Submission by the

Financial Rights Legal Centre

Consumer Credit Legal Service WA

Australian Retail Credit Association

Consultation on variations to the CR Code, October 2023

November 2023

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

Introduction

Thank you for the opportunity to provide feedback on the proposed variations to the Privacy (Credit Reporting) Code 2014 (Version 2.3) (**CR Code**). This submission will address the following proposals:

- Proposal 4: Format of the CR Code
- Proposal 6: Accommodating other entities reporting CCLI;
- Proposal 19: Introduce positive obligations related to statute barred debts;
- Proposal 24: Notification obligations;
- Proposal 28: 'Automatic' requests for credit ban extensions; and
- Proposal 37: Enable correction of multiple instances of incorrect information stemming from one event.

Proposal 4: Format of the CR Code

The CR Code is a complex piece of quasi-legislation that relies on a number of other pieces of law. It can be difficult for consumer advocates to navigate without clear references to the relevant sections of the Privacy Act and Regulations. In the CR Code Review process, consumer advocates supported the proposal to review source notes to ensure that the CR Code adequately explains the purpose and effect of each paragraph and that the relevant provisions of the law are clear.

While changing from the Classic Template to the Office of Parliamentary Counsel (OPC) template will not have a substantive impact, it does reduces the accessibility and plain language elements of the Code. While the information from the blue rows in the Classic Template has been carried over to the OPC template as 'notes', the entire OPC document is very legalistic. Community lawyers will be able to readily navigate it, but financial counsellors, community support workers and consumers may struggle.

Plain language is writing designed to ensure the reader understands as quickly, easily, and completely as possible. Plain language strives to be easy to read, understand, and use. It is as much about information organisation as it is about word choice. The 'blue rows' in the Classic Template helped to clearly differentiate language from the Privacy Act from the provisions of

the CR Code. The OPC document loses this delineation. We note the same OAIC guidance which references the OPC also states "*... it is important that entities bound by the code, the Information Commissioner, other stakeholders and the public are able to easily understand and interpret the code.*"

It is very useful for consumer advocates (solicitors as well as non-lawyers) who are not familiar with credit reporting rules to have relevant references to the Privacy Act and Regulations alongside the provisions of the CR Code. It is common for a financial counsellor or community lawyer to go from limited engagement with the credit reporting rules to having a client that needs detailed assistance with a credit reporting issue. Having a single source of information like the Classic Template made all the rules more accessible. For these reasons, if at all possible we recommend that the CR Code remain in the Classic Template and not be transformed into the OPC template.

Recommendation

1. **Retain the Classic Template for the CR Code.**

Proposal 6: Accommodating other entities reporting CCLI

Consumer groups agree that some of the definitions relating to CCLI in the CR Code need to be amended to accommodate telecommunications and utilities credit. This type of credit reporting information can help individuals build a positive credit history. CCLI from telcos and utilities can also be a very useful record of what accounts have been opened in an individual's name when they have been the victim of fraud or economic abuse.

The proposed definition for "Open Account Date" requires adjustment. The intention for the proposed variation in the Consultation Paper says:

- *For the energy sector, the "account open date" should effectively be the day on which:*
    - *the customer has given explicit, informed consent to establish an energy service contract;*
    - *the energy retailer owns the billing rights to the customer's service address in the energy market ; and*
    - *the energy retailer has generated an active account in its systems*

This suggests that the account open date should be the date on which the customer agrees to the contract/connection, not the day of commencement of the actual service. A consumer can book a new connection contract days, weeks or months in advance of actually

commencing the connection and they could change their mind and engage another service in that time (i.e. not move in to that home).

Consumer groups believe the relevant fact is the commencement of the actual service and the accumulation of usage 'credit'. As such, the Account Open Date should be the agreed connection date and actual commencement of service.

Nevertheless the proposed variation wording in Section 6.2 of the CR Code is closer to our view of an accurate definition of "open account" than the intention listed in in the Consultation Paper.

> *"In the case of credit provided in the context of a telecommunications or utility service, for consumer credit liability information disclosed after [date], the day that a service is first provided, and on which the credit provider has generated one or more active accounts within its systems"*

By requiring both the commencement of the service AND the generation of an active account in the provider's systems, the proposed variation wording should avoid situations where a person moves into a new rental earlier than the account start and start inadvertently using energy before entering a contract with the utility provider.

