A quick fix? Credit repair in Australia

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A poor credit history can preclude an individual from obtaining loans, credit cards and even access to basic utilities. Credit repair companies claim to assist people in this situation, by deleting adverse information from their credit histories. As financial hardship becomes more widespread, increasing numbers of Australians are turning to credit repair. Yet critics maintain that these companies charge high fees for services that are available for free through ombudsman schemes. In this way, they often increase their clients' financial hardship, while subverting the objectives of the ombudsman schemes. This article examines the Australian credit repair industry, including the regulatory context and the industry's attempts at self-regulation. It discusses several case studies from a Melbourne community legal centre, and describes the regulation of credit repair in the United States and the United Kingdom. It considers various law reform options that would address the problems posed by credit repair in Australia.

INTRODUCTIONS

The rise of an Australian credit repair industry reflects both the growing importance of access to consumer credit[1] and the increasing prevalence of financial hardship in Australian society. Credit repair companies (CRCs) offer to improve their clients' access to credit by deleting adverse information from their credit reports. A poor credit history can prevent an individual from obtaining loans, credit cards, and even access to basic utilities such as electricity and telephone connections.[2] At the same time, increasing rates of financial hardship make it more likely that even relatively affluent Australians will have difficulty paying their bills and making their loan repayments. Growing rates of personal insolvency, particularly among high-income earners, suggest that middle class Australians are experiencing increasing levels of financial distress.[3] Tertiary qualifications, home ownership and a high-status job are no longer reliable bulwarks against such problems.[4] Moreover, with Australia's unemployment benefits among the lowest in the developed world, even short periods of unemployment can pose a serious risk to an individual's financial stability and capacity to meet obligations such as loan repayments.[5] In this context, it is unsurprising that more and more Australians are seeking help from CRCs, after discovering defaults listed on their credit reports.

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[1] Van Der Eng P, "Consumer Credit in Australia During the Twentieth Century" (2008) 18 *Accounting, Business & Financial History* 243.

[2] Nigel Waters points out that "credit status is increasingly used as a proxy indicator of eligibility for other services (such as the connection of utilities and provision of mobile telephones)": Waters N, "Privacy Regulation of Credit Reporting in Australia: Major Change After 25 Years' Tension?" (2012) 108 *Precedent* 18 at 19. Several Australian energy and telecommunications providers advise that they may conduct credit checks in relation to potential customers. See, eg, Energy Australia, *Privacy Policy* (31 January 2014) http://www.energyaustralia.com.au/privacy; Alinta Energy, *Privacy Policy* (2014) http://alintaenergy.com.au/energy-products/customer-information/privacy-policy; Telstra, *Privacy Statement (Including Credit Reporting Policy)* https://www.telstra.com.au/privacy/privacy-statement/index.htm.

[3] Ramsay I and Sim C, "Personal Insolvency in Australia: An Increasingly Middle Class Phenomenon" (2010) 38 *Federal Law Review* 283 at 283-284.

[4] Ramsay and Sim, n 3 at 293-298.

[5] Denniss R and Baker D, "Are Unemployment Benefits Adequate in Australia?" (Policy Brief No 39, Australia Institute, April 2012) pp 1-3.

While CRCs promise to help their clients, consumer advocates are concerned that they only serve to entrench financial hardship. CRCs charge very high up-front fees, sometimes thousands of dollars, for services that could otherwise be accessed free of charge through an industry ombudsman, financial counselling service or community legal centre. Critics point out that people who contact CRCs are often experiencing acute financial stress, meaning that they are vulnerable to high-pressure sales techniques and unrealistic promises of assistance. They also observe that many Australians have little understanding of credit reporting law and believe, wrongly, that CRCs can expunge legitimate listings from their credit files. CRCs often fail to advise potential clients of the steps they can take to improve their own credit reports,[6] telling them that they have no option but to pay a CRC or wait five years for the listing to be removed automatically.[7] They are also reluctant to publicise their fees and often impose additional, unexpected charges for late payment, cancellation or other "administrative" functions.[8]

Australian policymakers can learn from several other jurisdictions in determining how best to address the risks posed by CRCs. In the United States, credit repair has attracted considerable attention from legal researchers and legislators since the 1980s. American CRCs are now governed by the federal *Credit Repair Organizations Act* (CROA),[9] as well as State laws in some jurisdictions. In the United Kingdom, CRCs have been subject to a licensing regime since 2008, first under the *Consumer Credit Act 1974* c 39 (UK) and more recently under the *Financial Services and Markets Act 2000* c 8 (UK). In Australia, by contrast, very little is known about the nature and scale of the industry, and there are few legal protections in place for clients of CRCs. While CRCs are subject to the *Australian Consumer Law* (ACL)[10] and State-based fair trading laws, they are not subject to any industry-specific regulation.

The need to examine the activities of CRCs has become more urgent since the introduction of new credit reporting laws in March 2014. Since then, Australian credit bureaus have been entitled to collect and disseminate much more detailed information about individuals, following amendments to the *Privacy Act 1988* (Cth). The Commonwealth Government implemented these changes in response to an Australian Law Reform Commission (ALRC) report released in 2008, which noted "a strong push by credit reporting agencies and credit providers to expand the types of personal information that may be collected and disclosed in the credit reporting process".[11] While these reforms have some merit,[12] they may increase the number of errors and adverse listings on individuals' credit reports.[13]

[6] Energy & Water Ombudsman (NSW) (EWON), *Research Survey Report Consumers' Use and Experience of "Credit Fix" Agencies* (September 2012) p 2 http://www.ewon.com.au/ewon/assets/File/EWON%20Credit%20Repair%20Report_2012.pdf.

[7] EWON, n 6, pp 18-19. Section 20W of the *Privacy Act 1988* (Cth) states that credit reporting bodies can retain information about defaults, and payments relating to defaults, for five years.

[8] The EWON report describes one CRC client who was threatened with a $300 cancellation fee, per listing, if she cancelled her contract: EWON, n 6, p 15. The authors discovered several instances of similar ad hoc fees in their survey of CRCs' websites and the files of CALC clients. These CRC websites and CALC files are discussed further below in this article. Such fees are charged in addition to the CRCs' upfront fees, which are generally non-refundable.

[9] *Credit Repair Organizations Act* 15 USC § 1679-1679j (2012).

[10] The ACL is a schedule to the *Competition and Consumer Act 2010* (Cth), formerly known as the *Trade Practices Act 1974* (Cth).

[11] Australian Law Reform Commission (ALRC), *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) Vol 3, p 1800 [55.3].

[12] See, eg, Waters, n 2 at 20; Witzleb N, "Halfway or Half-Hearted? An Overview of the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth)" (2013) 41 ABLR 55; Kreltszheim D, Shailer J and Carroll S, "Credit Reporting Privacy Reforms: Boon, Bane or Something in Between?" (2013) 28 *Australian Banking and Finance Law Bulletin* 134.

[13] Several submissions to the ALRC's inquiry noted the heightened risk of errors appearing in credit reports under a more comprehensive reporting regime. This perceived risk was attributed in part to the increasing amounts of data to be entered by credit providers, and in part to the limited incentives for reporting agencies to check that such data is accurate. While there is some incentive to verify data under a reporting system based on defaults, agencies may be less concerned to verify seemingly "positive" information, such as repayment history, since "the consequences of an inaccuracy will appear less severe". See ALRC, n 11, p 1821 [55.87]. For a discussion of the term "positive", as distinct from "comprehensive", credit reporting, see ALRC, n 11, pp 1800-1802 [55.6]-[55.11].

This in turn will create greater demand for the services of CRCs. In this context, it is important to consider whether or not Australian CRCs require more stringent regulation, given the risk that they pose to vulnerable Australians.[14]

This article examines the Australian credit repair industry, including the regulatory context and the industry's attempts at self-regulation. It reports the results of a survey of files at a Melbourne community legal centre. It goes on to discuss the measures that legislators in the United States and the United Kingdom have taken to address the problems caused by CRCs. It considers a range of law reform options, ranging from a total ban on CRCs to an enhanced form of industry self-regulation. It concludes by endorsing a hybrid model, drawing on aspects of both the US and UK regimes.

CREDIT REPAIR IN AUSTRALIA

What is credit repair?

The rise of CRCs reflects the increasingly important role of consumer credit in Australia and other Western societies.[15] Since the Second World War, access to consumer credit has supported discretionary spending and raised living standards, by making it easier for people to buy expensive products such as cars and large household appliances.[16] More recently, consumer credit has become an "essential utility", with a good credit history often serving as a prerequisite for access to basic services such as telephone connections and electricity.[17] Yet despite the increasing importance of credit reports and credit ratings, most individuals do not regularly monitor their credit reports and only discover that they have a poor credit rating when they apply for a loan, credit card or hire purchase agreement.[18] Faced with a negative listing or "default" on their credit reports, many seek help from a company promising to "repair" their credit histories, making them eligible for further loans.

CRCs act on behalf of their customers to identify and challenge any inaccuracies in the records of credit reporting agencies. In Australia, the details that may be contained in a credit report are prescribed by the *Privacy Act*.[19] Until March 2014, credit reporting agencies could only record the details of an individual's current credit providers, bills overdue by more than 60 days, dishonoured cheques, court judgments and bankruptcies. The credit report could also include details of recent credit checks performed by lenders and other service providers with respect to the individual.[20] In November 2012 the *Privacy Amendment (Enhancing Privacy Protection) Amendment Act 2012* (Cth) amended the *Privacy Act*, introducing a more "comprehensive" credit reporting regime.[21] Under the new Pt IIIA of the *Privacy Act*, credit reports may now contain much more detailed information, including the type of credit extended to the individual, the extent of the credit (that is, the credit limit), the duration of the credit agreement and the individual's repayment history. Consumer advocates point out that even before these changes took effect, Australian credit reports revealed "significant and recurrent problems of poor data quality",[22] while agencies often made little effort to help individuals to correct errors on

[14] See Consumer Affairs Victoria, "What Do We Mean By 'Vulnerable' and 'Disadvantaged' Consumers?" (Discussion paper, 2004) pp 3-4. Cited in Akseli O, "Vulnerability and Access to Low Cost Credit" in Devenney J and Kenny M (eds), *Consumer Credit, Debt and Investment in Europe* (Cambridge UP, 2012) pp 4, 9.

[15] Van Der Eng, n 1; Dawn Burton, *Credit and Consumer Society* (Routledge, 2008) p 1.

[16] Gelpi RM and Julien-Labruyère F, *The History of Consumer Credit: Doctrines and Practices* (Mn Liam Gavin trans, Macmillan Press and St Martin's Press, 2000) pp 100, 105 [trans of *Histoire du Crédit à la Consommation: Doctrines et Pratiques* (first published 1994)]. The authors note that "[c]redit ma[kes] it possible to separate current consumption from current income, and thus blur[s] social distinctions": p 99.

[17] Waters, n 2 at 19.

[18] EWON, n 6, p 3.

[19] *Privacy Act 1988* (Cth), Pt IIIA.

[20] ALRC, n 11, pp 1726-1727 [53.25].

[21] ALRC, n 11, pp 1800-1802 [55.6]-[55.11].

[22] Waters, n 2 at 20.

their credit reports. Under the new regime, it is possible that more erroneous information will appear on credit reports.[23] This may cause more people to seek assistance from CRCs.

CRCs form part of a burgeoning industry that offers fee-based commercial services to people experiencing financial difficulty.[24] Budgeting or "debt management" firms assume control of their clients' finances, offering "peace of mind" and freedom from the stress of managing bills and competing expenses. "Debt negotiation" firms offer to improve their clients' financial situation by persuading their creditors to "write off" part or all of their debts. Other commercial firms offer to help their clients to enter into binding debt agreements[25] or file for bankruptcy. Some of these firms may offer credit repair as an adjunct to their main services. CRCs offer to improve individuals' access to credit by removing negative information from credit reports. Our survey of the information provided by CRCs on their websites shows that they claim that they can remove defaults or "black marks" from a client's credit report by negotiating with the client's creditors, credit reporting agencies or an "independent body", such as an ombudsman or external dispute resolution (EDR) scheme. CRCs often charge fees in advance, on the proviso that these fees will be refunded if they cannot improve their clients' credit report or remove defaults. In their marketing material, CRCs often claim that they have special expertise or a distinctive approach, meaning that they get better "results" than individuals acting alone.

In 2012, the Energy & Water Ombudsman of New South Wales (EWON) produced a report on the activities of CRCs in Australia, based on a customer survey and "mystery shopper" research.[26] EWON undertook this research in response to anecdotal evidence that many customers engaged CRCs without realising that they could use EWON's services themselves, free of charge, to dispute adverse information placed on their credit reports by utilities providers. These customers often told EWON that they would not have engaged a "commercial advocate" to act on their behalf, if they had known that EWON's services were free. The report noted that these customers were often experiencing financial hardship, a situation "likely to be exacerbated by the avoidable fees charged by their agents".[27] EWON surveyed 43 of its customers whose cases had originally been lodged by CRCs. Of these respondents, 70% had more than one default or late payment listed on their credit report. Eighty-eight per cent only discovered that they had a bad credit rating as a result of applying for new credit, causing EWON to conclude that they were under "elevated… financial pressures" at the time they sought help from CRCs. EWON noted that people from non-English speaking backgrounds were over-represented in the sample, and suggested that these groups might be "less confident" than other Australians in dealing with creditors. Almost half those surveyed by EWON said that they sought help from CRCs because they did not know how to "fix" their credit ratings themselves.[28] In "the overwhelming majority of cases', the listings on customers" credit reports were for debts of less than $500, with several being less than $120. EWON noted with concern that the CRCs' fees were often far in excess of the debt owed to the original creditor.[29]

EWON's report outlined the business model most prevalent in the Australian credit repair industry, drawing on the "mystery shopper" research carried out by members of its staff. While it found considerable variation among CRCs, it identified three common fee structures in the industry. The first involved initial upfront fees ranging from $300 to $1,300, with additional payments for each

[23] ALRC, n 11, pp 1800-1802 [55.6]-[55.11].

