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Dear Chong Shao,

Credit Reporting Code Review – Early engagement with consumers

Thank you for the opportunity to engage early on the issues that are important to consumers in the upcoming review of the *Privacy (Credit Reporting) Code 2014 (Version 2.1)(CR Code)*. This submission was written in consultation with a number of other consumer advocates including Consumer Action Law Centre, Financial Counselling Australia, Care Financial Counselling, Consumer Credit Legal Service (WA), the Economic Abuse Reference Group and the Australian Privacy Foundation.

The issues presented in the Consultation Paper will be fundamental to the collection of meaningful insights from stakeholders. The way credit reporting issues are introduced, and competing solutions are described, will influence stakeholder perspectives and responses. Consumer advocates want to ensure (as much as possible) that the Consultation Paper reflects an unbiased framing of both consumer and industry concerns.

The Financial Rights Legal Centre (**Financial Rights**) will address the following major issues we believe should be included in the Issues Paper:

1. Readability and accessibility of code as a whole
2. Independent Code Governance
3. Individual vs account-based reporting
4. Simplifying the corrections/complaints process
5. Correcting or backdating Repayment History Information
6. Timely disclosure of negative RHI to customers
7. Flexibility for Credit Providers to not list or to remove negative information on reports when the customer is vulnerable

8. Use of Consumer Credit Liability Information by debt collectors
9. Economic Abuse considerations throughout the CR Code
10. Current or future use of CCR by unlicensed credit providers or service providers not covered by the NCCP

At the end of this submission we have also included a list of other issues about which consumers have serious concerns, for your consideration.

Major Issues which should be canvassed in the Consultation Paper

1. Readability and Accessibility of the CR Code & Credit Reports

Consumer advocates hold significant concerns regarding the overall complexity of the CR Code. Currently the CR Code is completely unintelligible to an average consumer. To engage constructively with the CR Code a consumer needs to read the legislation, the regulations, the code and the explanatory memorandum in order to make sense of the rules.

It will be difficult for consumers (or their advocates) to use the CR Code to hold lenders accountable for how they use the credit reporting system. Consumer advocates recognise that one of the roles of the CR Code is to further particularise the relevant provisions of the *Privacy Act* (and various amending legislation) and so requires a level of detail that might not be accessible to average consumers. Nevertheless, the CR Code is a consumer facing code and, at a minimum, it needs to be accessible to advocates like financial counsellors, consumer lawyers and case managers at AFCA.

Our recent Submission to the Office of the Australian Information Commissioner (OAIC) regarding new provisions to the CR Code recommends that the OAIC break up the CR Code between principles-based consumer-facing provisions and the technical industry-facing provisions. This will be an important issue to canvas in the Consultation Paper. Consumers need accessible principles-based provisions to enable them to make complaints to External Dispute Resolution schemes.

A related issue is the readability of credit reports themselves. The CR Code could set minimum standards for readability and accessibility of credit reports.

2. Independent code governance

Before the 2014 CR Code was drafted it was clear that there was agreement between the OAIC as well as industry and consumer representatives that the CR Code should have independent governance arrangements. The current CR Code does not include an independent Code Governance Administrator or a Code Compliance Committee and we strongly support creating one in the next version of the Code. Our understanding is that Independent Code Governance has not been put in place because of concerns that it may duplicate the role of the OAIC.

The key benefits of having an independent governance body are that it allows for increased, proactive monitoring and enforcement activity without impacting on the resources or activities currently being undertaken. While there are costs associated with establishing and operating an independent governance body, which would likely be funded by industry, we believe the

benefits of better Code compliance and more transparent monitoring and enforcement would outweigh those costs.

In the 2017 CR Code Review it was recommended that the OAIC internally review its regulatory activities in respect of the Code, and consider options for increasing its proactive monitoring and enforcement activities having regard to its available resources or ability to seek further funding if required. From the consumer advocates' perspective, this has not transpired.

This issue should be canvassed in the 2021 Consultation Paper.

