about. The only debt on his file that he acknowledges is one for approximately $500. Alex contacted Financial Rights after having tried to sort the problem out for three years. He is negotiating directly with each individual CP to make corrections to his credit report and is finding the process lengthy and complicated.

Source: Financial Rights Legal Centre

Recommendations

9. **We support extensions to the current ban period provisions in the Code to offer more protections to victims of fraud.**
10. **Following allegations of fraud where there is a need to correct credit reporting information, CRBs should have an obligation to act as an information hub, liaise with CPs and seek corrections on behalf of consumers who have been victims of fraud.**
11. **There should be a specific guide drafted within the next six months outlining the processes for corrections of credit reporting information, including the obligation of CRBs to act as an information hub, liaise with CPs and seek corrections on behalf of consumers who have been victims of fraud. The CR Code should then refer to this guide.**

Issue 5: Account open date

*"6.2(a) "the day the **consumer credit** is entered into" is:*

*(i) for consumer credit card or charge card **credit**, the later of the approval day or the day the **credit** is generated by the credit provider;*

*(ii) for all other **consumer credit**, the later of the day **credit** is made available to the individual or the day the **credit** is generated by the credit provider"*

At present, most CPs define 'account open date' for credit cards as the day the credit card amount is approved. This proposed amendment shifts away from what is both current practice and in our view best practice. Only one CP argues that 'account open date' should mean the day when a credit card is activated.

It is our view that account open date listed on a credit report should be the day that credit is approved. It is this day that the credit is available to the consumer. In theory, the consumer could activate and spend the entire credit limit in the same day: it serves no responsible lending purposes not to list the card on the report until it is activated because other credit could be granted in the meantime without any knowledge of the existence of the approved but so far inactive account. If the consumer does not ultimately activate the account, and this is preventing them from accessing other credit, it will need to be closed.

We suggest that section 6.2(a) should define account open date as, for cards, the approval day, and for other consumer credit, the day the credit is made available to the individual.

Recommendations

12. "The day the consumer credit is entered into" should refer to the day the credit is approved by the CP.

Issue 6: RHI assessment

Financial Rights are supportive of the clarification in the Code that RHI should be assessed based on a point in time assessment. It is important that there is consistency across CPs and CRBs as to when and how RHI is assessed, and a point in time assessment is the most appropriate approach.

An assessment of RHI based on a consumer's "worst" position at any point in a given month would over-penalise consumers for falling very temporarily behind. Further, if RHI were based on the "worst" position, we would be concerned that consumers might prioritise other payments, knowing that there is little point in them acting quickly to reduce their arrears before the end of the month as "the damage has already been done", so to speak. The point-in-time assessment is a strong incentive for consumers to get back on track in a timely manner throughout a month in which they may have at some point been overdue.

We are not supportive of the proposed change from a '7' to an 'X' for the reporting of RHI 180+ days in arrears. To someone unfamiliar with RHI or accessing their credit report for the first time, a 7 following a 6 looks clearer than an X does. Further, we are concerned with the precedent that accepting such a change would make, given that the primary justification for the change is that the reporting of an 'X' rather than a '7' is already industry practice.

We are disappointed that many CRBs are already reporting an 'X' rather than a '7' on consumers' credit reports in contravention of the CR Code. We understand that the Australian Credit Reporting Data Standard (**data standard**) is inconsistent with the CR Code as it stands, and does indicate an 'X' for the reporting of RHI 180+ days in arrears. It is inappropriate that these two documents are inconsistent with one another, and that in instances of inconsistencies, CR Code subscribers can choose to simply disregard the Code.

Inconsistency between the data standard and the CR Code cannot be an excuse to amend the Code, particularly given that amendments to the CR Code involve consumer consultation while the data standard is solely industry-generated. While the proposed change from a 7 to an X is minor, we are concerned that accepting this amendment sets a precedent whereby inconsistency can be manufactured between the data standard and the CR Code through industry amendments to the data standard, and then that inconsistency used as justification to amend the Code to a position more favourable to industry and less favourable to consumers.

