
Submission to OAIC - Review of the Privacy (Credit Reporting) Code 2014

11 February 2022

GPO Box 5218
Sydney NSW 2001

By email: [REDACTED]

Dear OAIC Secretariat,

Thank you for the opportunity to provide a submission on the review of the Credit Reporting Regime. CPRC is an independent, non-profit consumer research organisation. Our mission is to create fairer, safer and inclusive markets by undertaking consumer and policy research and working with leading regulators, policymakers, businesses, academics and community advocates.

Transparency and Governance – towards a *stewardship* approach

The Credit Reporting Regime is an essential input for the functioning of financial markets and provision of credit. The regime serves to address the issue of asymmetrical information between borrowers and lenders that leads to adverse selection and moral hazard¹ – and in doing so facilitates and establishes trust between consumers and credit providers. While the Credit Reporting Regime is not a consumer facing market, it is not unlike other essential services – consumers cannot opt-out of the Credit Reporting Regime – and credit reporting can materially affect the choice set of significant household purchases (e.g. property, vehicles, and other essentials services) through a higher cost of credit, the direct cost of credit offered to a consumer, or affect the ability of an individual to set up a business. The importance of credit reporting for consumer choice means the regime requires clear governance and effective regulation.

One of the primary responsibilities of a regulator is to monitor outcomes to evaluate efficacy of the regime. As far as CPRC is aware, there is little to no publicly available data around the efficacy of the Credit Reporting Regime in Australia. In addition, there appears to be no public record of complaints about credit reporting or the extent to which these credit providers resolve these complaints. A number of provisions require that Credit Reporting Bodies (CRBs) and Credit Providers (CPs) follow particular internal processes; however, there appears to be no public accountability about whether these processes are followed. We note the Consumer Financial Protection Bureau in the US recently published a report highlighting how the three leading credit reporting bureaus failed to provide meaningful responses and consumer relief in response to consumer complaints. The report finds that in 2021, 'Equifax, Experian, and TransUnion together reported relief in response to less than 2% of covered complaints, down from nearly 25% of covered complaints in 2019'.² The

¹ M Miller, 'Introduction' in M Miller (ed) *Credit Reporting Systems and the International Economy* (2003) 1, 1

² <https://www.consumerfinance.gov/about-us/newsroom/cfpb-releases-report-detailing-consumer-complaint-response-deficiencies-of-the-big-three-credit-bureaus/>

report highlights the barriers that consumers face in seeking to resolve incorrect information and also finds Equifax, Experian, and TransUnion failed to meet statutory obligations.³ It seems reasonable to suggest resolution of complaints/correction of information in Australia may be similar given that two of the three CRBs operate the Credit Reporting Regime in Australia. CRBs operate in an oligopoly without competitive pressure to improve service. Accordingly, these firms must be held accountable through adequate measuring and public reporting of consumer outcomes. The OAIC needs to be properly resourced to build capacity to deliver these functions, otherwise the regime cannot be deemed effective.

As outlined in our submission on the review of the Privacy Act, CPRC supports establishing a *Deputy Information Commissioner – Enforcement* to allow OAIC to have more dedicated focus on enforcement.⁴ Effective and regular surveillance and enforcement by the regulator is needed to educate and shift the market towards a more consumer-centric approach to the Credit Reporting Regime. The onus cannot remain on consumers alone to identify and report breaches to the regulator after the harm takes place. To truly create an effective ecosystem for privacy protections, effective complaints mechanisms need to be supplemented by an adequately resourced regulator with the capacity and capability to monitor and enforce regulatory breaches in this complex environment.

