

8 May 2018

Ms Angelene Falk  
Acting Australian Information Commissioner  
Acting Privacy Commissioner  
[REDACTED]

Dear Ms Falk

### **Privacy (Credit Reporting) Code**

The Financial Ombudsman Service (FOS) Australia<sup>1</sup> welcomes the opportunity to comment<sup>2</sup> on the proposals in the application for variations to the Privacy (Credit Reporting) Code (Code) made by the Australian Retail Credit Association on 26 April 2018.

### **Background**

FOS is an independent external dispute resolution (EDR) scheme that covers disputes across the financial sector. FOS is approved by ASIC<sup>3</sup> and is a recognised EDR scheme under the *Privacy Act 1988*.

FOS seeks to resolve disputes by conciliation and negotiation, but ultimately can make determinations that bind financial services providers. When deciding disputes, we are required to do what is fair in all the circumstances, having regard to factors including applicable industry codes or guidance and good industry practice. Our core business of dispute resolution therefore involves careful consideration of the standards set in the Code and how they apply in practice.

FOS handles an extensive range of credit reporting disputes, including disputes relating to both consumer and commercial credit reporting.

Major reforms are being made to the arrangements for EDR in the financial sector and the Office of the Australian Information Commissioner has participated in the development of the reforms by making submissions in consultations. A single EDR scheme – the Australian Financial Complaints Authority (AFCA) – is being established to replace FOS, the Credit and Investments Ombudsman and the Superannuation Complaints Tribunal. The Government has announced that AFCA will start receiving disputes no later than 1 November 2018.

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<sup>1</sup> Information about FOS is set out in full on our website at [www.fos.org.au](http://www.fos.org.au).

<sup>2</sup> These comments have been prepared by staff of FOS and do not necessarily represent the views of individual FOS directors. The comments draw on the experience of FOS and its predecessors in the resolution of disputes about financial services.

<sup>3</sup> FOS is approved by ASIC under its Regulatory Guide 139 *Approval and Oversight of External Dispute Resolution Schemes* ([Regulatory Guide 139](#)).

## FOS comments on the proposed variations to the Code

The only concern FOS has in respect to the proposed variations to the Code relates to the definition of “the day credit is terminated or otherwise ceases to be in force” in clause 6.2.

Clause 6.2(c) of the Code currently provides

- (c) “the day **credit** is terminated or otherwise ceases to be in force” is:
  - (i) the day that the **credit** contract, arrangement or understanding is terminated; or
  - (ii) if earlier, the day that the **credit** is no longer available to the individual under the terms of the contract, arrangement or understanding and the CP has irrevocably determined that the **credit** cannot be reinstated on those terms.

FOS understands that it is proposed to replace clause 6.2(c) of the Code and insert new paragraphs 6.2(d) and (e) as follows:

- (c) for **consumer credit liability information** disclosed up to and including 30 June 2019, “the day credit is terminated or otherwise ceases to be in force” is:
  - (i) the day that the **credit** contract, arrangement or understanding is terminated; or
  - (ii) if earlier, the day that the **credit** is no longer available to the individual under the terms of the contract, arrangement or understanding and the CP has irrevocably determined that the **credit** cannot be reinstated on those terms.
- (d) for **consumer credit liability information** disclosed from 1 July 2018, “the day **credit** is terminated or otherwise ceases to be in force” is:
  - (i) the day that the debt owed under the **credit** is repaid and there is no ability to defer payment of further debt under the **credit**;
  - (ii) the earlier of:
    - 1) the day that either the CP determines or the individual and the CP agree that all outstanding payment obligations arising under the **credit** has been written off or otherwise discharged (‘write off’); or
    - 2) the day that the CP charges off the full balance of the **credit** (‘charge off’).
- (e) for the purposes of 6.2(d)(ii):
  - (i) write off means that the CP has agreed to permanently forgo recovery or enforcement action in respect to any outstanding debt owed by the individual under the **credit**.
  - (ii) charge off means the accounting practice where the CP recognises outstanding balance as a loss due to the likelihood that the amount will not be recoverable, although the CP maintains the legal ability to enforce the outstanding debt against the individual.

- (iii) where either a write off event or charge off event occurs, the individual is no longer able to incur further debt (other than that arising from interest, fees or other charges in respect to the debt) under the existing **credit**.

### **Clarification required about the start dates**

FOS seeks clarification about whether the reference to 1 July 2018 in proposed clause 6.2(d) should be a reference to 1 July 2019. If it is meant to be 2019, then this would allow for a 12 month transition period to enable CP's "to upgrade their credit reporting processes to align with the new account close definition" as noted in the accompanying paper. If, however, it is intended to be 1 July 2018, then it appears there would be two different definitions that could apply between 1 July 2018 and 30 June 2019.

### **Concern about definitions**

We are also concerned about whether the definitions of "write off" and "charge off" in the proposed clause are commonly used and understood. It is our experience that a CP may "write off" a debt to meet their accounting obligations, but do not necessarily forgo recovery. The proposed Code provisions seem to create new definitions that may not be commonly used or understood in Australia.

We think that if these concepts are continued to be used, they should be called "write off" instead of "charge off" and "debt waiver" instead of "write off".

### **Do the proposed definitions meet the needs of a responsible lender?**

We are also concerned that the proposed variations to clause 6.2 do not necessarily provide useful information to a new responsible lender viewing an individual's credit file. A new lender who accesses consumer credit liability information wants to know if the consumer has outstanding debts to another lender.

Where a CP has reported the credit facility as having been terminated using the proposed definition of "charge off", it does not mean that the consumer has no liability or obligation to repay that debt.

In our view, a new lender, acting responsibly, would want to know about that obligation. To the extent that a "charged off" debt is reported in a way that suggests the customer has no further obligation to repay the debt, it could mislead a new lender about the extent of the customer's liability.

## Contact us

If you would like to discuss any of these matters further, or if FOS can provide further input or assistance, please contact me on [REDACTED] or by email at [REDACTED].

Yours sincerely

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**Philip Field**  
**Lead Ombudsman – Banking & Finance**  
**Financial Ombudsman Service Australia**