[24] Financial Counselling Australia, *Consultation on the Exposure Draft of the National Consumer Credit Protection Amendment (Enhancements) Bill 2011*, Submission to Treasury (22 August 2011) p 2.

[25] *Bankruptcy Act 1966* (Cth), Pt 9.

[26] EWON, n 6, p 2.

[27] EWON, n 6, p 2.

[28] EWON, n 6, p 3. EWON recommended several measures aimed at protecting consumers from the significant fees charged by CRCs. These included direct advertising to consumers, to raise their awareness of free external dispute resolution (EDR) schemes; liaison with creditors, to encourage them to advise consumers of the relevant EDR schemes; and negotiation with credit reporting agencies, to ensure that they include the details of EDR schemes in their credit reports and on their websites.

[29] EWON, n 6, p 4.

listing successfully removed from a client's credit record. The second model charged fees for each listing on a client's credit report, irrespective of the CRC's success in removing them. The third required clients to pay for each listing successfully removed from their credit reports.[30] To date, the EWON report is the most extensive empirical study of credit repair in Australia.

The websites of Australian CRCs reveal very little about their fees or the terms upon which they provide their services. In April 2014, the authors conducted a survey of eight Australian CRCs' websites.[31] Only one of these websites stated the fees it charged for "repairing" a credit report. Company A stated that its "price for service is one thousand and ninety five dollars". This figure appeared non-numerically, in extremely fine print, at the bottom of a web page, at the end of a paragraph of disclaimers. Another CRC, Company B, offered prospective clients the chance to "get started for as little as $50". Some CRCs published terms and conditions and disclosed some of their fees in this context. Company C referred to a "retained fee [sic]" of $1,095 in item 6 of its terms and conditions. Once again, the figure appeared in fine print and was expressed non-numerically as "[o]ne thousand and ninety five dollars". The terms and conditions of Company D made reference to a $550 "reactivation fee". This fee applied if a client's account was "paused" due to his or her failure to provide necessary documents, or to pay the company's ongoing fees, within 30 days. In most cases, the CRCs surveyed did not provide their terms and conditions on their websites. Company E stated that the "terms of retaining [Company E] will be provided to you ounce [sic] you decide to retain the services of [Company E]".

Those CRCs that did disclose their terms and conditions often imposed heavy obligations on clients, while significantly limiting their own legal responsibilities. In its terms and conditions, Company D urged its clients to

> understand that if you are relying on our 100% refund guarantee on the fees paid towards your credit rating repair if your application does not proceed… that this clause requires you to provide all application and assessment forms, supporting documents, signed letters of authority, signed ombudsman forms, photo ID, drivers [*sic*] licence and a copy of both your Veda Advantage credit file and your Dun & Bradstreet credit file, your Medicare card as well as full and detailed explanations of the circumstances that led up to your credit file listing within 10 working days of the payment of your fee. Failure to comply with this clause may render the 100% refund guarantee not applicable to your particular application.

Company D's terms and conditions further warned prospective clients that

> any indications that any statement, document, or verbal conversation that you have made or provided to [Company D], are fabricated, inaccurate, misleading, deceptive or untruthful; may be grounds to suspend your contract. In the event of such a suspension, we shall inform you in writing and immediately cease work on your file. You will have 14 days to sufficiently evidence your claim in order to have your suspended file reactivated. In the event of your file not being reactivated, all monies paid by you shall be forfeited. This in no way excuses you from liability or payment of any other monies due and payable under our agreement. You shall not be entitled to a refund of any nature.

Company D also reserved the right to terminate a contract if a client failed to exhibit "common courtesy and basic good manners". It stated that termination on these grounds would not entitle clients to a refund for fees already paid, and would "in no way excus[e] [the client] from liability or payment of any other monies due and payable".

[30] EWON, n 6, p 4. In the third scenario, according to EWON, the CRC would seek payment after the creditor had agreed to remove the listing, but before it had actually been removed.

[31] The CRCs surveyed will be described as Companies A, B, C, and so on.

The regulatory context

General consumer protection laws

Australian CRCs are currently subject to the ACL, which contains "general protections" for all consumers, prohibiting misleading and deceptive conduct, unconscionable conduct and unfair contract terms.[32] The ACL also contains "consumer guarantees" applicable to goods and services. Under these provisions, a supplier guarantees that its services will be provided with due care and skill, within a reasonable time, and that they will be fit for any specified purpose.[33]

Consumer credit legislation

Under the *National Consumer Credit Protection Act 2009* (Cth) (NCCPA), businesses engaging in "credit activities" are required to obtain a "credit licence".[34] "Credit activities", for the purposes of the NCCPA, include providing credit, consumer leases, mortgages, guarantees or other "prescribed activities".[35] They also include "credit services", defined as "provid[ing] credit assistance to a consumer" or "act[ing] as an intermediary" in the provision of such a service.[36] "Credit assistance" includes suggesting that a person apply for credit, an increased credit limit or a consumer lease, or assisting with an application for any of these things.[37] Engaging in credit activities without a credit licence is both a civil and criminal offence, with sanctions including fines and imprisonment for up to two years.[38] However there are several classes of people who are exempt from the licensing requirement. These include not-for-profit financial counsellors, trustees in bankruptcy, debt collectors, employment agencies and lawyers.[39] Currently, Australian CRCs are not required to hold a credit licence, although at least one CRC claims to hold such a licence.

Privacy laws and the Credit Reporting Code of Conduct

The amended Pt IIIA of the *Privacy Act* does not directly refer to CRCs but promises to have a significant impact on them. By widening the scope of information that can be included in a credit report, the new laws increase the potential for these reports to contain adverse or incorrect information. This in turn may create new business opportunities for CRCs, as more individuals find their applications for credit rejected on the basis of their credit histories.

As noted above, the new provisions enable credit reporting agencies to collect much more information about individuals than they could previously, including their repayment history, the types of credit arrangements they enter into, the duration of these arrangements and the maximum credit available to them (that is, their credit limit).[40] The amended Act also imposes new obligations on credit reporting agencies, credit providers and "affected information recipients", with regard to their handling of credit-related personal information.[41] The Explanatory Memorandum states that the amendments "enhanc[e]" reporting agencies' "obligations and processes dealing with notification, data quality, access and correction, and complaints", and include "measures to place greater responsibility

[32] *Competition and Consumer Act 2010* (Cth), Sch 2, Ch 2.

[33] *Competition and Consumer Act 2010* (Cth), Sch 2, items 60-62. For constitutional reasons, the Commonwealth Act applies only to corporations and to any person engaging in trade or commerce, but complementary State and Territory legislation extends the application of the ACL much further. *Competition and Consumer Act 2010* (Cth), ss 6, 131.

[34] *National Consumer Credit Protection Act 2009* (Cth), ss 6, 29.

[35] *National Consumer Credit Protection Act 2009* (Cth), s 6.

[36] *National Consumer Credit Protection Act 2009* (Cth), s 7.

[37] *National Consumer Credit Protection Act 2009* (Cth), s 8.

[38] *National Consumer Credit Protection Act 2009* (Cth), s 29(1) and s 29(2).

[39] *National Consumer Credit Protection Regulations 2010* (Cth), Pts 2-4.

[40] *Privacy Act*, s 6(1), s 6N; *Privacy Amendment (Enhancing Privacy Protection) Bill 2012* (Cth), Explanatory Memorandum, pp 46-47.

[41] *Privacy Act*, Pt IIIA, Divs 2-4. "Affected information recipients" include "mortgage and trade insurers, related body corporate, credit managers, and advisors": see *Privacy Amendment (Enhancing Privacy Protection) Bill 2012* (Cth), Explanatory Memorandum, pp 93, 98.

on credit reporting bodies and credit providers to assist individuals to access, correct and resolve complaints about their personal information".[42] The new provisions impose limits on the time an agency can take to respond to a request for information[43] and to amend an incorrect report.[44] These benefits will also flow to CRCs, which now possess distinct rights of access as a category of "access seeker" under the new provisions.[45]

The new *Credit Reporting Privacy Code* (the Code), developed by the Australian Retail Credit Association, came into effect on 12 March 2014, in conjunction with the new provisions of the *Privacy Act*.[46] It is a mandatory code, binding all Australian credit reporting agencies, and is expected to play a significant role in the new credit reporting regime.[47] The Code supplements the broad principles of the *Privacy Act*,[48] providing "detailed guidance" to the industry on specific "operational matters" such as data quality and dispute resolution.[49] It sets out the ways in which credit reporting agencies must handle requests for corrections to credit reports, and enables individuals to complain to a "recognised" EDR scheme[50] or the Information Commissioner if they are not satisfied with the results.[51]

Most commentators are ambivalent about these recent reforms, observing that they include important new privacy protections for individuals, but at the same time, greatly increase the complexity of the regime.[52] According to one commentator, the original provisions of the Act relating to credit reporting were "rushed into Parliament … with only minimal consultation" in 1989.[53] By contrast, the new provisions are based on an extensive ALRC inquiry and ensuing consultation with credit reporting agencies, consumer groups, privacy advocates and other parties. As such, they are a compromise between the "financial sector's desire for objective data" and consumers' interests in maintaining their privacy. In the view of Nigel Waters, the new laws represent a defeat for consumer

[42] *Privacy Amendment (Enhancing Privacy Protection) Bill 2012* (Cth), Explanatory Memorandum, p 3.

[43] *Privacy Act*, s 20R(3).

[44] Section 20T states that "[i]f the credit reporting body is satisfied that the personal information is inaccurate, out-of-date, incomplete, irrelevant or misleading, the body must take such steps (if any) as are reasonable in the circumstances to correct the information within: (a) the period of 30 days that starts on the day on which the request is made; or (b) such longer period as the individual has agreed to in writing". *Privacy Act*, s 20T(2). The Explanatory Memorandum states that "[i]t is expected that the registered CR code will deal in greater detail with the process around which extensions of time to respond to correction requests are proposed to the individual. However, it is generally expected that most requests for correction should be resolved within the 30 days specified in this provision". *Privacy Amendment (Enhancing Privacy Protection) Bill 2012* (Cth), Explanatory Memorandum, p 150.

[45] *Privacy Act*, s 6L(1)(b). Section 6L(1)(b) defines an "access seeker" so as to include "'a person': (i) who is assisting the individual to deal with a credit reporting body or credit provider; and (ii) who is authorised, in writing, by the individual to make a request in relation to the information under subsection 20R(1) or 21T(1)".

[46] The Code was varied slightly on 3 April 2014, to extend the "grace period" for reporting missed payments from five days to 14 days. Office of the Australian Information Commissioner (OAIC), *Credit Reporting Privacy Code* (28 April 2014), cl 8.1 http://www.oaic.gov.au/privacy/applying-privacy-law/privacy-registers/privacy-codes. See also OAIC, *Credit Reporting Privacy Code Varied* (3 April 2014) http://www.oaic.gov.au/news-and-events/news/privacy-news/credit-reporting-privacy-code-varied.

[47] Australian Retail Credit Association, *Executive Summary* (1 July 2013); OAIC, *Credit Reporting Reform*, p 5 http://www.oaic.gov.au/privacy/privacy-law-reform/credit-reporting-reform.

[48] OAIC, *Credit Reporting Reform*, n 47, pp 2, 3.

[49] ARLC, n 11, p 1746 [54.3].

[50] *Privacy Act*, ss 6, 35A.

[51] OAIC, *Credit Reporting Privacy Code*, n 46, cl 20. On 13 May 2014, the Australian Government announced its intention to disband the OAIC and reallocate its functions to the Australian Human Rights Commission. See Commonwealth, *Budget 2014-2015: Budget Measures*, Budget Paper No 2 (2014-2015) p 64. See also McMillan J, Popple J and Pilgrim T, *Australian Government's Budget Decision to Disband OAIC* (13 May 2014) http://www.oaic.gov.au/news-and-events/statements/australian-governments-budget-decision-to-disband-oaic/australian-government-s-budget-decision-to-disband-oaic: Statement by the Australian Information Commissioner (John McMillan), Freedom of Information Commissioner (James Popple) and Privacy Commissioner (Timothy Pilgrim).

[52] See Waters, n 2; Witzleb, n 12; Kreltszheim, Shailer and Carroll, n 12.

