Energy & Water Ombudsman NSW
Free, fair and independent

3 February 2022

Ms Angeline Falk
Information and Privacy Commissioner
Office of the Australian Information Commissioner
GPO Box 5218
Sydney NSW 2001

Via email: [redacted]

Dear Angeline

Review of the *Privacy (Credit Reporting) Code 2014* consultation paper

Thank you for the opportunity to comment on this consultation paper.

The Energy & Water Ombudsman NSW (EWON) investigates and resolves complaints from customers of electricity and gas providers in NSW, and some water providers. Our comments are informed by our investigations into these complaints, and through our community outreach and stakeholder engagement activities.

We have only responded to those questions in the consultation paper that align with issues customers raise with EWON, or with our organisation's operations as they relate to this consultation.

In our context, credit providers are energy retailers and therefore we have used this term where appropriate in this submission.

If you would like to discuss this matter further, please contact me or Rory Campbell, Manager Policy and Research, on (02) 8218 5266.

Yours sincerely

[redacted]

Janine Young
Ombudsman
Energy & Water Ombudsman NSW

Energy & Water Ombudsman NSW
Phone (02) 8218 5250 Web ewon.com.au PO Box A2436, Sydney South NSW 1235
Fax (02) 8218 5233 Email omb@ewon.com.au Level 11, 133 Castlereagh Street, Sydney 2000

3.4 Participation of other entities

Question 8. How might the Credit Reporting (CR) Code need to be updated to accommodate other entities?

We have raised some issues specific to energy retailers as credit providers in our comments in response to Question 17.

Energy retailers do not hold Australian Credit Licences, meaning that only parts of the *Privacy (Credit Reporting) Code 2014* (the CR Code) are relevant to energy retailers' credit activities. For example, energy retailers do not report repayment history information or financial hardship information. However, new energy retailer business models are emerging, including an energy retailer that is a wholly owned subsidiary of a credit provider that holds an Australian Credit Licence and offers personal loans and Buy Now Pay Later (BNPL) products. It is unclear at this early stage exactly how the business model will work or what customer relationships with the two entities will look like. It appears that the intention is to have integration between energy accounts with the energy retailer arm and loans for energy products such as solar panels with the finance arm. If the OAIC is considering how the CR Code should be updated in relation to entities such as BNPL providers, consideration should also be given to these emerging energy retailer business models which raise questions such as:

- Will new payment arrangement models emerge for integrated personal loan products and energy plans that fit the definitions of repayment history information or financial hardship information?
- How will related entities maintain data integrity and privacy requirements where they have differing credit reporting obligations?

The OAIC's consideration of how the CR Code does and should apply to BNPL products is important as these products impact consumer management of household expenses and debt, which can have implications for payment of essential utilities. A 2020 report by the Australian Securities & Investment Commission (ASIC) found that 20% of consumers surveyed said they cut back on or went without essentials such as meals in order to make BNPL payments on time[1].

4.1 Code governance, oversight and awareness

Question 10. Should additional compliance monitoring and governance arrangements be stipulated in the CR Code?

EWON supports increasing the OAIC's monitoring and enforcement functions via the CR Code. The current framework lacks penalties for organisations that have a history of ongoing, but relatively minor, non-compliance with the CR Code, such as non-compliant credit default listings. Incentives for preventative and mitigating action by organisations in relation to CR Code breaches are also inadequate, and there is insufficient recognition of the impact of breaches on individual customers.

See Case Study 1 in **Attachment 1** for an example of a complaint where a non-compliant credit default listing almost prevented a customer from being able to obtain a mortgage during a stressful COVID-19 restriction period. Under the current provisions, there are no consequences for the retailer beyond being required to correct the individual error, despite the high impact on the customer.

[1] ASIC Buy now pay later: An industry update (Report 672), 16 November 2020, p15

Changes to Part IIIA of the *Privacy Act 1988* (the Act), such as to penalty provisions, may also be required. This would also align with changes under consideration by the Attorney-General to strengthen the framework of enforcement, penalties, and legal recourse in relation to Australian Privacy Principle (APP) breaches[2]. While Part IIIA of the Act is outside the scope of this review, EWON notes the OAIC's request for comments on issues that touch on the CR Code and Part IIIA (which will be reviewed by the Attorney-General before 2024).