Recommendations

13. **RHI should be assessed based on a point-in-time assessment.**
14. **The reporting of RHI 180+ days in arrears should remain a 7.**

Issue 7: ISO References

Financial Rights agrees that if the Code refers to the ISO guidelines for complaint handling in organisations that it should refer to the most recent standard.

However, we note that the ISO standards are very expensive to access in full, other than through state libraries. It is unreasonable to expect that a consumer wishing to understand the standards to which their CRB and CP are presumed to be held must either first find the ISO standards online and then spend hundreds of dollars to download them, or be aware that they are able to view them at a state library. It is disingenuous to outline obligations in the Code that it is unfeasible for consumers to be able to understand and hold CPs and CRBs to account for.

We also note that the ISO standards are non-specific and weak.

Our experience suggests CRBs are far behind other financial services with respect to Internal Dispute Resolution (IDR) departments and policies.

AFCA and ASIC have very settled and robust guidance about how IDR departments and policies should function, as does the incoming ABA Banking Code of Practice. There is no need to recreate the wheel in implementing strong complaints and corrections procedures, only to bring this Code up to the same standard. We do not agree with PwC's assertion that this change could not be operationalised via the CR Code.

Section 26N(3) of the *Privacy Act* and the OAIC Guidelines for developing codes state that the CR Code may:

- *deal with the internal handling of privacy complaints by all the entities bound by the code and provide for the reporting to the Information Commissioner about these privacy complaints*

Internal handling of privacy complaints includes:

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

The Code of Banking Practice commits subscribers to having free, ASIC-approved internal dispute resolution processes, and that if a complaint is not resolved to the consumer's satisfaction, the bank will provide information as to how to take the complaint to the External Dispute Resolution (EDR) provider. It further commits subscribers to publicise their IDR and EDR processes to consumers.

Regarding complaints handling, the Code of Banking Practice states the following:

> *"201. We will keep you informed of the progress of your complaint.*
>
> *202. We will give you the name of a contact person who is handling your complaint and a way to contact them."*

Regarding complaint responses, the Code of Banking Practice states:

> *"203. When we have completed our investigation, we will provide you a written response, which will include:*
> *a) the outcome of our investigation of your complaint;*
> *b) your right to take your complaint to our external dispute resolution provider; and*
> *c) the name and contact details of our external dispute resolution provider."*

Regarding complaint handling timeframes, the Code of Banking Practice states:

> *"204. If we resolve your complaint to your satisfaction within five business days, we do not need to provide you with a written response as outlined in paragraph 203, unless you ask us. This does not apply to a complaint relating to hardship, a declined insurance claim or the value of an insurance claim.*
>
> *205. If we are unable to resolve your complaint within 21 days, we will tell you that we need more time to investigate the complaint.*
>
> *206. If we are unable to resolve your complaint within 45 days, we will:*
> *a) tell you the reasons for the delay;*
> *b) tell you the date by which you can reasonably expect to hear the outcome of our investigation; and*

c) give you monthly updates on the progress; and
d) provide you with the name and contact details of our external dispute resolution providers."

The Life Insurance Code of Practice similarly gives detailed information regarding subscribers' IDR processes.

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. In our experience, CRBs in dealing with complaints will almost always use the maximum time available and will regularly request unnecessary information. We suspect that IDR requirements are not well developed or understood by CRBs. The CR Code can and should be used to implement consistent IDR procedures for CRBs.

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 cannot navigate the system themselves.

Ensuring that CRBs implement and abide by better complaints handling procedures would go a long way to dissuading people from going to debt management firms (like credit repair agencies) to help them fix inaccurate listings on their credit file.

Where a CRB has contributed to a consumer's loss because of a breach of the Code, we see it as appropriate that the CRB compensate the consumer for the losses caused by the CRB's error. Consideration should be given to ways in which this can be operationalised.

