



Submission in relation to the OAIC's consultation draft of the Guidelines for developing codes

by the

Consumer Credit Legal Centre (NSW) Inc

Consumer Credit Legal Centre (NSW) Inc ("CCLC") is a community-based consumer advice, advocacy and education service specialising in personal credit, debt, banking and insurance law and practice. CCLC operates the Credit & Debt Hotline, which is the first port of call for NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. We provide legal advice and representation, financial counselling, information and strategies, referral to face-to-face financial counselling services, and limited direct financial counselling. CCLC took over 18,000 calls for advice or assistance during the 2011/2012 financial year.

A significant part of CCLC's work is in advocating for improvements to advance the interests of consumers, by influencing developments in law, industry practice, dispute resolution processes, government enforcement action, and access to advice and assistance. CCLC also provides extensive web-based resources, other education resources, workshops, presentations and media comment.

Thank you for the opportunity to comment on the consultation draft of the Guidelines for developing codes (Guidelines) released by the Office of the Australian Information Commissioner (OAIC).

General Comments

The Consumer Credit Legal Centre NSW ('CCLC') strongly supports the implementation of guidelines for the development of privacy codes.

In the development these Guidelines, the CCLC recommends that the OAIC models its Code Guidelines on ASIC Regulatory Guide 183. We are of the view that Regulatory Guide 183 (*Approval of financial services sector codes of conduct*) demonstrates best practice for code administration and development. We strongly recommend that the OAIC Guidelines mirror ASIC's RG183.

Recommendation 1

The Guidelines must be modelled on ASIC Regulatory Guide 183 and include all the key requirements included in RG183.

In particular, ASIC's RG183 takes an excellent position about the necessary objectives for and industry code:

*We consider a code to be a body of rules that sets enforceable standards across an industry (or part of an industry), and **delivers measurable consumer benefits** (emphasis added). (RG 183.19)*

The CCLC believes those last four words (*delivers measurable consumer benefits*) must be the crux of any industry driven code. If an industry code does not deliver measurable consumer benefits then there is no point to having a code at all. In any industry area, the legislation sets minimum standards for consumer protections, then codes of practice enhance and clarify those protections. New privacy codes will be industry-driven and shaped by the OAIC Guidelines. If the Guidelines do not set the right tone new codes will inevitably provide for weak enforcement of consumer rights and limited additional protections beyond what is provided for in the legislation.

As they are currently drafted, the OAIC Guidelines do not require measurable consumer benefits as a key requirement of the development of a Code. This is essential and the Guidelines need to cover this as a key requirement.

Recommendation 2

The Guidelines must require that any Code delivers measurable consumer benefits.

Finally, the CCLC emphasises that there is a critically important role for Regulators to play in the development of any code of practice. The Privacy Commissioner should be deeply involved in any code development process, and this needs to be reflected in the Guidelines. The Commissioner should get involved early in the development process, and should stay involved as an administrator through compliance enforcement. Any industry-driven code is only as good as its Regulator. Regulators must continually receive reports about code compliance, and take decisive action to enforce code provisions.

Recommendation 3

The OAIC must be actively involved in Code development, Code review and setting up appropriate mechanisms for Code enforcement.

Specific Submissions

Part 2 – Deciding and planning to develop a code

- “Code Governance” (2.7-2.10)

The CCLC is concerned that the Guidelines do not clearly define a uniform system of code governance. Section 2.10 states that the “type of governance arrangements that are ultimately adopted may depend on the circumstances of the particular code.” Code administrators are referred to later in Sections 7.1-7.6, but they are referred to only in the context of initiating regular independent reviews, not in the context of regular governance.

We believe this ambiguity will make it difficult for individuals to know how their privacy complaints under each code will be enforced. We submit there must be an independent person or body that is empowered to administer and enforce each code, including imposing any appropriate sanctions. Without a clearly defined independent code administrator community confidence in the effectiveness of registered codes will suffer. The CCLC recommends that Sections 2.7-2.10 of the OAIC Guidelines be redrafted so as to clarify a more uniform method of code administration, and to require certain threshold criteria for independent code administration and enforcement.

- “Options for privacy complaint handling and reporting” (2.22-2.25)

The CCLC urges the Commissioner to require all codes to have an identifiable internal privacy complaint handling and reporting procedure for all entities bound by that APP code. The inclusion of these procedures will ensure a consistent approach to internal privacy complaint handling and ensure that individual complaints are heard.

Part 4 – Developing Codes

- “Code Requirements under the Privacy Act” (4.2-4.7)

The CCLC believes the mandatory criteria listed in sections 4.2 and 4.6 should incorporate the requirement that all codes must be developed in a transparent and consultative manner, and the requirement that all codes must have effective administration and compliance mechanisms.

