



16 November 2023

Mr Richard McMahon
General Manager – Government & Regulatory
Australian Retail Credit Association
PO Box Q170
Queen Victoria Building NSW 1230

Via email: [REDACTED]

Dear Mr McMahon

Australian Retail Credit Association consultation on the Privacy (Credit Reporting) Code 2014 and potential variations

Thank you for the opportunity to comment on this consultation paper.

The Energy & Water Ombudsman NSW (EWON) investigates and resolves complaints from customers of electricity and gas providers in NSW, and some water providers. Our comments are informed by our investigations into these complaints, and through our community outreach and stakeholder engagement activities.

EWON is formally recognised as an External Dispute Resolution (EDR) scheme by the Office of the Australian Information Commissioner (OAIC) under section 35A of the Privacy Act 1988 (the Act). This requires EWON to receive, investigate and facilitate the resolution of privacy complaints about our members.

We have only responded to those proposals in the consultation paper that align with issues customers raise with EWON, or with our organisation's operations as they relate to this rule change.

If you would like to discuss this matter further, please contact Rory Campbell, Manager Policy & Systemic Issues, on (02) 8218 5266.

Yours sincerely

[REDACTED]

Janine Young
Ombudsman
Energy & Water Ombudsman NSW

Australian Retail Credit Association consultation on the Privacy (Credit Reporting) Code 2014 and potential variations

EWON supports changes aimed at better balancing an efficient credit reporting system with the protection of individuals' privacy. We support changes that better accommodate utilities in the credit reporting framework and the development of a framework that is transparent, provides adequate consumer protections and is fit for purpose with the current economic environment.

We have not answered specific questions in the consultation paper; however we have commented on the proposals and the suggested wording within the Draft Privacy (Credit Reporting) Code 2024 (Version 3.0) (Consultation CR Code) that align with the issues customers raise with EWON. Our comments focus on:

- Proposal 6 – Consumer Credit Liability Information (CCLI) for telecommunications and utilities credit
- Proposal 19 – Amend CR Code to introduce positive obligations related to statute barred debts
- Proposal 21 – Standalone notices given under s21D(3)(d) of the *Privacy Act 1988*
- Proposal 24 – Notification obligations in the credit reporting framework
- Proposals 39 – Including situations of domestic abuse in the example list of circumstances outside the individual's control
- Proposal 43 - Introducing a soft enquiries framework.

Proposal 6 – CCLI for telecommunications and utilities credit

ARCA has proposed definitions to clarify how the terms 'account open date' and 'account close date' apply to telecommunications and utility providers.

The Consultation CR Code proposed changes are defined as:

day on which the consumer credit is entered into means

(a) in the case of credit provided in the context of a telecommunications or utility service, for consumer credit liability information disclosed after [date], the day that a service is first provided, and on which the credit provider has generated one or more active accounts within its systems;

day on which the consumer credit is terminated or otherwise ceases to be in force means

(a) in the case of credit provided in the context of a telecommunications or utility service, for consumer credit liability information disclosed after [date], the day that service provision ceases

EWON supports the need for definitions, however we note the following:

- ARCA notes that it may be the case that multiple technical pieces of 'credit' are treated as one 'account' for credit reporting purposes as this would avoid complexity and confusion. However, customers often have multiple utility services with one retailer, either through separate contracts or dual fuel, i.e., combined electricity and gas contracts. The National Energy Customer Framework (NECF) regulates each contract the customer has with their retailer separately. EWON would suggest that ARCA consider adding wording, similar to the



effect of ‘each’ before ‘utility service’ or using wording to the effect of ‘the day that each utility service is first provided’ or “the day that each service provision ceases.”

- ARCA notes its intention that if a utility service is disconnected or ceases but credit remains unpaid, the account is to be considered ‘closed’ for CCLI purposes. Energy retailers and water providers in NSW do not report repayment history information and financial hardship information.