Recommendation 1: the OAIC be properly funded and resourced to:

- **engage in ongoing collection of complaints data and resolution of complaints, and publication of this data**
- **engage in audit processes required of CPs and CRBs to determine whether they are adhering to the requirements of the regime and make their evaluation public to help build trust and awareness of the regime**
- **engage in ongoing surveillance and enforcement to ensure a consumer centric approach credit reporting.**

Given the importance of this information for consumer choice, we urge the OAIC to take a clearer, stewardship approach to the Credit Reporting Regime, placing consumer outcomes at the heart of the regime. A *stewardship* approach involves shifting the focus of the regulator to consider an evidence-based view of how consumers are likely to engage with the regime, the barriers they encounter, and how these barriers can be mitigated to deliver better outcomes for all consumers. We refer the OAIC to our reports exploring how regulators can improve consumer engagement in complex markets to consider how the Credit Reporting Regime can be made more accessible.⁵ Broadly, this requires shifting the onus away from consumers and their advocates to navigate an unreasonably complex legislative instrument, to a simplified, accessible and well-regulated regime. As part of this shift, we encourage the OAIC to consider introducing outcomes-based regulation. This would shift the responsibility to industry for implementing good consumer outcomes and

³ Ibid.

⁴ Consumer Policy Research Centre, *Submission to The Attorney-General's Department – Privacy Act Review – Discussion Paper*, 10 Jan 2022, <https://cprc.org.au/publications/submission-to-the-attorney-generals-department-privacy-act-review-discussion-paper/>

⁵ See Ben Martin Hobbs and Emma O'Neill, *The experiences of older consumers: towards markets that work for people* (Consumer Policy Research Centre, (July 2020) <https://cprc.org.au/publications/the-experiences-of-older-consumers-towards-markets-that-work-for-people/>; Ben Martin Hobbs and Lauren Solomon, *Five Preconditions of effective consumer engagement*, (Consumer Policy Research Centre, April 2018) <https://cprc.org.au/publications/report-five-preconditions-of-effective-consumer-engagement/>

demonstrate to regulators how it is ensuring positive consumer outcomes through transparent reporting.⁶

Recommendation 2: the OAIC adopt a stewardship approach to the Credit Reporting Regime.

Recommendation 3: the OAIC shift towards outcomes-based regulation of the credit Reporting Regime.

Awareness and comprehension testing

Accessibility and comprehensibility of a consumer's own credit report is paramount to the efficient functioning of financial services, credit markets and ensuring informed consumer choice. Experian's own 2017 survey found 71% of respondents had never checked their credit score with the majority citing that they didn't know how to (22%), didn't know what it was or did not care (17%).⁷ As part of a stewardship approach, the OAIC should commission ongoing consumer research to better map how consumers engage with the Credit Reporting Regime and their broader awareness of the regime. There would also be value in engaging in longitudinal comprehension testing to identify how much consumers understand about information on their credit reports, accessing dispute resolution and about the Credit Reporting Regime more broadly beyond stated survey responses.⁸ Regulators in other essential services have engaged in comprehension testing, highlighting significant gaps in comprehension across the consumer base and barriers consumers face when engaging in or navigating complex and essential markets.⁹

Ultimately, the Credit Reporting Regime cannot rely on improved disclosure alone to ensure good consumer outcomes. While disclosure requirements and mechanisms have long been relied on as a key pillar of consumer protection to address information asymmetries, research demonstrates firms' inadvertent or deliberate and strategic use of complexity in information disclosure often results in poor consumer outcomes.¹⁰ ASIC's 2019 report *Disclosure: Why it shouldn't be the default* provides a useful summary of much of this evidence, highlighting, in particular, the real world context in which disclosure operates, explaining how and why disclosure and warnings can be less effective than expected, or even ineffective, in influencing consumer behaviour.¹¹ Services that are inherently or deliberately complex by design are very rarely simple to understand, no matter the quality of information disclosed.

⁶ Pete Lunn, Féidhlim P. McGowan, and Noel Howard, "Do some financial product features negatively affect consumer decisions? A review of evidence" No. 78. *Research Series*, (2018), 59-60; <https://www.bi.team/blogs/beyond-disclosure/>.