[53] Waters, n 2 at 20.

advocates, who "have had to accept" that their "25-year rearguard action" against more extensive reporting "has been largely lost".[54] By contrast, Normann Witzleb argues that "the new regime will, on the whole, enhance the protection of individuals vis-à-vis credit reporting organisations".[55] Still, Waters and Witzleb agree that the reforms have failed in their objective of "improv[ing] the accessibility of credit reporting law", instead "add[ing] further complexity to it".[56]

The Credit Repair Industry Association of Australasia (CRIAA) Code of Conduct

In 2012, the Credit Repair Industry Association of Australasia (CRIAA) published a Code of Conduct for its members.[57] This CRIAA Code did little more than restate the legal obligations imposed by the ACL and other State and federal laws. The CRIAA Code prohibited CRIAA members from making "untrue or misleading" statements, or statements "which, upon the exercise of reasonable care, should be known by the Credit Repairer… to be untrue or misleading". It prohibited them from engaging, or attempting to engage, in any fraud or deception in the course of providing their services. It also prohibited them from attempting to alter a customer's identification, so as to conceal adverse information on that customer's credit report from a current or prospective lender.[58] The CRIAA Code permitted members to charge their clients fees before performing any services, provided that these fees were "clearly stated" in the members' "terms and conditions". It stipulated that such fees should be charged only if members had "a process in place to identify and record matters that are unlikely to be removed and/or updated", if "disclosure is made to the client where the removal and/or correction of information is unlikely or doubtful", and if "the client has been informed of and agrees to proceed on that basis". While it may have been intended by the Code that this disclosure should take place *before* the payment of any fees, the Code did not state this explicitly.[59] In mid-2014, the CRIAA website "closed" and the CRIAA Code was withdrawn from publication.[60]

Controversies surrounding credit repair

Recently, Australian consumer advocates have begun to express concern about the activities of CRCs. The most significant complaint expressed by these critics is that CRCs charge high fees for services that are available free of charge from community-based financial counsellors, ombudsmen and EDR

[54] Waters, n 2 at 22, 21.

[55] Witzleb, n 12 at 60.

[56] Witzleb, n 12 at 60. Waters writes that "it is clear that the new credit-reporting provisions will regrettably not meet the objective, shared by all stakeholders, of greater clarity and simplicity". Waters, n 2 at 22.

[57] The Credit Repair Industry Association of Australasia (CRIAA) *Code of Conduct* (CRIAA Code) was first published in 2012: see Doessel G, "CRIAA Code of Conduct Seeks to Stamp Out Dishonest Credit Repair Practice", *Media Release* (Mycra Lawyers, 17 July 2012) https://www.mycralawyers.com.au/criaa-code-conduct-seeks-stamp-dishonest-credit-repair-practice. In April 2014, according to its website, CRIAA had five member CRCs: CRIAA, *Full Members* (2012-2013) http://www.criaa.org.au/membership/full-members.

[58] CRIAA Code, cl 5(a) to cl 5(d).

[59] CRIAA Code, cl 6. The other disclosure requirements imposed by the CRIAA Code were far from onerous. The CRIAA Code required only that its members "have a lawful contract that meets all relevant legislation prior to the provision of services to the client", and that this contract be provided to the client "upon request within 7 days". It required members to disclose "any conflict of interest as soon as is reasonably practicable and… the existence of any agency arrangements or other commercial relationships as would be reasonably determined under common law". The Code provided that members should advise their clients of relevant "government subsidies or other assistance… relating to obtaining Credit Repair or dealing with personal or financial hardship", a provision that could be interpreted as requiring CRCs to advise their clients of the availability of free financial counselling services or ombudsman schemes. However this requirement only extended to services of which the member could "reasonably be expected to be aware", and applied only "during the term of a service agreement". In other words, the Code imposed no obligation on CRCs to advise *potential* clients of alternative, free sources of assistance, such as financial counselling services or community legal centres; instead it contemplated CRCs providing this advice after the client had paid upfront fees and entered into a binding contract. Similarly, the Code stipulated that members should disclose to their clients that ombudsman services were free, and that clients could use these services "independently"; however it only required this disclosure to occur "[p]rior to referring a matter to an Ombudsman service", by which time the client would be likely to have paid significant fees. CRIAA Code, cll 9, 10(1)(A), 10(1)(D), 14(2).

[60] CRIAA, *Credit Repair Industry Association of Australasia website is now closed* (2014) http://www.criaa.org.au/code-of-conduct.

schemes. They also point out that consumers have the right to request free copies of their credit reports from reporting agencies, and can dispute incorrect listings without the intervention of an advocate. Financial Counselling Australia (FCA) describes credit repair, budgeting services and other related services as "overty traps".[61] The FCA points out that due to their high fees, these services often compound their clients' financial problems, instead of solving them.[62] The consumer group CHOICE has gone further, describing credit repair companies as "predatory businesses feeding off consumers' financial despair".[63] CHOICE singled out one CRC in its annual "Shonky Awards", arguing that it "has been known to overstate its ability to improve a credit report, providing false hope" to desperate people.[64] The Consumer Action Law Centre (CALC) has reiterated these concerns, describing CRCs as "symptomatic of a growing number of businesses seeking to profit from people in financial difficulty".[65] CALC's Chief Executive Officer has stated publicly that CRCs' contracts "can be misleading, saying they will get rid of defaults when that is not possible".[66]

Critics also point out that in some cases, the activities of CRCs may threaten the integrity and fairness of the credit reporting regime. The Consumer Credit Legal Centre has observed that some credit repair companies "us[e] aggressive tactics to try to persuade the lender or credit reporting agency to remove legitimate listings".[67] The Credit and Investments Ombudsman (CIO)[68] has observed that CRCs often cause problems for companies purchasing other parties' debts. These companies "do not have direct knowledge of the correctness of the relevant credit record entry," meaning that if a CRC disputes a debt,

> [c]onsiderable time and resources… must be devoted [to] making inquiries… and assessing or, where necessary, contesting, the allegation that the entry is not valid. It often makes good commercial sense for these debt purchasers, regardless of the merits of the case, to simply concede the point and allow the proposed amendment. This presents a threat to the integrity of the information on credit records and is detrimental to consumers, C[redit] P[rovider]s and C[redit] R[eporting] B[ureau]s.[69]

These concerns resonate with the experiences of the US peak body for credit reporting bodies, the Consumer Data Industry Association (CDIA). In 2007, the president of the CDIA spoke at length about "the problem of credit repair" in a US Congressional committee hearing.[70] He estimated that over 30% of disputes were instigated by CRCs, imposing a particularly heavy administrative burden

[61] Financial Counselling Australia, "Anti-Poverty Week: Five Poverty Traps", *Media Release* (14 October 2013) http://www.financialcounsellingaustralia.org.au/Corporate/News/Anti-Poverty-Week-Five-Poverty-Traps.

[62] Financial Counselling Australia, n 61.

[63] CHOICE, *8th Annual CHOICE Shonkys* (2013).

[64] The Shonky Awards "nam[e] and sham[e] the shonkiest rip-offs and shoddiest products being sold in Australia". CHOICE, n 63.

[65] Power J, "Credit Repair Companies Not Necessarily a Fix", *Sydney Morning Herald* (8 September 2013) http://www.smh.com.au/nsw/credit-repair-companies-not-necessarily-a-fix-20130908-2tdhz.html.

[66] Power, n 65. See also CCLC, CALC, Care Inc Financial Counselling Service and the Consumer Law Centre of the ACT, Caxton Legal Centre, CHOICE, Consumer Credit Legal Service (WA), COTA Australia, Financial and Consumer Rights Council, Financial Counselling Australia, Footscray Community Legal Centre, John Berrill, Redfern Legal Centre, Uniting Communities (SA) and Queensland Association of Independent Legal Services, *Independent Review of the Financial Ombudsman Service (FOS)*, Submission to CameronRalph Navigator Pty Ltd (25 October 2013), p 45 (hereinafter *Joint Submission*) http://consumeraction.org.au/joint-submission-independent-review-of-the-financial-ombudsman-service.

[67] Kavanagh J, "Tougher Stand Taken on Credit Files", *Sydney Morning Herald* (30 June 2012) http://www.smh.com.au/money/borrowing/tougher-stand-taken-on-credit-files-20120629-217q4.html.

[68] Until 19 November 2014, the CIO was known as the Credit Ombudsman Service Limited (COSL). For citation purposes, documents published prior to 19 November 2014 will be attributed to COSL.

[69] COSL, Submission to the Australian Retail Credit Association consultation on the *Draft Credit Reporting Code* (May 2013) p 2, http://www.cosl.com.au/publications/cosl-submissions/submission-draft-credit-reporting-code.

[70] *Credit Reports: Consumers' Ability to Dispute and Change Inaccurate Information: Hearing Before the H Comm on Financial Services*, 110th Cong 194 (2007) (statement of Stuart K. Pratt, President and CEO, Consumer Data Industry Association). Cited in Harper J, *Reputation under Regulation: The Fair Credit Reporting Act at 40 and Lessons for the Internet Privacy Debate*, Policy Analysis No 690 (Cato Institute, 8 December 2011) pp 8, 26 http://www.cato.org/publications/policy-analysis/reputation-under-regulation-fair-credit-reporting-act-40-lessons-internet-privacy-debate.

on "smaller data furnishers such as community banks". He said that many CRCs'

> primary tactic was to flood the reinvestigation system with repeated disputes of the same negative data in an effort to "break" the system and cause the data furnisher to both give up and not respond or to simply direct the consumer reporting agency to delete the data.[71]

Such tactics have prompted several agencies to train their staff to reject any disputes believed to originate with a CRC, though this has led to other undesirable consequences. In the same committee hearing, a consumer representative complained that some agencies have started to reject all disputes lodged by third parties, including those lodged by family members and "social services organization[s]".[72] This has the perverse effect of preventing "the most vulnerable of consumers – those with limited literacy skills or limited English speakers, for example – from exercising their rights" to amend a credit report.[73]

Australia's free industry ombudsman services have also raised concerns about the impact of CRCs on their operations. The CIO estimates that a third of complaints about incorrect credit reports originate with CRCs, and EWON attributes 25% of its cases to CRCs.[74] A recent independent review of the Financial Ombudsman Service (FOS) notes "evidence … that paid credit repair agents can 'game' the system, using the threat of FOS case fees to pressure [scheme members] to make unmerited corrections to credit listings".[75] In its submission to the Commonwealth Government's Financial System Inquiry in April 2014, the FOS stressed the importance of "[a]dequately funded community financial counselling and specialist community legal centres" to guard against "the emergence of a claims management industry". It argued that such an "industry" could expose more consumers to excessive fees, and could compromise EDR schemes by promoting "more adversarial conduct".[76]

These concerns have prompted both the CIO and FOS to adopt strict new policies regarding CRCs. In its 2014 annual report, the CIO stated that it had "observed too many instances of credit repair companies behaving badly". It announced that henceforth it might refuse to deal with "representatives… who behave[d] badly", and that in such cases, consumers would be invited "to deal with [the CIO] directly and at no charge".[77] Similarly, the FOS has amended its Terms of Reference with a view to curbing the activities of CRCs. Under its new Terms of Reference, effective from 1 January 2015, the FOS may refuse to deal with a "fee-charging representative" if that representative "is engaging in inappropriate conduct which is not in the best interests of the Applicant", or if it does not provide necessary information.[78] In these circumstances, the FOS may "decline to accept the [d]ispute".[79]

[71] *Credit Reports: Consumers' Ability to Dispute and Change Inaccurate Information: Hearing Before the H Comm on Financial Services*, 110th Cong 195 (2007) (statement of Stuart K. Pratt, President and CEO, Consumer Data Industry Association).

[72] *Credit Reports: Consumers' Ability to Dispute and Change Inaccurate Information: Hearing Before the H Comm on Financial Services*, 110th Cong 251 (2007) (statement of Chi Chi Wu, Staff Attorney, National Consumer Law Center).

[73] *Credit Reports: Consumers' Ability to Dispute and Change Inaccurate Information: Hearing Before the H Comm on Financial Services*, Statement of Chi Chi Wu, n 72.

[74] COSL, n 69, p 2; EWON, n 6, p 4.

[75] CameronRalph Navigator, *Report to Board of Financial Ombudsman Service: 2013 Independent Review* (2013) FOS, p 79 http://www.fos.org.au/custom/files/docs/independent-review-final-report-2014.pdf.

[76] FOS, *Financial System Inquiry*, Submission to Treasury (8 April 2014) pp 4, 19, 20. See also Kavanagh J, "EDR at Risk from Claims Management Industry", *Banking Day* (online, 22 April 2014) http://www.bankingday.com/nl06_news_selected.php?act=2&stream=1&selkey=16467&hlc=2&hlw.

[77] Alternatively, these consumers will be invited to appoint an "appropriate" representative, such as a community legal centre. COSL, *2014 Annual Report on Operations* (27 October 2014) pp 10-11.

[78] FOS, "Fee-charging Representatives", *The Financial Ombudsman Service Circular* (online magazine, Issue 20, FOS, January 2015) http://www.fos.org.au/the-circular-20-home/fos-news/feecharging-representatives.jsp.

[79] FOS, *Terms of Reference 1 January 2010 (as amended 1 January 2015)* http://www.fos.org.au/custom/files/docs/fos-terms-of-reference-1-january-2010-as-amended-1-january-2015.pdf.

Case studies

The authors conducted a survey of recent files involving CRCs at CALC, a specialist community legal centre in Melbourne. The following case studies broadly represent the wide range of issues raised by these files (though some minor details have been changed, in the interests of preserving the clients' anonymity).

