

24 October 2017

Mr Timothy Pilgrim PSM
Australian Information Commissioner and Privacy Commissioner
Level 3, 175 Pitt Street
SYDNEY NSW 2000

By email: consultation@oaic.gov.au

Dear Commissioner

Privacy (Credit Reporting) Code 2014

The Privacy Law Committee of the Business Law Section (**the Committee**) welcomes the opportunity to respond to the Office of the Information Commissioner (**OAIC**) request for comment in relation to the *Privacy (Credit Reporting) Code 2014 (Code)* and its review.

The Committee notes the significance of the Code as a key legislative instrument regulating the conduct of credit providers (**CPs**) and credit reporting businesses (**CRBs**) as they use and disclose this class of highly regulated personal information for credit risk and related processes. CPs and CRBs must comply with the Code as a breach of the Code is an 'interference with privacy' (section 13(2)(b)) and may expose the respective CRB or CP to some of the higher sanctions available under the *Privacy Act 1988 (Act)* (including the civil penalty provisions).

The Committee appreciates that many of the Issues nominated as items for review are, by their nature, highly operational and are directly linked to various credit risk specific processes.

We have therefore confined our comments to a number of legal issues or themes, namely:

- a) the interaction of the Code and the Act, as an instrument passed pursuant to the Act;
- b) changes, if made, would represent a departure from current law or practice and appear to be inadvertent or require further deliberation and testing so as to minimise negative or unintended consequences; and
- c) matters as noted in the Code review that overlap with other legal developments.

For brevity and consistency, we have simply referred to the issues as numbered and articulated by PwC in the Issues Paper as dated 20 September 2017 (**the Paper**).

Privacy Act 1988

A number of the issues as noted in the Paper concern definitions and various prohibitions in the Act that, in our view, cannot be overridden by the Code: for example, issues numbered 2, 4, 5, 6, 17 and 22.

Issue 2, inconsistency in amounts listed in section 6Q and section 21D notices

The Committee considers that inconsistency in amounts listed in section 6Q and section 21D notices is not a matter for which the Code is capable of changing the statutory position. Part IIIB, Div 3 of the Act permits the code to be developed and registered. Section 26N(3)(a) makes very clear that the code can **add to** the obligations which apply under Part IIIA, but cannot impose any requirements that are contrary to or inconsistent with Part IIIA. As the Code has been regulated, CRBs, CPs and other affected entities are required to comply strictly with Part IIIA as written (and subject to the penalties which are noted in it), and, to the extent the code imposes additional obligations, must comply with those also as it is an 'interference with privacy' to fail to do so (section 13(2)(b)). Sections 6Q and 21D impose obligations for notices to be provided at various times and for the content of those notices. A registered the code has no power to vary any element of this, other than by imposing additional obligations (such as an additional statement that is to be included). Rules might resolve this issue by providing (in the 6Q notice) an estimate of the amount that is likely to be in the section 21D notice. Alternatively, an explanation that the number in the next notice may be different due to the passage of time, may be suitable to resolve the confusion.

Issue 4, Notification of accelerated debts on section 6Q and section 21 D notices

For the same reasons as noted immediately above, the Code cannot make it permissible to list an accelerated amount any earlier than is permitted under sections 6Q and 21D. In the view of the committee it is clear that amounts referred to in section 6Q are **payments** which are overdue by at least 60 days. 'Foreshadowing' that an amount will be overdue at some future time does not make it 60 days overdue, if it was not in fact due at least 60 days before the relevant time. The requirement that a loan be validly accelerated, payment be demanded, and that the amount remain unpaid for a further 60 days, is in our submission, clear in section 6Q, and it appears to be the intention of the Parliament that the accelerated amount should not be capable of listing until at least that amount of time has passed. Whether or not this is an appropriate policy, only the Parliament has power to change it.

Issue 5, Definition of 'repayment history information'

The definition of 'repayment history information' is similarly an issue under the Act. We note that this may be affected by hardship arrangements and the role of external dispute resolution schemes in affecting credit providers' understanding of their obligations must be acknowledged and align to the proposed reforms in this field.

Issue 6, Inclusion of credit scores on free credit reports

The inclusion of credit scores on free credit reports rests on the definition of 'hold' as defined in the Act (see section 6). If access to credit scoring is to be prescribed (as of right) as part of CRB Derived Information, the Act or the Code will need to create this obligation and impose it on the CRBs. The new requirement will need to articulate the obligation to produce the score on request subject to appropriate qualifications (for example, CRBs who do not generate credit scores ever should not be required to create one). This raises policy

and commercial issues that are beyond the scope of this review. We also note that the matter was the subject of a Determination and is therefore addressed under the Determination power as granted to the Privacy Commissioner under section 52 of the Act.