We suggest that:

- There should be a separate specific standard published by the OAIC for complaints handling by CRBs, similar to RG 165. The CR Code should then refer to this standard.

- The CR Code should also itself explicitly set out basic principles for IDR processes for CRBs, similar to how the Code of Banking Practice and the Life Insurance Code of Practice set out basic IDR commitments for their subscribers.

We understand the drafting of a complaint handling standard specific to CRBs may take several months, and would suggest that in the interim the CR Code should include some basic principles for IDR processes for CRBs and can refer to the updated ISO standard.

For case studies illustrating the necessity of improved IDR processes for CRBs, please refer to the October 2017 Financial Rights submission to the PwC review of the CR Code, where under the complaints handling section you can read Fiona's, Nikki's and Jenny's stories.

Recommendations

15. **There should be a separate specific standard written up for complaints handling by CRBs, similar to RG 165. The CR Code should then refer to this standard.**
16. **The CR Code should also itself explicitly set out basic principles for internal dispute resolution (IDR) processes for CRBs, similar to how the Code of Banking Practice and the Life Insurance Code of Practice set out basic IDR commitments for their subscribers.**
17. **In the interim, until a specific standard for complaints handling by CRBs is drafted, the CR Code should include some basic principles for IDR processes for CRBs and can refer to the updated ISO standard.**
18. **Where a CRB has contributed to a consumer's loss because of a breach of the Code, the CRB should compensate the consumer for the losses caused by the CRB's error. Consideration should be given to ways in which this can be operationalised.**

Issue 8: Corrections issues

It is vital that CRBs have strong complaints and corrections procedures. This is particularly the case as increasing amounts of data are being added to credit reports, which will inevitably bring more complaints and more need for corrections.

We are disappointed that ARCA has chosen not to take up several of the more substantive corrections and complaints issues raised in the initial consultation and recommended by PwC as issues requiring further consideration.

It is important that these proposed complaints and corrections amendments are treated with the seriousness they deserve, and are adequately considered. We respond here to the two minor amendments drafted by ARCA, and also revisit several more substantive issues, raised by both our submission and by PwC, that require consideration.

Review of correction timeframe

Responsibilities of consulted CRBs and CPs

"20.2 When a CRB or CP (the consulted CRB or CP) is consulted by another CRB or CP (the first responder CRB or CP)

(a) when making the consultation request, the first responder CRB or CP must notify the consulted CRB or CP the date when the 30-day period to resolve the individual's correction request ends (the correction period);

(b) the consulted CRB or CP must take reasonable steps to respond to the consultation request as soon as practicable, and not less than three business days before the end of the correction period;

(c) *where the consulted CRB or CP will be unable to respond to the consultation request by the end of the correction period, it must advise the first responder CRB or CP at least three business days before the end of the correction period of the delay (unless the*

consultation request is made less than three business days before the end of the correction period, in which case the advice must be provided as soon as practicable), the reasons for this and the expected timeframe to respond to the consultation request."

We welcome the introduction of a timeframe on responses from consulted CRBs to the first responder CRB to ensure that the first responder CRB can comply with the 30 day response time. In our view, there should be a more restrictive timeframe for responses from consulted CRBs and CPs to the first responder CRB. "As soon as practicable" is not specific enough, and we are concerned that consulted CRBs will make a habit of using all available time to reply and only provide responses to first responder CRBs three business days prior to the conclusion of the 30 day response time. This will have the effect of providing first responder CRBs an excuse to exceed their 30 day response time. We would recommend that the consulted CRB or CP should have an obligation to respond at least five business days prior to the end of the correction period.