- A school teacher applied for a loan but her application was rejected. She discovered that her credit file listed a few unpaid bills for small amounts. The client had not updated her address with these creditors when she moved house, following her separation from her former partner. The client paid approximately $1,000 to a CRC, which contacted the creditors on her behalf, explained her circumstances and arranged for the listings to be removed. When the client contacted CALC, she discovered that she could have contacted the creditors directly, thus avoiding the fee charged by the CRC.
- A man in his 30s, who was not good with money, incurred some significant debts using a credit card. He saw an ad for a CRC and rang up to find out more about the company's services. By the end of the phone call, he had signed an agreement to engage the CRC, costing more than $1,000. When the man's mother found out, she contacted the CRC and complained about the high-pressure selling techniques it had employed, in order to engage her son in a binding contract he couldn't afford. When she threatened to lodge a complaint with the FOS, the CRC agreed to release the client from his contract.
- A university student ran up a bill of $800 on his mobile phone. He went overseas and while he was away the debt was listed on his credit report. He contacted a CRC and entered into a contract with them over the phone. The CRC read out the terms and conditions over the phone, but did not send him a written copy of the contract. Under the contract, the client agreed to pay the CRC nearly $2,000 to provide him with a "clean credit file". The client thought this figure was all-inclusive, but after he had been making regular payments for several months, the CRC told him he would need to pay the $800 to the phone company as well. The client paid the $800, and his credit file was amended to show that the debt had been paid. Still, he was unhappy about the situation and tried to terminate his contract with the CRC. The CRC began charging him dishonour fees and commenced legal action against him, claiming he owed $1,500 for outstanding payments, dishonour fees and other administrative charges. The client contacted CALC for help, but CALC pointed out that the CRC had performed a service, albeit of dubious value, and that even if the contract was very expensive, it was probably binding.

These and other cases examined at CALC suggest that the business practices of Australian CRCs are highly uniform. The CALC files repeatedly illustrated the disproportionately high fee charged by CRCs. In almost all cases, the fees charged by the CRC were significantly higher than the original debt that caused the adverse listing, or listings, on the client's credit file. A second common theme was that, according to their former clients, CRCs provided no information about the measures individuals can take to correct their own credit files, free of charge.

A third common feature was the widespread use of telephone salespeople and binding contracts formed over the phone. Several of these contracts included non-refundable "administration" fees of up to $1,000, and no cooling-off period. In many cases, the client's only opportunity to learn the terms and conditions of the contract was by listening to a recorded message, played once by the salesperson immediately prior to the formation of the contract. Several CALC clients said that CRCs used high-pressure sales tactics to encourage them to enter into contracts at short notice. These tactics included taking down the details of the caller's circumstances, offering to "take on" the case and warning that the caller might not be accepted as a client if he or she rang back later.

Whereas the CRCs demonstrated very consistent business models and sales tactics, the clients themselves did not conform to a single type. Some were on low incomes, but others were middle class and working in professional jobs. While some were relatively inexperienced in financial matters, several were highly educated and otherwise well-informed consumers. Some were from non-English speaking backgrounds, but many were native English speakers, born in Australia. The variable profile of CRC clients suggests that Australians in general have little understanding of credit reporting law, and low awareness of the potential harms associated with CRCs.

INTERNATIONAL APPROACHES TO CREDIT REPAIR

The United States

Policy context

In the United States, CRCs are governed by the CROA,[80] which was enacted in 1996. The CROA begins by noting that

> [c]ertain advertising and business practices of some… credit repair services have worked a financial hardship upon consumers, particularly those of limited economic means and who are inexperienced in credit matters.[81]

By 1996, the US Congress was acutely aware of the problems caused by unscrupulous CRCs. As early as 1988, a House of Representatives subcommittee heard that credit repair was "big business",[82] and that many companies were trading fraudulently. According to one former CRC executive, these companies were making "legally impossible" promises to remove legitimate information from clients' credit reports.[83] The executive, who was facing a prison sentence for his role in one such firm, maintained that CRCs should be banned. The committee adopted a more moderate position, concluding that CRCs could play a permissible role by helping individuals to understand and exercise their rights with regard to their credit histories. At that time, 19 American States had already enacted their own legislation to combat fraud in the credit repair industry.[84]

Despite this regulation, CRCs and the problems associated with them have persisted. This is attributable to two major factors.[85] First, many consumers find it difficult to enforce their consumer credit rights, including correcting their credit histories, without assistance and, secondly, CRCs in the United States have been able, as will be seen below, to circumvent key aspects of federal and State regulation. In addition, due to the small amounts involved, consumer credit products and services are relatively expensive to provide.[86] One of the principal costs of consumer credit regulation is that regulation will result in elimination of certain consumer credit products and services. This may, in turn, force consumers to resort to more expensive alternatives, including those that have been designed by providers to circumvent regulation.[87]

Provisions of the CROA

The v's stated purposes are to enable consumers to make "informed decision[s]", and to guard against "unfair or deceptive practices" on the part of CRCs.[88] The Act defines a "credit repair organization" as

> any person who uses any instrumentality of interstate commerce or the mails to sell, provide, or perform (or represent that such person can or will sell, provide, or perform) any service, in return for the payment of money or other valuable consideration, for the express or implied purpose of–

[80] *Credit Repair Organizations Act* 15 USC § 1679-1679(j) (2012).

[81] *Credit Repair Organizations Act* 15 USC § 1679(a)(2).

[82] *Credit Repair Organizations Act (HR 458): Hearing Before the Subcomm on Consumer Affairs and Coinage of the Comm on Banking, Finance, and Urban Affairs, HR, One-Hundredth Congress, second session, on HR 458, a Bill to Prevent Consumer Abuse by Credit Repair Organizations*, 100th Cong 9 (1988) (statement of Jeffrey Roberts, Former Co-Owner of Credit-Rite, Inc, Palmyra, NJ).

[83] *Credit Repair Organizations Act (HR 458): Hearing Before the Subcomm on Consumer Affairs and Coinage of the Comm on Banking, Finance, and Urban Affairs, HR, One-Hundredth Congress, second session, on HR 458, a Bill to Prevent Consumer Abuse by Credit Repair Organizations*, statement of Jeffrey Roberts, n 82; Nehf JP, "A Legislative Framework for Reducing Fraud in the Credit Repair Industry" (1992) 70 *North Carolina Law Review* 781 at 804.

[84] *Credit Repair Organizations Act (HR 458): Hearing Before the Subcomm on Consumer Affairs and Coinage of the Comm on Banking, Finance, and Urban Affairs, HR, One-Hundredth Congress, second session, on HR 458, a Bill to Prevent Consumer Abuse by Credit Repair Organizations*, 100th Cong 9 (1988) (statement of L Jean Noonan, Associate Director for Credit Practices, Bureau of Consumer Protection, Federal Trade Commission) p 19.

[85] Nehf, n 83 at 785.

[86] Campbell JY, Jackson HE, Mandrian BC and Tufano P, "Consumer Financial Protection" (2011) 25 *Journal of Economic Perspectives* 91 at 107-108.

[87] Campbell et al, n 86 at 108.

[88] *Credit Repair Organizations Act* 15 USC § 1679(b).

(i) improving any consumer's credit record, credit history, or credit rating; or

(ii) providing advice or assistance to any consumer with regard to any activity or service described in clause (i)…[89]

The definition specifically excludes "non-profit organization[s]"; banks and credit unions; and creditors, where they are merely assisting consumers to restructure debts owed to them.[90] Some courts have interpreted this definition expansively, holding that the CROA applies to a "person" engaging in credit repair activities, even if he or she is not part of any "organization". On this interpretation, car dealers, legal practitioners and mortgage brokers have found themselves subject to claims under the CROA.[91] Under the CROA, it is prohibited for "any person" to make any statement, or advise a consumer to make a statement, that is "untrue or misleading… with respect to any consumer's credit worthiness".[92] CRCs are specifically prohibited from charging fees before their services are "fully performed".[93]

The CROA requires CRCs to make extensive disclosures to their prospective clients before any contract can be formed. The Act includes a statement of consumer rights, which must be provided in writing to all prospective clients. The statement explains that consumers have a right to dispute inaccurate information in their credit reports, but that neither a consumer nor a CRC has the right to remove "accurate, negative information" from a report. It also informs consumers that they have a right to sue a CRC if it violates the CROA. It advises clients that they may cancel their contract for any reason within three days, and that they can seek to remove errors from their credit files by contacting credit bureaus directly, without engaging the services of a CRC.[94] The CROA also regulates the contracts that may be issued by CRCs, stipulating that they must be in writing and must include "the terms and conditions of payment" and "a full and detailed description of the services to be performed" by the CRC.[95] It provides for the three day cooling-off period described above,[96] and stipulates that clients of CRCs cannot waive any rights or protections afforded by the CROA.[97] While the Federal Trade Commission is empowered to enforce the CROA,[98] individuals may also take civil action against non-compliant CRCs, for both actual and punitive damages.[99]

The impact of the CROA

By the time the CROA was enacted in 1996, credit repair was a well-established industry in the United States. Consumer advocates, credit bureaus and the Federal Trade Commission were becoming increasingly vocal about the problems caused by unscrupulous and fraudulent CRCs.[100] In the succeeding years, courts repeatedly demonstrated their "extremely low tolerance" for such behaviour, interpreting the CROA expansively so as to capture a wide range of activities, and enforcing heavy penalties for non-compliance.[101]

[89] *Credit Repair Organizations Act* 15 USC § 1679a.

[90] *Credit Repair Organizations Act* 15 USC 1679a.

[91] Hirsh JB and Ropiequet JL, "The Credit Repair Organizations Act: Recent Developments" (2010) 64 *Consumer Finance Law Quarterly Report* 13 at 15-17.

[92] *Credit Repair Organizations Act* 15 USC § 1679b(a).

[93] *Credit Repair Organizations Act* 15 USC § 1679b(b).

[94] *Credit Repair Organizations Act* 15 USC § 1679c.

[95] *Credit Repair Organizations Act* 15 USC § 1679d.

[96] *Credit Repair Organizations Act* 15 USC § 1679e.

[97] *Credit Repair Organizations Act* 15 USC § 1679f.

[98] *Credit Repair Organizations Act* 15 USC § 1679h.

[99] *Credit Repair Organizations Act* 15 USC § 1679g.

[100] Nehf, n 83 at 799.

[101] Grefe AM, "*FTC v Gill*: A Step toward Deterring Illegal Practices of Credit Repair Organizations" (2002-2003) 15 *Loyola Consumer Law Review* 57 at 58.

Despite some attempts by CRCs to evade the reach of the CROA, the legislation was generally applauded by consumer advocates, who felt that it was "sufficiently broad and encompassing" to offer meaningful protection against misleading and fraudulent practices in the industry.[102] By contrast, some commercial litigators maintained that the CROA "illustrat[ed] the law of unintended consequences", arguing that the courts and plaintiff lawyers were applying the laws "much more broadly" than the legislature had intended.[103] These critics of the CROA have been particularly concerned by its application to people outside the credit repair industry, such as car dealers and lawyers. In order to avoid regulation by the CROA, some credit repair companies have obtained tax-exempt status as non-profit organisations, based on their provision of "education" to consumers. These attempts have had limited success, partly because they have fallen foul of other consumer protection statutes.[104]

In recent years, however, CRCs have found a more effective way to avoid exposure to civil litigation under the CROA. A number of appellate cases have considered whether or not a client's "right to sue" can be overridden by compulsory arbitration clauses in credit repair contracts. In 2007 and 2009, such compulsory arbitration clauses were upheld by the Third and 11th Circuit courts, respectively.[105] These courts held that the CROA should be read with regard to the *Federal Arbitration Act* (FFA).[106] The FAA creates a strong presumption that arbitration clauses will be "valid, irrevocable, and enforceable", unless they are expressly revoked by the legislature.[107] The Ninth Circuit created a "circuit split" in 2010,[108] by refusing to give effect to a compulsory arbitration clause, on the grounds that the CROA created a "substantive, non-waivable right that precludes arbitration".[109] This decision was reversed on appeal to the Supreme Court in 2012. In *CompuCredit Corp v Greenwood* 132 S Ct 665 (2012), the Supreme Court held that "[b]ecause the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms".[110]

The response of CRCs in the United States to the CROA is an example of the unintended consequences of consumer credit regulation, where the regulated provider of a consumer credit product or service acts, through contract design or other types of behaviour, to circumvent the regulation.[111] Ironically, the emergence of CRCs in the United States was itself the unintended consequence of consumer credit regulation: payday lenders recast themselves as CRCs since the fees they could charge in their capacity as a CRC fell outside the interest rate caps that had been imposed

[102] Moakley ML, "Credit Repair Organizations after Regulation: Wolves in Nonprofits' Clothing?" (2003) 77 *Florida Bar Journal* 28 at 36.

[103] Kelley Jr EJ, Ropiequet JL, and Durkin AJ, "The Credit Repair Organization Act: The 'Next Big Thing'" (2003) 57 *Consumer Finance Law Quarterly Report* 49 at 50.

[104] Moakley, n 102 at 33-34. As Moakley points out, these measures have not always been enough to shield the credit repairers from CROA liability: see *Zimmerman v Cambridge Credit Counseling Corp* 409 F3d 473, AFTR 2d 2640 (1st Cir, Mass, 2005); 15 USCS § 1679a(3)(B)(i).