In 2011, when the *Exposure Drafts of Australian Privacy Amendment Legislation* were introduced industry representatives supported the idea that an independent committee should be established to 'drive compliance with the Code'. In April 2013 ARCA's Issues Paper for the Consultation Draft of the CR Code addressed code governance and included four questions for stakeholders:

- *Is the proposed governance structure sufficiently robust to enable stakeholders to have confidence in the credit reporting system? Does it sufficiently deal with conflicts of interest?*
- *Is there a sufficiently compelling case for an additional level of governance – a code administrative body – overseeing credit providers and credit reporting bodies and reporting through to the Commissioner? Would the costs justify the benefits?*
- *Given that Part IIIA of the Privacy Act entrusts credit reporting bodies with signing up credit providers to agreements and with auditing credit providers' compliance with their agreements, would it be workable to have a code administrator with responsibility for auditing or investigating serious or repeated interferences with privacy or systemic issues?*
- *If a Code administrator body were to be established, how should this be constituted (bearing in mind the OAIC's draft Guidelines that state the body needs to be representative of those bound by the Code)? What should the body's responsibilities be? How should the body be funded and how should it operate?*

With a limited amount of tweaking these same questions could be put to stakeholders again in the 2021 Review.

3. Individual versus account-based reporting

Industry is increasingly aware of economic abuse. Creditors, and AFCA, accept that there are circumstances where one joint borrower should not have been a borrower, should not be liable for payment, and/or should be granted a variation without notice to the other borrower due to safety concerns. These approaches should be supported by the credit reporting system.

Consumer advocates have raised concerns in our recent Submission to the OAIC that account-based reporting is inappropriate, and that individual based reporting is the optimal way to ensure both privacy and safety objectives for at risk borrowers can be met. Account-based reporting necessarily includes weighing up the privacy rights of one joint account holder against the safety and privacy rights of the other. We submit that safety should trump privacy in these circumstances.

Consumer advocates would like to challenge the assumption the account-based reporting is fundamental to the credit reporting system. While we recognise that converting the entire system to individual reporting would entail costs, individual reporting is possible in discrete cases. Our anecdotal experience is that credit providers can manually report different repayment histories for different joint account holders. In the context of victim survivors of economic abuse, this change can be critical.

The difficulty of obtaining financial independence is often the most significant barrier for a victim survivor to leaving a violent relationship, and a lack of financial independence often results in a person returning to that relationship. Joint finances become a tool of control, particularly if the perpetrator can no longer harm their victim in the form of physical or psychological abuse. Even though it may not be in the abuser's best interests to stop payment or default on the debt, they may do so knowing that it will cause further pain for their victim.

The issue of individual versus account-based reporting should be canvassed in the Consultation Paper.

4. Simplifying the corrections/complaints process

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

Consumer advocates submit that the correction of information mechanism is inefficient and ineffective in practice. For example:

- Section 20 of the Code is difficult for consumers to read and understand,
- There should be a simple method for disputing credit report entries and requesting corrections, especially when a number of entries need to be corrected across various credit accounts (such as occurs in situations of domestic violence or fraud),
- Given responsibility for making a correction is held by both CPs and CRBs, both have a tendency to 'push back' against a request for correction of information by a consumer. In particular, this is partly due to CRBs charging a fee for correction which CPs are often unwilling to incur,
- CPs and CRBs have 30 days to correct the information listed, however in many cases this timeframe is not commercially reasonable (for example, where the individual is seeking approval for a new line of credit in order to purchase a house or vehicle).

The CR Code should strive to commit CRBs to best practice in dispute resolution, not simply to meet the minimum requirements set by Part IIIA of the Act. Consumer advocates will be advocating for stronger commitments in the CR Code with regards to dispute resolution and these issues should be canvassed in the Consultation Paper.

5. Correcting or backdating Repayment History Information

Section 20 of the CR Code contains detailed information relating to the correction of default listings, but there are no specific rules relating to the correction or backdating of Repayment History Information (RHI). Consumer advocates would like the Consultation Paper to consider whether the CR Code should have clear rules regarding the correction of RHI.

For example, Section 20.5 explains that default information can be corrected if it relates to an overdue payment which occurred because of the “unavoidable consequences of circumstances beyond the individual’s control...”. This section should also apply to the correction of negative RHI if it relates to missed payments that occurred because of circumstances beyond the individual’s control.

6. Timely disclosure of RHI to consumers

The CR Code should require credit providers who are reporting RHI about their customers to notify those customers on their regular account statements or by SMS about the information reported to the CRB and its meaning. We contend that there are advantages to credit providers, consumers and CRBs:

For credit providers:

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

For consumers:

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

For CRBs

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

7. Flexibility for Credit Providers to not list or to remove negative information on reports when their customer is vulnerable

Consumer advocates (which includes solicitors, financial counsellors and other caseworkers) regularly include the contents of credit reports in consumer disputes and settlements with industry. When we are assisting clients to resolve financial disputes it is standard practice for us to request that credit providers, debt collectors or utilities companies refrain from listing negative information while hardship negotiations are ongoing. The majority of industry members will work with advocates to come to a fair outcome for their customers. However the CR Code does not always permit this type of best practice hardship flexibility.