5.3 Default information and payment information

Question 17. Are the default information and payment information provisions appropriate? Should the provisions contained in paragraphs 9 and 10 be updated in any way? If yes, how?

Changes should be made to paragraphs 9 and 10 to better balance an efficient credit reporting system with the protection of individuals' privacy.

EWON supports the following suggested measures in the consultation paper which are relevant to the energy sector:

- establish a positive obligation on credit providers to request the removal of default information that has become statute barred under section 6Q(1)(c);
- require credit providers to list any defaults with credit reporting bodies within a reasonable period of time;
- simplify arrangements for removal of default information in cases of economic abuse; and
- require a stand-alone section 21D(3)(d) notice.

EWON also reiterates two suggestions from our submission to the 2017 independent review consultation:

- increase the minimum threshold for credit default listing from $150 to at least $300; and
- introduce a sliding scale where the credit default listing is for a period relative to the amount of the debt.

These two suggestions also require amendments to Part IIIA of the Act, as well as consideration of whether changes would need to be industry and/or entity specific.

Obligation to remove statute barred debts and listing defaults within a reasonable period of time

EWON provided case studies in our submission to the 2017 independent review indicating that, under current provisions, negative impact(s) on customers' credit reports can continue well beyond the date after which recovery of debts would be statute-barred[3]. See Case Study 2 in **Attachment 1** for a more recent example of a default listed on a customer's credit file an unreasonably long time after the debt was due, exacerbated by the debt being sold to a collections agency.

EWON supports putting in place a positive requirement for credit providers to request the removal of default information that has become statute barred under section 6Q(1)(c). It also suggests a requirement for credit providers to include the date that the debt fell overdue when reporting to the credit reporting body to help identify debts that exceed the statute-barred period[4]. This would also

[2] Attorney General Privacy Act Review Discussion Paper, October 2021, pp173-206
[3] EWON submission – Consultation Issues Paper, Review of *Privacy (Credit Reporting) Code 2014*, 18 October 2017, pp2-3
[4] Ibid, p3

help manage adherence to any new requirements in the case of debt transfers or sales (refer also to response to Question 31).

EWON strongly supports a requirement for credit providers to list defaults within a reasonable timeframe. EWON's position is that requiring the default to be listed within 12 months of the due date for the debt is reasonable[5]. EWON acknowledges that this may not be appropriate for debts in all industries, such as mortgage payments. As per Question 8, consideration needs to be given to how updates would accommodate different industries and entities.

Simplified arrangements in cases of economic abuse

Protections for customers experiencing economic abuse or family violence are discussed in detail in our response to Question 29.

Stand-alone section 21D(3)(d) notices

EWON supports requiring Section 21D(3)(d) to be a stand-alone notice to aid customer understanding of the status of their debt and the potential consequences of non-payment. In the energy sector, for example, it would be confusing for a customer if the 21D(3)(d) notice was combined with any other notice such as a section 6Q notice for a more recent energy debt, a promise to pay cancellation notice or a payment plan cancellation notice.

Increased minimum threshold

The minimum threshold for credit default listing is $150, which has not been updated since the introduction of the threshold in 2014. EWON supports a minimum amount being prescribed and suggests that the amount be reviewed[6]. $150 is not reflective of the average utility bill and the adverse consequences of credit default listing can be well out of proportion to the debt. Case Study 3 in **Attachment 1** is an example of a customer experiencing disproportionate adverse impact for a small debt of $201.

An appropriate amount for the energy sector would be at least $300. This is the amount the Australian Energy Regulator (AER) has set as the minimum threshold below which a customer cannot be disconnected for non-payment. The AER sets this amount to give customers protection against being disconnected for the non-payment of one quarterly bill, and EWON believes this same principle should apply for credit default listings. Notably, the AER is currently exploring whether the threshold of $300 should be increased[7].

