AUSTRALIAN RETAIL CREDIT ASSOCIATION

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BY EMAIL ONLY

6 June 2019

Dear ██████████,

CREDIT REPORTING ISSUES – OAIC VIEW SOUGHT

I write to seek the Office of the Australian Information Commissioner's (OAIC's) views in relation to two credit reporting interpretation issues, as set out below. I appreciate the OAIC's views are not binding but will certainly assist ARCA Members determining their approach to these matters.

Disclosure of credit eligibility information

A credit provider (CP) Member has previously sought (and been provided) a view from the OAIC as to the meaning of a disclosure to "a person for the purpose of processing an application for credit made to the credit provider" under Privacy Act section 21G(3)(c)(i).

The fact scenario is as follows:

- An individual has applied to a CP for consumer credit using an accredited broker as their agent.
- The CP assesses the application, and identifies that the total debt obligations disclosed on the individual's application do not match up with the credit reporting information obtained by the CP.
- The CP wants to pass that particular information (credit eligibility information [CEI]) to the broker, so that the broker can ask the individual about the discrepancies.

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The initial view provided by the OAIC to the CP Member was that section 21G(3)(c)(i) would not permit the disclosure of CEI to accredited brokers, as they would likely not be considered to be 'processing an application for credit' under this section. Instead, it was suggested the access seeker provisions in the Privacy Act may aid disclosure to the broker, provided the broker obtains the necessary authority from the individual.

ARCA requests the OAIC reconsider this view.

ARCA considers that the initial OAIC view is premised on an unduly narrow interpretation of disclosure required for a person 'for the purpose of processing an application for credit'. Under this interpretation, it means that disclosure can only occur where the third party receiving disclosure is actively processing the application (rather than assisting the processing of that application).

ARCA submits that instead the interpretation of s21G(3)(c)(i) ought to permit the disclosure of CEI to be made by a CP to a person who supports or enables the processing of the application (as well as a person who directly processes the application). This broad interpretation is consistent with the underlying policy intent of this provision.

In this regard, ARCA notes:

- The permitted disclosures in section 21G enable disclosures of CEI for a consumer credit related purpose which is broadly defined as including the purpose of assessing an application for credit.
- The restrictions imposed on these provisions focus on prohibiting regular or continuous disclosures which do not appear to link back to this consumer credit related purpose, and which may amount to monitoring or checking a consumer's behaviour. (See Explanatory Memorandum discussion of the meaning of 'consumer credit related purpose' at pages 105 to 106).
- The restrictions do not appear to require a narrow reading of s21G(3)(c)(i), given a disclosure to a person who supports or enables the processing of an application would support the purpose of assessing that application but is not activity in the nature of 'monitoring' or 'continuous disclosure'.
- The assessment of the credit application would be hampered by the inability for the CP to directly disclose CEI to a broker. While the access seeker provisions could enable the disclosure, this requires the customer to provide consent to the broker. Consent could conceivably be withheld or delayed, or provided in an inconsistent form (given the responsibility will be imposed on the broker in each instance to obtain the consent from the customer).
- This restrictive approach thus creates an inconsistency in the information about potentially unstated liabilities that can be provided to a customer who has applied direct with the CP versus one who has applied through a broker.

Having discussed the practical application of this interpretation at length with Members, it is clear that a narrow interpretation of s21G(3)(c)(i) creates inefficiencies in the credit application process, but without any clear benefit for consumers.

ARCA requests the OAIC consider what we have set out above, and confirm its interpretation of s21G(3)(c)(i).

Permitted disclosure of CCLI for a guarantor

ARCA Members are uncertain about what CCLI for a guaranteed consumer credit is permitted to be disclosed as part of credit information for the individual guarantor.

In terms of what can be disclosed on a guarantor's credit report, it is agreed that:

- Default information disclosed about the guarantor's failure to pay an overdue payment under the guarantee may be disclosed under sections 6Q and 21D
- Any information about the repayment history of the consumer credit will not be able to be disclosed on the guarantor's credit report, because this information can only be disclosed on the principal borrower's credit file.

However, it is unclear whether or not CCLI about the consumer credit account guaranteed by the guarantor can be disclosed as part of the guarantor's credit information.

We note:

- Section 6 defines consumer credit liability information (CCLI) as information about consumer credit which is CCLI about the individual, which includes "terms and conditions of the consumer credit that: (i) that relate to the repayment of the amount of credit; and (ii) that are prescribed by the regulations"
- Regulation 6D of the Privacy Regulations prescribes these terms and conditions include, "whether the individual is a guarantor to another individual in relation to the other individual's credit".

We have identified that the possible options for the CCLI disclosure on the guarantor's credit report include:

- No information about the guaranteed consumer credit will appear on the guarantor's credit file. The principal borrower's credit file will record CCLI for the consumer credit, including that the credit is secured by guarantee.
- The guarantor's credit file will reflect that they have provided a guarantee in respect to another individual's consumer credit, but no information about that consumer credit will be disclosed.
- The guarantor's credit file will reflect that they have provided a guarantee in respect to another individual's consumer credit, and information about the facility will be disclosed (except for the name of the borrower). The guaranteed sum will not be disclosed, as this is not included as part of CCLI (this means the 'maximum amount of credit available' would appear as whatever this relevant entry is for the individual's consumer credit).

We have recently written to the Attorney-General's Department to seek their view on the policy intent underpinning Regulation 6(d). They have advised in response:

> "Unfortunately, we have not managed to find any further information on the policy intent of Regulation 6(d) at the time the Regulations were made. As you may be aware, the Explanatory Statement (**attached** for reference) simply explains the effect of the provision, but does not provide any guidance on the type of information that may be disclosed in relation to guarantors.
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> We are aware, however, that when the Regulations were being developed AGD considered that the information that may be listed and the way it is listed under Regulation 6 could be

prescribed in the *Privacy (Credit Reporting) Code.* However, the current version of the CR Code does not contain any such prescription.

For further guidance about interpretation of Regulation 6(d), you may wish to contact the Office of the Australian Information Commissioner."

We would appreciate your views on Regulation 6(d), and whether you consider it may be necessary to include further prescription in the CR Code. In that regard, I would note that there is no agreed ARCA Member view on what CCLI should be disclosed on a guarantor's credit report, and, in that regard, we would appreciate any insight that could be provided by the OAIC.

If you would like to discuss these issues further, please contact me on ███████████ or ███████████

Yours sincerely,

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