Clause 20.5 of the Code needs amendment to include domestic and family violence as an example of circumstances beyond an individual's control (while noting that this is not an exhaustive list), and to clarify that credit providers have discretion where the CP believes that the information which could be reported (or which is already on the credit report) is beyond the control of the consumer.

Credit providers regularly agree to waive a debt, or to not pursue payment against one joint debtor, due to the debt being incurred (or a default resulting) due to domestic and family violence. However, consumer advocates report that CPs often say that they can't remove a default as they believe this is not allowed under the rules.

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

Up until recently, the comprehensive credit reporting system has been a voluntary system, meaning the relevant legislation has not needed to address the voluntary removal of default listings. It is common for a lender to refuse to formally admit that negative information is inaccurate (for example, due to breaches of responsible lending laws), but nevertheless agree to remove a default listing as part of a legitimate settlement agreement.

The level of flexibility that the CR Code could include in reporting is an issue that the Consultation Paper should consider, as we believe industry stakeholders as well as consumer advocates would support it.

8. Use of Consumer Credit Liability Information by Debt Collectors

In the last year an issue has developed around debt collectors using Consumer Credit Liability Information (**CCLI**) (or account information) as a place to list old debts which are still technically in force, but not active credit accounts. Consumer advocates do not believe this was the purpose of CCLI and it is a misuse of the credit reporting system.

Under existing rules debt collectors do have the right to list information on credit reports once they have been legally assigned the debt, and they can list CCLI up to two years after the account has been 'closed'. We have seen an example where a debt collector listed CCLI years after the default information fell off because there was a court judgment and technically the debt was still in force. This re-listing of debts in the CCLI is both confusing to consumers and also detrimental to their credit rating. The CR Code should prescribe a maximum period of time that one debt can appear in any form on a credit report. It is clear that default information cannot be relisted, so debt collectors should not be able to use the work-around of listing CCLI instead.

Section 6 of the CR Code will need to be amended to resolve this issue.

9. Economic abuse considerations throughout the CR Code

The Code needs to consider any specific obligations that should be included to guide CRBs and credit providers in dealing with economic abuse. There are a number of credit reporting issues that arise for victim survivors who are experiencing or escaping abusive relationships. For example:

- The need to remove negative RHI or a default listing (where it has occurred as a result of duress or fraud on the part of a partner for example),
- Problems with access and identification after a victim survivor has fled violence,
- Simplification of the corrections process when there are numerous debts and enquiries on the victim survivor's credit report which are a result of economic abuse. Needing to go through separate disputes to remove each one can be re-traumatising for a victim of economic abuse,
- Security concerns when a victim survivor uses a new address to access a credit report and does not want that address shared with the perpetrator (who may be a joint account holder) or any other third party (like debt collectors).

Some of these problems relate to account-based reporting, but some of them require additional amendments to the CR Code.

10. Current or future use of CCR by unlicensed credit providers or service providers not covered by the NCCP

Consumer advocates have concerns relating to the use of CCR by certain credit providers which are unlicensed or not subject to responsible lending obligations under the NCCP. These include Buy Now Pay Later (BNPL) providers, small business lenders and agents of credit providers (debt collectors).

To access the CCR regime, lenders must hold an Australian Credit Licence (ACL) applicable to consumer lending and provide consumer lending data to credit bureaus and other credit providers. In a recent submission to the ongoing parliamentary inquiry into housing affordability, the Australian Finance Industry Association (AFIA) has suggested expanding the categories of lenders that can contribute to, and access data from, the CCR scheme. While consumer advocates would not support expanding access CCR to unlicensed credit providers, the idea of BNPL providers accessing CCR raises concerns about whether having an ACL should be the only requirement required for access. Consumer advocates strongly believe the ability to

contribute to and access CCR data should be linked to a credit provider being subject to responsible lending obligations.

Currently BNPL providers do not need to comply with responsible lending obligations due to the nature of their products, but some providers do have an ACL. Many of Australia's ADIs are contemplating offering BNPL services,¹ but those services will not be subject to the same lending rules as even payday lenders. Consumer advocates believe credit providers should have an ACL and comply with responsible lending obligations before they can gain access to CCR data.

Additional Issues which should be considered for inclusion in the Consultation Paper

Although there is not space in this submission to explain all of the issues that consumers are concerned about in relation to the CR Code, we have included a summary list below. Please contact us if you would like more information on any of the following items.

