Joint Submission by the

Financial Rights Legal Centre

Consumer Action Law Centre

Financial Counselling Australia

Australian Privacy Foundation

Australian Communications Consumer Action Network

Australian Retail Credit Association (ARCA)

CR Code Variation, 28 March 2018

17 April 2018

Financial Rights Legal Centre |PO BOX 538, Surry Hills 2010 | Tel (02) 9212 4216 |Fax (02) 9212 4711 |
info@financialrights.org.au | www.financialrights.org.au | @Fin_Rights_CLC | ABN: 40 506 635 273

Introduction

Thank you for the opportunity to comment on proposed CR Code Variation. Consumer Representatives will address our general concerns about the 2017 CR Code Review, as well as the specific proposed Code variations put forward by ARCA.

General Concerns about the 2017 CR Code Review

Concerns regarding the 2017 Independent Review

As this review of the CR Code comes to a close Consumer Representatives would like to express our discontent with the review process and its outcomes. We recognise that as a mandatory legislative instrument the CR Code does not play the same role as other industry self-regulatory codes, but its purpose is still to make it easier for individuals to understand the relevant provisions of the Act. Developers of the CR Code should still strive for it to be a vehicle for more clarity and transparency around consumer credit reporting, and wherever possible create concrete benefits for consumers. This CR Code Review did not achieve any of those outcomes.

Other industry codes also must follow ASIC's RG 183 with states that code reviews must "address consumer concerns." This too was not achieved in the 2017 CR Code Review. As we have discussed in correspondence and in person with the OAIC, we do not believe that PwC had the requisite background experience in this subject matter or regarding industry Codes. PwC had no real understanding of the history of these issues (for example, the issue of RHI & Hardship and the complete failure for this issue to be resolved until now). We also don't believe PwC had an appreciation for the gravity of some of the impending changes or evolution in credit reporting (i.e. importance of credit scores). During the consultations PwC did not demonstrate any real understanding of consumer issues and the arguments they made for dismissing our concerns in their final report were superficial, inadequate and misconstrued.

Main Unresolved Issues

The following issues remain very important to Consumer Representatives and they have not been resolved in this Code Review. However we do acknowledge that ARCA plans to undertake consultations for another tranche of CR Code variations before September 2018 which might address some of the following issues.

1. **RHI & Hardship**

How CPs should report Repayment History Information when customers are experiencing financial difficulty is a serious unresolved issue and we are very concerned about the imminent mandated reporting deadline before this issue has been resolved. Clarifying how banks should report RHI in these circumstances should be put in the Code and could have been achieved in this review. A major review of this issue has been announced by the Attorney Generals

Department, but no resolution will come in time for the first 50% of RHI data which is due to be reported this year. The lack of clarity on this issue will force these consumers to take credit reporting disputes over RHI to EDR and Court. This is an extremely inefficient use of resources.

2. **Access to Credit Scores in free reports**

There is no question that credit scores are going to become more and more influential in Australia in lending decisions, but also probably to tenancy decisions, telecommunications contracts, and much more. There is evidence in the Australian marketplace that this is already happening. Currently consumers can only get access their credit scores for free if they agree to endless direct marketing through a third party provider. This is a terrible situation for consumers and it could and should have been resolved in the CR Code. It was clearly the intention of the legislation for this type of scoring to be available to people, as credit scoring was always an expected outcome of CCR. Failing to require CRBs to provide consumers with their credit scores on their free reports is a missed outcome of this review. Privacy laws in Australia lean towards giving people access to their own information, except in this instance where proprietary interests of CRBs seem to have come out on top. We note that PwCs reasoning on this issue was patronising to consumers and erroneous.

3. **Reporting writs and summons as Credit Information**

There is consistent and general support from all sides of debate that reporting writs and summons as credit information is inappropriate. The Act was clearly intended to only include default judgments in this category (see the Explanatory Memorandum). The Code is here to supplement and clarify the Act, not mirror it. So why would clarifying this issue require changing the Act?

4. **Direct Marketing to consumers asking for their free report**

Allowing CRBs to have pre-ticked boxes for direct marketing to sell paid services to consumers that are clearly requesting a free report is just not best practice. It is not best practice from a public policy perspective or from an Australian Privacy Principles perspective. The CR Code is the perfect place to put high standards on CRBs for the benefit of consumers.

