

ARCA Consultation – Privacy (Credit Reporting) Code (CR Code) Variation Consultation

Submission by Legal Aid Queensland



Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to provide a submission in response to the Australian Retail Credit Association's Consultation concerning variations to the Privacy (Credit Reporting) Code (CR Code).

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and is required to give this "legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ's Civil Justice Services Unit lawyers are experienced in providing specialist advice and representation about banking and finance, credit and debt, credit reporting and default listings, insurance and consumer law. The unit provides advice to clients as well as lawyers and financial counsellors throughout Queensland.

Issue 1:

Further Reviews of the Code

"24.3 The Commissioner will initiate an independent review of the operation of this CR Code within 3 years of the date of the completion of the initial independent review, and thereafter, every 3 years (following completion of each independent review)."

LAQ supports paragraph 24.3 of the CR Code being amended to require the CR Code to be reviewed on a regular basis.

However, the proposed amendments do not give effect to the proposal that the CR Code should be reviewed on a regular basis because:

- (a) The start of the next review is currently tied to the completion of the previous independent review which means the CR Code would not be reviewed on a consistent basis.
- (b) Independent reviews can take anywhere between 1-2 years to complete.

The effect of this is that there would be no certainty to when the Code is reviewed.

Credit reporting is an evolving landscape that will continue to be effected by:

- (a) Technology and Innovation,
- (b) The effect of Comprehensive Credit Reporting (CCR), and
- (c) The interaction of Repayment History Information (RHI) and financial hardship arrangements with credit providers.

Our involvement in reviewing Codes and, Ombudsman schemes etc. is that these reviews take significant time and resources. The effectiveness of proposed changes is sometimes not evident if a review is conducted every 3 years. However, it is not appropriate that the CR code be reviewed on an inconsistent basis. Instead, it should be reviewed every 5 years, with the next review commencing within 5 years of the commencement of the initial independent review.

To address the issue of significant changes within the five year period, there could be a mechanism to trigger an- unscheduled review of part of the CR Code when significant changes are made to:

- the *Privacy Act 1988* and regulations affecting credit reporting or
- there is a decision of Australian Financial Complaints Authority, the Office of the Australian Information Commissioner OAIC or other relevant body that impacts individual provisions of the OAIC.

This appears to work in practice given the proposed changes are as a result of an unscheduled review.

Issue 2:

Direct marketing practices

Free and Fee based Reports

LAQ has seen issues with the way that Credit Reporting Bureaus (CRB) market the value of their paid credit reporting products and failing to advise consumers that they are able to access credit reports for free once every 12 months. LAQ is aware of misleading statements made to consumers about the negative impacts of accessing their free credit report.

LAQ acknowledges that Paragraph 19.3 (C) attempts to address some of these concerns.

*“19.3(c) the information made available by the CRB about the **fee-based service** must also identify the difference between the information or service available to the **access seeker** as part of its **fee-based service** compared to that information or service available to the **access seeker** free of charge.”*

However, LAQ does not support these proposed amendments. The proposed amendments could have the effect of legitimising the up-selling by CRBs to consumers of their paid credit report offerings.

We recommend that consideration be given to amending the paragraph to provide as follows:

“19.3(c) CRBs must provide accurate information to consumers about their right to access their own credit reporting information for free. CRBs must not indicate that a consumer exercising this right might negatively impact on their credit report.”

To avoid misleading consumers paid reports should not be sold to a consumer where they are entitled to a free report.

Additionally, information provided on a free report should be the same as the information being included and provided in a paid report. The major difference between a paid report and a free report appears to be that the paid report includes a “credit score”. If this information is being provided to credit providers it should be made available to consumers regardless of whether they have requested a free or paid report.

Consumers having regular access to reports contributes to the accuracy of the information on the credit report. We therefore support the CRBs' obligation to ensure the accuracy of the information collected.

Pre-ticked consent boxes

*“19.4(c) the CRB may only provide the **access seeker** with a direct marketing communication where the **access seeker** has provided his or her consent to receipt of this communication by opting in to providing this consent”*

LAQ supports the proposed amendment but is concerned that this proposed amendment does not address the practice of CRBs providing consumers with forms that have pre-ticked a consent box that automatically opts the consumer into receiving direct marketing.

