AUSTRALIAN
RETAIL
CREDIT
ASSOCIATION

Privacy (Credit Reporting) Code 2014 (CR Code) – second tranche of variations

Briefing note

Background

The Pricewaterhouse Coopers (PWC) independent review of the CR Code concluded in December 2017. The review made a number of recommendations, as well as identifying issues in the CR Code requiring further consultation.

The Office of the Australian Information Commissioner (OAIC) proposed that the response to this review be progressed in two tranches of variations.

The first tranche of largely technical variations was considered between 3 April 2018 and 17 April 2018, approved by the OAIC on 29 May 2018, and became operational on 1 July 2019. A current copy of this CR Code is available here: https://www.oaic.gov.au/privacy-law/privacy-registers/privacy-codes/privacy-credit-reporting-code-2014-version-2.

The current consultation concerns the second tranche of variations to the CR Code, and includes potential variations relating to both recommendations or issues raised in the original PWC independent review, and other potential variations relate to issues which have arisen subsequently.

Some of the second tranche issues are wide-ranging and complex e.g. issues concerning the corrections provisions in the CR Code. This meant that, in some instances, how the CR Code might be amended to appropriately respond to the concerns of stakeholders was not immediately apparent. On this basis, ARCA conducted an informal consultation with key stakeholders in December 2018. The feedback from this initial consultation has informed the proposed drafting contained in this consultation draft of the CR Code.

The consultation draft will be made publicly available for a four-week period, and stakeholders will be invited to participate in further consultation sessions.

Below a brief explanation of each proposed change is provided, including references to some of the feedback received by stakeholders to date. The views of specific stakeholders have not been set out in detail, as a complete analysis of all feedback will be included in the consultation statement in support of the final variation application to the OAIC.

Variations proposed – rationale

1. Paragraph 24.3 – Further review of the CR Code

This variation was recommended by PWC (Recommendation 1).

Paragraph 24.3 became redundant following completion of the initial independent review. The proposed variation will institute an ongoing three-year independent review process. In each instance, the three-year period will commence upon completion of each independent review which means in practice the review period will be more than three years (noting the first independent review process commenced 12 March 2017 and concluded on 8 December 2017).

Stakeholders were broadly comfortable with a three-year review timeframe. Some preference was expressed for a longer timeframe (five years), however, overall it was felt that a longer timeframe would hamper efficient processing of any CR Code issues.

2. Paragraph 19 – Direct marketing practices

Two variations are proposed to paragraph 19 being the inclusion of provisions restricting the use of pre-ticked marketing consents for free credit reporting applications (19.3) and requiring credit reporting bodies (CRBs) to identify differences between free and paid credit reports (19.4).

This variation relates, in part, to PWCs' issue 8 (Marketing to consumers who have requested a free credit report). We note that PWC did not recommend a change to the CR Code, on the basis that any such change was outside the scope of the CR Code (and ought to be dealt with under the Australian Privacy Principles or the Australian Consumer Law).

ARCA's view is that both variations are within the scope of the CR Code. Section 20R(4) of the Privacy Act provides that CRBs must give access to credit reporting information in the manner set out in the CR Code. This is a broad provision. Given the two proposed variations deal with how access is given, it is arguable that they come within the scope of this provision. On that basis, these variations are within the scope of section 26N(2) of the Privacy Act (which sets out matters the CR Code must deal with, relevantly including provisions permitted by Part IIIA).

Stakeholders provided a broad level of support for both variations.

3. Paragraph 11 – inclusion of writ and summons information on credit reports

This variation excludes originating process[1] from the meaning of 'publicly available information'.

This proposed variation corresponds to PWC's issue 14b. PWC did not recommend a change to the CR Code, on the basis that imposing a restriction on the reporting of writs and summons information may require a change to the Privacy Act and would represent an effective policy switch.

This proposed variation attracted a split in stakeholder views, with some industry stakeholders opposed to a variation, yet with other industry stakeholders, consumer advocates and the Australian Financial Complaints Authority (AFCA) in favour of a variation.

ARCA has included the proposed variation in the consultation draft for the principal reason that it appears that the inclusion of originating process as publicly available information is a loophole in the drafting of the Privacy Act, and contrary to the underlying intent.

The underlying intent of the 'court proceedings information' definition in section 6(1) is to ensure the only type of court proceedings information available on credit reports is a credit judgement. An earlier iteration of the 'court proceedings information' definition referred broadly to 'information about a judgment'. In response, in October 2011, the Senate Finance and Public Administration Legislation Committee recommended strengthening this definition, citing concerns with the prospect that this could allow the disclosure of originating summons on credit reports. Submissions to the Committee noted that originating summons could impact an individual's credit file even without liability having been established, moreover the summons did not necessarily have to relate to credit.

