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Consultation Paper: Review of the Privacy (Credit Reporting) Code 2014

This consultation paper only recently came to our attention therefore we are providing a compressed submission without the benefit of having sought contribution from potentially impacted members.

Having participated in the roundtable conference on 01 February 2022 we believe there are other parties who share a common perspective with that of the FBAA and our position will be advanced through the submissions of others.

We are generally comfortable with the current drafting of the CR Code.

The Privacy framework is becoming increasingly complex for affected parties (CPs, CRBs, AIRs, consumers and their advocates) to apply and comply with. It is important to keep in mind when considering this framework and any further changes, that not all parties impacted by the framework are well capitalised, sophisticated or who spend much of their time examining the framework in detail.

The framework undoubtedly delivers benefits to beneficiaries including participants in the credit industry and consumers. Transparency assists credit providers and intermediaries to more accurately assess credit risk and credit behaviour. Consumers benefit from having individual credit identities that improve their access to credit products.

It is fundamentally important that any changes to the CR Code are made to:

- Make it easier to comply with the obligations by making them clear, simple, logical and consistent;
- Deliver on the core objectives of the CR Code which are identified in the consultation paper to include:
    - Improve the economic effectiveness of credit reporting
    - Ensure the privacy of enhanced credit reporting information

- Improve the integrity of the credit reporting information
- Improve transparency in the credit reporting process
- Set standards of conduct and practice for industry participation in the credit reporting system, and
- Provide credible monitoring and enforcement of compliance.

Prescriptive or principles-based?

The roundtable discussion included whether consideration should be given to moving towards a more principles-based model. One suggestion was to consider the approach taken by AFCA in adopting a 'fairness' approach to its determinations.

We support comments made by other groups at the conference that the CR Code should remain prescriptive as it provides certainty to parties working with the Code and the obligations created by it. We do not support any move towards a fairness principle or any approach that affords greater discretion to decision makers to find against financial firms where they have correctly applied the law and complied with the requirements of the Code.

AFCA's fairness approach was considered in the report of the Review of AFCA published in August 2021. The Report noted that submissions made to AFCA regarding the fairness approach identified concerns about the consistency of decision making and the fact that it resulted in AFCA holding firms to a higher standard than that required by law or contractual terms.

Recommendation 2 of the AFCA Review addressed the fairness approach. While it acknowledged that it was appropriate for AFCA to have jurisdiction that enables it to make decisions with respect to considerations beyond the strict legal application of legal principles, AFCA should have primary regard to the four factors identified in its Rules – legal principles, industry codes, good industry
practice and previous decisions.

In order to give greatest certainty to financial firms and consumers impacted by the Code we maintain that it should be administered in a prescriptive manner.

Credit inquiries impacting consumer credit file

While this may not be the correct paper to flag this, the FBAA would like to raise the issue of how credit inquiries impact consumer credit scores. We believe that consumers should be able to make inquiries (and have inquiries made on their behalf) regarding access to credit without impacting their credit file (and credit score). The differentiator between whether an inquiry should impact a credit score or not should be whether the consumer has knowingly

applied for finance with a particular provider with an intention to obtain finance as opposed to shopping multiple credit providers for competitive rates.

There are two levels of credit inquiry that can be made. Light touch inquiries that do not leave a footprint and are made by access seekers and those that leave a footprint on the credit file made by credit providers. One entity cannot hold both access seeker and credit provider access to credit reporting bureaus. This means a credit provider cannot make an inquiry to a CRB without leaving a footprint and impacting a consumer's credit score.

Entities with larger, more complex corporate structures are able to hold multiple CRB memberships that allow them to make access seeker and credit provider inquiries through different corporate structures then share the results of those inquiries within the group. Smaller entities however can only hold one type of membership. If they are a credit provider, the only inquiry they can make against a consumer's file is a credit provider inquiry which impacts their credit score. Many credit providers are unable to provide a tailored quote for credit without making an inquiry. This can lead to a customer shopping around for the best rate between multiple providers having their credit file impacted multiple times for a single transaction. This produces poor consumer outcomes and also leads to complaints against credit providers where consumers present applications to multiple lenders for the most competitive rate.

The framework should allow non-footprint inquires to be made by credit providers.

CP Question 11 - Do industry and individuals have access to the information they need to understand and/or apply the CR Code in practice?

Complexity causing honest mistakes and leading to complaints

From our perspective, compliance and enforcement attitudes are galvanizing towards demanding perfection by participants in the highly complex credit reporting framework. Given its complexity, honest mistakes can be made. Complexity also makes the regime more difficult for consumers and advocates to understand which in turn leads to more complaints being made to, or against, participants.

Connected to 4.1.2 and question 11 of the Consultation Paper, it is our perception that complaints related to credit reporting are steadily increasing. More and more complaints arise from a complainant's lack of understanding about how information is collected and reported.