⁷ Experian, *Two thirds of Australians unaware of credit reporting improvements*, 10 March 2017, <https://www.experian.com.au/media-alert-two-thirds-of-australians-unaware-of-credit-reporting-improvements>

⁸ See for example, Paul Harrison, Laura Hill, and Charles Gray, *Confident, but Confounded: Consumer Comprehension of Telecommunications Agreements* (Sydney: Australian Communications Consumer Action Network, 2016)

⁹ AER BETA partnership, *Improving energy bills*, <https://behaviouraleconomics.pmc.gov.au/projects/improving-energy-bills>; Behavioural Insights Team, *Testing the impact of behaviourally informed energy bills and best offers*, 30 October 2018 <https://www.esc.vic.gov.au/sites/default/files/documents/BIT%20Report.pdf>

¹⁰ Martin Hobbs and O'Neill, *Towards markets that work for people*, 31-39.

¹¹ Australian Securities and Investments Commission (ASIC) and the Dutch Authority for Financial Markets (AFM), *Disclosure: Why it shouldn't be the default* (REP 632), (October 2018).

Recommendation 4: the OAIC be resourced to engage in comprehension testing and journey mapping research to better understand the barriers consumers experience in navigating to and engaging with their credit report.

Regarding the Credit Reporting Code (the Code), it is particularly important to identify the intended audience and purpose of this instrument. As outlined in the *Independent Review of the Banking Code of Practice Final Report* (BCoP Final Report), the BCoP as an instrument currently seeks to meet the needs of too many audiences.¹² The BCoP Final Report agreed with consumer advocates in concluding the most appropriate and logical audience of the code is primarily the code signatories and banking staff, followed by the Australian Financial Complaints Authority (AFCA) in its role as the external dispute resolution (EDR) mechanism – given the instrument provides the ‘rule book’ for these institutions and is intended to ensure these companies deliver good consumer outcomes.¹³ Effective regulation of the Code (through ongoing monitoring, evaluation and enforcement through EDR) should negate the need for consumers and their advocates to engage with the legislation at all. Alongside the BCoP itself, the BCoP Final Report recommended the introduction of a ‘separate consumer friendly and readily accessible document that highlights consumers have rights in their dealings with banks’.¹⁴

This logic applies to the Credit Reporting Code as well. The most appropriate audience is the entities it regulates and the regulator enforcing the legislation, not consumers. We note consumer advocates have characterised the current Credit Reporting Code as ‘completely unintelligible to an average consumer.’¹⁵ It is inappropriate and unreasonable to place the onus on consumers and their agents to navigate and understand the legal obligations on regulated entities. Instead, the OAIC should consider the approach recommended in the BCoP Final Report – to develop a consumer-friendly guideline to inform consumers and financial advisors about their rights.

Recommendation 5: the OAIC develop a separate consumer friendly and readily accessible document that highlights consumers have rights in their dealings with CPs and CRBs.

The Australian Retail Credit Association (ARCA) and the OAIC should consider simplifying the Credit Reporting Code to improve industry compliance. The BCoP Final Report notes banks indicated that their staff do not have legal training and found the 2019 BCoP easier to understand, particularly compared with legislation, as well as improving comprehension for lawyers, financial counsellors, and others with financial services experience. There is a case for significantly improving the readability of the Credit Reporting Code to ensure staff within CPs and CRBs can more easily understand requirements themselves, providing clarity in how to resolve particular issues and ensuring consistency between different credit providers. This clarity is particularly important as mandatory credit reporting extends to the Code to new credit providers and utilities, to support their compliance with the Code. The Code also needs enough clarity to ensure it can be effectively monitored by the OAIC.

¹²Mike Callaghan, *Independent Review of the Banking Code of Practice Final Report*, 26 November 2021, 41. <https://www.ausbanking.org.au/wp-content/uploads/2021/12/Final-Report-Banking-Code-of-Practice-Review-2021.pdf>

¹³ Ibid.

¹⁴ Ibid. 42.

¹⁵ Financial Rights Legal Centre, *Credit Reporting Code Review – Early engagement with consumers*, 8 November 2021

Recommendation 6: the ARCA and the OAIC consider a plain English re-write of the Code to help ensure industry compliance and monitoring.