5. **Audit Trail**

Under Issue 23 PwC said:

> *Consideration could be given to amending the Code to include a requirement for CRBs to adopt a standard format for audit trail disclosure of information about access to credit reports, including a flag for those access request which are 'accessible' by CPs and a standard explanation of the types of request that fall within each category.*

This would be a good outcome and we are unclear why PwC just did not recommend this straight out. This is an issue that confuses and worries people when they get their credit report and a standard audit trail format would go a long way to help consumers understand what this

is. Consumer Representatives are also very concerned that CRBs are using information from these audit trails in their credit score calculations, since there is nothing preventing them from doing that. Audit trails do not relate to a person's creditworthiness and should not be used to calculate their credit score. The CR Code should prohibit any such use.

Specific Comments on Matters Identified by PwC

Consumer Representatives understand that the OAIC has written to ARCA and confirmed that it would consider an application by ARCA (as Code developer) to vary the CR Code to address the following matters identified by the CR Code Independent Reviewer (Pricewaterhouse Coopers):

1. clarifying the timing of issuance of section 21D notices and the possibility that there is inconsistency between the relevant provisions in the Privacy Act 1988 (Cth) and the Credit Code (PwC recommendation 4)

2. clarifying the permitted methods of delivery of section 21D notices and where to deliver those notices (PwC recommendation 5)

3. determining how the 'maximum amount of credit available' is calculated and consistent categorisation of credit contracts in determining the maximum amount of credit available (PwC Issue 15)

4. determining 'the day credit is terminated or otherwise ceases to be in force' to ensure accurate disclosures of consumer indebtedness (PwC Issue 16)

5. improving and clarifying mechanisms for correction of information (PwC Issue 18)

6. clarifying the definition of 'month' for purposes of reporting repayment history information (RHI) in respect of whether the time is to be calculated using business and/or non-business days (PwC Issue 29)

7. clarifying the impact of the application of a 'grace period' when calculating the first RHI period (PwC recommendation 7)

8. clarifying the scope of prohibition for developing a 'tool' to facilitate a CP's direct marketing (PwC recommendation 9).

Consumer Representatives will respond to ARCA's proposed changes under each of these matters in turn.

1. Clarifying the timing of issuance of section 21D notices and the possibility that there is inconsistency between the relevant provisions in the Privacy Act 1988 (Cth) and the Credit Code (PwC recommendation 4).

This variation is in response to a technical industry issue, and doesn't appear to have much consumer impact. ARCA is actioning the PwC recommendation that paragraph 9.3(f)(i) be amended to conform to the language of section 21D(3) of the Act. In practice this will be unlikely to affect consumers.

2. Clarifying the permitted methods of delivery of section 21D notices and where to deliver those notices (PwC recommendation 5).

This variation is intended to permit, but not prescribe, that the 'Individual's last known address' for delivery of Section 6Q and Section 21D notices may be an email address. Consumer Representatives don't have concerns with the intent of this variation. We support the included language that "*the individual has nominated an electronic address*" because it should never be assumed that electronic communication is always the best option for all consumers. Consumers should be given a genuine choice to opt in to electronic communications, as well as to opt out again.

While Consumer Representatives support the use of electronic disclosure (and we recognise the strong support for this change in the EWON Submission to the Code Review) we do so subject to the following:

1. CPs should be required to make electronic notices available for a reasonable period, and in a format that allows the electronic notice to be saved to an electronic file and printed. CPs should have a reasonable expectation that the intended recipient would be able to access, save and print the electronic notice.

2. The CP should take reasonable steps to optimise the consumer's likelihood of receiving any notice, including, where appropriate, using more than one form of communication. When the CP is on notice that a customer may not have received a notice (because, for example, an e-mail has bounced back or mail has been returned to sender) they should be required to take reasonable attempts to contact the customer and serve the notice by alternative means.

We would strongly encourage ARCA to at the very least put a statement under 9.3(d) about what best practice for the delivery of Section 6Q and Section 21D notices looks like when a communication bounces back (either electronically or through the postal service). The Code should state that CPs should take reasonable steps to make contact with the customer in order to update his or her contact details. This could easily align with what FOS would require under those circumstances.[1] The CR Code is the right vehicle for this type of best practice guidance

[1] See FOS Circular Issue 15 Spring 2015 Changes to the Insurance Contracts Act where FOS anticipated disputes in relation to the implementation of insurance policy notifications under the *Electronic Transactions Act 1999* where they anticipated they would receive disputes about:

- Whether consent was given for the information to be provided electronically.
- Whether the correct email address was used.
- Whether the party could open the attachment or access the hyperlink.

as it will inform the general public about what they can expect as well as inform industry practice.