[1] 'Originating process' has been used rather than 'writ and summons' or 'originating summons' to ensure the term applies to all jurisdictions, across differing terminology.

ARCA has formed a view that the same concerns which saw the restriction placed on the 'court proceedings information' definition should apply to the publicly available information definition restricting the use of this definition to report originating process.

In addition, a further reason in support of the proposed variation is that no retention period applies to publicly available information (as the information can be disclosed so long as it remains 'publicly available'). This could mean originating proceedings could remain on credit files in excess of the five-year retention period that applies to court proceedings information (section 20W(b), Item 8).

4. Paragraph 17 – notification where allegations of fraud

This proposed variation corresponds to PWC's issue 21. While PWC did not issue a recommendation to vary the CR Code to address this issue, it did recommend further consultation. It was suggested that the further consultation focus on the appropriateness of the ban period process, and the prospect of imposing obligations on CPs and CRBs (to relieve the burden on consumers).

One suggestion to improve the current fraud processes was to include provision in the CR Code requiring a CRB to act as an 'information hub' where fraud had occurred.

Stakeholder feedback raised concern with difficulties that may arise in this approach. In particular, there was concern that a CRB, acting on the individual's behalf, may notify CPs who have not been impacted by the fraud and those CPs may take action to limit their exposure (including freezing or suspending credit). Further, insofar as the fraud had resulted in applications made in the individual's name, it wasn't clear why the CRB wouldn't already be acting as a 'correction hub' (to fix the incorrect applications with each of the relevant CPs) under the existing first responder correction provisions.

All stakeholders expressed a level of support for the inclusion of a provision in the CR Code which would enable the co-ordination of ban periods across CRBs. The proposed variation to paragraph 17 seeks to impose a new obligation on a CRB to contact other CRBs on behalf of the individual where it is notified that the individual requires a ban period to be implemented with these additional CRBs. The proposed variation drafting does not also cover the extension of the ban period, on the basis that (at this point) the individual may be better placed to identify which CRB has been impacted (and may not wish to continue the ban with multiple CRBs). However, feedback is sought from stakeholders as to whether there is a need to make further amendment to the variation to also cover the extension of the ban period.

5. Paragraph 6.2(a) – account open date

This issue was not raised at the time of the PWC review, but has been identified as an issue for credit providers who are now transitioning to comprehensive credit reporting (CCR). Credit providers have identified that the concepts of 'credit being made available' and 'under the terms and conditions' may sometimes be contradictory. For instance, a credit card may, under its terms and conditions, not be treated as open until it is activated by the customer, but it may still be available to the customer in the sense that the credit is otherwise in place.

The proposed variation addresses these concerns by proposing two new definitions for account open date, one for credit and charge card products, and the other for all other credit products. The account open date, in each instance, is intended to more closely to when the credit liability exists or is created within the credit provider's systems.

Stakeholders have expressed support for this variation, on the basis that it supports greater clarity and consistency in reporting. Industry stakeholders are expected to continue to provide

feedback on the proposed variation wording, to confirm that it aligns with current practices. Feedback will also be sought from stakeholders as to whether there will be a need to include a grandfathering provision, similar to the approach taken to the change to the account close date (paragraph 6.2(c)) definition.

6. Paragraph 8 – RHI assessment

This issue was not considered by PWC, as it is an issue which has arisen since the PWC review.

The proposed variation addresses an inconsistency in how repayment history information (RHI) is assessed, when comparing the requirements of subparagraphs 8.1(a) and 8.2(c). From discussions with ARCA Members, we understand that there are currently two approaches utilised for RHI assessment. The first approach relies on the wording of 8.1(a) to assess the RHI reported based upon the 'worst' RHI position during the month (allowing for the grace period). The second approach relies on the wording of 8.2(c) (and the view that 8.1(a) is consistent with this wording) to assess the RHI based on the 'point in time' RHI position at the time of the reporting period (again, allowing for the grace period).

Stakeholders provided feedback that a single approach to RHI assessment should be adopted, with a point in time assessment being preferred. On that basis, minor amendments have been made to paragraphs 8.1 and 8.2 to clarify that any RHI assessment must take into account any payments made by an individual during the relevant RHI month. This removes the possibility that a CP will assess an individual's RHI without taking all payments into account, and instead reflecting what the RHI was whichever day in the month that the individual was at their most overdue.