- **Credit Reporting Bodies (CRB) removing multiple credit enquiries from a person's report**
 - Consumer advocates would like to see a solution where multiple credit enquiries can be removed in one go when economic abuse or fraud is involved. It can be extremely difficult, and even re-traumatising for a victim of economic abuse or fraud to try to remove many credit enquiries relating to different credit providers from their report.
 - The CR Code could require CRBs to certify that numerous enquiries are a result of abuse or fraud if they were in the same time period and remove them en masse.
- **Security of contact information**
 - Consumer advocates would like the CR Code to impose restrictions around sharing contact information of consumers when they request access to their free credit report.
 - Victim survivors of abuse can be particularly reticent to access their credit report out of concern that their updated contact details will be shared with third parties, like debt collectors or joint account holders who may be perpetrators of abuse.
- **Access by real estate agents or landlords**
 - There is currently a common problem where real estate agents or landlords request that consumers supply a copy of their credit report as a part of any

¹ The Commonwealth Bank for example has recently introduced a BNPL product called StepPay.

rental application. This is a common work-around of the rules preventing real estate agents or landlords from accessing the credit reporting system.

- The CR Code should impose stronger rules preventing real estate agents/landlords asking consumers to supply a credit report in order to apply for rental accommodation.
- **Credit repair companies**
 - Credit repair companies offer to “fix” your credit report for a fee. Credit Repairers are also purporting to provide services or products to “improve” credit ratings/scores. They guarantee high success rates of getting credit reports fixed (regardless of whether the listing is inaccurate or not). The fees charged for the service can be around \$1,000 to fix one credit default listing (or a similar non-refundable amount upfront with additional payments for each listing removed). Fees often apply even if the company is unable to remove any default listings from a consumer’s credit report. Credit repair companies use dispute resolution schemes on behalf of consumers to try and get listings removed even if the listing is completely accurate.
 - The CR Code could include certain requirements that would enable the OAIC to monitor problems caused by credit repair companies in the credit reporting space. For example, Credit Reporting Bodies could be required to record data on applications and disputes raised by credit repair companies, and report this data regularly to the OAIC and ASIC.
 - The CR Code could also address inappropriate referral arrangements between creditors, CRBs and credit repair companies and require CRBs to inform consumers represented by credit repair companies of their right to dispute inaccurate listings, or listings made in breach of the law, for free and of the free services available to assist in this process.
 - Stakeholders should be asked in the Issues Paper about potential changes to the CR Code which might tackle some of the ongoing problems caused by the growing credit repair industry.
- **Consistency of reports between Credit Reporting Bodies**
 - Currently, credit providers report information separately to the three credit reporting bodies (Equifax, Illion, Experian). Consumer advocates’ experience has been that we need to go through three separate processes to gain all credit records as different information has been reported on each of them. This is both time consuming and sometimes administratively difficult. Furthermore, as we have a number of vulnerable clients, the amount of time it takes to obtain all three can be detrimental to their case and personal wellbeing.
 - We are optimistic that the new credit reporting arrangements will eventually result in the same information appearing across all three credit reports, so that the current necessity of obtaining all three reports is no longer required. However this will not be a reality for several years.

- In the meantime the CR Code could require the CRBs to develop a free single-entry point tool to get access to all three credit reports with different bureaus through one website.
- **Handling of statute barred debts**
 - We have found that many entitles list a debt close to the time when a debt would become statute barred;
 - Defaults should be removed immediately if the debt has become statute barred;
 - Creditors should have to prove a debt is *not* statute barred within 30 days of a consumer's request for removal, or the listing is automatically removed;
- **Victims of Fraud**
 - The CR Code should require CRBs notify all affected CPs of an allegation of fraud, ask lenders to provide the documentation on which they relied on to establish the identity of the person, track responses and then CRBs can report back to the consumer: Section 17.
- **Fairness Principle**
 - Most financial services sector codes commit subscribers to acting fairly. The CR Code does not. This type of commitment is important for dispute resolution and issues of vulnerability. It is important to note too that AFCA applies its fairness jurisdiction to credit reporting decisions², so complying with a fairness principle in the CR Code could help prevent AFCA complaints.
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Concluding Remarks

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

Kind Regards,



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² <https://service02.afca.org.au/CaseFiles/FOSSIC/742728.pdf>;
<https://service02.afca.org.au/CaseFiles/FOSSIC/617615.pdf>

About Financial Rights

Financial Rights is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters.