Energy & Water Ombudsman NSW
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7 July 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.

We have only responded to those questions 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 [redacted].

Yours sincerely

[redacted]

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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. These include the following proposals from the Office of the Australian Information Commissioner's (OAIC) final report on its independent review of the *Privacy (Credit Reporting) Code 2014* (CR Code), which the Australian Retail Credit Association (ARCA) is considering for its variation proposal:

- Proposal 6 – Amend the CR Code to accommodate other entities reporting Consumer Credit Liability Information
- Proposal 19 – Amend CR Code to introduce positive obligations related to statute barred debts
- Proposal 21 – Amend CR Code to specify that a 21D(3)(d) notice, which informs an individual that a credit provider intends to disclose information to a credit reporting body, must be a standalone notice
- Proposal 24 – Amend the CR Code regarding notification obligations
- Proposal 32 – Amend CR Code to require credit reporting bodies to provide information on accessing other CRB's credit reports
- Proposal 33 – Amend CR Code to specify that CRBs must provide physical copies of credit reports upon request
- Proposal 37 – Amend CR Code to enable correction of multiple instances of incorrect information stemming from one event
- Proposals 39-41 – Amend CR Code mechanism for corrections due to circumstances beyond the individual's control to:
    - include domestic abuse as an example
    - extend correction requests to include credit providers
    - expand the correctable categories of information.

We have not answered most of the specific questions in the consultation paper, as the questions are seeking to particularise the CR Code wording changes required to achieve the proposals and/or obtain feedback from credit providers and credit reporting bodies about the practical application of the proposals. Our comments focus on:

- Proposal 6, where ARCA is seeking views and practical information about the accommodation of utility businesses in the CR Code
- Proposal 19, where ARCA is seeking views about potential changes to support, or act as an alternative to, introducing a positive obligation related to statute-barred debts
- Proposal 39, where ARCA is seeking views on the intended approach for including situations of domestic abuse in the example list of circumstances outside the individual's control.

Proposal 6 – Amend the CR Code to accommodate other entities reporting Consumer Credit Liability Information

ARCA is seeking information in order to make a decision about how to proceed with potential amendments to make it clearer how certain definitions in the CR Code apply to telecommunications (telco) and utility businesses. Our comments focus on energy and water, as telecommunication complaints are not within our jurisdiction. We would be happy to meet to discuss any of the below aspects further if it would be helpful for ARCA's decision-making.

Energy retailers and water providers in NSW generally have provisions in their customer contracts and/or privacy policies indicating that they may exchange information with credit reporting agencies. Energy retailers and water providers in NSW do not hold Australian Credit Licences, meaning that only parts of the CR Code are relevant. For example, energy retailers and water providers in NSW do not report repayment history information and financial hardship information.

EWON receives complaints related to energy retailers performing checks on customers' credit worthiness and complaints about energy retailers listing defaults for energy debts. We note that EWON does not currently receive similar complaints about NSW water providers (including public water utilities and private water schemes) participating in the credit reporting system.

What is the most appropriate comparison point for 'account open date' and 'account close date' in the telco/utility context? Why?

In the context of a competitive **energy market** where end-users have a choice of energy retailer, the 'account open date' and 'account close date' best align with the period of service provision by an energy retailer. There are some complexities for customers living in embedded networks who do not have access to retail energy competition. However, the period of service provision is still the most suitable comparison for 'account open date' and 'account close date'.

Service provision is a more suitable comparison than specifically service connection because the terms 'connection' and 'disconnection' could be somewhat misleading when talking about account opening/closure in the energy context. There may be continuity of access to energy at a service address while account opening/closure occurs. For example, a common scenario in energy is where a customer has an electricity account with Retailer A, but wishes to change to Retailer B. The customer opens a new electricity account with Retailer B, which initiates a switch in the energy market and triggers the account with Retailer A to be closed. The customer continues to have electricity supply throughout as the electricity supply itself is not connected/disconnected at any point in the process.

The most appropriate comparison point for 'account open date' in energy is generally the point at which:

- the customer has given explicit, informed consent to establish an energy service contract as per the provisions of the *National Energy Retail Rules*
- the energy retailer owns the billing rights to the customer's service address in the energy market
- the energy retailer has generated an active account in its systems.

The most appropriate comparison point for 'account close date' is generally the point at which the energy retailer has ended the energy service contract and closed the customer's account in its system, usually due to a request by the customer (eg the customer notifies the energy retailer they are moving out of the service address) or due to a switch in the energy market which has transferred the billing rights away from the retailer. Complaints to EWON about energy credit default listings indicate that energy retailers do treat this point as the 'account closure date' for credit reporting.

The specifics of the energy service contract (eg discount benefits or prices) may vary during the overall period of service provision. However, as ARCA pointed out in the consultation paper in relation to telco contracts, information about the duration of the overall service provision relationship between the customer and energy retailer is likely to be more useful information than information about the most recent change or rollover of contract terms.

Water accounts in NSW follow property ownership and are not based on end-user choice. The most suitable comparison for 'account open date' and 'account close date' is therefore the period of

service provision aligning with the period of property ownership. As an example, one public water utility states in its customer contract that an individual is its customer if they are the owner of a property within its area of operations that is connected to a water main or wastewater system which is owned and authorised by the utility.

Is there any limit to the amounts that can be charged under a telco/utility credit contract?

There is notionally no limit to the amounts that can be charged under a utility contract. The amounts charged are dependent on variable factors including the customer's level of energy or water usage.

Do you consider that monthly plan arrangements (eg the monthly payment for a telephone and phone service) are analogous to a credit limit? Why, or why not?

Monthly plan arrangements toward energy or water services are not analogous to a credit limit.