Recommendations

1. **Consumer Representatives recommend amending the Code so that:**

   a. **CPs are required to introduce a procedure for consent and notification that covers simple withdrawal of consent, change of email address and a requirement for CPs to verify an email address is still active and valid; and**

   b. **CPs are required to introduce procedures to provide documents in a paper format simply and easily if the electronic communication failed.**

3. Determining how the 'maximum amount of credit available' is calculated and consistent categorisation of credit contracts in determining the maximum amount of credit available (PwC Issue 15)

Consumer Representatives support this variation. It is just a technical change designed to remove two categories of the existing 'maximum amount of credit available' as they may be redundant, and CPs may more accurately make this disclosure under the remaining four categories. This variation to the code should add more consistency and clarity in reporting. We just want to ensure that potential credit providers can obtain an accurate picture of the total amount of credit available to a consumer whether or not they are using those facilities to their maximum potential, or at all, at a particular point in time. This is vital to conducting a reliable responsible lending assessment.

4. Determining 'the day credit is terminated or otherwise ceases to be in force' to ensure accurate disclosures of consumer indebtedness (PwC Issue 16)

ARCA states that the intent of this variation is to remove the ability for a CP to disclose the credit close date any earlier than the day the credit has been terminated.

Consumer Representatives strongly support clarifying the CR Code so that CPs can no longer list accounts as closed when there is still the possibility of a consumer to rectify the arrears and get back on track. For example, reporting a contract as terminated when the CP issues a default notice (for NCCP regulated credit) is completely inappropriate, as the consumer has the right to rectify the default and put the contract back on foot. Even after the expiry of the

- Whether the FSP received an email bounce back and if so, what process it followed to ensure the relevant information was sent to the party.

s88 notice, the CP has the right to accelerate the debt but is not required to. In practice some customers make contact with the CP and get back on track after the expiry of the default notice and this is consistent with flexible hardship practices. We contend that as a minimum a default notice needs to have expired without being rectified and a further reasonable period passed before the credit provider can report the credit contract as terminated.

We agree that generally speaking RHI should not continue to record when the account has been accelerated and is in collections, particularly if the result of this would be "7, 7, 7, 7, …. indefinitely. However we would like to note that the more the CR Code reflects the exact wording of the Act, the less purpose it serves as a Code.

The OAIC's Guidelines for Developing Codes clearly states that registered Codes should be easily understood and interpreted by the general public and written in plain English language. The OAIC Guidelines state:

> *Language used in the code should be consistent with the Privacy Act to make it easier for individuals to understand the code and for the Information Commissioner to apply in relation to a privacy complaint.*[2]

By mirroring the Privacy Act exactly this variation is taking the CR Code one step *away* from making it easier for individuals to understand the code. Legislative language is not accessible or transparent for the general public and it has no place in a public facing code.

Simply regurgitating what the Privacy Act says about the day credit is terminated does not add any value to the credit reporting regime. The CR Code should be used as a tool to clarify and expand upon the requirements in the Act, not simply cite them. We are particularly opposed to any referral back to the provisions of the Act which require the reader to review the legislation in order to understand the import of the Code. In this instance the legislation does not appear to define the relevant terms in any event and the reference serves no purposes whatsoever. Ideally the Code should clarify the circumstances in which the credit contract can be reported as terminated in plain language.

5. Improving and clarifying mechanisms for correction of information (PwC Issue 18)

This is an issue that is of the upmost importance to consumers and Consumer Representatives devoted a large portion of their submission to the PwC Review to the concerns we have regarding correcting information on credit reports. In its final report under Issue 18 PwC raised five suggested changes that could be made to the code, so we query why ARCA has chosen to only action one of those changes in its proposed CR Code variation (identification information in paragraph 20.9 notices).

The five suggestions for change that PwC discusses on page 39 of its final report are:

[2] OAIC Guidelines for Developing Codes. Issues under Part IIIB of the *Privacy Act 1988* on 27 September 2013. Para 2.31-2.33. Available at: https://www.oaic.gov.au/agencies-and-organisations/advisory-guidelines/guidelines-for-developing-codes

- ***Review of correction timeframe:*** *It was suggested that the 30 day response time for correction of information requests be reviewed. This may be appropriate in circumstances where a CRB does not need to consult with third parties and would result in timelier resolution of requests for consumers. However, given the frequency with which CRBs need to consult with third parties in order to achieve a correct outcome, a lesser timeframe is likely to be impractical.*

Consumer Representatives called for this change because we have seen numerous examples where the consumer has clear and cogent information of an inaccuracy. The requirement to involve the credit provider is not a necessary requirement in all cases. Time frames could therefore be considerably shorter in circumstances where no consultation between CRBs and CPs are required. The rules should reflect that shorter timelines should apply for these matters. In more complex matters, where consultation is required, those time frames should remain as 30 days.

