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Interaction between Part IIIA and paragraph 11.2 CR Code (v2.1)

The 2017 independent review of the CR Code had identified a concern that some types of court judgments and originating processes were being inappropriately recorded in credit reports (i.e. where they did not meet the definition of 'court proceedings information' or 'publicly available information'). Paragraph 11.2 was added into the CR Code to address these concerns. Importantly, the change was intended to support and clarify the existing provisions in Part IIIA, rather than create new rights or obligations. This is shown by the wording of the change (i.e. "For the avoidance of doubt…") and the explanation that accompanied the updated CR Code (attached, see p13).

The operation of paragraph 11.2(a) in relation to originating processes appears straightforward, so I won't go into detail on that issue.

Paragraph 11.2(b) and (c) were intended to clarify when a judgment, that wasn't 'court proceeding information, *couldn't* be 'publicly available information'. That is, when a judgment doesn't relate to the "individual's credit worthiness" (as described in s6N(k)).

Paragraph 11.2(b) is straightforward – it covers judgments where an individual, who is insured, needs to claim on the insurance and, having had the claim paid, the insurance company steps into their shoes and pursues (or defends) the court proceedings. While those proceedings are done in the name of the individual, it is clear that any subsequent judgment has no negative bearing on the individual's credit worthiness. (This is not the same as when the provider has claimed against the customer on the basis the provider has had to pay out to a third party on the customer's behalf – such as for a deposit bond guarantee.)

Paragraph 11.2(c) is more complex. As part of the 2017 independent review, there were questions as to when a court judgment (that was not captured by the meaning of 'court proceedings information') would relate "to the individual's credit worthiness". There is an argument that *any* judgment relates to the individual's credit worthiness as it shows a liability is owed by the individual. However, we don't consider this interpretation is consistent with the intent of the law (if for no other reason than the mere existence of a judgment does not indicate the customer continues to have a liability).

Rather, we consider that the important factor is how the judgment relates to the behaviour of the individual in originally incurring liability for the debt. 'Credit worthiness' is generally considered to be the propensity for an individual to repay the debts that they incur, however in this context we would expand this to be "the debt they *intentionally* incur".

We do not think that it is appropriate to list a court judgment that relates to, for example, a tortious debt as such judgments relate most directly to non-credit worthiness issues, such as driving or professional competency (rather than the individual's credit worthiness). This would exclude, most obviously, judgments for car accidents against an uninsured driver (in addition to paragraph 11.2(b)

which relates to insured drivers). It would also exclude judgments relating to professional negligence.

It is different if the judgment relates to a quantifiable, certain debt that the individual knew was owing (or could become owing) because of their deliberate actions. That is, given 'credit worthiness' relates to the propensity for an individual to repay debt they intentionally incur, the fact that the customer has been successfully sued for a debt intentionally incurred is relevant to their credit worthiness. We consider that this would therefore include debts which the individual has incurred through contract or similar arrangements.

'Similar arrangements' would, for example, include council rates that are a known and predictable debt that will be incurred through home ownership. However, it would not include, for example, a judgment in relation to overpaid child support.

We do recognise that paragraph 11.2(c) refers to judgments "unrelated to credit" – and that "credit" under the Privacy Act ordinarily requires a defer of the debt. We acknowledge that this may, on the surface, further limit the concept of 'publicly available information' beyond that described above.

However, we don't consider that this should have that effect (and, as noted above, we may raise this in the upcoming independent review of the CR Code). Importantly, as noted earlier, the changes introduced by paragraph 11.2 were not intended to change the effect of Part IIIA in relation to publicly available information and a strict reading of paragraph 11.2(c) would do that.

Also, such a strict reading of paragraph 11.2(c) would effectively replicate the meaning of "court proceeding information" – which creates a paradox as 'publicly available information' is (partly) defined as something which is not 'court proceedings information' (although we do recognise that the explanation that accompanied the updated CR Code does suggest that the "'catch all' exclusion" in paragraph 11.2(c) "is appropriate and restates the policy intent underlying the 'court proceedings information' definition"). Finally, if the intent of the Privacy Act (and the CR Code) was to prohibit any court judgments other than "court proceeding information" the logical approach would simply to have said that.