Inclusive design and consumer vulnerability

Given the importance of credit reporting information for accessing credit products or utility services, policymakers and regulators must ensure the regime is designed inclusively so they can be accessed by all Australians. Consumers are not homogeneous – they differ in their ability and preferences in accessing and navigating digital marketplaces or online information. Approximately 2.5 million Australians are not connected to the internet,¹⁶ and a significant proportion rely on their mobile phone as their primary internet connection (9.6%).¹⁷ Accessing and navigating the Credit Reporting Regime information needs to be as accessible for those without/with low digital access and low digital literacy as for those who have high digital access and literacy. Policymakers, regulators and industry should adopt an inclusive design approach when designing legal frameworks and business practices to ensure all consumers can effectively navigate the regime.¹⁸ Taking an inclusive design approach can help to reduce the need for ex-post supports, awareness campaigns and patchwork or reactive protections.¹⁹

Regulators in Australia are beginning to follow the lead of UK regulators in adopting vulnerability strategies. In 2019, the Australian Energy Regulator (AER) commissioned a CPRC research report, *Exploring regulatory approaches to consumer vulnerability: a report for the Australian Energy Regulator*, which outlines key findings, lessons and approaches being taken to address vulnerability across different jurisdictions, sectors and regulators. This report recognises that significant work has been done around vulnerability and hardship in other sectors - that everyone is likely to experience vulnerable circumstances at some point in their lives, due to common, unavoidable and unpredictable life events such as illness, job loss, financial shocks, the death of a loved one and natural disaster.²⁰ Moreover, the COVID-19 pandemic has amplified existing drivers of vulnerability or exposed some people to the causes of vulnerability for the first time.²¹ Life events such as having children, ageing and disability can also contribute to consumer vulnerability. Vulnerability can arise from personal circumstances, but it can also arise as a consequence of market complexity, poor product and service design, deliberate exploitation of people's behavioural biases, information asymmetry and targeted exploitation of particular communities. More recently, the AER and the Essential Services Commission have consulted on their own vulnerability

¹⁶ Fergus Hunter, "Digital divide': 2.5 million Australians with no internet connection", *The Sydney Morning Herald*, 27 March 2020 <https://www.smh.com.au/politics/federal/digital-divide-2-5-million-australians-isolated-with-no-internet-connection-20200327-p54egn.html>

¹⁷ Thomas, J., Barraket, J., Parkinson, S., Wilson, C., Holcombe-James, I., Kennedy, J., Mannell, K., Brydon, A. *Australian Digital Inclusion Index: 2021*. (Melbourne: RMIT, Swinburne University of Technology, and Telstra, 2021), <https://www.digitalinclusionindex.org.au/key-findings-and-next-steps/>

¹⁸ Martin Hobbs and O'Neill, *Towards markets that work for people*, 62.; Centre for Inclusive Design, *The Benefit of Designing for Everyone*, May 2019; PwC Australia, *Inclusive Design Report: The benefit of designing for everyone*, May 2019

¹⁹ Money Advice Trust, *Inclusive Design in Essential Services: A Guide for Regulators report*, 2021, <https://fairbydesign.com/wp-content/uploads/2021/01/Inclusive-Design-Regulators-Report-Final-Fair-By-Design-Money-Advice-Trust.pdf> .

²⁰ Emma O'Neill, *Exploring Regulatory Approaches to Consumer Vulnerability: A Report for the Australian Energy Regulator*, (Consumer Policy Research Centre, February 2020). <https://cprc.org.au/projects/exploring-regulatory-approaches-to-consumer-vulnerability/>

²¹ CPRC, *Towards a wellbeing approach to consumer policy in Australia. Part One: Why now?* November 2021. <https://cprc.org.au/publications/towards-a-wellbeing-approach-to-consumer-policy-in-australia/>

strategies, outlining clearer expectations around regulatory design and regulated business practices and approaches.²²

Recommendation 7: the OAIC adopt an inclusive design approach to the Credit Reporting Code.