If a customer is disconnected for non-payment, an account will still be ‘active’ and energy retailers still have obligations to the customer under the National Energy Retail Rules regarding re-energisation for at least 10 business days, along with obligations around financial hardship. There are also additional obligations on energy retailers that requires them to offer a customer supply under a standard retail contract when it is what is known as the ‘financially responsible market participant’, regardless of the credit status of the customer.

Proposal 19 – Amend CR Code to introduce positive obligations related to statute barred debts

We acknowledge that ARCA is not seeking comments as part of this round of consultation and we support the approach of further exploring the alternative measures outlined in ARCA’s consultation paper¹.

While we also acknowledge that law reform would be required in this area, and that this will be pursued in the upcoming review of Part IIIA of the Privacy Act, there is no guarantee that the issue of positive obligations relating to statute barred debts issue would form part of review.

EWON is concerned that this is an ongoing issue that is not being solved and that has continuously been deferred to a later time. For example, EWON supported a requirement for credit providers to list defaults within a reasonable timeframe when the OAIC’s first independent review of the CR Code was undertaken in 2017 – we are now six years on from that review and nothing has changed.

Our position remains that requiring a default for an energy debt to be listed within 12 months of the due date of the debt is reasonable, while acknowledging this may not be appropriate for debts in all industries. We strongly encourage ARCA to pursue this, with a call that any review and implementation be timely.

Proposal 21 - Standalone notices given under s21D(3)(d) of the Privacy Act 1988

ARCA is amending Paragraph 9(3)(d) of Schedule 2 to require section 21D(3) notices to be issued separately to other correspondence that would reduce the prominence of the messages on the notices. ARCA is adding definitions to the Consultation CR Code to clarify that the notice may include information about how to contact the credit provider to request affordability (hardship) assistance.

There is a common underlying theme in many of the credit listing complaints that we receive, that customers are of the view that they have not received notifications of unpaid balances on their energy accounts. Therefore improving notification format could address this.

In the energy and water sectors, issuing a standalone notice is standard practice for many retailers. Formalising this process would not only be beneficial to customers to ensure that there is a

¹[ARCA consultation on variations to the CR Code](#), p18



consistent approach amongst retailers, it should reduce the risk of customers missing important information, as reported to us by affected customers, and also assist retailers in the avoidance of future complaints about customers not receiving, or recognising that they have received, appropriate notification.

ARCA has proposed adding a note under the definition of a section 21D(3) notice to include

“Note 2: A section 21D(3) notice may include information about how to contact the credit provider to request hardship assistance”.

EWON supports the inclusion of this information as it, along with a standalone notice, encourages re-engagement between the customer and energy retailer. We recommend that ARCA consider allowing additional information such as the availability of affordability (financial hardship) assistance a to further encourage customers to take steps to seek assistance, if required.

Proposal 24 - Notification obligations in the credit reporting framework

ARCA’s draft variation directs credit providers to provide consumers with a short, prominent statement relating to credit reporting and enquires. The draft wording states:

(a) providing the individual with a short, prominent statement about the likely disclosure of information to a credit reporting body, including that consent is not required for the disclosure to the made.

Presently Section 21C of the *Privacy Act 1988*, requires a credit provider to notify an individual that they are likely to disclose their information to a credit reporting body. 4.2 of the Credit Reporting Code (CR Code) makes it clear that energy providers can comply with their obligations by publishing a statement on its website and bringing this to their customers’ attention.

From an energy perspective, this is usually included in an energy retailer’s privacy statement. EWON sometimes receives complaints from customers who advise that they were not informed that a credit check would be completed or that they were not advised that their information would be disclosed to a third party.

Under the proposed drafting this means that it would no longer be sufficient to make the consumer aware that the information is available on its website. It is likely that this ‘statement’ would be worked into any terms and conditions provided at the time a customer enters into a contract, or contained in a ‘welcome pack’ sent to the customer afterwards. However, energy contracts can be entered into over the telephone, via the internet or via a third party website/broker.

