29 May 2024

Ms Heidi Richards
Independent Reviewer on behalf of Attorney-General's Department
Review of Australia's Credit Reporting Framework

Online via: https://consultations.ag.gov.au/rights-and-protections/credit-reporting-framework

Dear Ms Richards

Thank you for the opportunity to comment on this issues paper.

The comments contained in this submission reflect the feedback of the Energy and Water Ombudsman Queensland (EWOQ), Energy & Water Ombudsman South Australia (EWOSA), Energy and Water Ombudsman Victoria (EWOV) and Energy & Water Ombudsman New South Wales (EWON). We are the industry-based external dispute resolution schemes for the energy and water industries in our respective states.

EWOQ, EWOSA, EWOV and EWON are formally recognised as External Dispute Resolution (EDR) schemes by the Office of the Australian Information Commissioner (OAIC) under section 35A of the Privacy Act 1988 (the Act). This requires us to also receive, investigate and facilitate the resolution of privacy and credit related complaints about our members.

We have collectively reviewed the issues paper and we have only responded to those questions that align with issues customers raise, or with each respective organisation's operations as they relate to the issues paper.

If you require any further information regarding this submission, please Mr Jeremy Inglis, Manager Policy and Research (EWOQ) on 07 3212 0630, Mr Antony Clarke, Policy and Governance Lead (EWOSA) on 08 8216 1861, Mr Ben Martin-Hobbs, Policy Insights and Engagement Manager (EWOV) on 03 8672 4239 or Dr Rory Campbell, Manager Policy & Systemic Issues (EWON) on 02 8218 5266.

Yours sincerely

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Review of Australia's Credit Reporting Framework

We strongly support the first comprehensive review of the whole credit reporting framework. Collectively, we have commented on privacy and credit related reviews since the implementation of the *Privacy (Credit Reporting) Code 2014* (the Code) and have raised issues over this period.

We recognise the need to modernise the framework and strengthen how this interacts with privacy protection in particular, striking the right balance between the adequate protection of personal information with practical issues including consumer protections, ever-evolving technology and the ways in which businesses and organisations carry out their function.

There are many issues that arise in the current credit reporting framework and its operation within the energy industry. Below we have listed the main causes of customer complaint to our offices:

- Debt collection activities for overdue amounts for active energy accounts.
    - We assist customers with disputes with their energy retailer with issues such as payment arrangements or reviews as to the accuracy of the debt (billing).
    - With active energy accounts, under the National Energy Consumer Framework, consumers are afforded protection from disconnection and further credit collections activity when they are engaged with their retailer.
- Compliance of credit reporting bodies, including appropriate sending of notifications
    - With increasing energy debt, increased energy prices and the cost of living it is likely that more debt will fall into the collections cycle.
    - Customers often advise that they do not receive notifications, however the framework does not place trust in the consumer and relies only on evidence that the retailer sent a notification.
- There is a significant reduction in consumer protections available to consumers with closed energy accounts.
    - Customers who close their energy accounts and transfer to a different retailer leaving behind a debt with their old retailer do not receive any affordability program assistance to pay off that debt over time.
    - Customers with a poor credit history can be refused market energy contracts with competitive rates when opening new accounts. This can occur when moving properties or trying to change to a new retailer to take advantage of cheaper rates. This disadvantages customers in a cycle of debt trying to mitigate their future costs.
- Default listings are generally linked to closed accounts where customers cannot pay or contact with the provider has been lost.
    - Collections activity with default listing in the energy market has yet to return to pre-COVID levels, with some energy retailers not yet commencing collections activity. This may change and we may see an increase in complaints.
    - Increased tailored assistance for customers with active and closed accounts would increase engagement and reduce the need for providers to utilise the framework.

Our comments are not to specific questions and focus on the issues that arise through our unique perspective of complaints, community outreach and stakeholder engagement.

We raised a number of suggestions, along with providing supporting case studies when the Office of the Australian Information Commissioner's (OAIC) conducted its first independent review of the Code in 2017.

These suggestions have continuously been noted as not within the scope of these reviews as their implementation would require changes to the Act along with potential changes to the Code.