Issue 17, Scope of prohibition for developing a 'tool' to facilitate a CP's direct marketing

The scope of prohibition for developing a 'tool' to facilitate a CP's direct marketing seems to stress that there is to be no direct marketing that uses credit reporting information (e.g. forms of propensity modelling) and reinforces and expands the prohibition in section 20G. As, noted in many other references, Pre-screening operates by way of an exemption in 20 G (2). Any modifications to the prohibition is therefore an issue under the Act. The only matter legitimately open under the Code are the additional requirements' if any under 20 G (2) (f). However, those additional requirements cannot override the primary prohibition in Section 20 G. If industry wishes to strengthen the prohibitions, these need to fit into the requirements as worded in Section 20 G (2) (f) and by their nature limited the manner of operation of operation of permitted pre-screening as articulated by section 20 (G) (2).

Issue 22, Insufficient range of sanctions available to CRBs

Issue 22 appears to want to add the power to sanction by the CRBs. No such power exists under the Act and its creation under the Code would be ultra vires. The interaction of the CRBs and Credit Providers remains a contractual matter, with use and disclosure of the exchanged information regulated by Part IIIA and the Code. Any consideration of sanctions' need to consider the requirements of *Competition and Consumer Act 2010* (Cth). We recommend that all references to sanctions are removed.

Other provisions of the Code

In addition, the Committee notes that other provisions of the Code are potentially an overreach of the Code (or may be incorrectly interpreted to be). An example is clause 16 of the Code, dealing with uses of credit information and credit eligibility information. The only way that these provisions can operate is subject to compliance with sections 20F regulating (in items 1 to 5) when a CRB can disclose such information to CP and 21 H regulating (in item 5) how a CP can use that information. Read in isolation, Clause 16 of the Code risks suggesting (in our view in error) that uses of credit information and credit eligibility information are not otherwise restrained by the disclosure and use limitation prescribed by sections 20 F and 21 H respectively. The Committee recommends that these matters be expressly addressed by clarifying that uses permitted under clause 16 are subject to the information used (first) meeting the requirements of sections 20F and 21H.

Departures from current law or practice

A number of the Issues, if progressed would represent substantial departures from current law or practice: for example, issues 1,8,13 and 26.

Issue 1, deals with whether the Code should make it clear that notices can be delivered electronically to email addresses as the "last known address". Under current law, such notices are covered by the Electronic Transactions Act and there is no need to specifically address this in the Code. To the extent that the timing requirement in the Code differs from that in the Act, the Code should, in our view, be aligned to the Act.

Issue 8, Marketing to consumers who have requested a free credit report, the discussion notes 'aggressive or misleading marketing from CRBs'. If so, this would be an issue under the existing *Competition and Consumer Act 2010* and needs to be reiterated as such. Also, there is a view that such marketing is regulated under the APP7 not the Code.

Of course, under section 20A (2), a CRB is not subject to the Australian Privacy Principles (**APPS**), including APP 7 in its CRB capacity and in relation to credit reporting information. While it is technically possible for individuals to interact with a CRB organisation in a general capacity (not as a CRB but as an organisation or 'entity', for example in the capacity as a shareholder or an investor) extreme care should be taken not to override what is the current position in the law – that is that APPs and Part IIIA operate as distinct regimes. Interactions with CRBs in that capacity as regulated by Part IIIA and the Code need to remain regulated. This will become increasingly important as the volume and complexity of interactions with CRBs (in that capacity) increase in the course of new interactions as envisaged under comprehensive reporting and with the pending introduction of mandatory breach reporting in February 2018. Any departures from this structure are best avoided, and if required, must be very clearly articulated (for example, as it is section 20G under the Act in respect of pre-screening).