We recommend amended wording for 20.2(b) and 20.2(c) as follows:

(b) the consulted CRB or CP has a responsibility to respond to the consultation request as soon as practicable, and not less than five business days before the end of the correction period;

(c) *where the consulted CRB or CP will be unable to respond to the consultation request by the end of the correction period, it must advise the first responder CRB or CP at least five business days before the end of the correction period of the delay (unless the consultation request is made less than five business days before the end of the correction period, in which case the advice must be provided as soon as practicable), the reasons for this and the expected timeframe to respond to the consultation request. The expected timeframe must be reasonable."*

While we support this change, we do not believe that it is clear enough as to how the responsibility for consulted CRPs and CPs to respond appropriately to requests for information can be effectively enforced, and what recourse there is if they fail to do so. It should be made clear in the Code that failure of a consulted CRB or CP to comply with requests for information in the necessary timeline constitutes a breach of the Code, and made clear what the process is for recourse following such a breach.

Corrections timeframe

*20.4 If a CRB or CP is satisfied that **credit-related personal information** needs to be corrected, the CRB's or CP's obligation to take reasonable steps to correct the information will be satisfied where the CRB or CP, or a CRB or CP consulted in relation to the correction request (as applicable):*

*(a) as soon as practicable it makes reasonable endeavours to determine if a correction should occur, and, once this determination has been made, corrects the **credit information** as soon as practicable"*

We acknowledge the attempt to account for consumer advocate concerns that the 30 day timeframe is in many cases too lenient, and note that the amendment suggests CRBs and CPs

respond faster when they are able to. This is a welcome change, however in our view does not go far enough in terms of specificity and enforceability.

There are many cases in which a consumer has clear and cogent information of an inaccuracy, and in which it is not necessary to involve the CP. CRBs 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 time period and without reference to the CP. PwC agrees that when third parties are not required to prove the need for a correction that the timeframe could be shorter. The rules should explicitly reflect that shorter timelines should apply for these matters: it is not enough to include a vague statement that corrections should be made as soon as is practicable. An appropriate timeframe in cases such as these is three business days.

Our proposed wording for this provision is as follows:

> *(a) as soon as practicable it makes reasonable endeavours to determine if a correction should occur, and, once this determination has been made, corrects the **credit information** within three business days.*

Separating obligations of CPs and CRBs regarding corrections

Rule 20.3 of the Code combines the obligations of credit providers (s21V Privacy Act) with those of credit reporting bodies (s20T Privacy Act). We understand that the intention of this is to create a system whereby a consumer could expect an identical corrections outcome and experience whether they approach the CP or the CRB. However, despite this intention it is not clear to consumers that they can approach either. In practice this combination creates a situation in which it is unclear to consumers whether they should go to the CP or the CRB, and in which both CPs and CRBs regularly attempt to avoid responsibility on the corrections issue by telling the consumer that they should go to the other entity. It is also unclear which entity is in breach of the CR Code if the correction does not happen in a timely manner and the consumer suffers additional detriment because of the delay.

We disagree with PwC's argument that this could represent a fundamental change to the operation of the CR Code. It is simply a redrafting exercise to ensure that it is clear what obligations and responsibilities are attributed to which entities. We similarly reject ARCA's assertion that there is no evidence that this variation would resolve an underlying issue with current corrections processes. As a consumer-facing organisation that often helps people through corrections and complaints processes with their CPs and CRBs we see this as a necessary amendment to add clarity to the Code and make it easier to understand for the general public, and more clearly hold CPs and CRBs accountable to their obligations. These are things that are expected under the OAIC's Guidelines for developing codes.

It is important that the respective obligations of CPs and CRBs be separated in the Code such that it reduces confusion and becomes clear to consumers whether they should go to a CP or CRB in cases where corrections are required. Separating the obligations will also make it clear which entity is in breach of the CR Code if the correction does not happen in a timely manner and the consumer suffers additional detriment because of the delay. Finally, separating these obligations will ensure that necessary communications (both between the CRB and CP, and from either of them to the consumer) do occur. The drafting of a more specific corrections protocol, as raised in recommendation 11, can supplement additional clarity in the Code and more comprehensively outline obligations of CRBs and CPs to assist consumers requesting corrections.

