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Kellie Fonseca
Director
Regulation & Strategy Branch, Office of the Australian Information Commissioner
by email: [redacted]

Dear Kellie,

Re: Credit Reporting Code Variation Application

Thank you for the opportunity to comment on the variation application for the *Privacy (Credit Reporting) Code 2014* (**CR Code**). Financial Rights Legal Centre (**Financial Rights**) is pleased that several of the comments and recommendations provided to ARCA in February 2019 by consumer representatives regarding their proposed variations have been taken up. However, we retain concerns both with some of the amendments within this variation application, and with ARCA's failure to account for several consumer representative recommendations.

1. Clause 6.2 - The day the consumer credit is entered into

We are **not opposed** to this amendment in principle. We are of the view that the credit should date from when it is "approved" as opposed to made available. For responsible lending purposes, the relevant date is approval.

However, the addition of "and the credit provider has generated the consumer credit account within its credit management system" appears to weakens the obligation as it is not clear what gap may exist between approval and "generation" of the account. As argued in the consumer representative joint submission, there is no responsible lending argument for leaving information regarding approved credit off an individual's credit report until the credit product has been activated and credit has been generated by the bank. A consumer who has been approved for credit may very well activate and spend the entire credit limit very quickly; and in the time between approval and that day of activation, that consumer may well have been approved for further credit that is in fact unaffordable.

It is important, however, to note that accounts should also be promptly removed or listed as closed in the event the consumer does not draw down on the credit and its availability is withdrawn.

The way the provisions are currently drafted, presumably to create some form of transitional arrangement, does not make sense. The two points in time overlap - one being the day of commencement of the varied code and the other being up to 12 months from the day of commencement.

2. Clause 8.1 & 8.2 – Repayment history information

We **support** the change to ensure that RHI reflects all payments that have been made within the relevant period are taken into account in assessing the applicable information to be reported. This ensures both consistent reporting and provides appropriate incentive for consumers who have missed payment dates to catch up as soon as possible if they are in a position to do so.

We are **not supportive** of the proposed change from a '7' to an 'X' for the reporting of RHI 180+ days in arrears. To someone unfamiliar with RHI or accessing their credit report for the first time, a 7 following a 6 looks clearer than an X does. Further, we are concerned with the precedent that accepting such a change would make, given that the primary justification for the change is that the reporting of an 'X' rather than a '7' is already industry practice.

We are disappointed that many CRBs are already reporting an 'X' rather than a '7' on consumers' credit reports in contravention of the CR Code. We understand that the Australian Credit Reporting Data Standard (**data standard**) is inconsistent with the CR Code as it stands, and does indicate an 'X' for the reporting of RHI 180+ days in arrears. It is inappropriate that these two documents are inconsistent with one another, and that in instances of inconsistencies, CR Code subscribers can choose to simply disregard the Code.

Inconsistency between the data standard and the CR Code cannot be an excuse to amend the Code, particularly given that amendments to the CR Code involve consumer consultation while the data standard is solely industry-generated. While the proposed change from a 7 to an X is minor, we are concerned that accepting this amendment sets a precedent whereby inconsistency can be manufactured between the data standard and the CR Code through industry amendments to the data standard, and then that inconsistency used as justification to amend the Code to a position more favourable to industry and less favourable to consumers.

3. Clause 10.1 - Payment information

We are **not opposed** to the amendment to delete the reference to replacing the overdue credit with new consumer credit. We note however that this leaves the Code without any reference to how new arrangement information (s6S of the Privacy Act) will be recorded. This is confusing for consumers who are likely to be reading the Code without cross-referencing the Act. Perhaps the relevant parts of s6S could be included as a note under this section instead.

4. **Clause 11.1 & 11.2 Publicly available information**

We are **very supportive** of these amendments. It is vitally important that the protections afforded by the credit reporting provisions of the Privacy Act are not circumvented by the insertion of publicly available information that is potentially prejudicial and powerfully distorted by the context of being included in a credit report. We are pleased that ARCA have taken up our suggestions in relation to this provision.

5. **Clause 12.2 New payment information in the context of a serious credit infringement**

We **support** this amendment as a necessary flow on from the change to clause 10.1 above. Again we note that this will be the only reference to new arrangement information in the Code.

6. **Clause 17 CRB's able to pass on requests for ban and extensions of bans to other CRBs**

We **support** these amendments.