Recommendation 8: the OAIC adopt a vulnerability strategy to inform the approach to regulating the Credit Reporting Regime.

Ensure consumers have a feedback loop to their own credit report

If a consumer's own credit report has errors, this can have significant implications for consumer choice – credit providers may price in risk that is unwarranted or may not offer credit/products at all. Errors might also be caused by fraudulent activity. During COVID-19, the ACCC observed a significant uptick in scams and in particular identity theft – which was one of the top three scams in 2020, with reports of identity theft up 84% over the pandemic.²³ Consumers encountering payment difficulty may also have a default placed on their credit report. Our own COVID-19 data found one in ten young Victorians missed payments across two or more sectors within the same month in November and December 2020.²⁴ Consumers need a simple, effective feedback mechanism to ensure they are aware of any fraudulent activity on their account, as well as being aware of a default being placed on their account. This would allow consumers to address these issues before applying for a credit product.

Recommendation 9: consumers be notified of credit report activity in a simple and understandable feedback mechanism.

Data sharing, direct marketing and the disclosure of credit related personal information

The overwhelming majority of consumers have concerns about their personal data. As identified in our *2020 Data and Technology Consumer Survey*:

- 94% of Australian consumers are uncomfortable with how their personal information is collected and shared online
- 85% of consumers consider it is unfair for companies to share personal information they've provided to other companies – while 90% think it is unfair for this information to be sold to other companies
- a large majority of consumers also find it unfair when companies collect more information than is necessary to deliver the product or service they are receiving (88%).

Our survey also highlights the limitations of privacy policies as a reasonable disclosure mechanism to seek consumers' consent:

²² See the ESC's Getting to Fair consultation process <https://www.esc.vic.gov.au/other-work/regulating-consumer-vulnerability-mind> and the AER's Consumer Vulnerability Strategy consultation process <https://www.aer.gov.au/retail-markets/guidelines-reviews/consumer-vulnerability-strategy>

²³ ACCC, *Targeting Scams – Report of the ACCC on scams activity 2020*, June 2021 <https://www.accc.gov.au/system/files/Targeting%20scams%20-%20report%20of%20the%20ACCC%20on%20scams%20activity%202020%20v2.pdf>

²⁴ CPRC, *Towards a wellbeing approach to consumer policy: Part one: Why Now?*, 11.

- as 94% of consumers report not reading privacy policies all the time and 33% of consumers never read these documents at all
- of the 67% who had read terms and conditions at some point in the 12-month period, 69% reported accepting terms even though they were not comfortable with them, with the majority (75% of those consumers) accepting them as it was the only way to access the product or service.

Finally, consumers have clear expectations around companies' use of their data – 75% of consumers consider companies have the highest level of responsibility to provide protection against collection and sharing of personal information.²⁵

As outlined in our submission on the Privacy Act Review, the Privacy Act needs to place a clear onus on credit reporting businesses and any intermediaries – in particular those whose business models are predicated on the collection, use and disclosure of consumer data – to satisfy themselves that consumers are being enabled to make informed, meaningful choices.²⁶

Recommendation 10: All direct marketing based on consumers' credit reporting data and disclosure of credit related personal information should be offered on an opt-in basis with a requirement for consumers' explicit informed consent, rather than relying on opt-out mechanisms.

If you have any questions about this submission, please contact Ben Martin Hobbs, Senior Research and Policy Manager at [REDACTED]

Yours sincerely



Chandni Gupta
Acting Chief Executive Officer
Consumer Policy Research Centre

²⁵ CPRC, *2020 Data and Technology Consumer Survey*, (December 2020), <https://cprc.org.au/publications/cprc-2020-data-and-technology-consumer-survey>.

²⁶ CPRC, *Submission to The Attorney-General's Department – Privacy Act Review – Discussion Paper*, Jan 2022 <https://cprc.org.au/publications/submission-to-the-attorney-generals-department-privacy-act-review-discussion-paper/>