[105] *Gay v CreditInform*, 511 F3d 369 (3d Cir, 2007); *Picard v Credit Solutions, Inc*, 564 F3d 1249 (11th Cir, 2009). See also Hanft G, "Giving Arbitration Some Credit: the Enforceability of Arbitration Clauses Under the Credit Repair Organizations Act" (2011) 79 *Fordham Law Review* 2761 at 2791-2797.

[106] *Federal Arbitration Act* 9 USC § 1-16 (2012).

[107] *Federal Arbitration Act* 9 USC § 2; MacCaskey M, "Is the Right to Sue Really the Right to Sue? Examining Arbitration and the Language of the Credit Repair Organization Act" (2011) 50 *University of Louisville Law Review* 131 at 138.

[108] Cannon MQ, "Greenwood v. Compucredit Corp: The Ninth Circuit's Misdirected Interpretation of the Credit Repair Organization Act" (2011) 1 *Brigham Young University Law Review* 67 at 67.

[109] *Greenwood v CompuCredit Corp* 615 F3d 1204 (9th Cir, 2010); "Arbitration and Consumer Protection – Credit Repair Organizations Act – Ninth Circuit Holds That Statutory Ban on Arbitration Is Nonwaivable – Greenwood v CompuCredit Corp, 615 F 3d 1204 (9th Cir 2010)" (2011) 124 *Harvard Law Review* 1058 at 1058.

[110] *CompuCredit Corp v Greenwood* 132 S Ct 665 at 673 (2012); Kyriakides S, "CROA Claims May Be Arbitrated, Supreme Court Rules" (2012) 67 *Dispute Resolution Journal* 4. The Acts are not italicised in the original document.

[111] Campbell et al, n 86 at 108.

by most US States on payday loans.[112] This, as one commentator noted, was "the very antithesis of what many consumer advocates had hoped to accomplish with [the payday lending] legislation".[113]

State legislation

As noted above, CRCs are bound by state legislation in much of the United States. Many State laws predate the CROA and some adopt "unique and noteworthy" approaches to regulating CRCs.[114] State laws often reproduce elements of the CROA, with provisions banning CRCs from charging upfront fees and imposing disclosure requirements.[115] Some States go much further than the CROA. Several require CRCs to "register" their businesses with a government authority, and to pay a bond, which can be used to compensate clients for losses caused by a CRC's illegal conduct. California requires CRCs to obtain a $100,000 surety bond, "in favor of the State of California for the benefit of any person damaged by any violation" of the State's credit repair laws.[116] The bond must be maintained for two years after the CRC ceases its business activities in California.[117] In Florida, a CRC may charge its clients fees in advance, but only if it obtains a $10,000 surety bond and deposits the said fees into a trust account until all services have been performed.[118] Some States impose criminal sanctions on CRCs for breaches of their laws, and in the State of Georgia, operating any kind of CRC is classified as a misdemeanour.[119] Given their diversity, it is difficult to generalise about these State laws. Still, the mere fact of their existence suggests that the CROA has not, in itself, proved sufficient to curb the harmful practices of CRCs in the United States.

The United Kingdom

Consumer credit regulation in the United Kingdom is in transition. From 2002 until March 2014, the Office of Fair Trading (OFT) administered a licensing regime under the *Consumer Credit Act 1974* c 39 (UK) (1974 Act) and the *Consumer Credit Act 2006* c 14 (UK) (2006 Act).[120] On 1 April 2014, the regulation of consumer credit transferred from the OFT to the newly established Financial Conduct Authority (FCA), bringing it under the same regulatory regime as other financial services.

The OFT regime

The OFT regime was essentially a licensing system, with limited enforcement and oversight provided by the OFT, and, more recently, the UK Financial Ombudsman Service (UK FOS). Under the 1974 Act c 39, any "consumer credit business", "consumer hire business" or "ancillary credit business" was required to obtain a licence.[121] An "ancillary credit business" included the "provision of credit information services", that is, credit repair.[122] Under s 145 of the amended 1974 Act c 39, "[a] person provided credit information services if" he or she took "steps" or advised any individual as to the taking of steps

> with a view–

[112] Spector M, "Taming the Beast: Payday Loans, Regulatory Efforts and Unintended Consequences" (2008) 57 *DePaul Law Review* 961 at 962-963.

[113] Spector, n 112 at 963.

[114] Hanft, n 105 at 2773.

[115] See eg Cal Civ Code §§ 1789.10-1789.26 (Deering 2014), especially Cal Civ Code §§ 1789.13-1789.15 (Deering 2014). Under the Californian laws, CRCs are described as "credit services organization[s]": Cal Civ Code § 1789.12 (Deering 2014)

[116] Cal Civ Code § 1789.18a (Deering 2014).

[117] Cal Civ Code § 1789.18c (Deering 2014).

[118] Fla Stat § 817.7001-706 (2013), especially Fla Stat § 817.7005 (2013). See also Moakley, n 102 at 32.

[119] Ga Code Ann § 16-9-59 (2013). See also Hanft, n 105 at 2773.

[120] Finlay S, *Consumer Credit Fundamentals* (Palgrave Macmillan, 2nd ed, 2009) p 78; Carter R, "Statutory Interpretation Using Legislated Examples: Bennion on Multiple Consumer Credit Agreements" (2011) 32 *Statute Law Review* 86 at 86.

[121] *Consumer Credit Act 1974* c 39 (UK), s 21(1).

[122] *Consumer Credit Act 1974* c 39 (UK), s 145(1), s 145(7B), s 145(7C). These provisions relating to "credit information services" were inserted by s 25 of the *Consumer Credit Act 2006* c 14 (UK).

(a) to ascertaining whether a credit information agency (other than that person himself if he is one) holds information relevant to the financial standing of an individual;
(b) to ascertaining the contents of such information held by such an agency;
(c) to securing the correction of, the omission of anything from, or the making of any other kind of modification of, such information so held; or
(d) to securing that such an agency which holds such information–
  (i) stops holding it; or
  (ii) does not provide it to another person.[123]

Under the 1974 Act c 39, the OFT had "wide discretion to grant, vary, suspend, or revoke" licences,[124] as well as powers to investigate non-compliant firms. However as the National Audit Office (NAO) observed, the OFT never had sufficient resources to "monitor the behaviour of licensees on a day-to-day basis", instead relying on "intelligence" from consumer groups, trade associations and other sources.[125] Because it could only respond to proven instances of consumer harm, the OFT regime was limited in its capacity to regulate the industry.[126]

The FCA regime

Under the new regime, consumer credit is governed by the *Financial Services and Markets Act 2000* c 8 (UK) (FSMA), meaning that CRCs are now regulated by the FCA.[127] The UK Government has argued that under the new regime, CRCs and other consumer credit firms will be subject to much more stringent oversight than they were under the OFT regime. In shifting consumer credit to the FCA, the government has sought to create a consumer credit regulator with greater flexibility, more power and more resources, in order to protect consumers and to "keep pace with a fast-growing innovative market" for consumer credit services.[128] Given the paucity of commentary on CRCs in the United Kingdom, it is at this stage difficult to predict the impact that the changes will have upon the industry.[129]

Under the new regime, a CRC must obtain authorisation from the FCA in order to carry out its activities. To do so, it must meet the "threshold conditions", including a "fit and proper person" test.[130]

[123] *Consumer Credit Act 1974* c 39 (UK), s 145(7B), s 145(7C). The *Consumer Credit Act 2006* c 14 (UK) also had the effect of bringing holders of consumer credit licences, including CRCs, within the jurisdiction of the UK FOS: *Consumer Credit Act 2006* c 14 (UK), s 59.

[124] Ellinger EP, Lomnicka EZ and Hare CVM, *Ellinger's Modern Banking Law* (Oxford University Press, 5th ed, 2011) ppb 52-53.

[125] National Audit Office (NAO), *Office of Fair Trading: Regulating Consumer Credit*, Report No HC 685 (19 December 2012) p 19 http://www.nao.org.uk/report/office-of-fair-trading-regulating-consumer-credit.

[126] NAO, n 125, p 26.

[127] The Government commenced the transition to the new regime in 2013, with the *Financial Services Act 2012 (Consumer Credit) Order 2013* SI 2013/1882 (*FSA Order*) and the *Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No 2) Order 2013* SI 2013/1881 (*FSMA Amendment Order*). The FSA Order SI 2013/1882 carried forward certain provisions of the *Consumer Credit Act 1974* c 39 (UK). The FSMA Amendment Order SI 2013/1881 amended the FSMA c 8 and the related statutory instrument, the *Financial Services and Markets Act 2000 (Regulated Activities) Order 2001* SI 2001/544 (*FSMA Order*). The FSMA Order SI 2001/544 sets out a number of "specified" activities, ie activities subject to FCA regulation (pursuant to s 22 of the FSMA c 8). Under the new regime, "credit information services" are defined in terms that mirror the *Consumer Credit Act 1974* c 39 (UK): see FSMA Order SI 2001/544, Art 89A. See also UK, Explanatory Memorandum to the *Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No 2) Order 2013* and the *Financial Services Act 2012 Consumer Credit Order 2013* (Explanatory Memorandum); United Kingdom, House of Commons, Second Delegated Legislation Committee *Parliamentary Debates* (15 July 2013) (2013-2014 session), *Draft Financial Services and Markets Act 2000 (Regulated Activities) Amendment (No 2) Order 2013, Draft Financial Services Act 2012 (Consumer Credit) Order 2013*, col 4 http://www.publications.parliament.uk/pa/cm201314/cmgeneral/deleg2/130715/130715s01.htm.

[128] United Kingdom, Explanatory Memorandum, n 127, cl 7.4.

[129] This may be due to the relatively small size of the United Kingdom's credit repair industry, compared with that of the United States. In a 2012 report, the NAO estimated that only 1.6% of "consumer harm" in UK consumer credit markets was attributable to the activities of CRCs. By contrast, it estimated that "credit agreements/loans" caused 58.9% of harm, while "debt collection" caused 18.8%. NAO, n 125, p 17.

[130] These are set out in Sch 6 of the *Financial Services and Markets Act 2000* c 8 (UK). The "fit and proper person" test requires the person seeking authorisation to "satisfy the Authority that he is a fit and proper person having regard to all the

CRCs are also subject to the "General principles" governing all firms under the FCA's regulatory system. These general principles, set out in the FCA's *Handbook*,[131] require all regulated firms to act with integrity, skill, care and diligence. They require each firm "to organise and control its affairs responsibly and effectively, with adequate risk management systems"; to maintain adequate financial resources; to "observe proper standards of market conduct"; to "pay due regard to the interests of its customers and treat them fairly"; to avoid conflicts of interest; to ensure the suitability of its advice to clients; to protect its clients' assets; and to "deal with its regulators in an open and cooperative way".[132] Under the new regime, CRCs remain within the jurisdiction of the UK FOS.[133]

The FCA has set out its approach to the ongoing supervision of consumer credit firms in a series of discussion papers and a statement of "final rules", published in early 2014.[134] It proposes to distinguish between not-for-profit and for-profit CRCs, adopting a more energetic approach in relation to the latter. Commercial CRCs will be treated as "higher-risk activities", meaning they will undergo a more rigorous authorisation process and will be subject to "targeted, proactive supervision".[135] They will be subject to ongoing supervision and will be required to submit periodic reports to the FCA. They will also be required to publish information about any complaints made against them.[136] The FCA has a wide range of enforcement powers, which are stronger than those of the OFT.[137] It has the power to withdraw a firm's authorisation, suspend it from undertaking certain activities, censure it through public statements, and apply for injunctions and orders to freeze assets.[138] It can order firms to reimburse consumers who have lost money due to their activities.[139] It can also prohibit individuals from operating in financial services, and prosecute firms and individuals for carrying out regulated activities without the appropriate authorisation.[140] The FCA has published a *Consumer Credit Sourcebook* in which it sets out the new rules that will govern CRCs and other consumer credit firms.[141] This *Sourcebook* includes detailed rules regarding "appropriate" advice to clients, and sets out extensive pre-contractual disclosure requirements, including mandatory referrals to not-for-profit

circumstances, including (a) his connection with any person; (b) the nature of any regulated activity that he carries on or seeks to carry on; and (c) the need to ensure that his affairs are conducted soundly and prudently". *Financial Services and Markets Act 2000* c 8 (UK), Sch 6, Pt 1, item 5.

[131] Financial Conduct Authority (FCA), *Handbook* (2014) (*Handbook*) PRIN 1.1.1, http://www.fca.org.uk/handbook.

[132] FCA, *Handbook*, n 131, PRIN 2.1.

[133] *Financial Services and Markets Act 2000* c 8 (UK), s 226A.

[134] See, eg, FCA, *High-Level Proposals for an FCA Regime for Consumer Credit*, Consultation Paper No CP 13/7 (March 2013); FCA, *Detailed Proposals for the FCA Regime for Consumer Credit*, Consultation Paper No CP 13/10 (October 2013) (*Detailed Proposals*); FCA, *Detailed Rules for the FCA Regime for Consumer Credit, Including Feedback on FCA QCP 13/18 and Made Rules*, Policy Statement No PS 14/3 (February 2014) (*Detailed Rules*).

[135] Unlike the *Consumer Credit Act 1974* c 39 (UK), the new regime applies to not-for-profit CRCs as well as commercial CRCs: FSMA Amendment Order SI 2013/1881, n 127, Art 13. See also *Detailed Proposals*, n 134, pp 23-25; *Detailed Rules*, n 134, p 18.