Consideration of issue 8 overlaps with comments in respect of Issue 17 (above) should be considered in that light. In the view of the Committee, the balance of obligations regarding advertising was subject to detailed consideration in the process leading up to amendments of the Act which took effect in 2014 and should not be detracted from, namely that pre-screening, strictly in accordance with 20G, should be permitted, and that all other CRB marketing activity should not be permitted without a further thorough review of the policy issues underpinning the current regulatory compromise. Further, the Committee notes that CRBs receive credit reporting information from CPs who do so, by providing notice to individuals. In the course of interaction with individuals, CRBs in turn require very detailed personal information in order to be certain that a credit reporting information is provided only to the individual entitled to it. Accessing consumer credit reporting information is not possible without providing this information. Detailed non-public information is available to CRBs as a result of providing access to individuals. Further, seeking access should not be discouraged. Therefore, the Committee considers that there are strong grounds to consider that there should be an absolute bar on CRBs using the information obtained in the course of their credit reporting business from marketing their own services, or from making that information to other persons for any purpose not specifically contemplated in Part IIIA. Subsections 20E (1) and 20G (1) already impose these restrictions. Without a change in the law, consent does not override the express prohibitions as prescribed in the Act or the Code.

Issue 9, proposed notification of RHI reporting

In the Committee's view, the balance of convenience and information relating to RHI were carefully set when the final form of the Act was determined (despite the further regulatory development which led to the cure period for RHI being substantially lengthened. Formal credit defaults have a complex notification regime. RHI was not intended to have a notification obligation. This reflected the ongoing and dynamic nature of RHI (in contrast to defaults, which are entirely historical in nature). Consumers who wish to be informed of RHI events have the option of subscribing to a CRB alert service.

Issue 13, Mandatory reporting of default information

This appears to introduce or refer to a mandatory requirement where there is none currently (although the discussion in the Paper deals with broader issues). This would be a substantial change in the current law which, subject to contract and industry practice (such as the Principles of Reciprocity), leaves it open to the CP whether to report a default or not and how and when the CP chooses to interact with the credit reporting system.

The Committee appreciates that, for a number of reasons, consistent reporting of defaults may be a desirable policy or industry goal. However, given that the scope of the Code review, any introduction of new rights and obligations in whole or in part are not appropriate. For completeness, we also note that updating of defaults as posted is already addressed in the Code and is covered by the general obligation of accuracy. In the specific context of binding settlement agreements, the underpinning of the credit reporting regime has been that a CRB's records should be a source of truth.

Issue 26, Meaning of 'prominently' when advertising the right for individual to access a free credit report

As with issue 6 above, the matter was the subject of a Determination and is therefore addressed under the Determination power as granted to the Privacy Commissioner pursuant to section 52 of the Act. The word has an ordinary meaning and care needs to be taken to prescribe matters that are highly contextual, especially in the online environment.

Related developments

The Productivity Commission's Report on *Data Availability and Use* makes a number of important recommendations dealing with comprehensive reporting (including the mandating of its introduction) and the creation of a new consumer right of access. These changes, if enacted, will create new definitions and regulatory models in support of such new rights and obligations. Similarly, there are changes pending in the EDR regime, many of which as noted above, overlap with the definitions and concepts articulated by the Code.

Ideally, the review of the Code would benefit from alignment to these developments and may need to be revisited once the new regulatory models are in place.

Other issues

The Committee also notes, issue 12 dealing with the independent governance of the Code and issue 24, dealing with the General drafting of the Code. Provided that the OAIC is adequately resourced, the regulatory structure in place supports the effective and independent administration of the Code. Further, if the Code is redrafted to address the areas of overreach noted above and expressly aligns to the Act, the administration of the Code will also be improved. To that end, issues 12 and 24 are related and worth addressing as part of this review.

As noted above, most of the obligations under Part IIIA and the Code were outcomes of a detailed policy and legal review and reflect a policy and regulatory outcome built on compromise. This is particularly so in respect of obligations regarding advertising and pre-screening (which is to be conducted strictly in accordance with 20G). If any other marketing activity using credit reporting data or many of its derivatives is to be permitted in the future, a further thorough review of the policy issues underpinning such initiatives is warranted. This is particularly pertinent in the context of comprehensive reporting. The Code is and will remain a key instrument regulating an important (albeit highly industry specific) aspect of privacy and consumer data rights generally. Considering the volume of personal information exchanged as part of the highly regulated consumer credit regime, its impact on the privacy and credit related rights of individuals and the onerous obligations of CPs and CRBs, the ability to address the legal issues as noted remains important.

The Committee looks forward to continuing to work with the OAIC in supporting the smooth and efficient application of the Code and welcomes any questions from the OAIC raised by

this submission. Please direct these to the Committee via its Chair, Olga Ganopolsky on olga.ganopolsky@macquarie.com in the first instance.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Teresa Dyson', written in a cursive style.

Teresa Dyson, Chair

Business Law Section