PwC agrees that when third parties are not required to prove the need for a correction that the timeframe could be shorter. This new commitment should be added to the CR Code.

- ***Separating obligations of CPs and CRBs:*** *It was suggested that obligations of CPs and CRBs under paragraph 20.3 of the Code be separated, to ensure that the necessary communications do, in fact, occur. This represents a fundamental change to the operation of the Code and would require further consultation to confirm its practicality.*

Rule 20.3 of the Code seeks to combine the obligations of credit providers (s21V Privacy Act) with those of credit reporting bodies (s20T Privacy Act). Consumer Representatives submit that the difficulty with combing these obligations in the code at rules 20.3 to 20.10, is that it is confusing and not clear that a consumer can go to the credit provider or the CRB. It is also not clear which entity is in breach of the CR Code if the correction does not happen in a timely manner and the consumer suffers additional detriment because of the delay.

We disagree with PwC's assessment that this could represent a fundamental change to the operation of the CR Code. It is simply a redrafting exercise to ensure that it is clear what obligations and responsibilities are attributed to which entities. This is about adding clarity to the code and making it easier to understand for the general public. Again this is expected under the OAIC's Guidelines for developing codes.

- ***Including identification information in paragraph 20.9 notices:*** *It was suggested that paragraph 20.9 of the Code should be amended to require the notice provided to CRBs, CPs and other affected information recipients to incorporate sufficient identification information about the debtor so that the notified party can record the correction. This should facilitate swifter resolution of correction requests, however further understanding of consumer views would be required prior to actioning this change.*

This is the only suggested change that ARCA has actioned in its proposed variation to the CR Code. Consumer Representatives do not object to this. It seems obvious that any notification to a CP about corrected information needs to include enough identifying information about the person to whom it relates for the notification to be of any use.

- ***Imposing responsibility for correction on the original CP:*** *It was suggested that the original CP, rather than any subsequent acquiring CP following transfer of a debt, should continue to hold responsibility for correction of information even after the transfer event. This would resolve difficulties experienced by acquiring CPs not having the information required to address the correction request, however would cause original CPs to continue incurring costs to correct. Further consultation is recommended to better assess the costs and benefits of this suggestion.*

Consumer Representatives strongly support this suggested change, as does the Australian Collectors and Debt Buyers Association. It is not often that our interests align, but the problems that stem from credit reporting errors caused by original CPs are common and very difficult to resolve if the original CP does not retain responsibility for the correction of information after they have transferred a debt. Consumer Representatives consistently face challenges of getting documentation to prove the need for a correction after a debt has been sold. It is clear that there would be tremendous benefits to both consumers and industry members if the CR Code was changed to address this issue. Any costs incurred by the original CP to make a correction would be justified if that CP was responsible for the error.

- ***Requiring better IDR procedures for CRBs:*** *This suggestion would result in greater resolution of complaints and reduce consumer complaints made to EDR schemes and the OAIC, however would impose additional costs on CRBs in the development and implementation of new IDR procedures. There is also a risk that CRBs might not implement consistent procedures. This suggestion would require a policy change and could not be operationalised via the Code.*

Consumer Representatives have seen examples where the substance of responses from CRBs to consumer complaints has been very poor. Similarly we have seen examples where the internal investigation into complaints done by CRBs has been inadequate. PwC's reasoning above that this change could not be operationalised by the CR Code is erroneous.

The CR Code can and should be used to implement consistent IDR procedures for CRBs. Section 26N(3) of the *Privacy Act* and the OAIC Guidelines for developing codes state that the CR code may:

- *deal with the internal handling of privacy complaints by all the entities bound by the code and provide for the reporting to the Information Commissioner about these privacy complaints*

Internal handling of privacy complaints includes:

- Disputes over a CRB not removing a listing;
- Requiring unnecessary information to remove a listing;
- Other service standards, including provision of credit reports.

Better complaints handling procedures by CRBs through amending Rule 21 would go a long way to dissuading people from going to debt management firms (like credit repair companies) to help them fix inaccurate listings on their credit file.