Changes to the minimum threshold would require changes to Part IIIA of the Act along with the CR Code. As with the 12-month timeframe, EWON acknowledges that $300 (or a new amount set by the AER) may not be suitable for all industries and entities. For example, the average bill and debt in the telecommunications sector differs from that in the energy sector. As per Question 8, consideration needs to be given to how any updates could accommodate these differences.

Sliding scale

A credit default listing is for a period of five years regardless of whether the listing is for a debt of $300 or $30,000. While it might be expected that credit providers would take this into account, it appears from customer reports to EWON that this is not the case and credit is denied to customers regardless of the amount of the debt. At present, there is no leniency on the time of a default listing, and a customer's future financial stability and ability to obtain credit for major financial

[5] Ibid, p3
[6] Ibid, pp3-4
[7] AER Consumer Vulnerability Strategy draft for consultation, 20 December 2021, p40

undertakings, such as buying a house or starting a business, are significantly impacted. In Case Study 3 in **Attachment 1**, the customer's ability to obtain a mortgage was still impacted more than a year after the credit default listing for only $201 and would continue to be impacted for another four years.

EWON suggests the introduction of a sliding scale where the credit default listing is for a period relative to the amount of the debt[8]. For example, a debt of $1,000 or less would result in a one-year listing, a debt of between $1,001 and $5,000 would incur a two-year listing, a debt of between $5,001 and $10,000 a three-year listing, and debts above that amount being listed for 5 years. This would also require changes to Part IIIA of the Act, and consideration of suitability and applicability to different industries and entities.

6.1 Notice to individuals

Question 20. Are the provisions regulating how individuals are notified that their information will be provided to a credit reporting body appropriate? Should they be amended in any way? If yes, how?

The OAIC noted in the consultation paper that there may be consumer confusion about the difference between notice and consent in relation to credit enquiries. Consumers may complain that they did not consent to a credit enquiry, but Part IIIA of the Act and the CR Code do not require credit providers to get an individual's consent before making an information request and the obligation is only to notify to them.

EWON receives complaints that demonstrate there is consumer confusion about the difference between notice and consent for credit enquiries. See Case Studies 4 and 5 in **Attachment 1** for examples of complaints where the customer considered the credit enquiry should require consent.

EWON suggests that the OAIC give consideration to whether the current provisions requiring notice only are sufficient to balance an efficient credit reporting system with the protection of individuals' privacy. EWON notes that the Attorney-General recently proposed changes to the Act which would strengthen the consent requirements for collection, use and disclosure of personal information under the APPs[9]. This demonstrates that consent is an important issue to consumers when it comes to their privacy, and is worth considering in relation to credit reporting privacy as well as APP-related privacy.

6.5 Correction of information

Question 25. Are the correction provisions appropriate? Should the provisions in paragraph 20 be updated in any way? If yes, how?

EWON supports the following suggestions in the consultation paper:

- amend paragraph 20 to better support a 'no wrong door' approach to corrections; and
- include family violence in the list of circumstances beyond the individual's control that provide a basis for the destruction of default information.

[8] EWON submission – Consultation Issues Paper, Review of *Privacy (Credit Reporting) Code 2014*, 18 October 2017, p4
[9] Attorney General Privacy Act Review Discussion Paper, October 2021, pp74-79

'No wrong door' corrections

The OAIC notes that there can be ambiguity around whether a credit reporting body or credit provider should process a correction request, which can lead to a credit reporting body or credit provider referring an individual to another credit reporting body or credit provider rather than processing the correction request itself. EWON supports adjustments that would institute a 'no wrong door' approach to corrections. In EWON's experience, consumers can feel bounced around between credit reporting bodies and credit providers. Case studies 1 and 2 in **Attachment 1** demonstrate that this ambiguity also applies where there has been a transfer of rights and it is unclear whether the customer needs to deal with the original credit provider or the acquiring credit provider.

Removal on the basis of family violence

Protections for customers experiencing economic abuse or family violence are detailed in our response to Question 29.

6.6 Complaint handling

Question 26. Are the provisions on complaint handling appropriate? Should the provisions in paragraph 21 be amended in any way? If yes, how?