Energy and water are generally invoiced in quarterly or monthly periods. The charges are variable for each invoice depending on factors like prices, the customer's usage, the customer's eligibility for government rebates and the number of days in the quarter/month.

Customers may pay each periodic invoice in full individually. Customers may also come to an arrangement with their energy retailer or water provider to pay toward their account in weekly, fortnightly or monthly instalments. The payment amounts under these arrangements are not reflective of a credit limit or maximum capacity to accrue debt. The payment frequency, payment amount and duration of the payment arrangement are agreed upon between the energy retailer or water provider and the customer, and in a best practice scenario are based on:

- an estimate of the customer's future ongoing usage charges, based on previous charges
- the customer's capacity to pay (including any affordability issues)
- if applicable, an amount towards any outstanding arrears from past quarterly/monthly invoices.

The amount a customer is charged on quarterly/monthly invoices can routinely exceed the accumulation of agreed upon weekly, fortnightly or monthly payment amounts – for example, if the customer's usage is higher than the historical usage which was used as a basis to calculate the payment amounts. There are various eventualities for such scenarios, including:

- the customer accrues debt
- the customer makes a lump sum payment to cover the amount exceeding what was covered by regular payments
- the energy retailer or water provider and customer come to a new payment arrangement for a higher regular payment amount.

Monthly payments toward energy or water services are therefore different to monthly arrangements for financial services credit products.

Additional comments

EWON made two suggestions in the OAIC's second independent review of the CR Code which we understand are out of scope for ARCA's current variation proposal, being:

- 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 has been raising these suggestions and providing supporting case studies since 2017 when the OAIC conducted its first independent review of the CR Code.

We acknowledge that these suggestions are out of scope for ARCA's current consultation as their implementation would require changes to Part IIIA of the *Privacy Act 1988* (the Act) along with

potential changes to the CR Code. 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 raise the two suggestions here as we consider that they are crucial to better accommodate utilities in the credit reporting framework, as per the intention of Proposal 6.

Increased minimum threshold

The minimum threshold for credit default listing is $150, which has not been updated since the introduction of the threshold in 2014. EWON supports a minimum amount being prescribed and suggests that the amount be reviewed. $150 is not reflective of the average utility bill and the adverse consequences of credit default listing can be well out of proportion to the debt.

An appropriate amount for the energy sector would be at least $300. This is the amount the Australian Energy Regulator (AER) has set as the minimum threshold below which a customer's energy supply cannot be disconnected for non-payment. The AER sets this amount to give customers protection against being disconnected for the non-payment of one quarterly bill, and EWON believes this same principle should apply for credit default listings. Notably, the AER is currently exploring whether the threshold of $300 should be increased. EWON acknowledges that $300 (or a new amount set by the AER) may not be suitable for all industries, and that consideration would need to be given to how any updates could accommodate these differences.

Sliding scale

A credit default listing is for a period of five years regardless of whether the listing is for a debt of $300 or $30,000. While it might be expected that credit providers would take this into account, it appears from customer reports to EWON that this is not the case and credit is denied to customers regardless of the amount of the debt. At present, there is no leniency on the time of a default listing, and a customer's future financial stability and ability to obtain credit for major financial undertakings, such as buying a house or starting a business, are significantly impacted.

EWON suggests the introduction of a sliding scale where the credit default listing is for a period relative to the amount of the debt. For example, a debt of $1,000 or less would result in a one year listing, a debt of between $1,001 and $5,000 would incur a two year listing, a debt of between $5,001 and $10,000 a three year listing, and debts above that amount being listed for 5 years. This would also require changes to Part IIIA of the Act, and consideration of suitability and applicability to different industries and entities.

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

The consultation paper outlines that introducing a positive obligation to remove statute barred debts would be complex, and that some supporting or alternative measures to consider include:

- a general obligation in the Act or the CR Code to require credit providers to take steps to list defaults within a reasonable period
- the development of a time period – either in the CR Code or Part IIIA of the Act – beyond which default information cannot be listed
- a requirement in the CR Code that, if a credit provider has disclosed default information to a credit reporting body, that same default cannot be listed with another credit reporting body at a materially later time.

What are your views about the options which could be considered that are listed above?

EWON supports the three measures listed above on the basis that they would reduce the risk of significantly aged debts having a disproportionately long-term negative effect for customers. In particular, EWON has supported a requirement for credit providers to list defaults within a

reasonable timeframe since the OAIC's first independent review of the CR Code in 2017. EWON's position is 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.

Proposal 39 – Amend CR Code to include situations of domestic abuse in the example list of circumstances outside the individual's control

ARCA intends to add situations of domestic abuse to the list of examples in Paragraph 20.5(a)(iii) of the CR Code, which currently includes natural disaster, bank error in processing a direct debit or fraud. The intention is for the list to remain non-exhaustive, so that other circumstances may also still be considered on a case-by-case basis.

Do you agree with ARCA's intended approach to this proposal? Why or why not?

We strongly support ARCA's unequivocal statement that it will develop a CR Code variation to ensure this proposal is implemented. EWON's expectation is that a default listing should be removed by a provider where the default listing has occurred when a provider was not aware of the customer's experience with family violence at the time of the listing[1]. ARCA's proposed variation to include domestic violence as a specific example in Paragraph 20.5(a)(iii) will make it a clear requirement that defaults that were the unavoidable consequences of domestic abuse should be removed from credit reports. This will better protect customers who have experienced and/or are experiencing this complex form of vulnerability, and support a fairer credit reporting system overall. We also agree with retaining the non-exhaustive nature of the list to continue to allow consideration of other circumstances in addition to the specific examples.

[1] EWON Position Statement – EWON's approach to dealing with family violence, 2020, p10