A further minor amendment in RHI reporting is proposed, which is to change the RHI code '7' (which indicates a payment is 180 days or more overdue) with the RHI code 'X'. The industry practice is already to use the RHI code 'X' in these situations, and we understand most stakeholders are familiar and comfortable with this practice. Further, unlikely the other RHI code numbers which represent a tightly defined time period, the current RHI code '7' represents a potentially open-ended time period. Using an 'X' code arguably more accurately represents the nature of the RHI being reported.

7. Paragraph 21 – ISO references

This issue was not considered by PWC, as it is an issue which has arisen since the PWC review.

It has been identified that the ISO standard referred to in paragraph 21.1 (*ISO 10002-2006 Customer satisfaction – Guidelines for complaint handling in organisations*) had been superseded in 2018. The variation includes the updated ISO standard (*ISO 10002:2018(E) Quality management - Customer satisfaction - Guidelines for complaints handling in organisations)*, and makes minor amendments to the cross-references to that standard.

8. Paragraph 20 – corrections issues

The PWC review had identified the following corrections issues which required further consideration (issue 18):

- Review of correction timeframe – possible shortening of the 30-day correction time period in certain circumstances.
- Separating obligations of CPs and CRBs in paragraph 20.3.
- Including identification information in paragraph 20.9 notifications (this was addressed in the first tranche of variations).

- Imposing responsibility for correction on the original CP in debt transfers.
- Requiring better internal dispute resolution (IDR) procedures for CRBs.

In the initial consultation, stakeholders were asked to consider these specific issues, and to identify possible variations to the CR Code that could be made, and how each of these variations would resolve the identified issues. ARCA has noted that some of the issues raised about corrections tend to be anecdotal in nature, and there was not a great deal of substantive evidence (whether aggregated figures or case studies) which would assist evaluation of possible alternative drafting. For this reason, ARCA has not sought to vary the CR Code to include the more substantive variations proposed (for example, separating the obligations of CPs and CRBs) because there is no evidence that this variation would resolve an underlying issue with current corrections processes.

ARCA has also noted that some issues are particularly complex, for example the imposing of responsibility for correction on the original CP in debt transfers, which involves issues arising from debt assignment contracts, as well as problems with the debt transfer process. While stakeholders did acknowledge a need to address these issues, it is apparent (principally due to concerns about the lawfulness of any 're-assignment' of liability) that the CR Code is not the appropriate means to resolve these issues.

ARCA has proposed two variations to the corrections provisions, as follows:

- Timeframes for consultation requests: A range of stakeholders (including consumer advocates, debt buyers and mortgage insurers) shared a common concern with the first responder provisions, and particularly, the current drafting of paragraph 20.2 of the CR Code which imposes an obligation on a 'consulted CP or CRB' but without a specific timeframe for that consulted CP or CRB to respond (beyond 'as soon as reasonably practicable'). The proposed variation addresses this concern by implementing a consultation timeframe, to ensure the consulted CP or CRB is obliged to respond to the consultation request so that the first responder CP or CRB can meet their 30-day correction timeframe.

- Shortened timeframe for response to correction requests: Stakeholders also raised some concern with the strict reliance on the 30-day correction timeframe, even in straight-forward situations. Industry indicated that it would process corrections with expediency, but implementing a blanket reduction in the 30-day correction timeframe for 'simple situations' could be difficult, given apparent 'simple situations' could sometimes become more complex than anticipated. Noting this concern, the second proposed variation to the corrections provisions (paragraph 20.4) introduces an obligation for a CP or CRB to, as soon as practicable, both determine whether a correction should occur, and then, to correct the information (if required). These obligations should provide an ability for expedient correction processes, but without implementing a blanket reduction in the timeframe for 'simple situations'.

9. Paragraph 10.1 – Payment information

This issue was not considered by PWC, as it is an issue which has arisen since the PWC review.

The proposed variation relates to a view provided by the OAIC to ARCA in December 2018, on the OAIC's interpretation of 'payment information'. Relevantly, the OAIC provided an opinion that paragraph 10.1 of the CR Code lists circumstances in which an overdue payment is taken to be paid. In practical terms, this means each of the disclosures in paragraph 10.1 ought to then result in a disclosure of 'Paid' ('P') code, rather than other codes (in the context of the OAIC's view, this then has meant the 'Settled' ('S') code is no longer able to be disclosed).

However, paragraph 10.1(d) had also enabled a type of new arrangement information (being a statement that an individual has been provided with new consumer credit in accordance with section 6S) to also be a disclosure of payment information. Given the OAIC's recent view, it is proposed to remove this provision from the CR Code and enable new arrangement information (currently an 'N' (new consumer credit) or 'V' (varied consumer credit) to continue to be disclosed simply as provided under section 6S rather than the CR Code.

Feedback has not been sought from stakeholders on this variation, at this stage.