Energy retailers are bound by energy industry complaint handling requirements, so the parts of paragraph 21 applicable to industries that do not have their own requirements are not relevant. Under section 81 of the *National Energy Retail Law* (NSW), energy retailers are required to have a complaint and dispute resolution procedure that is substantially consistent with the Australian Standard AS/NZS 10002:2006 *Customer satisfaction — Guidelines for complaints handling in organizations* as amended from time to time. For credit reporting bodies and credit providers not bound by industry specific requirements, the CR Code requires adherence to certain sections of International Standard ISO 10002:2018 *Quality management — Customer satisfaction — Guidelines for complaints handling in organizations.* It may be worth the OAIC reviewing which standard is more commonly used by those industries, like the energy sector, that do have their own requirements, and aligning the requirement for credit reporting bodies and credit providers not bound by industry specific requirements with the majority.

Further it should be noted that both of the above standards are outdated. AS/NZS 10002:2006 has been superseded by AS/NZS 10002:2014, and Standards Australia is currently again reviewing AS/NZS 10002 again with publication due shortly. This version includes references to social media and other channels which were not referenced in the outdated Standards mentioned above. EWON recommends that the most recent (ie soon to be published) Standard be included in paragraph 21.

6.7 Dispute resolution processes for individuals

Question 27. Are arrangements for dispute resolution appropriate? Should the arrangements be changed in any way? If yes, how?

The existing provisions are suitable as they require customers to be referred to the recognised industry external dispute resolution (EDR) scheme or the OAIC where there is no industry EDR, and customers must be advised of their right to contact both. This ensures customers are aware of their rights and gives room for EWON and the OAIC to come to referral arrangements for credit reporting complaints (among other privacy complaint types) that best serve customers.

6.8 Other options to protect individuals affected by domestic abuse

Question 29. How could the CR Code be amended to better support people affected by economic abuse or domestic violence?

EWON strongly supports the OAIC's consideration of specific provisions in the CR Code for people affected by economic abuse and family violence. EWON's position statement regarding family violence discusses the complex issues faced by people in family violence situations, including examples of utility related economic abuse and implications for debt collection and credit default listing. For example, EWON's expectation is that a default listing should be removed by a provider where the default listing has occurred when a provider was not aware of the customers experience at the time of the listing[10]. However, this is not currently required by the CR Code. EWON strongly supports simplifying arrangements for default removal in cases of economic abuse, and specifically the proposal to include family violence in the list of circumstances beyond the individual's control that provide a basis for the destruction of default information.

See Case Studies 6 and 7 in **Attachment 1** for examples of positive customer outcomes when retailers remove default listings in cases where there has been family violence or economic abuse.

Introducing specific requirements into the CR Code would promote a cross-industry move toward approaching family violence as a particularly complex form of vulnerability. In the energy industry, the Australian Energy Market Commission (AEMC) is currently considering changes to the *National Energy Retail Rules* which would introduce specific protections for customers affected by family violence[11]. This follows the introduction of specific provisions in Victoria, with Victoria's Essential Services Commission (ESC) making changes to the *Energy Retail Code* effective 1 January 2020[12].

The OAIC needs to consider what supporting information individuals will be expected to provide. Family violence experts suggest that businesses should carefully consider the purpose of seeking evidence from victim-survivors of family violence, and EWON's position is not to request evidence of family violence unless it is absolutely necessary[13]. In Victoria, the *Energy Retail Code* has specific provisions around documentary evidence of family violence stating that it must be reasonably required by the retailer for purposes specified by the code. Similar specificity should be considered for the CR Code to minimise the potential burden on victim-survivors of family violence when seeking removal of credit default listings.

7.1 Information requests

Question 30. Is the provision regulating information requests appropriate? Should it be amended in any way? If yes, how?

The OAIC has noted in the consultation paper that there can be misapprehension regarding information requests, where credit repairers and similar entities perceive legitimate credit enquiries reported in an individual's credit report as negative and similar to default information. There is a question as to whether the CR Code should be amended to address this issue.