It may be useful to have additional guidance from ARCA to clarify that the day on which the consumer credit is entered into is NOT necessarily the day the consumer enters into a contract with the provider (as this may have occurred long before the service is commenced). It is also NOT the day the provider owns the billing rights (as this could possibly happen when a tenant moves into a rental early and starts accruing usage). The account open date must include BOTH the commencement of the service as well as the provision of explicit, informed consent to establish an energy service contract by the consumer.

We support the variation relating to "the day on which the consumer credit is terminated or otherwise ceases to be in force". Again it might be useful to have a note after 6.2(d)(i) which clarifies that when service provision ceases but a debt remains outstanding, the credit should still be reported as closed. We offer no comment on the 'maximum amount of credit' and revolving credit or reverse mortgages.

Recommendation

2. **ARCA should issue guidance to clarify situations relating to utilities that would not lead to the creation of CCLI and what happens when a service ceases but a debt remains outstanding.**

Proposal 19 Introduce positive obligations related to statute barred debts

Consumer representatives long supported establishing a positive obligation on CPs to request the removal of default information that has become statute barred. In numerous previous submission regarding the CR Code we have included evidence of the harm we see from statute barred defaults remaining on credit reports. We agree with the 2021 Independent Review findings that the current arrangements involve a substantial imbalance of power that ought to be corrected.

We appreciate that implementing these changes will be complex and will require an amendment to the Privacy Act. Our preferred option for addressing statute barred defaults is that the five-year limit for defaults on credit reports should run from the date of the default, rather than the date of the default being listed on the credit report. We acknowledge this option will require legislative change.

Noting the review of Part IIIA of the Privacy Act is imminent, any changes to default listing timeframes will take years to implement. As such, it is important to introduce limitations on default listings into this Code.

If under the CR Code a CP had only a two-year limit to either list the default or sell the debt to a debt buyer that could list the default, there would be very few defaults which linger on credit reports after they have become statute barred. This limited period of disclosure could be a transitional arrangement until any legislative changes take place.

We note ARCA's previous concerns that prohibiting the disclosure of default information after 1-2 years could obscure information about recoverable debts that are relevant to the individual's creditworthiness. There will always be recoverable debts that consumers owe that are left out of the credit reporting system. There are lenders that choose not to participate in credit reporting (like payday lenders and wage advance). There are also service providers that are owed money but are not able to participate because they do not belong to an EDR scheme (like private schools, private solicitors, gyms, etc.). Finally, people might owe any number of debts to friends, family or other individuals who have legally recoverable claims but are not listing on credit reports. As such, we don't consider this to be an impediment to our proposed reform.

Case study – Consuela's story – S295343 – August 2023

Consuela defaulted on a personal loan from a bank 7 years ago. She confirmed that she had not made any payments or acknowledged the debt since the first date of default. Consuela recently checked her credit report and found that the debt was listed on the report only in 2021 despite being outside the statutory limitation period.
Consuela wrote to the bank about the 'alleged debt' and request documents associated with the loan. The bank responded with a one-page letter stating that they could not find any documents associated with offer of loan and the last balance on the loan shows 2 late payment fees in 2015.

Case study – Kate's story – S294431 – July 2023

Kate was in her late 30s, the full-time carer for her mother, and suffered from depression and social anxiety. Kate reached out for help because of a payday loan dispute. While helping Kate with her payday loan issue the financial counsellor discovered she also had a default listing from a debt collector that was listed on her credit report in 2020.
The original debt of the listed default was from a telco account Kate had settled in full via a payment arrangement in 2010. The debt collector agreed the account had reached statute of limitations and had it removed from Kate's credit file.

Recommendation

3. **Introduce into the CR Code a restricted time period (12-24 months) beyond which default information cannot be listed. This will serve as a transitional arrangement while changes are sought to the Privacy Act.**

Proposal 24 Notification obligations

Consumer groups have no objections to the proposed change to Section 4 of the CR Code. It is possible that a short and prominent statement for consumers when they open a new credit account will give them a heads up that information about their regular payments will go on their credit report. This may help consumers better understand that they will not be notified or asked to consent before missed repayments are listed on their credit report.

However, information about notification and consent to credit reporting information being shared with CRBs is, in our view, a low priority issue for most people when they take out a loan. It is unsurprising that people later claim were not told or not given a chance to consent to credit reporting information being shared. No matter how clear or prominent such information is at the start, consumers will not absorb this information until it is relevant to them (i.e. when they start missing payments).