This practice unfairly commits consumers in vulnerable circumstances to receiving direct marketing when all they have sought is to exercise their legal rights to access a free credit report. In LAQ's view, any consent to receive the direct marketing provided in these circumstances is not genuine consent.

It is important that the CR Code addresses this point because it is unlikely that this conduct would be caught by the provisions of the Privacy Act or the Australian Consumer Law.

Therefore, an additional Paragraph 19.4(d) should be added to support the obligations in Paragraph 19.4(c) to prevent CRBs from using pre-ticked consent boxes on any forms that a consumer is required to complete in order to access their credit report.

In LAQ's view, appropriate wording would be:

“19.4(d) a CRB must not have any pre-ticked box providing consent to marketing on any forms that a consumer must fill out to access the CRBs services. Any form submitted by a consumer that has a pre-ticked consent box to marketing does not constitute valid consent being provided by the consumer.”

Issue 3:

The Inclusion of writ and summons information on credit reports

*“11.2 **Publicly available information** does not include originating process issued by a Court or Tribunal because this information does not relate to the individual's creditworthiness.”*

LAQ supports CRBs being prevented from including originating processes filed in Court on a consumer's credit report. In LAQ's view, having a Court action filed against a consumer does not in any way affect their ability to repay a loan or their credit worthiness. It is only evidence that the person has a legal dispute with another person.

Additionally, in many jurisdictions originating processes are not generally available to the public or are only available on the payment of a fee.

In LAQ's view there are other Court proceedings that CRBs should be prevented from including on a consumer's credit report:

- (a) Any judgement or court proceedings where the consumer's rights have been subrogated to an insurer - The consumer no longer has any ability to control the success or failure of these types of proceedings and should not have their credit report affected by the result. It should be noted that these complaints are not generally credit related. For example, where there is a dispute about liability in a traffic accident.
- (b) Any judgement that does not relate to credit - Legal disputes that do not relate to credit should not affect a consumer's credit report.

The legislation already makes it clear that only information about the person's credit worthiness should be included on a credit report. However because of the lack of knowledge in the community about this requirement, particularly in relation to judgments, it should be specifically referenced in the CR Code

As a consequence Paragraph 11.2 should be amended to provide:

*"11.2 For the avoidance of doubt **Publicly available information** does not include:*

- (a) originating process issued by a Court or Tribunal; or*
- (b) any judgment or proceedings where the individual's rights have been subrogated to an insurer; or*
- (c) any judgment or proceedings that is otherwise unrelated to credit.*

Issue 4:

Protection for Victims of Fraud

We support greater protection for victims of fraud. Ban periods provide limited assistance and generally only help where the person is an ongoing victim of fraudulent behaviour. Consumers contact us only after a significant period has elapsed since the fraudulent behaviour has occurred. They become aware of the fraudulent behaviour in when they apply for credit and the credit is refused on the basis of a listing due to fraudulent activity or they are contacted by a credit provider seeking repayment of a debt that has been fraudulently incurred.

Once the person becomes aware of the identity theft, difficulties can be experienced in seeking to correct information on their credit report. This is best illustrated by the following example.

Case Study

In December 2016 a consumer requested a copy of her credit report after making a complaint to the police that a person who she knew used her identity to take multiple loans with multiple credit providers. Because the consumer was vulnerable, the person was able to convince her that money being deposited into the consumer's account belonged to her. Up to 26 different loans were made to the fraudster using identity information of the consumer.

The consumer sought LAQ's assistance because she was unable to correct the information on her credit report or negotiate settlements with numerous credit providers.

Complaints were made to the following:

- *the client's bank – for allowing direct debits to be processed to her account by the fraudster;*
- *individual credit providers as they sought payment ; and*
- *a CRB*

The issue with the bank was resolved in a short space of time with the bank refunding over \$5000 of payments that had been debited from her account

A request seeking release from the debt was made to each individual credit provider.

In relation to one credit provider, despite having a specialist report stating the consumer had a borderline intellectual disability, it was not until investigation by the police that the credit provider agreed to release the consumer in relation to the disputed account.

The CRB initially advised that the consumer was required to contact each creditor individually.