EWON receives complaints that demonstrate there is confusion about whether credit enquiries have a negative impact on credit worthiness. In Case Study 4 in **Attachment 1**, this confusion had financial

[10] EWON Position Statement – EWON's approach to dealing with family violence, 2020, p10
[11] AEMC Protecting customers affected by family violence consultation paper, 18 November 2021
[12] ESC Energy Retail Code Changes to Support Family Violence Provisions for Retailers, 22 May 2019
[13] EWON Position Statement – EWON's approach to dealing with family violence, 2020, p9

implications for the customer as he engaged a paid commercial credit repair agent to try and have the credit enquiry removed. Case Studies 4 and 5 also show that there can be differing outcomes for customers under the current provisions.

EWON supports changes to provide clarity and guidance for credit reporting bodies and credit providers around the treatment of credit enquiries and their impact in credit reports.

7.2 Transfer of rights of Credit Provider

Question 31. Are the provisions regulating transfer of rights of credit provider appropriate? Should they be amended in any way? If yes, how?

If changes proposed under Question 17 are implemented, it may also require changes to the transfer of rights provisions. In particular, changes would likely be required to ensure acquiring credit providers can comply with a positive obligation to remove a statute-barred debt and adhere to any maximum timeframe for credit default listing from the due date. For example, Case Study 2 in **Attachment 1** demonstrates that under the current provisions, a transfer of rights between credit providers can contribute to an extended period between the due date and an eventual default listing.

Similarly, if changes proposed under Question 25 to institute a 'no wrong door' approach to corrections are implemented, consideration should be given to applying this principle to original credit providers and acquiring credit providers. Case Study 1 in **Attachment 1** demonstrates a positive customer outcome where the original credit provider voluntarily applied a 'no wrong door' principle to liaise with the acquiring credit provider and make the process of default removal easier.

Enquiries about this submission should be directed to Janine Young, Ombudsman on [redacted] or Rory Campbell, Manager Policy and Research on [redacted].

Case studies

Case Study 1

A customer was almost unable to obtain a mortgage due to a non-compliant default listing.

A customer applied for a mortgage in mid-2020 and discovered that an energy retailer had listed a default on her credit file in August 2019 for an energy debt of $847 relating to a previous address. She did not consider the default listing to be reasonable as she had arranged a direct debit payment plan to pay off the debt. She contacted the retailer to query the default listing, but the retailer advised that it could not assist her as the debt had since been sold to a collections agency. She and her partner were living with her parents while waiting for the mortgage approval to buy a house, which was a particularly stressful situation as it was during the original COVID-19 restrictions in mid-2020.

EWON's investigation found that after the electricity account was closed, the retailer referred the debt to a collections agency for assistance recovering the debt (not yet sold). The customer agreed to a formal payment arrangement with the collections agency and was making the required payments. However, the retailer continued the debt collection notice cycle in the meantime. When the customer contacted the retailer in response to the debt collection notices, the retailer provided conflicting information about who she should be making the payments to, and the arrangement was discontinued. The retailer listed the default on the customer's credit file and sold the debt to a different collections agency. The customer paid the debt in full following contact from that collections agency.

EWON's investigation found that the retailer commenced the debt collection notice cycle while the customer was still meeting payment plan obligations agreed upon with the collections agency, and that there had been inadequate communication between the two entities. EWON considered the default to be non-compliant on the basis that debt collection activity should not have been taking place while the customer was making agreed payments. The retailer agreed to liaise with the debt buyer to arrange for removal of the default listing, and the customer was able to move forward with the mortgage process.

Case Study 2

A customer had a default listed on his credit file almost three years after the debt was originally due.

A customer reviewed his credit report and found a default listed on his credit file in August 2018 for an energy debt of $2,440. He spoke to the energy retailer and the collections agency that purchased the debt but was referred back and forth between the two. He was unable to get any details about the debt, such as what period it covered. He had only lived at the relevant address for short time many years ago and did not remember receiving any notices about an overdue amount or risk of default listing.

EWON's investigation found that the debt related to an energy account the customer held from July 2013 to October 2013. The retailer had sold the debt to a collections agency and the collections agency listed the default in August 2018. The customer advised EWON that the collections agency had agreed to remove the default listing as the retailer had not provided the agency with the customer's updated address.