However, we argue that **CRB's should have even stronger obligations** to assist victims of fraud. Where there is a need to correct credit reporting information as a result of fraudulent activity, CRBs should have an obligation to act as an information hub, liaise with CPs and seek corrections on behalf of consumers.

7. **Clause 19 Pre – ticked boxes do not indicate consent**

We **support** the proposed amendment to clarify that consumers seeking access to their credit reports must opt into receiving direct marketing information AND that pre-ticked consent boxes do not constitute adequate evidence of having opted in.

We have also suggested a clause along the following lines to address the type of misleading conduct identified by our own previous submissions and more recently the ACCC and are disappointed it was not taken up:

> *"CRBs must not mislead consumers about their right to access their own credit reporting information for free, or about the differences in content between free and purchased reports; or indicate that exerting that right would negatively impact their creditworthiness."*

We have additional suggestions to strengthen the CR Code in relation to gaining genuine consent from consumers in relation to direct marketing. We refer to the ACCC Rules statement on consent:

> *"Consent must be unbundled with other directions, permissions, consents or agreements, and must not rely on default settings, pre-selected options, inactivity or silence."*

Accordingly we submit that the Code should specify that:

> *"Consents should be presented in plain language and data recipients should be prevented from using:*
>
> *a) pre-ticked boxes;*
> *b) negative sentences;*
> *c) silence or inaction;*
> *d) illegible terms and legalese; or*
> *e) any other strategy meant to obscure the consent process."*

An even better option would be to **ban the sale of paid credit reports** completely. We note that several CRBs do not offer paid reports. In our view, CRBs should not offer paid reports at all and should include all relevant information in the free reports, including credit scores, and be able to provide those reports promptly upon request.

Allowing consumers to regularly review their data free of charge is a basic accountability mechanism which would both improve the integrity of the system and recognise consumer's essential ownership of data collected about them. The law permits an exception to privacy to improve the efficiency of the credit market. It does not follow that consumers should be able to be charged to look at their own information.

If the CR Code does not move to explicitly ban the sale of paid reports, at a minimum CRBs **should be obliged to include credit scores in all free credit reports** provided under the current free access rules.

8. **Clause 20.2 Timeframes for responding to consultation in relation to a correction request**

We **support** the amendments to Clause 20.2 to create sub-clauses (a) & (b). We submit that sub-clauses (c) and (d) provides too much leeway for response delays and **should be stronger**. In the case of (c) where the consultation request if made less than five business days before the end of the correction period it, the response should be provided within 10 days of the request. In the case of (d) there should be an ultimate backstop rather than simply "a reasonable timeframe" (for example 30 days from the request). Where the information sought cannot be provided within the period set, the listing should be corrected as requested by the person to whom the information relates. People should not

be able to be prejudiced indefinitely by CPs and CRB who cannot locate appropriate records, or cannot do so in a timely fashion. This would require amendment of 20.3 also.

We also propose that there should be a **tighter timeframe** for situations where a CRB can identify that information must be corrected without the need to consult and CP. For example, where records have been incorrectly matched and a consumer can provide adequate evidence to establish that this has occurred, or where a CRB has included publicly available information that does not correctly pertain to their record (for example, a judgment against a different person of the same name). We submit that in such cases the CRB should be required to correct the record within 3 days of having received reasonable evidence from the affected consumer.

9. Clause 20.4 Reasonable steps to correct information

We **support** the amendments to clause 20.4.

10. Clause 21.1 Complaints

We **support** the amendments to clause 21.1. However we submit that the Code should explicitly set out basic principles for Internal Dispute Resolution (IDR) processes for CRBs, similar to how the Code of Banking Practice and the Life Insurance Code of Practice set out basic IDR requirements of their subscribers.

11. Clause 24.3 Regular independent reviews

We support the amendment of Cluse 24.3 to ensure there are regular independent reviews of the Code to ensure that it keeps pace with rapidly developing technology and addresses emerging consumer issues as they arise.

We would be grateful for the opportunity to meet with you in order to discuss our outstanding concerns with the proposed variations to the CR Code and ensure that the CR Code provides an adequate level of consumer protection.

We look forward to your positive response to this matter.

Yours faithfully,

Karen Cox
Chief Executive Officer

Financial Rights Legal Centre

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