The OAIC indicated in the final report on its second independent review that it will raise some of these issues with the Attorney General for consideration in its forthcoming review of the Act. We strongly recommend that this action be taken as the ongoing delays continue to increase the number of consumers impacted by these issues.

Minimum amount – the threshold for credit default listings needs to increase

The minimum threshold for credit default listing is $150, which has not been updated since the introduction of the threshold in 2014. We support a minimum amount being prescribed and suggests that the amount be reviewed. $150 is not reflective of the average utility bill and the adverse consequences of credit default listing can be well out of proportion to the debt.

Many unpaid utility debts arise when a final bill is issued after the customer has moved out of their premises. These debts tend to be based on usage for one quarter, or less if the customer moved out mid billing cycle and are usually for a small amount. In circumstances where the debt is paid as soon as the customer becomes aware of it, and the credit listing is updated as paid, customers are often still denied credit. The adverse consequence for these customers is out of proportion to the debt.

An appropriate amount for the energy sector would be at least $300. This is the amount that the Australian Energy Regulator (AER) for New South Wales, Queensland and South Australia and the Essential Services Commission in Victoria has set as the minimum threshold below which a customer's energy supply cannot be disconnected for non-payment.

Energy regulators set this amount to give customers protection against being disconnected for the non-payment of one quarterly bill, and we believe this same principle should apply for credit default listings. Notably, the AER is currently exploring whether the threshold of $300 should be increased.

We acknowledge that $300 (or a new amount set by energy regulators) may not be suitable for all industries, and that consideration would need to be given to how any updates could accommodate these differences.

As the meaning on default information is currently prescribed within the Act, we recommend that this review consider whether placing this within the Code would be more practical. The Code is subject to independent review every four years, allowing a review of the minimum amount on a more regular basis, making it easier to change and to be more suitable for fluctuating economic circumstances.

Duration of default – is disproportionate to the level of debt.

A credit default listing is for a period of five years regardless of whether the listing is for a debt of $300 or $30,000. This creates an imbalance between customers that genuinely miss a payment, to those that incur large amounts of debt with no willingness or ability to repay it.

Some customers only find out that they have a default credit listing years later when they apply for some type of loan. This may be because the retailer did not notify the customers that they would be default listed. Alternatively, customers may have moved to a different property (which is common amongst low-income customers who rent) and did not receive the notification.

While it might be expected that credit providers would take this into account, it appears from customer reports to our offices that this is not the case and credit is denied to customers regardless of the amount of the debt.

At present, there is no leniency on the time of a default listing, and a customer's future financial stability and ability to obtain credit for major financial undertakings, such as buying a house or starting a business, are significantly impacted.

We suggest the introduction of a sliding scale where the credit default listing is for a period relative to the amount of the debt. For example, a debt of $1,000 or less would result in a one-year listing, a debt of between $1,001 and $5,000 would incur a two-year listing, a debt of between $5,001 and $10,000 a three-year listing, and debts above that amount being listed for 5 years.

This would also require changes to the Act, and consideration of suitability and applicability to different industries and entities. However, this disproportionate level of harm to consumers is seen in many industries that utilise the credit reporting framework and the benefit to consumers would outweigh any cost of reducing this disproportionate harm.

Moving from an address and not receiving their final bill

There is a common underlying theme in many of the credit listing complaints that our offices receive, that customers are of the view that they have not received notifications of unpaid balances on their energy accounts. We have previously supported improving notification processes to help address this.[1]

The current framework does not provide any protection for customers who have previously had a good payment history with a retailer and miss a bill when moving out. Complaints received by our offices show customers do not receive final bills, or notices, sometimes due to notices being sent to the last known address where they no longer live, despite the customer advising the retailer of the new address or not being sent to email addresses provided.

We support changes that consider payment history prior to listing defaults, to ensure the removal of a default if, on balance, the customer did not receive a final notice and has paid the outstanding amount in full.

Closed accounts and the strict application of the credit reporting framework

Consumers losing payment difficulty entitlements when moving property

As noted above, we have identified a number of circumstances where customers with a poor credit history are refused market energy contracts with competitive rates when opening new accounts. This can be when moving properties or trying to change to a new retailer to take advantage of cheaper rates. This disadvantages customers in a cycle of debt trying to mitigate their future costs.