Imposing joint responsibility for correction on the original CP and the acquiring CP in debt transfers

There are significant difficulties faced by consumers and CPs alike following the transfer of a debt, if there is need for correction of information relating to the period prior to the transfer. Acquiring CPs often face difficulties making corrections due to inaccessibility of the information required to address the correction request.

The problems that stem from credit reporting errors caused by original CPs are common and very difficult to resolve if the original CP does not retain responsibility for the correction of information after they have transferred a debt. Consumer Representatives consistently face challenges of getting documentation to prove the need for a correction after a debt has been sold.

We understand that the amendments to section 20.2 can function to impose some responsibility on the original CP to assist in situations where corrections are required, by providing necessary information to the acquiring CP. However, as stated above in our comments on the amendments to section 20.2, it is unclear how this can be enforced and what consequences are available for original CPs who do not comply with their responsibility to respond to information requests in a timely manner. It also does not address the issues that arise when an original CP has gone into liquidation. As such, while this amendment can improve processes for corrections following the transfer of a debt, we do not believe this amendment alone is sufficient to ensure adequate outcomes for consumers seeking corrections.

The Code should be amended to set out that when the acquiring CP is unable to obtain relevant information from the original CP within the timeline set out in section 20.2, the complainant consumer must be given the benefit of the doubt and the listing corrected or removed as appropriate. This will function to incentivise tighter contractual arrangements between original and acquiring CPs, to incentivise acquiring CPs to do all they can to seek relevant information from the original CP in a timely manner, and to address the issues that arise when a consumer seeks a correction of information but the original CP has gone into liquidation. Incorrect information remaining on a consumer's credit report indefinitely has the potential to be immensely detrimental to that consumer's wellbeing. We see this as the only way in which to protect a consumer from being stuck in limbo in situations where the original CP has gone into liquidation or otherwise cannot or does not respond to requests for information.

Recommendations

19. **We support imposing a timeframe for a consulted CRB or CP to respond to first responder CRB regarding a correction.**
20. **Sections 20.2 (b) and (c) should be amended to read:**

    (c) the consulted CRB or CP has a responsibility to respond to the consultation request as soon as practicable, and not less than five business days before the end of the correction period;

    (d) where the consulted CRB or CP will be unable to respond to the consultation request by the end of the correction period, it must advise the first responder CRB or CP at least five

business days before the end of the correction period of the delay (unless the consultation request is made less than five business days before the end of the correction period, in which case the advice must be provided as soon as practicable), the reasons for this and the expected timeframe to respond to the consultation request. The expected timeframe must be reasonable.

21. **There should be more specificity in the Code as to the enforceability of section 20.2.**
22. **Where no communication between the CRB and the CP is required, the timeframe for corrections requests should be three business days.**
23. **The respective obligations of CPs and CRBs regarding corrections issues should be separated in the Code.**
24. **In the event that an acquiring credit provider, following a correction request from a customer, is unable to obtain relevant information from the original credit provider within the timeframe required by the Code, the complainant consumer must be given the benefit of the doubt and the listing corrected or removed as appropriate.**

Issue 9: Payment information

We do not support the outright removal of "the CP agrees to terminate the consumer credit provided to the individual to which the overdue payment relates and replace it with new consumer credit" from the CR Code. We note that due to the distinction drawn in the Privacy Act between 'payment information' and 'new arrangement information', there is justification for recording these things differently, but the outright deletion of this from the Code leaves the Code unclear. As much as possible, amendments should be made to the Code such that consumers do not have to cross-reference the Privacy Act in order to understand their credit reports.

We recommend instead moving this line under a separate heading in the Code outlining how new arrangement information will be recorded.

Recommendations

25. **Section 10.1(c) should not be deleted, but should instead be moved under a separate heading in the Code outlining how new arrangement information is to be recorded.**

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 Financial Rights on (02) 9212 4216.

Kind Regards,

Karen Cox
Coordinator
Financial Rights Legal Centre
Direct: (02) 8204 1340
E-mail: Karen.Cox@financialrights.org.au