Case Study 3

A customer was unable to obtain a mortgage due to a credit default listing for $201 for an energy debt.

A customer applied for a mortgage in December 2020 and discovered that an energy retailer had listed a default on her credit file in September 2019 for an energy debt of $201. She had moved out of the address and thought she had provided a forwarding address to the energy retailer. She did not recall receiving any notice that she was at risk of a default being placed on her credit file. The contacted the retailer and it declined to remove the default listing.

EWON's investigation found that the amount of $201 was the customer's final bill for the address which covered a period of only one month as the customer had moved out mid-quarter. EWON found that the retailer had complied with the requirements of the CR Code, as the retailer had sent the required notices to her last known address with compliant timing. The customer had paid the balance of $201 in October 2019, but the default had already been listed in September 2019. The retailer declined to remove the default listing and EWON did not identify a basis on which the retailer would be required to remove it.

The customer advised EWON that her mortgage application was declined on the basis of the default listing, although it had been updated to paid status. This was a disproportionate impact given the low amount of debt representing only a month of energy charges. The customer had always paid her previous energy bills in full by the due date until the final bill, including bills for higher amounts such as $1,400.

Case Study 4

A customer disputed a credit enquiry on the basis that he did not consent to it.

A customer became aware that a credit enquiry was completed by an energy retailer when he opened an electricity account. He considered he did not consent to the credit enquiry, was not made aware it would take place, and that it had a negative impact on his credit score. He raised the issue with the retailer and it was unable resolve the issue. The customer engaged a commercial credit repair agency to assist him in having the credit enquiry removed due to his concern over his credit score.

EWON's investigation found that the customer was given appropriate notice in accordance with the Act and the CR Code that the retailer would perform a credit check as part of its account establishment procedures. EWON did not identify a basis for the credit enquiry to be removed.

Case Study 5

A customer disputed four credit enquiries on the basis that he did not consent to them.

A customer found that an energy retailer completed four credit enquiries over several years. He considered he did not consent to the credit checks and that they lowered his credit score. He contacted the retailer and it initially declined to take any action. It then advised that it would remove three of enquiries, but all four remained on his report after several weeks of follow-up.

EWON's review found that the customer had multiple accounts for different addresses over several years and the credit enquiries took place each time he established an account. Although EWON did not identify any breaches of the Act or CR Code, the retailer agreed to request removal of the credit enquiries to resolve the complaint.

Case Study 6

A retailer agreed to remove a default listing as the customer experienced family violence, which the retailer was not aware of at the time of the default listing.

A customer disclosed a family violence situation to EWON and advised that it led to her leaving her previous address in a rush. Due to the way she vacated, she was not aware that she had an outstanding debt with her energy retailer. She found out that the retailer had listed a default on her credit file for $500 in December 2019. As soon as she was aware of the debt, she contacted the retailer and paid the amount of $500 in full. She thought the retailer had advised it would remove the default listing but it was still on her credit file.

EWON discussed the default listing with the retailer, after obtaining the customer's permission to discuss her circumstances. The retailer confirmed that the customer had also disclosed the family violence situation to it directly when querying the default listing. The retailer then promised that it would remove the default listing due to the customer's circumstances.

Case Study 7

A retailer agreed to remove a default listing as the customer experienced economic abuse, which the retailer was not aware of at the time of the default listing.

A customer advised that she and her ex-partner ended their relationship in 2019. She and her children left the shared home. While in the relationship she did not realise that her former partner had been establishing accounts in her name and not making payments, including utility and mobile phone accounts. When applying for a personal loan in 2021, she discovered a default listed in her name by an energy retailer for $700 that prevented the loan being approved. She contacted the retailer to discuss the default listing but considered the retailer could not assist her. A free financial counsellor gave her EWON's number to see what options may be available to her.

EWON spoke to the retailer and, with the customer's permission, discussed her circumstances. Due to the circumstances, the retailer agreed to remove the default listing. The retailer also waived the debt of $700 in full to further assist the customer.