

OAIC – Privacy (Credit Reporting) Code (CR Code) Application by the Australian Retail Credit Association ARCA

Submission by Legal Aid Queensland

8 May 2024

OAIC Consultation – Application by the Australian Retail Credit Association to vary the Privacy (Credit Reporting) Code (CR Code)

Legal Aid Queensland (LAQ) welcomes the opportunity to provide a submission in response to the Australian Retail Credit Association's (ARCA's) application to vary 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 legal and justice systems.

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. LAQ believes 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 lawyers have extensive experience providing specialist advice and representation to vulnerable clients in banking and finance, credit and debt, credit reporting and default listings, insurance, and consumer law. Civil Justice Services provides advice to clients as well as lawyers and financial counsellors throughout Queensland in relation to insurance, mortgage stress, housing repossession, banking and financial issues, financial hardship, debt, contracts, loans, telecommunications, and unsolicited consumer agreements.

LAQ assists and represents clients who have issues with their credit reports on a regular basis.

This submission is informed by that knowledge and experience.

Overview

The proposed amendments to the CR Code originate from the 2022 Review commissioned by ARCA, whose membership comprises Credit Providers (CPs) utilising the credit reporting system and Credit Reporting Bodies (CRBs).

ARCA has not implemented all proposals recommended by the Reviewer. LAQ has not commented on the proposals recommended by the Reviewer that ARCA has decided not to progress except in relation to the definition of when credit is “terminated” for the purposes of defining when an account is closed (Proposal 15) and the positive obligation to remove listing of statute barred debt (Proposal 19).

General Comments about the Code and the Reforms

The comments in this submission relate to the proposals adopted by ARCA. Only those proposals where LAQ is in a position to comment have been included in this submission.

LAQ's views in relation to the following, and articulated in LAQ's February 2022 submission to ARCA, remain unchanged:

- The inappropriateness of having an industry body responsible for Code Development.
- The complexity and at times incomprehensibility of the Code as a consumer facing document.
- Comments in relation to particular CR code clauses as articulated in previous submissions.

LAQ notes it is difficult to follow what sections of the CR Code had been amended to implement each proposal. It would be beneficial if, when changes to the CR Code are proposed, the amended sections are included in the explanatory document to facilitate locating the sections in order to provide meaningful feedback on the actual draft of the amended sections of the CR Code.

Proposals

Proposal 4 – Amend CR Code source notes column and blue row lines.

In LAQ's experience, the CR Code remains largely incomprehensible for the majority of individuals and many advocates who assist individuals with understanding the law relating to credit reporting and challenging breaches of Part 111A of the *Privacy Act 1988* and the CR Code.

The CR Code predominantly continues to serve as a document aimed at assisting CPs and CRBs in complying with legislation.

Proposal 13 – Amend CR Code to require CRBs to publish their CP audits and submit these to the OAIC.

The review of the CR Code specifically recommended greater transparency concerning CRB audits and reporting. It recommended that CRB audits of CPs be made publicly available alongside the CRB's credit reporting policies and annual website reports.

Without accountability, CRB audits are unlikely to induce change in industry practices. One of the most effective methods of enhancing industry accountability is by publishing comparative results. This not only fosters transparency but also facilitates regulators in targeting enforcement actions.

When assisting individuals with specific credit reporting issues, (such as fraudulent information reported on credit files due to third-party conduct) there is no mechanism for reporting systemic failure of CRBs and CPs in meeting their obligations under the CR Code (for example regarding complaint handling or correction requests in the case of fraudulent information) beyond resolving the one complaint.

There is also no way of identifying whether the issue is systemic or a single incidence as there is an absence of publicly available information relating to compliance audits and what if any remedial action was taken by CRBs or CPs where a breach was detected.

A lack of public reporting means that failures in compliance are not dealt with in a timely manner, nor given a high priority by CRBs.

As an initial measure to enhance transparency, individual audits should be furnished to the Office of the Australian Information Commissioner (OAIC), not solely upon request, but as a standard practice. Furthermore, a consolidated report should be made publicly accessible at minimum, providing an overview of audit findings and compliance within the credit reporting system.

This will allow systemic issues to be ventilated in a public forum and allow the OAIC to target any enforcement action.

Once this framework is established, it is prudent to contemplate releasing information concerning each CP's audits. This step would stimulate competition and encourage improved compliance within the industry.

The Australian Financial Complaints Authority currently publishes highly detailed information regarding the performance of its members in handling complaints. This practice has significantly benefited consumers by providing early warning signs of a company's financial struggles and offering insight into how they are likely to handle certain complaints. Additionally, it has facilitated advocacy efforts by enabling advocates to pinpoint companies demonstrating systemic non-compliance with various financial codes and in advocating for increased enforcement and changes to the law.

ARCA's response to the proposal by the Reviewer to require CRBs to publish their CP audits underscores why entrusting the development of the CR Code to an industry body is problematic. ARCA appears to have not independently assessed the benefits to consumers and overall compliance of making audits public. Instead, ARCA appears to have exclusively relied on industry reservations in shaping their response to the Reviewer's recommendations.