[136] *Detailed Proposals*, n 134, Ch 4; *Detailed Rules*, n 134, pp 28, 140.

[137] *Detailed Proposals*, n 134, p 102.

[138] FCA, *Enforcement Information Guide* (1 April 2013) p 1, http://www.fca.org.uk/your-fca/documents/enforcement-information-guide.

[139] Department for Business Innovation and Skills (UK), *A New Approach To Financial Regulation: Transferring Consumer Credit Regulation to the Financial Conduct Authority* (Consultation Paper, DBIS, March 2013) pp 9-11 https://www.gov.uk/government/consultations/a-new-approach-to-financial-regulation-transferring-consumer-credit-regulation-to-the-financial-conduct-authority.

[140] FCA, *Enforcement Information Guide*, n 138, p 1.

[141] The *Consumer Credit Sourcebook* is an annex to the Consumer Credit Instrument 2014: FCA, *Consumer Credit Instrument 2014*, FCA 2014/11 (27 February 2014). The *Sourcebook* constitutes a new section of the *Handbook* and applies specifically to firms carrying on "credit-related regulated activities": FCA, *Consumer Credit Sourcebook*, r 1.2.1 http://www.fshandbook.info/FS/html/FCA/CONC (*Sourcebook*).

agencies and other sources of "impartial" advice.[142] It also proscribes a range of misleading and unfair business practices, including coercive sales techniques and misleading advice regarding the amendment of credit files.[143]

Early responses to the UK Government's reforms

While the government states that its reforms enjoy "widespread support",[144] several commentators have suggested that these changes may disadvantage consumers by reducing their substantive legal protections. Consumer advocacy group *Which?* has said that while it can see "benefits in applying a supervisory approach to consumer credit issues", it does not support "a full transition to a FSMA c 8-style regime". It has warned that

> [r]emoving the key consumer protections provided by the Consumer Credit act [*sic*] by moving to a more principles-based rulebook regime risks greater uncertainty for consumers and lower standards of consumer protection.[145]

The British Bankers' Association has echoed this concern, submitting that broad "[p]rinciples-based regulation does not give consumers or providers the certainty they require and creates the risk of retrospective regulation through hindsight".[146] At the same time, some commentators have argued that the new regime is too complex and will impose an excessive burden on small consumer credit firms, making them unsustainable. The Bar Council of England and Wales remarked that obtaining FCA authorisation was an "onerous process" that "might lead to a reduction in competition, particularly from smaller lenders".[147] This concern was shared by several consumer credit firms, which suggested that the increased fees and general regulatory burden imposed by the new regime may force smaller firms to leave the industry.[148]

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[142] Section 8.3 sets out detailed requirements regarding pre-contractual disclosures and warnings. Matters that must be disclosed and explained include the nature of the firm's services; the duration of the contract; the total costs of the firm's services, or if this is impracticable, the way in which fees will be calculated; any deposits or fees to be charged (such as an administrative or management fee); other costs likely to be incurred; and the circumstances in which the customer may terminate the contract: r 8.3.1. CRCs must ensure that their pre-contractual advice has regard to a potential customer's best interests, that it is appropriate to the customer's individual circumstances, and that it is "based on a sufficiently full assessment" of the customer's financial circumstances: r 8.3.2. They must also provide potential customers with "a source of impartial information" about other "debt solutions" available to them: r 8.3.7(1). A CRC must refer the potential customer to "an appropriate not-for-profit debt advice body" if he or she cannot pay the CRC's fees, or if he or she has problems requiring immediate attention "with which the firm is unable or unwilling to assist": r 8.3.7(3).

[143] The *Sourcebook* states that a CRC must not employ "unfair business practices", meaning that it must not "coerce or use pressure", or "take advantage of a customer's lack of knowledge or understanding of the law" in order to sell its services': r 2.6.3. It "must establish and implement clear and effective policies and procedures to identify particularly vulnerable customers and to deal with such customers appropriately": r 8.2.7. Rule 8.10.3 provides that a CRC "must not: (1) claim to be able to remove negative but accurate information from a customer's credit file, including entries concerning adverse credit information and court judgments; or (2) mislead a customer about the length of time that negative information is held on the customer's credit file or any official register; or (3) claim that a new credit file can be created, such as by the customer changing address".

[144] United Kingdom, House of Commons, Second Delegated Legislation Committee, *Parliamentary Debates*, n 127, col 3.

[145] Cottrell V and *Which?*, Submission to Financial Regulation Strategy, HM Treasury (11 March 2011) p 1, https://www.gov.uk/government/consultations/a-new-approach-to- financial-regulation-reforming-the-consumer-credit-regime.

[146] British Bankers' Association, *A New Approach to Financial Regulation: Consultation on Reforming the Consumer Credit Regime*, Submission to HM Treasury (undated) p 2 https://www.gov.uk/government/consultations/a-new-approach-to-financial-regulation-reforming-the-consumer-credit-regime.

[147] Law Reform Committee of the Bar Council of England and Wales, Submission to HM Treasury (16 March 2011) p 4 https://www.gov.uk/government/consultations/a-new-approach-to-financial-regulation-reforming-the-consumer-credit-regime.

[148] See, eg, Billing Finance Limited, *A New Approach to Financial Regulation: Consultation on Reforming the Consumer Credit Regime*, Submission to Financial Regulation Strategy, HM Treasury (16 March 2011) https://www.gov.uk/government/consultations/a-new-approach-to-financial-regulation-reforming-the-consumer-credit-regime; 1st Stop Group, *A New Approach to Financial Regulation: Consultation on Reforming the Consumer Credit Regime*, Submission to Financial Regulation Strategy, HM Treasury (16 March 2011) https://www.gov.uk/government/consultations/a-new-approach-to-financial-regulation-reforming-the-consumer-credit-regime.

Comparing the United States, United Kingdom and Australian regimes

The United States, United Kingdom and Australian regimes represent starkly different approaches to the regulation of credit repair. The US regime is the most targeted, the most rigorous and perhaps the most effective. As discussed above, the CROA reflects the concerted efforts made by US legislators to investigate and understand the peculiarities of the credit repair industry, particularly during the hearing of the 1988 subcommittee discussed above. The CROA applies exclusively to CRCs and imposes significant sanctions on CRCs that do not comply with its terms. It arms consumers with clear and readily enforceable rights again CRCs, meaning that its effectiveness does not depend on the efforts of a government regulator. Although in recent years, the CROA has been somewhat blunted by the use of compulsory arbitration clauses in CRC contracts, US case law and commentary suggests that the CROA has had a significant effect on the US credit repair industry to date.[149]

By contrast, it is difficult to gauge the impact of the UK's past and present licensing regimes on CRCs and their customers. In 2011, the Citizens' Advice Bureau made a submission to the OFT in which it noted "widespread non-compliance" with the OFT's guidance relating to debt management services and credit repair.[150] The Bureau expressed concern that the OFT's attempts to enforce a "minimum standard of practice"' had "proved ineffective in preventing consumer detriment". It argued that CRCs should have to demonstrate

> proactively… that they are striving to avoid engaging in bad business practices, rather than the onus being exclusively on the OFT to investigate firms and uncover bad practices based on intelligence received.[151]

Arguably, the new FCA regime represents just such a reform, with its seemingly more stringent licensing regime and ongoing reporting requirements.[152] Still, the FCA may find its resources coming under significant strain as it assumes responsibility for regulating a wide variety of consumer credit firms, in addition to its role as regulator of deposit-taking institutions and financial advisers. By failing to provide consumers with clear avenues of redress, comparable to those in the CROA, the new FCA regime may prove less effective than the CROA.

Nevertheless, the UK's current and previous regimes are both superior to Australian laws, which offer consumers no specific protections against the risks posed by CRCs. While Australian CRCs are governed by the ACL, they are otherwise almost entirely unregulated.

Options for regulating credit repair in Australia

This section outlines five options for regulating CRCs in Australia. These options range from a total ban on credit repair to a more effective and comprehensive form of industry self-regulation. Drawing on the US and UK models, this section also considers statutory rules and licensing regime. It concludes that in the Australian context, the most effective approach would be a "hybrid" model, combining elements of both the US and the UK approaches and incorporating a robust EDR scheme.

Banning credit repair

The US experience suggests that CRCs contain "inherent potential for consumer harm"[153] and that even when regulated, they can pose significant risks to consumers. In 1988, the chair of the US congressional subcommittee observed that

> [a]ll too often, promises of credit repair are fraudulent. They are fraudulent for a simple reason – you cannot remove accurate information from your credit file… Credit repair clinics pose a threat to

[149] See, eg, Moakley, n 102 at 32; Kelley, Ropiequet and Durkin, n 103 at 1-2; Grefe, n 101.

[150] Citizens Advice Bureau, *Response from Citizens Advice and Citizens Advice Scotland to the Office of Fair Trading* (September 2011) p 3 http://www.citizensadvice.org.uk/debt_management__and_credit_repair_services__guidance.pdf.

[151] Citizens Advice Bureau, n 150.

[152] The FCA has already demonstrated its willingness to subject CRCs to increased scrutiny. A recent media release on advertising standards referred specifically to firms "claiming that their product would help repair credit ratings", and stated that such advertising "did not meet the regulations". FCA, "Consumer Credit Firms must Raise Advertising Standards, Says FCA", *Media Release* (16 May 2014).

[153] Hanft, n 105 at 2807.

> consumers who can least afford it… consumers whose often dire straits and dreams of a better life make them susceptible to the false promises of unscrupulous credit clinic operators.[154]

One solution would be to ban CRCs from operating in Australia, for example by amending Ch 3 of the ACL. This Chapter deals with unfair business models, such as pyramid schemes, and potentially harmful business practices such as door-to-door selling.[155] The credit repair industry would no doubt contend that if CRCs were banned, consumers would lose access to a vital source of information and assistance. It could also be argued that such a ban would undermine the effectiveness of certain EDR schemes. The recent FOS review suggested that FOS should enhance the operation of the scheme, by reducing rates of "discontinuance", as discontinuance can be used as a justification by CRCs for their services.[156] Critics of CRCs could point out, in reply, that high rates of discontinuance and poor understanding of credit reporting laws could be addressed by improving access to free information and support for consumers, through financial counselling services, community legal centres and government websites.[157] To date, however, it seems that very few jurisdictions have imposed a total ban on credit repair.[158] Enhanced regulation of CRCs would therefore seem to be a more appropriate way of dealing with them in Australia.

A rule-based regime

An alternative to banning CRCs would be to introduce new federal laws dealing specifically with CRCs and seeking to curb their more harmful practices. This could be achieved by introducing new legislation, or by amending current legislation or binding codes pertaining to a related area, such as consumer credit or credit reporting. The simplest way to introduce new laws of this kind would be to amend the *National Credit Code* (NCC), a code binding all providers of consumer credit in Australia.[159] The NCC is a schedule to the NCCPA and already contains sections dealing with "small amount credit contracts" (or payday loans),[160] consumer leases[161] and reverse mortgages,[162] among other things. If the government decided to introduce rules binding on all CRCs, it would be logical to do so in the context of the NCC, which "provides a consumer protection framework for consumer credit and related transactions"[163] while also specifically regulating "fringe credit products".[164]

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[154] *Credit Repair Organizations Act (HR 458): Hearing Before the Subcomm on Consumer Affairs and Coinage of the Comm on Banking, Finance, and Urban Affairs, HR, One-Hundredth Congress, second session, on HR 458, a Bill to Prevent Consumer Abuse by Credit Repair Organizations*, 100th Cong 1-2 (1988).

[155] *Competition and Consumer Act 2010* (Cth), Sch 2, Ch 3.

[156] The rate of discontinuance is the rate at which people drop out of the process before their claims are determined: see CameronRalph Navigator, n 75.

[157] See, eg, Australian Securities and Investments Commission (ASIC), MoneySmart, *Credit Reports and Credit Repair* (24 March 2014) https://www.moneysmart.gov.au/borrowing-and-credit/borrowing-basics/credit-repair and https://www.moneysmart.gov.au/borrowing-and-credit/borrowing-basics/credit-reports. See also Australian Retail Credit Association, *CreditSmart* (2013) http://creditsmart.org.au. As noted in the "Evaluation" section under "A rule-based regime" in this article, Australia's new privacy laws impose new positive obligations on credit providers and credit reporting agencies, with the aim of making it easier for consumers to correct inaccuracies in their credit reports: see *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth), ss 20S, 20T, 21U and 21V; *Privacy Amendment (Enhancing Privacy Protection) Bill 2012* (Cth), Explanatory Memorandum, pp 130-131, 148-49 and 158. The Australian Retail Credit Association has created a new website, *CreditSmart*, in which it explains the new laws and the rights of consumers in relatively simple language. It is not yet clear, however, whether or not these measures will, in practice, make it easier for consumers to amend their own credit reports. See *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth), ss 20S, 20T, 21U and 21V; *Privacy Amendment (Enhancing Privacy Protection) Bill 2012* (Cth), Explanatory Memorandum, pp 130-131, 148-49 and 158.

[158] See the criminal sanctions imposed on CRCs in the US State of Georgia: Ga Code Ann § 16-9-59 (2013). See also Hanft, n 105 at 2773.