We know from our experience consumers get very confused and vexed about credit enquiries or the access records, especially if there are a lot of them from debt collectors or a lot of them which are the result of economic abuse. Most consumers do not understand that they will not get any notice about access to their credit reports by CPs, and that their consent is not necessary.

The new Soft Enquiries framework may help prevent lots of enquiries appearing on credit reports when consumers are shopping around. We'd like to see information from industry about how enquiry information is viewed and scored in a lending decision process. This could be done in the form of ARCA Guidance that financial counsellors could share with clients if they have concerns of this nature. If consumers knew that enquiries do not cause a lot of harm to credit scores then they wouldn't be so vexed by them, and the consent versus notice issue would not lead to as many disputes.

Regular notification of missed payments or enquiries

Consumer representatives have argued for some time that lenders could do more to keep their customers informed in real time when negative information is going to be recorded on their credit reports.

The CR Code should require credit providers who are reporting missed payments (or negative 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.

The CR Code should also require CRBs to notify individuals in real time when an enquiry has been listed on their credit report. This would go a long way to protecting individuals from the growing problems of economic abuse and identity theft.

Case study – Vijay's story - S298518 – October 2023

Vijay is trying to refinance his mortgage but there are a couple of missed payments listed on his credit report which are making it impossible. A few years ago Vijay tried to arrange a direct debit to pay his mortgage but his bank said a direct debit can only be set up at a branch. Vijay tried going to the branch but this was too difficult and the wait too long. Instead Vijay opted for an online auto payment setup. However, when the interest rates changed Vijay failed to update his auto payments and so only made partial payments on his mortgage for several months leading to the poor repayment history.
The bank did not succeed in notifying Vijay about his partial mortgage repayments, so he had no idea that his RHI was recording a "1" for every other month for about 9 months. Vijay does admit that he had a few missed calls from his bank, but no voicemails or SMS messages. Vijay is employed and has savings. He would have updated his auto payments if he had realized partial payments were getting recorded on his credit report.

Case study – Wendy's story – S291610 – May 2023

Wendy had escaped an abusive relationship and was beginning to put her life back together. She applied for a car loan and was rejected because, unbeknownst to her, Wendy had a commercial listing on her credit report. Wendy contacted the company with which the listing was associated and discovered that her ex-partner had put her down as a 'manager' of that company on a credit application. Wendy explained this to the company, and the company said that they would remove the listing if she sent them a considerable volume of personal information about her circumstances. Wendy found it extremely challenging and re-traumatising to collect and send all the information related to the period during which she was in an abusive relationship. Had she gotten notice when the credit application was first listed on her credit report she likely could have resolved the issue herself or gotten assistance immediately.

Recommendations

4. **Require CPs reporting missed payments about their customers to notify those customers on their regular account statements or by SMS, about the information reported to CRBs and its meaning.**
5. **Require CRBs to notify individuals when an enquiry has been listed on their credit report.**

Proposal 28 'Automatic' request for credit ban extensions

Consumer representatives do not agree that making this change might soon be redundant and thus is not worth the effort in this round of CR Code Variations.

Consumer advocates strongly support amending Section 17 to require CRBs to offer individuals an automatic extension to the 21 day ban period when they first request a ban.

As we noted above regarding statute barred debts, it is likely to take years before any amendments to Part IIIA of the Privacy Act are legislated and put into practice. While we agree that the laws relating to credit bans require substantial amendments to be fit for purpose in modern times, we also agree with the 2021 Independent Review that an interim solution is needed.

The risk that some individuals might not recall that a ban is in place when they apply for credit does not outweighs the risk that a short 21 day ban expires and the individual is a victim to fraud or abuse before they can request an extension. If someone wants to apply for credit while a ban is in place, procedures exist to address this. A procedure which allows CRBs to offer an automatic extension to an individual when they first request a ban period is the missing option.

Proposed variations to Section 17.2 of the CR Code already introduce a requirement for CRBs to "explain to the individual that they may request a ban notification service." It should be straightforward to introduce another subsection which requires CRBs to offer an automatic extension to the 21 day ban period. Not all individuals will select this option, but in our view this will meet the needs of many consumers.

Recommendation

6. **Amend Section 17 to require CRBs to offer individuals an automatic extension to the 21 day ban period when they first request a ban.**

Proposal 37 Enable correction of multiple instances of incorrect information stemming from one event

Consumer representatives strongly support a solution where multiple credit listings can be removed where economic abuse or fraud is involved. It can be extremely difficult, and re-traumatising for a victim of economic abuse or fraud, to try to remove multiple credit listings relating to different credit providers from their report. This existing barrier results in considerable harm, including time and resources, mental health deficits, and financial loss (where for example a consumer cannot complete a contract for purchase of real estate).