EWON supports the inclusion of this provision as it would assist retailers in managing complaints about notification of disclosure and provide customers with additional information. However, noting the different methods of contact establishment and appropriate methods of explicit informed consent, we recommend that ARCA consider clarifying that the short, prominent statement can be verbal or written and requiring the statement to be provided to a customer, including in a later ‘welcome pack’.

Proposal 39 - Including situations of domestic abuse in the example list of circumstances outside the individual’s control

EWON supports the inclusion of family violence to further strengthen consumer protections for victim-survivors. Our expectations are that:



- a default listing should be removed by a provider where the default listing has occurred and a provider becomes aware of the customer's experience with family violence²; and
- defaults that were the unavoidable consequences of domestic abuse should be removed from credit reports.

The proposed drafting in the Consultation CR Code uses the term 'domestic abuse.' EWON recommends that ARCA consider adopting the term 'family violence', as this is utilised across multiple industries, including the energy and water sectors. We also note that the Office of the Australian Information Commissioner has used the term family violence in recent publications, including in its Australian Privacy Principles Guidelines.³

In May 2023, the National Energy Retail Rules were amended to provide additional protections for victim-survivors of family violence. The Australian Energy Market Commission took a progressive approach by including a broad definition of family violence, which was given the meaning of the term "domestic abuse" in section 8(8) of the *Intervention Orders (Prevention of Abuse) Act 2009 SA*, which included relationships where one person is a carer of the other, or where the relationship is established under Aboriginal and Torres Strait Islander kinship rules.

We acknowledge that ARCA's approach is to be non-exhaustive and allow for consideration of other circumstances in addition to the specific examples within the code. EWON still considers there is merit in defining, or providing guidance on, the types of relationships within which abuse may occur.

Proposal 43 – Introducing a soft enquires framework

EWON supports the introduction of a soft enquiries framework, however it should be clear how this applies to utility providers.

The proposed wording within the definition provides:

- (a) an information request, made by a credit provider in relation to an individual, that seeks information to make an indicative assessment of:*
 - (i) the individual's pricing for consumer credit;*

Currently an energy consumer is able to get energy retailer pricing information without the need to engage directly with an energy provider and energy providers do not need credit information to provide pricing information.

We would support the code providing further specification around how utility providers would operate within this framework. Alternatively, this could be achieved by the development of a guideline that accompanies the CR Code which would provide further clarification of the operation of the framework, including specific requirements for telecommunication and utility providers.

Additional comments

EWON raised two critical issues in the OAIC's second independent review of the CR Code, which we understand are out of scope for ARCA's current variation proposal as their implementation would require changes to Part IIIA of the Privacy Act 1988 along with potential changes to the CR Code.

The critical issues being to:

² EWON Position Statement – EWON's approach to dealing with family violence, 2023, p10

³ OAIC, *Chapter 5: Australian Privacy Principle 5 – Notification of the collection of personal information*, p4



- increase the minimum threshold for credit default listing from \$150 to at least \$300
- introduce a sliding scale where the credit default listing is for a period relative to the amount of the debt.

EWON initially raised these suggestions and provided supporting case studies in 2017 when the OAIC conducted its first independent review of the CR Code.

We again raised these critical issues in EWON's submission to ARCA's first round of consultation on potential variations to the CR code⁴.

While acknowledging and accepting that these suggestions are out of scope for ARCA's current consultation, we will continue to bring these to ARCA and OAIC's attention as addressing them will contribute to better accommodation of utilities in the credit reporting framework.

Accordingly, while noting that the OAIC indicated in the final report on its second independent review that it will raise some of these issues with the Attorney General for consideration in its forthcoming review of Part IIIA of the Act, we call upon ARCA, and the OAIC, to urgently consult on these issues.

⁴ EWON submission – [ARCA consultation on the Privacy \(Credit Reporting\) Code 2014 and potential variations](#), July 2023