Negative impacts of the credit framework also impact the way a customer interacts with payment assistance protections under energy laws in each state. We have identified a number of cases in which customers had lost their payment difficulty entitlements after they moved house.

[1] EWON submission - ARCA CR Code variation proposal - November 2023

Case Study 1 - Retailer objects to customer transferring account to a new property due to credit history

The customer called his retailer to arrange to transfer both his gas and electricity accounts over to his new address. The retailer advised it would not accept him as a customer at the new address for his electricity account due to his credit history, however it transferred his gas account. The customer was renting, and relied on Jobseeker Payment, and had been set up on a payment plant of $20 per fortnight for electricity and $20 per fortnight for gas. After referral back to the retailer, it agreed to transfer both fuels and set up a payment plan for each account. Further investigation into the retailer's reasons for initially refusing to supply electricity at the new address and on the terms previously agreed with the customer for the original address. As a result of these investigations, it became obvious that credit history is used to decline current customers from accessing new competitive contracts at a new premises, which consequently impact a customer's access to appropriate financial hardship assistance. This is despite retailers already having an ongoing relationship with the customer.

The investigation identified that:

- some retailers consider that Payment Difficulty Framework entitlements under the Victorian *Energy Retail Code of Practice* (ERCoP) apply only to current customers with an active account
- when a customer moves address and their new premises is not in the designated area, where the retailer is required to offer supply, the retailer may not open a new account based on the customer's payment history and/or credit history
- when a new account is not opened, or a customer transfers to another (new) retailer, and has an outstanding debt, the retailer will end any previously agreed payment plan and generally offer a maximum of three months to pay off the debt, unless special circumstances apply.

We understand that retailers, who are not obligated to supply customers in the relevant designated area, may make a commercial decision not to offer new market contracts at a new premises. However, this investigation provided an insight into how credit history and the credit reporting framework can adversely impact customer access to competition in the energy market and appropriate financial hardship assistance. It also highlights how default information may be listed in circumstances where it wouldn't have if the customer could stay at the original premises or access a new account with the retailer with ongoing financial hardship assistance.

For example, for renters in payment difficulty, moving to a cheaper rental may be a means to reduce overall living costs but others may not actively choose to move – i.e. where their lease has ended, or they have been evicted. In either case, losing access to financial hardship assistance may exacerbate affordability challenges rather than enable them to pay down and better manage arrears.

Additional concerns are that:

- customers do not necessarily understand that transferring properties may end one supply contract and give rise to a new supply contract where retailers will conduct credit checks
- retailer credit checks may further affect a customer's credit score, compounding affordability challenges and barriers to accessing other essential services
- where customers are unable to transfer their account to a new premises and are refused a new supply contract on the basis of their credit history, the consequential effect of losing access to financial hardship assistance may exacerbate affordability challenges and cause further harm.

Introduce positive obligations related to statute barred debts

Under current provisions, negative impacts on customers credit reports can continue well beyond the date after which recovery of debts would be statute barred. Our offices are concerned that this is an ongoing issue that is not being solved and that has continuously been deferred to a later time.

Case Study 2 - A customer had a default listed on his credit file almost five years after the debt was originally due

A customer reviewed his credit report and found a default listed on his credit file in August 2018 for an energy debt of $2,440. He spoke to the energy retailer and the collections agency that purchased the debt but was referred back and forth between the two. He was unable to get any details about the debt, such as what period it covered. He had only lived at the relevant address for short time many years prior and did not remember receiving any notices about an overdue amount or risk of default listing.

The investigation found that the debt related to an energy account the customer held from July 2013 to October 2013. The retailer had sold the debt to a collections agency and the collections agency listed the default in August 2018. The customer was disadvantaged for a period well beyond the time when the ability to list the debt ends, as the credit listing period starts on the date the debt is listed.

The customer advised the Ombudsman's office that the collections agency had agreed to remove the default listing as the retailer had not provided the agency with the customer's updated address.