LAQ made a complaint to the Credit and Investment Ombudsman (CIO). The CRB then argued that the information was "accurate" at the time it was listed as it was based on reasonable information provided by the credit provider. This argument was accepted by the CIO, resulting in no changes being made to the credit record, including a refusal to alter address information contained in the report that was clearly wrong.

Consideration could be given to the development of a guide regarding the information CRBs' require to enable records to be altered where there is an allegation of fraud. The requirement that a police report be provided may not be practical as generally police, in relation to online frauds, are requiring consumers to make a complaint to Australian Cybercrime Online Reporting Network (ACORN). This is not a police complaint but a notification. It can take some time for the ACORN complaint to be referred to police.

It is critical that the CRB act as a central hub in relation to complaints where there is an allegation of fraud and the consumer is seeking to correct their credit report. It's acknowledged that the legislation requires CRBs to provide assistance where the consumer first complains to them but this does not reliably occur in practice. In those circumstances the provision of a clear guidance as proposed above would be useful.

Issue 5

Account open date

For some types of credit there is a distinction between when credit is approved and when it becomes available. For example, for credit cards, the lender can approve the credit but the credit is not available until the card is activated. A consumer may not activate the card for months or even years, and for home loans there is often a significant delay between the date of approval and the date of drawdown.

LAQ supports defining the "account open date" as the date the credit is approved. This supports responsible lending because other credit could be approved in the interim period between approval and drawdown of the loan or activation of the card and the credit provider making a subsequent approval would have no knowledge of the previously approved but as yet not accessed credit.

Issue 6

Repayment History Information (RHI) Assessment

LAQ supports the clarification in paragraph 8 of the CR Code that RHI should be assessed based on a point in time assessment. This clarification is important as it will ensure consistency across credit providers and CRBs about how and when RHI should be appropriately assessed.

Issue 7:

Credit Reporting Bureaus (CRB) and Complaints Handling and Internal Dispute Resolution (IDR)

The handling of complaints and the IDR processes of CRBs is significantly less developed and less accessible for consumers than the IDR departments operating in Banks, insurers and other financial services providers.

The responses provided by the complaints handling departments of CRBs are poor and often do not address the issues being experienced by consumers.

These problems will not be solved by referring to the current ISO Standards for complaints management. Paragraph 21 as it is currently drafted is not strong enough to protect the rights of consumers and ensure that CRBs provide a quality and responsive internal dispute resolution process.

Instead, this review of the Code is an opportunity for ARCA to embed a robust and quality internal dispute resolution and complaints handling process for CRB and ensure it is similar to what already exists within finance and insurance industries and as set out in:

- (a) Clauses 46-49 of the Banking Code of Practice commencing 1 July 2019 - [https://www.ausbanking.org.au/images/uploads/Banking Code of Practice 2019 w eb.pdf](https://www.ausbanking.org.au/images/uploads/Banking_Code_of_Practice_2019_w eb.pdf) ; and
- (b) Clause 10 of the Insurance Code of Practice - [http://codeofpractice.com.au/assets/pdf/Code of Practice 2012VF.pdf](http://codeofpractice.com.au/assets/pdf/Code_of_Practice_2012VF.pdf)

Issue 8

Correction and complaints

The current system fails to adequately deal with urgent corrections of credit reports

Consumers generally seek to correct credit reports on an urgent basis when the credit provider has refused an application for credit based on information contained in a credit report. Timeframes that provide for 30 days to respond simply are not adequate for consumers who in the case of finance for the purchase of a home may have as little as “14 days” to obtain approval for finance under a contract of sale. These consumers often suffer significant detriment if the listing is not corrected within the time they have to seek approval for finance to finalise a purchase contract.

LAQ supports the introduction of timeframes where inaccurate information is contained in the credit report that has caused or is likely to cause consumer detriment. Where the credit provider/CRB has not removed this inaccurate information in time to avoid detriment, then the Code should make it clear that the credit provider/CRB will be liable for the losses incurred by the consumer.

Issue 9

How payments are recorded

We support changing paragraph 10 of the CR Code to make it clear that payments of defaults can only be recorded as ‘P’ for Paid for all payments rather than an ‘S’ in some cases meaning “settled” where the credit provider has accepted some lesser payment in settlement of default listing. We understand that these changes arise out of a decision of the Financial Ombudsman Service and advice from the OAIC.