[159] *National Consumer Credit Protection Act 2009* (Cth), Sch 1.

[160] *National Credit Code*, s 31A.

[161] *National Credit Code*, Pt 11.

[162] *National Credit Code*, ss 18A-18C.

[163] *National Consumer Credit Protection Bill 2009* (Cth), Revised Explanatory Memorandum, p 239.

Rules modelled on the CROA

An Australian rule-based regime could follow the CROA in imposing binding rules on all CRCs. The regime could include a total prohibition on CRCs charging fees until their services have been "fully performed", as under the CROA.[165] It could also require CRCs to offer all clients a cooling-off period, during which time the clients could cancel their contracts and receive a refund of any fees paid. While the CROA only stipulates a cooling-off period of three days,[166] it would be more effective to provide for a longer period of up to two weeks, given the prevalence of fortnightly direct debit agreements in the Australian industry. The regime could also include disclosure rules, requiring CRCs to provide information to prospective and existing customers, regarding their rights under statute (for example, under the NCCPA and the ACL) and under the terms of any contract for services. As in the United States, Australian CRCs could be required to make certain disclosures to prospective clients, prior to formation of a contract. This could include advising them of other ways to deal with inaccuracies in credit reports, such as contacting reporting agencies and creditors directly.[167] CRCs could be required to draw prospective clients' attention to their cooling-off rights, and to explain the full extent of their fees, with a particular emphasis on any fees that are "non-refundable" (after the expiration of the cooling-off period). CRCs could also be required to advise prospective clients of the free services offered by financial counsellors and community legal centres. Like cooling-off periods, these standardised, "blanket" disclosures are likely be of little benefit to consumers with low levels of financial literacy.[168] To address this, Australian policy-makers could devise more "targeted, individualised" forms of disclosure, like those governing credit card contracts under the NCCPA.[169]

While the CROA only requires CRCs to make disclosures prior to the creation of a contract, an Australian regime could impose ongoing disclosure obligations on CRCs, which would apply not only to existing and prospective customers, but to the world at large. CRCs could be required to include certain information on their websites, including:

- more detailed information about the circumstances in which CRCs *can* and *cannot* change or remove a listing from a credit report;
- detailed instructions regarding the ways in which individuals can obtain free copies of their credit reports, and dispute information contained in these reports, by contacting a credit reporting agency or a creditor directly;
- links to information about financial counselling services and community legal centres in the CRC's State or Territory;
- links to information about free industry ombudsman services such as the FOS and the CIO; and

[164] Gillam Z, *Payday Loans: Helping Hand or Quicksand? Examining the Growth of High-Cost Short-Term Lending in Australia, 2002-2010* (Report, CALC, September 2010) p 1. See also Ali P, McRae C and Ramsay I, "The Politics of Payday Lending Regulation in Australia" (2013) 39 *Monash University Law Review* 411. Alternatively, the Government could insert provisions relating to credit repair into the Credit Reporting Privacy Code, as discussed in the "Introduction" to this article. This may be a less desirable option, as it would not provide CRC clients with the powerful remedies available under the *National Consumer Credit Protection Act 2009* (Cth). See the section on "Remedies and enforcement" below in this article.

[165] *Credit Repair Organizations Act*, §§ 1679b(b).

[166] *Credit Repair Organizations Act*, §§ 1679e(a).

[167] *Credit Repair Organizations Act*, §§ 1679c(a).

[168] See Consumer Affairs Victoria, *Cooling-off Periods in Victoria: Their Use, Nature, Cost and Implications*, Research Paper No 15 (January 2009) p 78; Ali P, McRae C and Ramsay I, "Consumer Credit Reform and Behavioural Economics: Regulating Australia's Credit Card Industry" (2012) 40 ABLR 126 at 127.

[169] See, eg, the "Key Facts Sheet" that must be provided to all prospective customers along with any application for a credit card contract (*National Consumer Credit Protection Act 2009* (Cth), ss 133BB-133BD), and the "Minimum Repayment Warning" that must appear on every credit card statement, setting out the total interest that the consumer will pay if he or she elects to make only the minimum repayment (*National Consumer Credit Protection Regulations 2010* (Cth), reg 79B). In the context of CRCs, such "targeted" disclosure might require a CRC to provide detailed, personalised statements of all fees for which the individual consumer will be liable; a statement of these fees expressed as a proportion of the customer's total debt owed to all his or her creditors; or a statement of the fees expressed as a proportion of the consumer's income (on a weekly, fortnightly or monthly basis, depending on how the fees are charged).

- links to a government website, such as the "MoneySmart" website published by the Australian Securities and Investments Commission (ASIC), or the Australian Retail Credit Association's "CreditSmart" website,[170] containing information about CRCs and the laws relating to credit reporting.

If published on every CRC's website, this information would help existing clients to decide whether or not to exercise their cooling-off rights, or to take action against a CRC that was not meeting its legal obligations. It would also allow prospective clients to make an informed assessment of a CRC's services, without having to make a telephone enquiry. This would reduce the risk of individuals entering into contracts in response to high-pressure sales techniques by CRC staff. The Australian regime could also impose a cap on fees charged by CRCs, just as it currently caps the fees that can be charged under "small amount credit contracts", or payday loans.[171] This would prevent CRCs from charging fees vastly disproportionate to their clients' original debts.[172]

Remedies and enforcement

The efficacy of such a regime would depend on the remedies available to clients of CRCs and other affected parties, and the enforcement powers granted to the relevant regulator. As noted above, the CROA empowers individual consumers to pursue actual and punitive damages and to initiate class actions.[173] It also empowers the Federal Trade Commission and State authorities to take legal action against CRCs.[174]

If rules governing credit repair were incorporated into the NCC , it would be relatively simple to include remedies and enforcement provisions broadly comparable to those of the CROA. The NCCPA confers jurisdiction on the Federal Court, Federal Circuit Court and the superior and lower courts of any State or Territory (subject to the jurisdictional limits of those courts), for civil actions against credit providers acting in breach of the NCCPA or the NCC. The NCC provides that a "party to a credit contract", a guarantor or ASIC may apply to the court for an order against such a credit provider.[175] If a "key requirement" of the NCC has been contravened, the court can impose penalties on the credit provider.[176] These penalties can be as great as $500,000 if the order is sought by ASIC or another credit provider;[177] if the application is brought by a debtor, they cannot exceed the total interest charges payable under the contract, or compensation for any loss suffered by the debtor.[178] If the NCC were amended to include CRCs, it may be useful to grant ASIC similar powers to seek penalties against non-compliant CRCs. The NCCPA also provides valuable rights to individual consumers in the form of a small claims jurisdiction with lower fees, simpler procedures and protection from adverse costs orders.[179] The capacity to use the NCCPA's small claims procedure would make it much easier and simpler for CRC clients to exercise these rights.[180]

[170] ASIC, MoneySmart, n 157; Australian Retail Credit Association, n 157.

[171] *National Credit Code*, Div 4A.

[172] For a discussion of this practice, see EWON, n 6.

[173] *Credit Repair Organizations Act*, § 1679g.

[174] *Credit Repair Organizations Act*, § 1679h.

[175] *National Credit Code*, s 112.

[176] *National Credit Code*, s 113.

[177] *National Credit Code*, s 116.

[178] *National Credit Code*, ss 114-15. This limitation also applies to guarantors.

[179] *National Consumer Credit Protection Act 2009* (Cth), s 199. When hearing claims brought under this small claims procedure, a court is not bound by the rules of evidence and may act "in an informal manner" and "without regard to legal forms and technicalities": s 199(5). Parties can only appear with legal representation if they obtain leave from the court, and if only one party has legal representation, the court can impose "conditions designed to ensure that no other party is unfairly disadvantaged": s 199(7)-s 199(8). Importantly, a party can only be ordered to pay another party's costs if the court is satisfied that the proceedings were brought "vexatiously or without reasonable cause", or that the party's "unreasonable act or omission caused the other party to incur the costs": s 200.

[180] If rules for CRCs were inserted into the *Credit Reporting Privacy Code*, rather than the *National Credit Code*, the task of enforcement would fall to the Australian Information Commissioner. The Commissioner has broad enforcement powers,

Evaluation

A rule-based regime modelled on the CROA would impose some limits on the harmful practices of CRCs. It could address some of the most pervasive problems in the industry, such as high upfront fees, hidden administrative charges and punitive cancellation fees, by prohibiting upfront fees and imposing mandatory cooling-off periods. A rule-based regime would have several advantages over a licensing regime. It would be simple and transparent, in contrast to a licensing regime with complex criteria and assessment processes. It may also be less costly to implement than a licensing regime, particularly if it could be grafted on to existing laws governing credit providers. Such a regime would have the advantage of providing consumers with clear legal remedies against non-compliant CRCs.

Still, a rule-based regime modelled on the CROA may have limited impact, since it would rely to a large extent on individual consumers taking legal action to enforce their rights. As noted above, the CROA empowers individuals to seek actual and punitive damages from non-compliant CRCs, but in the United States, unsuccessful litigants are rarely required to pay the legal costs of the successful party. In Australia, it is likely that many CRC clients would be deterred from litigating by the risk of an adverse costs order. This would be particularly true if these clients could only hope to recover the fees they had paid to the CRC, as distinct from punitive damages. As noted above, the NCCPA's small claims procedure could protect CRC clients from some of the cost, complexity and risk associated with litigation, making it much more likely that they would exercise their rights under a rule-based regime. Still, lack of understanding of these procedures, and the stress inevitably associated with litigation, may deter consumers from taking legal action against CRCs.

Moreover, it is likely that a regime based on compulsory disclosure requirements would not be sufficient to protect vulnerable individuals, such as those with low financial literacy.[181] Many prospective clients may not have the inclination or capacity to read or understand long disclosure statements or information on CRCs' websites. This is particularly true of individuals who have limited knowledge of English, limited literacy or a disability, or who are experiencing acute financial hardship. As the former Credit-Rite executive, Jeffrey Roberts, told the US Congressional subcommittee in 1988, disclosure requirements can create the impression of informed consent, while providing little meaningful assistance to ordinary consumers. Mr Roberts observed that under a disclosure model, "[y]ou can read a contract to a person and if the person does not understand what you are reading and sign[s] their name, supposedly it is legal".[182]

Adopting a regime based on the CROA would also require the involvement of an active and well-resourced regulatory body, comparable to the US Federal Trade Commission, to monitor and enforce the new laws. While this may be relatively easy in the short term, it would become increasingly difficult as new CRCs entered the industry. The enforcement of such a regime would represent a significant ongoing cost to government. These resources may be more effectively devoted to a mandatory licensing regime, or to expanding access to financial counselling services and community legal centres.

A licensing regime

A further alternative would be to adopt a licensing regime, drawing on the United Kingdom's current system and the existing licensing regime for consumer credit providers under the NCCPA. Currently, the NCCPA requires all credit providers to be licenced, but the application process is far less stringent than the process for gaining authorisation from the FSA, under the UK's regime. At present, under the

including the power to apply to the Federal Court for civil penalty orders against credit reporting agencies. Part IIIA, Div 7 of the *Privacy Act* also empowers individuals to apply to the court for compensation, if a credit reporting entity is found to have committed an offence under Pt IIIA. These provisions could be extended to apply to CRCs. See n 51 above, regarding the Australian Government's intention to disband the OAIC and incorporate its functions into the work of the Australian Human Rights Commission.

[181] See Ali, McRae and Ramsay, "Consumer Credit Reform and Behavioural Economics", n 168.

[182] *Credit Repair Organizations Act (HR 458): Hearing Before the Subcomm on Consumer Affairs and Coinage of the Comm on Banking, Finance, and Urban Affairs, HR, One-Hundredth Congress, second session, on HR 458, a Bill to Prevent Consumer Abuse by Credit Repair Organizations*, statement of Jeffrey Roberts, n 82.

NCCPA, a person will be granted a credit licence provided that "ASIC has no reason to believe that the person is likely to contravene the obligations that will apply under [the Act] if the licence is granted", and "no reason to believe that the person is not a fit and proper person to engage in credit activities".[183] In making this assessment, ASIC may consider whether the person has ever held a licence which has been suspended or cancelled; has ever been subject to a banning or disqualification order under the NCCPA or the *Corporations Act 2001* (Cth) (*Corporations Act*); has ever been banned from engaging in credit activity in any State or Territory; has ever been insolvent; has ever been banned from managing corporations; or has any criminal convictions of less than 10 years' standing.[184]

Positive criteria to demonstrate suitability

A stringent licensing regime, modelled on the new UK system, could require CRCs to meet positive criteria in order to prove their suitability to operate in the industry. CRCs could be required to demonstrate that they have staff with appropriate qualifications, skills, experience and knowledge of relevant laws; adequate financial resources; an effective management structure and a rigorous process for training and monitoring employees; a business plan; a plan for managing customer complaints; and protocols for dealing with potential and current clients experiencing severe financial hardship (for example, by referring them to free financial counselling services or community legal centres). ASIC may be the most appropriate body to administer this licensing regime, as it already administers the regime for consumer credit licences.