We supported a requirement for credit providers to list defaults within a reasonable timeframe when the OAIC's first independent review of the Code[2] was undertaken in 2017 – we are now seven years on from that review and nothing has changed.

Our position remains that requiring a default for an energy debt to be listed within 12 months of the due date of the debt is reasonable, while acknowledging this may not be appropriate for debts in all industries.

We strongly encourage this review to recommend appropriate changes to address this, with a call that any review and implementation be timely.

Family violence

We strongly support the consideration of changes to the credit reporting framework that would strengthen protections for victim-survivors of family violence. We were supportive of ARCA's proposal to include situations of domestic abuse in the example list of circumstances outside of an individual control[3]

Our expectations are that:

- a default listing should be removed by a provider where the default listing has occurred, and a provider becomes aware of the customer's experience with family violence; and
- defaults that were the unavoidable consequences of domestic abuse should be removed from credit reports.

In May 2023, the National Energy Retail Rules were amended to provide additional protections for victim-survivors of family violence.

[2] EWON submission – Consultation Issues Paper, Review of Privacy (Credit Reporting) Code 2014 18 October 2017

[3] ARCA consultation on variations of the CR Code - 2023

The Australian Energy Market Commission took a progressive approach by including a broad definition of family violence, which was given the meaning of the term “domestic abuse” in section 8(8) of the *Intervention Orders (Prevention of Abuse) Act 2009* SA, which included relationships where one person is a carer of the other, or where the relationship is established under Aboriginal and Torres Strait Islander kinship rules.

We recommend that any family violence provisions further define, or provide guidance on, the types of relationships within which abuse may occur.

Credit repair agents

A large proportion of credit complaints received by our offices are from customers disputing a default listed on their credit file. As debt moves through the collections cycle, a customer may be credit listed by an energy retailer if an energy debt remains unpaid and the energy retailer meets the required notice conditions.

In the past, a significant proportion of these complaints involve commercial advocates, namely credit repair agents and solicitors offering credit repair services. Credit collection activity within the energy sector has not returned to pre-COVID levels, however we do still receive complaints from customers utilising these services.

We have long raised potential issues with the use of commercial advocates by customers to assist with the removal of credit default listings. In September 2012, EWON published a research survey report[4] of EWON customers represented by credit repair agents, and mystery shopper research into credit repair agents. The report highlighted some common consumer circumstances and agent practices that were of concern to our offices.

We all welcomed the requirement for credit repair agents to hold a credit licence from July 2021[5]. However, there are still concerns about their operation within the energy sector.

Our concerns about credit repair agents include:

- credit repair agent fees can exacerbate consumer financial challenges and are sometimes disproportionately high compared to the defaulted debt.
- credit repair agents are not generally equipped to deal with related issues like billing complaints.
- there is low awareness among consumers of free alternatives to credit repair agents, particularly among vulnerable groups such as Culturally and Linguistically Diverse (CALD) customers; and
- sometimes misleading conduct and/or incomplete information is provided to customers by some credit repair agents, including setting unrealistic expectations of the likelihood that a credit default listing will be removed.

When credit repair agents approach ombudsman’s offices on behalf of customers, we also see some actions by agents that can hinder effective dispute resolution, such as:

- credit repair agents querying our procedures, particularly practices around ensuring customers are aware that ombudsman services are a free alternative to the credit repair agent.
- being unable to maintain contact with credit repair agents; and

[4] Research survey report: Consumers’ use and experience of ‘credit fix’ agents
[5] *National Consumer Credit Protection Amendment (Debt Management Services) Regulations 2021*

- having difficulty obtaining information necessary to progress investigations from customers when dealing with the credit repair agent as an intermediary.

Unlike credit repair agents, our offices provide a free service to customers seeking review of a credit default listing by an energy retailer. We set realistic expectations about the likelihood of removal and adhere to principles of transparency and procedural fairness. We are also well-placed to handle any other related aspects of a customer's complaint, including concerns about customer service and billing.

The case study below illustrates the value ombudsman's offices brings to reviewing credit listing complaints.