The FBAA have strongly advocated for simpler drafting of legislation and other regulatory instruments. We also support less, but more effective disclosure being given to consumers. We are concerned with any proposal to create additional guidance or disclosure as a means to improving understanding of the regime.

Consumers are presented with a very large amount of information when applying for credit. They are provided with pre-contractual disclosure, Privacy Act disclosure, credit guides, quotes, credit proposals, a credit contract, consent forms for electronic communication, account opening forms and often information relating to additional products or services that may support their credit journey.

The two most significant barriers to improving consumer understanding are engagement and the large volume of information already being supplied. As much as Government, regulators and professionals aligned with the industry believe that consumers will understand better if more education material is made available, the truth is that very few consumers will take the time to read any of it. Whilst important, it is dry subject matter.

We are cautious to put our support behind any recommendations to produce further explanatory material for consumers. It is difficult to produce concise, readable material that accurately and comprehensively explains all aspects of the framework. Any attempts to summarise or simplify it risk leaving out important material that could further misunderstandings that lead to more complaints against participants.

The question was asked whether additional guidance could be produced along the lines of the regulatory guidance produced by ASIC. ASIC regulatory guides are primarily produced for regulated entities and those supporting regulated entities to understand how ASIC intends to apply the laws it administers. This is provided to help regulated people design their processes and procedures to align with ASIC's expectations with the expectation that this leads to less inadvertent mistakes by regulated persons. Undoubtedly some consumers also read ASIC regulatory guidance but they are not the intended audience.

As several participants at the 01 February 2022 roundtable observed, the CR Code is effectively legislation and is part of a complex framework. If it were possible to produce clear guidance to assist participants understand their key obligations with respect to CR Code compliance it would be beneficial, however we do not believe consumer level guidance is practical.

CP Question 16 - Are the RHI provisions appropriate? Should RHI provisions contained in paragraph 8 be amended in any way? If yes, how?

In response to the final bullet point under section 5.2, we do not support any recommendation to introduce a requirement that credit providers (CPs) should be required to separately notify consumers when reporting negative RHI. Such a move would impose additional notification burdens on CPs.

Defaults and serious credit infringements have significant and lasting impact on consumer credit files and notifying consumers before reporting to the CRB provides consumers with a final opportunity to address the conduct that has led to the default or SCI.

RHI is reported every month for every customer and having to notify customers prior to reporting negative RHI would likely be unmanageable. We do not believe notifying consumers of a pending negative RHI report will achieve that same outcome as providing notification ahead of more significant defaults and SCI listings. It will lead to a significant reporting burden and to consumers being peppered with notifications.

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

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

In relation to Paragraph 6.6 and 6.7 we wish to raise awareness of the challenges facing credit providers and other participants when dealing with complaints relating to credit inquiries. Credit providers are essentially held to ransom to remove credit inquiries from consumer files because they can be subjected to a costly complaints process, regardless of fault, if the consumer is unhappy with the refusal to amend the report.

Where a consumer insists that a CP make a correction to their credit file (inquiry removal or similar) the credit provider faces two outcomes:

1. Outcome one - they remove the inquiry. This is appropriate where an error has been made. This is not appropriate where the inquiry is valid and the credit file is accurate.
2. Outcome 2 – explain to the customer why the inquiry was made and refuse to remove it. This is the correct approach where no error has been made.

The challenge facing CPs and CRBs when they do not agree to amend the credit file is that a customer can complain to an EDR scheme if they are dissatisfied with the outcome provided by the CP, even where the outcome is correct and justified. Where a customer wants their credit file amended, they may be dissatisfied with anything less than their credit file being amended. Once a matter is taken to EDR, the financial firm will incur costs running into the thousands. EDR fees are not recoverable and are charged to the member firm regardless of fault.

The commercial reality of a consumer demanding removal of information from their credit file is that a credit provider can either remove it at little to no cost of time or money and satisfy the consumer's demand, or, risk a protracted and expensive complaint against them. CPs are also at risk of being investigated by a CRB if the Bureau is concerned the request to amend the credit file is not valid.

This places CPs in a bind. There should be relief given to credit providers to defend credit inquiry removal demands at no cost – naturally where the credit inquiry has been correctly made.

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

We agree that information requests appearing on credit files are causing an elevated number of complaints and demands from credit repair companies for their removal. Unfortunately, most demands for removal are made to the credit provider where the parties most impacted by the information request notation on the credit file are consumers and the CRBs.

Consideration may be given to making changes to how inquiries impact consumer credit scores. If inquiries that do not result in credit being provided do not impact a consumer's credit score, parties would have no reason to seek their removal from the credit file.

Thank you for the opportunity to provide this submission.

Yours faithfully

Peter J White AM *MAICD*
Managing Director

Life Member – FBAA
Life Member – Order of Australia Association

Executive Chairman & Co-Founder - The Sanity Space Foundation
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