Proposal 15 – Amend CR Code to clarify the definition of ‘account close’ in respect of CCLI.

The proposal was intended to ensure that CCLI information could not be added to a person's credit report after the account was “closed”. The date the account was closed referenced to the earliest of:

- the day the contract is repaid
- the date contract is terminated or obligation waived
- the day the CP charges off the loan.

This amendment does not address the issue of the CP listing CCLI after the contract is terminated at law in the following circumstances:

- The CP calling up the balance of the amount owing under the *credit* (as defined in 6M of the *Privacy Act 1988*)
- Issuing court proceedings to recover the debt owed under the *credit*

- When a court judgment is obtained

unless the CP has “charged off” the credit.

There is no definition as to what constitutes a “charge off” is as it appears to be an accounting concept used by CPs and is not otherwise defined.

This could be corrected by amending the definition of *day on which the consumer credit is terminated or otherwise ceases to be in force* (see below and corrections in red).

This issue was canvassed in LAQ’s February 2022 submission to the ARCA review of the CR Code¹.

In addition, the “and” at the end of subparagraph b(ii) ought to be deleted and consideration be given to adding “or” at the end of subparagraph (iv) (v) and (vi).

day on which the consumer credit is terminated or otherwise ceases to be in force means

- (a) *in the case of credit provided with a telecommunications or utility service, for consumer credit liability information disclosed after [date], the day that service provision ceases and on which there is no right to have a service reconnected under an existing contract; and*
- (b) *in all other cases, the earliest of:*
 - (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 day that either the credit provider determines or the individual and the provider agree that all outstanding payment obligations arising under the credit have been waived or otherwise discharged and the provider cannot undertake further enforcement action in respect to any outstanding debt owed by the individual under the credit; and*
 - (iii) *the day that the provider charges off the full balance of the credit after deciding that the outstanding balance is a loss due to the likelihood that the amount may not be recoverable, although the provider maintains the legal ability to take enforcement action in respect to any outstanding debt owed by the individual under the credit, or*
- (iv) **The day that the contract is terminated at law including, the day on which the CP calls up the balance of the credit, issues legal proceedings to recover the outstanding credit or obtains judgment for the repayment of the credit.**

The day a consumer credit contract is “charged off” is a date that is arbitrarily determined by the CP. An Individual who is concerned about when the “account closed date” is noted on the credit report

¹ Submission by LAQ to OAIC review of Privacy (credit Reporting Code) 2014 Feb 2022.

cannot look to a legal framework for determining when the account ought to have been closed if the date is determined by the CP “charging off” the account in their books.

Ensuring that the “account close” date aligns with the date the consumer credit contract is terminated at law will also make it easier to determine whether a default listing was made within a reasonable time of a default.

Proposal 17 – Amend CR Code to clarify definition of ‘month’ to more flexibly accommodate CP reporting practices.

The proposed changes will allow the definition of a month to extend from a period of 26 to 31 days.

ARCA asserts in their application that such a proposal “*could promote consumer understanding (such as consistent ‘end days’), while limiting the situations where ‘month’ may depart from a period of time people would commonly associate with ‘month’².*”

It is challenging to envision a scenario where consumers would naturally assume that a reporting month could be as short as 26 days. This has significant implications for consumers, particularly regarding the reporting of Repayment History Information (RHI) and Financial Hardship Assistance (FHA). LAQ concurs with AFCA’s perspective that it is imperative to contemplate making the reporting of RHI more consistent across all CPs, rather than accommodating CPs’ accounting practices with months as short as 26 days.

Proposal 19 Positive obligations about statute barred debts.

LAQ acknowledges ARCA’s response to the proposal of imposing positive obligations on CPs to remove default information from credit reports regarding statute-barred debts.

Recognising the challenge in determining when a debt might be statute barred, LAQ also acknowledges that law reform may be required to deal with listing of statute barred debt to cover all situations.

In most cases, the latest date from which a debt would become statute-barred is typically linked to the termination of the contract at law. This could occur when the entire debt is called up, when legal proceedings are initiated, or when a judgment is obtained. Therefore, it is crucial to have a clear definition of the “account close” date that encompasses the termination of the contract. Please refer to proposal 15 recommendations above.

Incorporating a definition of “account close” date in the CR Code that encompasses termination at law could enable a variation of the interim solution to law reform, as proposed by the Financial Rights Legal Centre (FRLC).

² ARCA Application to vary Credit Reporting Code OAIC dated 19 December 2023 at page 28.

The FRLC proposal was that default information cannot be listed more than two years after default. LAQ agrees that it is difficult to determine when “default” occurred, LAQ is of the view that the interim solution to law reform should be that default information cannot be listed more than one year after the “account close” date if the definition of “account close date” is extended to include the date on which the account is terminated at law.

Proposal 31 – Amend CR Code to require a CRB to record and alert an individual of access requests during a ban period.

LAQ supports this initiative including that free notification is provided and that the individual opts into the notification.

It should be explicitly stated that during the ban period, CRBs are prohibited from utilising the free alert service for marketing purposes to promote a paid alert service once the ban period has ended.

Proposal 33 – Amend CR Code to specify that CRBs must provide physical copies of credit reports upon request.

LAQ supports the proposal but is concerned that identity requirements for hard copy requests may be more burdensome than those for online requests. For example, there may be a requirement for individuals to provide copies of identification documents or documents demonstrating that the requested documents' delivery address is their residential address.

It is also important to guarantee that individuals have the option to request their report online but can also request a hard copy if desired. Some individuals may rely on local libraries or community organisations for assistance with their request but may not have access to email or find it challenging to do so, necessitating a hard copy of the report.

Proposal 37 – Amend CR Code to introduce a mechanism to correct multiple instances of incorrect information stemming from one event.

LAQ supports the initiative to introduce a mechanism to correct multiple instances of incorrect information stemming from a single event. However, based on the proposal document and draft amendments, it appears that only information related to enquiries may be corrected arising from such an event or set of circumstances.

Some individuals may also have had loans entered fraudulently which have generated, incorrect address information, account information and default information.

It is important to note that some individuals may have experienced fraudulent loan entries, resulting in incorrect address information, account details, and default records. In the past, LAQ has struggled to rectify this information on credit reports as there was a requirement to contact each CP individually, particularly concerning enquiry and address information. Although these issues occurred some years ago, LAQ doubts whether CRBs would handle such situations differently.

The amendments do not address correcting other information beyond enquiry information arising out of a single event or set of circumstances. Subsection 20 (9), (10) and (11) restrict the circumstances to enquiries only.

Proposal 39 – Amend CR Code to include domestic abuse as an example of circumstances beyond the individual’s control.

LAQ supports including circumstances beyond the person's control as a valid reason for correcting credit information. However, there are concerns regarding the limitation of correction requests to specified information. It is unclear why correction requests could not extend to all personal and credit-related information, especially in cases involving fraud.

LAQ supports including domestic abuse as an example of circumstances beyond the individual's control but is of the view that the term “family violence” should be substituted as this is a broader term encompassing violence between family members and is the preferred term for violence between Aboriginal and Torres strait islander peoples.

Proposal 41 – Amend CR Code to expand the categories of information that can be corrected (paragraph 20.5)

Please see response to proposal 39 above.

Proposal 43 – Amend CR Code to introduce soft enquiries framework.

LAQ is unable to comment comprehensibly on this issue as it was not involved in the consultation process around this issue.

LAQ's overarching perspective regarding the listing of enquiry information is that both the quantity of enquiries and their source have a detrimental impact on creditworthiness. Therefore, they advocate against the inclusion of such enquiry details on individuals' credit reports.

In the past CPs often relied on inquiries when evaluating credit applications, especially since account information on active credit contracts was frequently not furnished by CPs to CRBs.

Given that account information on credit reports is mandatory for CPs accessing the credit reporting system, whether due to legal requirements or under industry codes like the Principles of Reciprocity and Data Exchange Code 2017, enquiry information becomes less relevant for assessing whether an individual has additional undisclosed credit.

For individuals shopping around for credit, potential CPs often review a person's credit report before providing an indication of whether they will approve the credit and at what price it will be offered. This practice enables individuals to make informed decisions about which product is best suited to their needs.

Individuals will also be informed if the credit is likely to be denied due to information found on their credit report. It is typically during inquiries about potential credit that individuals become aware of any incorrect information contained on their credit report.

Whilst the proposal to introduce a soft enquiries framework is promoted as a tool to assist individuals as not all enquiries will be listed on the credit report, the primary beneficiaries of the proposal seems to be CPs who want to compete on price, but still want to have access to enquiries made outside of the “soft enquiries framework”.

Many of the issues regarding the correction of reports related to enquiries could be circumvented by simply removing enquiries from credit reports. Enquiries could still be listed in "access requests" so that individuals can evaluate whether they might be the victim of fraud. Information from access requests is not accessible to CPs.

Proposal 44 – Amend definition of ‘capacity information’ to include an individual in their capacity as a trustee.

LAQ does not support this proposal, as there is no evidence provided to suggest that amending the definition will lead to benefits for individuals or correct any existing detriments. Furthermore, the proposal has, at best, lukewarm support from CPs, and implementing it will necessitate significant changes to systems by the CPs. Moreover, the reform seems to have been primarily driven by ARCA's desire to capture additional information in the credit reporting system.

Organisation	Legal Aid Queensland
Address	44 Herschel Street Brisbane QLD 4001
Contact number	██████████
Approved by	Nicky Davies, Chief Executive Officer
Authored by	Loretta Kreet Senior Lawyer Consumer Protection Unit, Civil Justice Services