Case study 3 – Ombudsman office assists in removal of default listing after customer pays credit repair agent

A credit repair agent contacted the Ombudsman on behalf of a customer who had a default listed on his credit file in December 2017 for an electricity account debt of $2,250. The customer was experiencing personal and financial hardship when the default was listed and considered the default listing unreasonable. The customer did not become aware of the default listing until over three years later, when he applied for finance. The customer had since paid the debt in full. The credit repair agent attempted to resolve the complaint with the energy provider, but the provider declined to remove the default listing. The Ombudsman referred the complaint back to the retailer at a senior level in the first instance. The credit repair agent returned to EWON and advised that the complaint was not resolved.

During the investigation, it was confirmed that the customer was aware that as a free service, the Ombudsman's office could deal with him directly at no cost if he preferred. The customer advised that he had already paid $1,000 to the credit repair agent, with a further $500 payable if the default listing was removed. As he had already made a payment, he elected for the credit repair agent to remain his advocate for the Ombudsman complaint.

The credit repair agent had raised several potential issues with the default listing, but review indicated that none of these provided a reasonable basis for the default to be removed. The investigation identified that a portion of the $2,250 default amount was not overdue by 60 days when the default was listed. Compliant default listings require the whole amount of a debt be overdue by at least 60 days. On this basis, the energy retailer agreed to remove the default listing. EWON communicated the outcome to the customer, but he did not advise whether he paid the additional $500 to the credit repair agent.

The case study below highlights the conduct of some credit repair agents.

Case Study 4 - Credit repair agent questions Ombudsman's processes

An Ombudsman was contacted by a credit repair agent on behalf of a customer who had a default listed on his credit file in October 2019 for an electricity debt of $1,500. He left the supply address due to the end of a relationship and experienced issues finalising the account in his name after his ex-partner remained at the property. He did not discover the default until over a year later, when he applied for finance. He considered the default listing unreasonable as he had not received any notices. We referred the complaint back to the retailer at a senior level in the first instance. The credit repair agent returned to EWON advising that the complaint had not been resolved.

Our investigation was initially delayed due to issues obtaining confirmation that the customer was aware an Ombudsman's service is free. There were also delays clarifying customer information via the credit repair agent.

The Ombudsman's preliminary review did not identify a basis for the default to be removed. The credit repair agent then questioned the fairness of our dispute resolution processes and indicated he would tell the customer that it was the Ombudsman's responsibility if the default was not removed. He also noted that if there was an unfavourable outcome, he would refer the customer to dispute this with EWON. We confirmed our independent role and explained that we are never able to guarantee removal of a default and would be happy to speak with the customer directly.

Although we did not identify any basis for removal and the retailer maintained that the listing was compliant, through the dispute resolution process the retailer offered to remove the default listing to resolve the complaint. The retailer made this decision in part because the customer had paid the debt in full, and the default listing was preventing him from obtaining crucial finance without which he would be in financial difficulty. We communicated the outcome and did not receive any further contact from the credit repair agent or customer.

Compliance monitoring and penalties

Many complaints about credit listings look at the compliance of credit reporting bodies, including appropriate sending of notifications.

With increasing energy debt, increased energy prices and the cost of living it is likely that more debt will fall into the collections cycle and customers often advise that they do not receive notifications. However, the framework does not place trust in the consumer and relies only on evidence that the retailer sent a notification.

The current framework also lacks penalties for organisations that have a history of ongoing, but relatively minor, non-compliance with the Code, such as non-compliant credit default listings. Incentives for preventative and mitigating action by organisations in relation to Code breaches are also inadequate, and there is insufficient recognition of the impact of breaches on individual customers.

We would support increasing monitoring and enforcement functions of the OAIC or changes to the Act, such as to penalty provisions.

Case Study 5 – Ombudsman office assists a customer to remove a non-compliant default listing

A customer contacted the Ombudsman's office after receiving a disconnection notice. They had around $7,200 owing and had been experiencing personal hardship and payment difficulty but was struggling to access assistance from their provider. During the investigation of this complaint, it was discovered that a credit default listing had been applied, which the customer was not aware of.

The Ombudsman's office found that the provider had not complied with timeframe or notification requirements under the Privacy Act 1988, and therefore had not been permitted to list the default. As part of the resolution of this complaint, the provider removed the default listing.