General conduct obligations

To obtain and maintain a licence, CRCs could be required to meet ongoing conduct obligations. These requirements could be modelled on the conduct obligations currently applicable to credit providers under the NCCPA. These include a general requirement to conduct activities "efficiently, honestly and fairly"; to avoid conflicts of interest; to ensure that employees are adequately trained; and to have "adequate risk management systems" in place.[185] The conduct obligations could also draw on the rules governing CRCs that are scattered throughout the UK's new *Consumer Credit Sourcebook*. For greater clarity, and in contrast to the *Sourcebook*, these obligations could be stated concisely in a standalone section of the NCCPA.

Under a licensing regime, CRCs could be subject to a set of duty-based obligations to ensure that their activities serve the best interests of their clients. These obligations could be modelled on s 961B of the *Corporations Act*, which concerns financial advisers' duties to their clients.[186] A "best interests" obligation for CRCs could require CRCs to identify and assess their clients' needs, to obtain complete

[183] *National Consumer Credit Protection Act 2009* (Cth), s 37(b)-37(c).

[184] If the applicant is a body corporate, trust or partnership, the "fit and proper person" test must be applied to each relevant individual within the body corporate, trust or partnership. *National Consumer Credit Protection Act 2009* (Cth), s 37(2)(h).

[185] *National Consumer Credit Protection Act 2009* (Cth), s 47.

[186] The section forms part of the Future of Financial Advice (FOFA) reforms enacted by the former Labor Government in 2012 with the *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth) and *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth). Section 961B(1) provides that a financial adviser "must act in the best interests of [his or her] client". Section 961B(2) sets out steps an adviser must take to satisfy this duty. The steps include "identif[ying] the objectives, financial situation and needs of the client", actively seeking "complete and accurate" information about the client's circumstances, assessing whether or not he or she has sufficient expertise to assist the client, and making "a reasonable investigation into the financial products that might achieve… the objectives and… needs of the client" Section 961B(2)(g) is a "catch-all" provision that requires the adviser to take "any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client's relevant circumstances". This provision has attracted criticism from some financial advisers and legal scholars, on the grounds that it is both too broad and too vague: see Corones S and Galloway T, "The Effectiveness of the Best Interests Duty – Enhancing Consumer Protection" (2013) 41 ABLR 5 at 16. In response to these concerns, the Australian Government moved to repeal the "catch-all" provision in mid-2014, by means of an amendment to the *Corporations Act 2001* (Cth) and an interim Regulation: see *Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014* (Cth), Sch 1, item 10; *Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014* (Cth), Explanatory Memorandum, pp 7, 10-11; *Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014* (Cth), reg 7.7A.3. Consumer advocates strongly opposed this change, arguing that it would remove a "critical component" of the FOFA reforms and render the other limbs of the duty "largely ineffective": see CHOICE, *Exposure Draft: Future of Financial Advice Amendments*, Submission to Treasury (February 2014) p 6; Batten R and Pearson G,

and accurate information about their circumstances, and to provide them with information about any services that would best suit them (including EDR schemes, free financial counselling services and community legal centres). It could require CRCs to implement a process to ascertain and demonstrate that their services are suitable to individual clients analogous to those imposed on credit providers under the NCCPA.[187]

Reporting and enforcement

A CRC licensing regime may include reporting requirements. Licensed CRCs could be required to provide periodic reports to ASIC, in order to demonstrate their ongoing suitability to operate in the industry. As in the United Kingdom, this scheme could impose varying requirements, depending on the size of the CRC. To promote transparency, some or all of this information could be made public. The licensing regime could be used to enforce general conduct requirements, modelled on the FCA's "General principles" and the more specific rules contained in the *Consumer Credit Sourcebook*. ASIC could enforce these requirements by limiting, suspending or cancelling the licences of firms that demonstrably failed to meet minimum standards of conduct or professionalism.

Internal and external dispute resolution

If CRCs were subject to a licensing regime, as part of the regime they would be required to offer internal dispute resolution to their clients and to join an EDR scheme approved by ASIC. These requirements currently apply to all credit providers licenced under the NCCPA, as well as to holders of an Australian Financial Services licence.[188]

Evaluation

The success of a licensing regime for CRCs would partly depend on the identification of an appropriate and adequately resourced regulator. In Australia, ASIC appears the most appropriate body to oversee a licensing regime, given that it already administers the licensing regime for credit activities under the NCCPA. This licensing regime could be implemented at relatively little cost to government, provided that the costs of establishing and running the scheme could be partially recouped through CRCs' licensing fees. Depending on the fees charged, and the size of the industry, licensing fees could eventually make the regime self-sustaining. Given the high fees charged by many CRCs, and the risk they pose to vulnerable consumers, there are strong public policy arguments for requiring CRCs to bear the cost of the licensing regime.

An advantage of a licensing regime would be the requirement that all CRCs join an EDR scheme approved by ASIC.[189] This would empower clients to seek redress if CRCs breached the terms of their licences or violated the ACL. At the same time, it would allow such clients to avoid the stress and costs associated with litigation. An approved EDR scheme would provide an important source of information to government policy-makers, consumer advocates and the wider community, as all such

"Financial Advice in Australia: Principles to Proscription; Managing to Banning" (2013) 87 *St John's Law Review* 511 at 524-530. Following extensive debate, the Government's partial repeal of FOFA was disallowed by the Senate on 20 November 2014: see Morris S, "Labor Rallies Crossbench Senators Over FOFA Reforms", *The Saturday Paper* (online, 22 November 2014) http://www.thesaturdaypaper.com.au/news/politics/2014/11/22/labor-rallies-crossbench-senators-over-fofa-reforms/141657 48001275#.VOQbeS7D9ME.

[187] A recent report on debt settlement companies, produced by the US Center for Responsible Lending, provides a useful point of comparison. The Center recommends that debt settlement companies be required to "screen" prospective clients before enrolling them in a debt settlement programme. This screening process would require companies to "to conduct a personalized evaluation of a prospective client and conclude that the debt-settlement program is likely to provide a net benefit and is affordable, given the prospective client's current income, expenses, assets, and liabilities". The Center argues that such an assessment should be provided to prospective clients in writing, prior to the formation of any contract. See Parrish L and Harnick E, "The State of Lending in America and Its Impact on US Households: Chapter 12: Debt Settlement" (Research Report, Center for Responsible Lending, 30 June 2014) p 13.

[188] *National Consumer Credit Protection Act 2009* (Cth), s 47(1)(h)-47(1)(i); *Corporations Act 2001* (Cth), s 912A(1)(g), s 912A(2). See also ASIC, *Licensing: Internal and External Dispute Resolution*, Regulatory Guide No 165 (June 2013).

[189] At present, the FOS and COSL are the only two schemes with ASIC's approval: ASIC, *ASIC-approved External Dispute Resolution Schemes* (18 April 2012) http://www.asic.gov.au/asic/asic.nsf/byheadline/ASIC+approved+external+complaints+resolution+schemes?opendocument.

schemes are obliged to report on systemic issues and serious misconduct by industry participants.[190] A licensing scheme would also be the most effective way to implement a "best interests" duty of the kind described above.

A voluntary industry code

A voluntary industry code would provide a less onerous, and far less effective, alternative to the various reform options outlined above. As discussed in Pt 1, the CRIAA has devised its own code of conduct for CRCs, but this CRIAA Code imposed very few meaningful restrictions on the conduct of its members.[191] A voluntary industry code might be more effective if it were approved by ASIC. The *Corporations Act* empowers ASIC to approve industry codes relating to "any aspect of the activities of persons for which it has regulatory responsibility".[192] In order to gain ASIC's approval, an industry code must provide for independent reviews at least once every three years.[193] An ASIC-approved code for the credit repair industry would need to set out the basic rules necessary to ensure that clients of CRCs received fair, efficient and valuable services in return for the fees they paid. It would also need to include effective dispute resolution processes, remedies and sanctions for breach of its provisions. To this end, it may need to establish an independent governing body, including industry representatives and consumer advocates in equal number.

While such a code may offer some advantages over the former CRIAA Code, it is difficult to see what incentive CRCs would have to sign up to it. The evidence suggests that at present, several CRCs are able to operate profitably without complying with any industry code or belonging to an industry body. It seems unlikely that prospective clients would choose a particular CRC because of its membership of such an organisation. In fact, such membership may place CRCs at a significant disadvantage to their competitors, since it would impose compliance costs and limit their capacity to charge very high fees. For these reasons, a more stringent voluntary code may have little impact on the operation of the industry.

A hybrid model

The most effective option for regulating CRCs in Australia would be a rule-based regime combined with a licensing system. Such a system would be consistent with the approach already adopted in other parts of the NCCPA and the NCC, in relation to activities and products deemed to pose potential risks to consumers (for example, reverse mortgages and unsolicited increases in a consumer's credit limit).[194]

A hybrid model would draw on the strengths of both the UK and US models, while avoiding some of their disadvantages. A rule-based model promotes transparency and consistency. A set of overarching rules, applicable to all CRCs, would provide regulators, consumer advocates and the general public with a clear framework for dealing with CRCs. These rules could include a strict prohibition on upfront fees, a mandatory cooling-off period, a prohibition on charging fees during the cooling-off period, and perhaps even a requirement that CRCs charge no fees until they have successfully amended their clients' credit reports. Such rules would address some of the more damaging aspects of CRCs' current business model. If combined with rights to sue, and access to the NCCPA's small claims procedure, they would constitute valuable protections for individual consumers. Extensive disclosure requirements – applying not only to prospective clients, but to information published on CRCs' websites – would help potential clients to make informed decisions

[190] ASIC, *Approval and Oversight of External Dispute Resolution Schemes*, Regulatory Guide No 139 (June 2013) pp 26-29.

[191] CRIAA Code, n 57.

[192] *Corporations Act 2001* (Cth), s 1101A(1)(c); ASIC, *Approval of Financial Services Sector Codes of Conduct*, Regulatory Guide No 183 (March 2013) (hereinafter RG183) p 7 [RG 183.13].

[193] ASIC, RG183, p 19 [RG 183.82].

[194] *National Credit Code*, cl 67(4); *National Consumer Credit Protection Regulations 2010* (Cth), Pt 3.5.

about whether or not to engage the services of a CRC. Where possible, CRCs' disclosures should be "targeted" and tailored to the circumstances of the individual consumer.[195]

In conjunction with these rules, a mandatory licensing and reporting regime would eliminate the worst operators from the industry and provide the government with valuable information about the extent and activities of CRCs. It would also enable the government to recoup some of the costs of regulating the industry, through the collection of licensing fees. A licensing regime would enable ASIC to monitor and enforce a "best interests" duty modelled on the Australian FOFA reforms. Just as importantly, a licensing regime could ensure that all CRCs belonged to an ASIC-approved EDR scheme. This would enable individuals to take action against CRCs without engaging in litigation. Such a scheme would be funded by the industry and would impose no additional costs on government. Indeed, by providing an incentive for CRCs to comply with their legal obligations, it may reduce the workload of the regulator charged with enforcing the new regime.

The introduction of a licensing regime and the ongoing monitoring by ASIC of CRCs entailed by such a regime also address one of the key hurdles to the effective regulation of CRCs. CRCs in the United States have responded to regulation by engaging in a wide range of behaviours, including contract design, intended to circumvent regulation. Similarly, in Australia, payday lenders have attempted to use contract design to circumvent the payday lending regulations.[196] ASIC's role in enforcing the licensing regime by sanctioning offending conduct, for example by banning certain services or providers and cancelling licenses, is thus critical to ensuring the protection of consumers of credit repair services.

CONCLUSION

Australian CRCs charge upfront fees on the assurance that they can improve their clients' credit reports. These fees can be extremely high, even for clients with relatively minor debts, or for those whose credit reports cannot be "cleaned" or amended. While CRCs claim unique expertise in "credit reporting law", financial counsellors, community legal centres and industry ombudsman schemes offer similar services free of charge. In many cases, then, the fees charged by CRCs unnecessarily compound their clients' financial problems. Despite this, the credit repair industry is subject to no regulation, apart from Australia's general consumer protection laws.

In attempting to regulate the activities of CRCs, Australia can learn from the experiences of the United States and the United Kingdom, both of which have laws that deal specifically with credit repair. In the United States, the CROA has imposed clear rules on CRCs, including a ban on upfront fees, mandatory cooling-off periods and extensive disclosure requirements. It has also provided US consumers with legal remedies against CRCs that do not comply with the law. Despite the recent trend towards compulsory arbitration, these remedies have enabled consumers and their advocates to draw attention to the worst practices of CRCs. Under the UK's licensing regime, consumers have been compelled to rely on the OFT, and more recently, the FCA, to monitor and enforce compliance with the law. While this system lacks the strong individual remedies afforded by the CROA, it does allow the regulator to exert direct control over the conduct of CRCs, in a relatively efficient manner.

A regulatory model drawing on both the UK and US regimes would do a great deal to mitigate the worst effects of CRCs. This hybrid model would impose clear, consistent rules on all CRCs, while also subjecting them to a licensing regime. Such a model would enable the government to monitor the industry, and provide individuals with meaningful, accessible remedies against non-compliant CRCs. While it would not provide the quick fix of a total ban, this hybrid regime would do much to protect vulnerable Australians from the most harmful practices of CRCs.

[195] See Ali, McRae and Ramsay, "Consumer Credit Reform and Behavioural Economics", n 168 at 127, 132-33, and see the section, "Rules modelled on the CROA" above in this article.

[196] See, eg, ASIC, "ASIC Continues Crackdown on Payday Lending Avoidance Models", *Media Release* 14-278 (22 October 2014).