We strongly support the OAIC's review findings relating to this issue in the 2021 Independent Review Final Report: [1]

> *Correction rights are fundamental to ensuring an accurate credit reporting system in Australia. Enabling multiple correction of instances of incorrect information through a single correction process addresses a current gap in the credit reporting system. Further, this change has support across both consumer and industry representatives and is in line with the overall intention of the correction provisions in Part IIIA. Amending the CR Code would go some way to clarifying this and improving the correction process for individuals, particularly where they are vulnerable or do not know who to engage to seek correction of their personal information.*
>
> *The Review considers that CRBs are best placed to coordinate the correction of multiple instances of incorrect information. Both consumer advocates and CRBs however, should be consulted when determining amendments to the CR Code.*
>
> ***Proposal 37 – Amend CR Code to introduce a mechanism to correct multiple instances of incorrect information stemming from one event***
>
> *Amend paragraph 20 to enable correction of multiple instances of incorrect information.*
>
> *The code developer should consult with CPs/CRBs and consumer advocates to determine the best approach.*

[1] Final Report, September 2022. Available at: https://www.oaic.gov.au/privacy/privacy-legislation/the-privacy-act/credit-reporting/2021-review-of-cr-code#:~:text=The%20report%20on%20the%202021,issues%20and%20makes%2045%20recommendations. Pg 100

The OAIC has very clearly proposed a new corrections mechanism be added to paragraph 20 in the CR Code. The Proposed variation in this consultation is significantly different to the original recommendation.

We note that the Consultation Paper sets out reasons why credit providers are the best placed to determine whether the information needs to be corrected as soon as practicable (as opposed to CRBs). We see no reason why CPs cannot retain responsibility for making decisions about whether enquiries made to them were fraudulent. It should be the role of the CRB to **coordinate** these correction requests. Just because a CRB plays a coordination role does not mean the CRB needs to make decisions about whether the enquiries (or resulting credit reporting information) were fraudulent or a result of economic abuse.

The OAIC has also this month released Guidance relating to all correction requests: [2]

> ***The 'no wrong door' approach to correction requests***
>
> *Where an individual makes a request to correct their personal information, the Privacy Act requires the CP or CRB that the individual first approaches to handle the request. This includes a requirement to consult with (as required) and provide notification about a correction made to (see ss 20U, 20T and 21V, 21W of the Privacy Act and paragraph 20.1 of the CR Code):*
>
> - *other CRBs or CPs relevant to the request, or*
> - *other CRBs or CPs that also hold the information.*
>
> *This allows an individual to approach any CRB or CP that holds their credit information regarding a correction and is referred to as the 'no wrong door' approach to corrections.*
>
> *Individuals can have their correction requests dealt with readily regardless of whether they approach the CRB or CP first and should not be unnecessarily 'bounced' between entities.*

As described above in this new guidance, there are already mechanisms set out in the CR Code for CRBs to consult with CPs that hold the relevant credit information regarding a correction request. We see no reason why this cannot be expanded to apply to multiple correction requests at the same time.

[2] https://www.oaic.gov.au/privacy/privacy-guidance-for-organisations-and-government-agencies/organisations/credit-reporting/guidance-for-industry-on-corrections-requests-and-the-no-wrong-door-approach-to-corrections

Victims should be able to nominate any type of credit reporting information to be corrected if they believe it stemmed from the same event including CCLI, RHI, defaults, enquiries, even audit trail entries. In this consultation ARCA is proposing a new variation to 20.5 regarding correction requests due to "unavoidable consequences of circumstances beyond the individual's control." In this new variation ARCA sets out in 20.5(b)

> *"If the correction request is made to a credit reporting body or a credit provider other than the provider that disclosed the information to a body, consult with the provider that disclosed the information …"*

This same mechanism can be used for multiple correction requests. The key is that the CRB first approached by the individual gathers evidence relevant to the DV or fraud from the individual up front and liaises with all of the relevant CPs about each correction. Doing this offers efficiencies and avoids unnecessarily contacting the individual multiple times.

Key to this process should be that the victim only has to:

- **Establish once** that a particular type of fraud has occurred with reasonable evidence (whether that be a single theft of ID data or a series of fraudulent applications/loans by the same perpetrator); and
- Identify all the information the person believes stems from this event or pattern of conduct.

While we appreciate that requesting information to support the correction of multiple pieces of information held across multiple CPs might be complex, but the 30 day timeframe in the Privacy Act should not prevent this solution. Section 20.3 already allows a CRB to notify an individual if it will not be able to resolve a correction request within the 30 day period set out in Part IIIA and to seek the individual's agreement to an extension period that is reasonable in the circumstances. If a fraud or economic abuse victim (or their advocate) is confident that a CRB will coordinate the multiple correction requests without inflicting additional harm to the victim, they may anticipate goodwill if timeframes need to be amended.

Once this new process is in place we would imagine that the receiving CRB could share information with other CRBs who could then undertake an identification and deletion process where information likely stems from the same event.

Proposed variations to 20(8) and 20(9)

While consumer representatives support more consistency about evidence/supporting material sought when individuals seek corrections, we do not think these proposed variations will prevent the harm we are trying to address. Nor do we think these variations come close to achieving Proposal 37 as was set out by the OAIC.

Once a proper mechanism has been established in the CR Code for coordinating multiple correction requests, ARCA should develop best practice guidance for industry to confirm

what information needs be collected to effectively assess whether an unsuccessful enquiry or period of missed repayments should be corrected.

Case study – Benjamin's story - C222659

Benjamin was a victim of identity fraud which he had reported to the police. When Benjamin called Financial Rights he had already dealt with several other loans and enquiries which were a result of the identity theft that were removed and resolved. He was frustrated by two matters he was struggling to resolve himself. The first related to someone who bought goods using his details and paid for it with a Buy Now Pay Later account. He was being chased by a debt collector. Secondly, he also had an enquiry on his credit report related to a telco service.

He was frustrated by the BNPL provider who had now taken over 30 days to investigate the matter. The BNPL provider requested more time to look into it, but didn't say how long they needed. Benjamin was concerned that he will need to spend money on a lawyer to resolve the dispute. Benjamin requested a CRB remove the enquiry because it was a result of the fraud, but the CRB says they won't. They say he needs to speak to the telco, which he did at the local branch of the telco provider and all they did was note the fraud on their file, they did not give him anything in writing. The CRB still has the enquiry listed and will not remove it.

Case study – Emma's story - C221006

Emma was in an abusive marriage for several years. After separating from her husband Emma had to take out an ADVO. He was later incarcerated for the abuse. During her relationship Emma's husband exerted coercive behaviour over her. He was unemployed and had a very bad credit history and he pressured her to take out loans to pay for his addiction.

When Emma reached out to Financial Rights for help she had no assets apart from a vehicle and she was renting in private accommodation. In late 2021 she became aware of a number of default listings on her credit report by different lenders and debt collectors. Emma wants these defaults removed so she can move on with her life.

Emma did not receive any benefit from these loans and was experiencing domestic violence at the time the loans were issued. Financial Rights has had to help her apply to

each of the 6 creditors to show evidence of the domestic violence, resolve the debts and remove the default listings.

Case study – Sophia's story - C201939

Sophia is a young single parent of a new baby and her sole source of income when she contacted us was Centrelink. Sophia had just recently taken out an AVO and separated from her partner of 7 years due to prolonged domestic violence including financial abuse. Sophia and her baby had to leave her rental and move to regional NSW to live with her parents because of her ex-partner's continued threatening behaviour. Sophia advised Financial Rights that her ex-partner has always been abusive physically and financially, that he did not contribute to household expenses so she had to manage all the bills herself – often when she was only working part-time.

When Financial Rights first started working with Sophia she had seven unsecured debts totalling around $10,000. Financial Rights helped Sophia contact her creditors one by one to request the removal of default listings from her credit report. Financial Rights was continuously met with barriers to communicating or getting a response from some of the creditors but in the end we were successful at helping Sophia clear her credit report. Sophia's life is now turning around, she seems happy and is back working with her previous employer before she had to flee her home.

Recommendations

7. **Amend the CR Code to enable correction of multiple instances of incorrect information as per original Proposal 37**
8. **With consent from the individual, oblige CRBs to share information regarding corrections.**
9. **ARCA should develop industry guidance on information collection to effectively assess where corrections are required.**

Concluding Remarks

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

Kind Regards,

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

About the Financial Rights Legal Centre

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

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

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

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