The CR Code should strive to commit CRBs to best practice in dispute resolution, not simply to meet the minimum requirements set by Part IIIA of the Act. Poor Internal Dispute Resolution (**IDR**) processes by CRBs are providing predatory debt management firms, especially credit repair companies, with customers as people feel like they can't navigate the system themselves.

Where a CRB has contributed to a consumer's loss because of a breach of the Code, consideration is needed to the CRB compensating the consumer for the losses caused by the CRB's error.

Recommendations

Corrections

2. **The obligations of credit providers and CRB's should be in separate rules and not combined to assist in consumers understanding the provisions;**

3. **For matters not requiring consultation between CRB and CP's time frames should be less than 30 days, CRBs should be required to remove information which can be established as clearly wrong on the face of the evidence provided by the consumer (for example, the information is included on the wrong credit report) within a much shorter period and without reference to the CP – such as 3 business days.**

4. **Rule 20.10 should be removed. The reality is that all correction requests will be in essence a dispute. There is no good reason why the principles of dispute resolution enunciated in rule 21.1(a)-(e) is excluded from decisions relating to corrections.**

5. **The original CP, rather than any subsequent acquiring CP following transfer of a debt, should continue to hold responsibility for correction of information even after transfer event.**

Complaints

6. **CRB's should have robust time frames to respond to complaints;**

7. **Access to remedies where a breach of the rules is established.**

6. Clarifying the definition of 'month' for purposes of reporting repayment history information (RHI) in respect of whether the time is to be calculated using business and/or non-business days (PwC Issue 29)

Consumer Representatives support the intention behind this variation but we do not support 1.2(i)(ii)(3) which would give consumers less time to make a payment on time. We do not see why all CPs cannot consistently end each payment period on the first business day that follows

the corresponding day of the next calendar month. Simply eliminate Option three from the new list.

Recommendation

1. **Option 1.2(i)(ii)(3) should be removed from the proposed variation. CPs should consistently end each payment period on the first business day the follows the corresponding day of the next calendar month.**

7. Clarifying the impact of the application of a 'grace period' when calculating the first RHI period (PwC recommendation 7)

This issue was not included in PwC's September 2017 Consultation Issues Paper, so Consumer Representatives have not had an opportunity before now to consider it.

The goal of clarifying operation of the 14 day RHI grace period is sensible, as is the decision by PwC to endorse the following interpretation:

> *first RHI period commences on day 1, however CPs are prohibited from disclosing RHI to CRBs until after the expiration of the grace period on day 15.*

However, we are concerned about the additional variation that ARCA has included, that the 14-day RHI grace period is only required to be applied to the first month an account is overdue. It is not clear how this will work in practice if a person is making catch-up payments. Will there be a new grace period every time a person has caught up on payments and is up to date before they are reported late again? Or is there a new grace period for each monthly "payment" as the CR Code now reads?

Section 8.1(b) of the CR Code says "*the grace period allowed by the CP for an overdue payment must be at least 14 days*" – it does not say "*the grace period allowed by the CP for <u>the first</u> overdue payment must be at least 14 days.*"

We do not believe the intention behind the grace period was for it to apply only once. If a person misses one overdue payment, and struggles to catch up on that payment, but continues to make the rest of his or her payments after that only a few days late, will he or she never get the benefit of another grace period? This would mean that forever more that person would be reported as RHI 2 every month they are a few days late, instead of RHI 1, even though it is only one repayment they are late on due to administrative oversight or transition as opposed to 'hardship'. We are concerned that a lot of consumers regularly make payments a few days late (which was the whole impetus behind the grace period), and whether or not they are caught up on all payments should not be the reason they get a grace period or not. We also think arbitrary differences about which day of the reporting period banks record RHI will affect different people differently depending on whether they get the benefit of a grace period or not.

We would encourage ARCA to draft a number of scenarios and case studies to better explore how this variation would work in practice. The credit reporting system and the 14 day grace period will be confusing enough for consumers as it is, without introducing additional complexity by having different grace periods for different people depending on which catch-up payments they have made or depending on when their banks record RHI.

Recommendations

8. **Each payment due should have a 14-day grace period beginning on the date that the CP's systems first classified the payment as being in arrears.**

8. Clarifying the scope of prohibition for developing a 'tool' to facilitate a CP's direct marketing (PwC recommendation 9).

Consumer Representatives support this variation. It is a straight forward technical change that may serve to avoid a potential loophole being exploited.

Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please do not hesitate to contact Financial Rights on (02) 9212 4216.

Kind Regards,

Karen Cox
Coordinator
Financial Rights Legal Centre
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