Section 183.20 of ASIC’s Regulatory Guide on the *Approval of financial services sector codes of conduct* sets out a good example of ‘threshold criteria’ for approved codes:

- a) The rules contained in the code must be binding on (and enforceable against) subscribers through contractual arrangements;*
 - b) The code must be developed and reviewed in a transparent manner, which involves consulting with relevant stakeholders including consumer representatives; and*
 - c) The code must have effective administration and compliance mechanisms.*
- “Inclusion of matters unrelated to information privacy and credit reporting” (4.20-4.21)

The CCLC submits that if code developers include matters that are unrelated to information privacy or credit reporting when developing a code those matters will still form part of the code registered by the Commissioner. As long as the code also deals with either information privacy or credit reporting, and the additional matters are reasonably related to information privacy or credit reporting, the CCLC believes unrelated matters should also be registered and enforceable.

It is not practical for code developers to draft an industry code that would be part registered and enforceable, and part unregistered and unbinding on entities bound by the code. For the sake of consistency and enforceability, the Commissioner should be able to approve an entire code even if that code deals with some activities of entities that don't fall under the category of information privacy or credit reporting.

Part 5 – Handling and reporting of privacy complaints (5.1-5.17)

As a general comment, the CCLC believes this section is woefully lacking in substance and detail, and the consequence of this can already be seen in the inadequate reporting and complaints procedures outlined in the draft CR Code.

As a point of comparison the Australian Bankers Association's Code of Banking Practice sets out a thorough explanation of how the banking industry will handle the resolution of disputes, monitoring and sanctions under the code (*ABA Code of Banking Practice Part F*). Another useful comparison can be drawn from ASIC's RG 165 and RG 139 which set out in great detail how the financial services sector deals with IDR and EDR processes. The privacy and credit reporting sectors should be setting out these procedures with the same substance and detail as the financial services sector. The efficient and fair resolution of credit reporting complaints has an immediate and significant impact on consumers. The Guidelines and the CR Code must both have well-developed sections about dispute resolution, as this is key to providing *measurable consumer benefits*.

More specifically in reference to the Guidelines, the CCLC strongly disagrees with Section 5.2 which allows the Commissioner to decline to investigate a privacy complaint. We believe this undermines the enforceability of registered codes under the Privacy Act and flies in the face of procedural justice.

The draft Guidelines do not mandate that each code must have specific dispute resolution procedures. Nor do the Guidelines force each code to have a designated 'code administrator' that will oversee individual complaints. If an APP entity is not required to have a recognised Internal Dispute Resolution (IDR) process, or is not a member of an External Dispute Resolution (EDR) scheme, then an individual has no other option than to take his or her privacy complaint to the Commissioner.

Part 7 – Reviewing and varying registered codes and removing registered APP codes

- “Review of registered codes initiated by the code administrator” (7.1-7.3)

The CCLC believes new codes must be independently reviewed at intervals of no more than three years. Section 7.2 currently requires an independent review at regular intervals of at least every five years, but we believe this interval is too long for newly registered codes. Once the OAIC and the industry have more experience drafting effective and

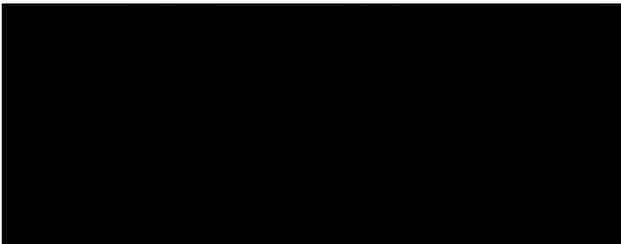
enforceable codes, then the interval length for independent reviews of new codes can be increased.

- “Variations to a registered code” (7.7-7.13)

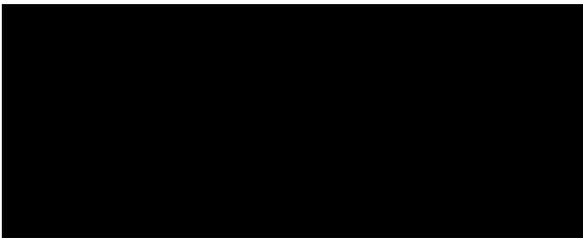
The CCLC submits that a small exemption should be included in this section for variations that are merely technical in nature. For example, changes to the name of an organisation that is bound by the code, or changes to a statute referred to in the code. Small or technical changes should be formally notified to the Commissioner, but should not have to go through the entire consultation process described in Section 7.9.

Concluding Remarks

Thank you again for the opportunity to comment on the comment on the consultation draft of the Guidelines for developing codes released by the Office of the Australian Information Commissioner (OAIC). If you have any questions or concerns please do not hesitate to contact the Consumer Credit Legal Centre on (02) 9212 4216.



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