



14 August 2015

By email: adjudication@accc.gov.au

Dr Richard Chadwick
General Manager
Adjudication Branch
Australian Competition & Consumer Commission

Dear Dr Chadwick

Australian Retail Credit Association Authorisation A91482 - draft determination

The Consumer Action Law Centre (**Consumer Action**), Financial Rights Legal Centre (**Financial Rights**) and Financial Counselling Australia (**FCA**) welcome the opportunity to make a submission in response to the Australian Competition and Consumer Commission's (**ACCC**) draft determination on the above authorisation application.

As set out in our initial submission, we acknowledge that there are some benefits of the Australian Retail Credit Association's (**ARCA**) proposed Principles of Reciprocity and Data Exchange (**PRDE**). It is a positive step towards having a single source of free credit reports for consumers, and it is likely to improve consistency in data reporting and competition amongst credit reporting bodies (**CRBs**).

However, our response reiterates two key concerns from our initial submission. Firstly, the PRDE does not resolve the critical problem of consistency in treatment of hardship variations on credit reports. Secondly, we are concerned that the PRDE may increase uncertainty in settlement negotiations that relate to the listing of credit defaults. In our view, these issues should be addressed before the ACCC provides final approval for the PRDE.

Our comments are detailed more fully below.

Reporting RHI during hardship

The PRDE does not resolve the issue of inconsistent treatment of hardship variations in credit reports. This will be a problem for credit providers (**CPs**) that sign up under the comprehensive tier level of the PRDE to provide and receive Repayment History Information (**RHI**) about consumers. There is no clear direction on how CPs are expected to record RHI when a consumer has entered into a repayment arrangement due to financial hardship. Without consistency on this one critical issue, we are very concerned about the fairness, transparency and even workability of the PRDE as well as the entire comprehensive credit reporting regime. Until this issue is resolved somewhere, even temporarily, we do not believe it is possible for CPs to provide RHI consistently under the PRDE.

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Where a CP has chosen to contribute comprehensive information under the PRDE, in our view the CP must not disclose a payment as overdue if the individual entered into a hardship arrangement. During the period of the hardship arrangement, RHI should be recorded as "Current up to and including the grace period", in accordance with clause 8.2(c)(i) of the *Credit Reporting Code 2014 (the CR Code)*. If CPs are offering genuine hardship arrangements, the debt is no longer 'overdue' for the hardship period meaning it should not be reported as such.

ARCA's response

The ACCC summarises ARCA's response to our concerns in paragraphs 303 to 307 of the draft determination. ARCA argued that this issue should not be dealt with in the PRDE because:

- a) the non-reporting of RHI may inadvertently flag that the credit provider's customer is in hardship;
- b) credit providers who are seeking to avoid meeting their contribution obligations could rely on this exception; and
- c) non-signatories would not be subject to this or any other provisions of the PRDE.¹

In relation to a) above, we are not convinced that non-reporting of RHI would actually operate as an inadvertent hardship flag. We therefore suggested in our initial submission that future discussion on this topic needs to be informed by independent research on:

- what kinds of processes have been used in other jurisdictions, and how well they have worked; and
- consumer testing to gauge attitudes of consumers (particularly low income, disadvantaged and vulnerable consumers) against a variety of RHI reporting options.

It may also be worthwhile surveying CPs to gauge whether CPs would actually recognise the non-reporting of RHI as a hardship flag, and whether this would impact their decision to approve credit.

We note that ARCA has previously supported the use of temporary hardship flags on credit reports in place of RHI, despite the concerns raised about 'inadvertent' hardship flags. We have rejected previous proposals for temporary hardship flags, as we are concerned this would cause many debtors to avoid asking for a hardship variation if they knew that other CPs will be informed about the hardship variation and may react by closing or restricting existing credit contracts.

In relation to b) above, we query whether CPs would provide hardship to consumers merely to avoid meeting their contribution obligations under the PRDE. In relation to non-signatories mentioned in c) above, we believe that the PRDE has an important role to play in leading the industry in relation to this issue, and that it could provide a 'best practice' model for all CPs reporting RHI.

¹ ACCC Draft Determination, paragraph 306.

ARCA also said that it is "involved in broader efforts to address the hardship reporting issue and is confident it will be resolved in the appropriate forum and should not be considered a detriment of the PRDE."² Consumer groups have been raising these concerns for years and, while we understand ARCA is advancing discussions with regulators, there has been little substantive progress towards resolving the issue. We note that the ACCC acknowledged that this issue has been the subject of discussion for some time and considers that it needs to be resolved in order to address consumer concerns.³

In order to encourage the prompt resolution of this issue, we recommend that the authorisation of the PRDE be reduced to three years, with re-authorisation conditional on the formal resolution of this issue.

Recommendation 1

The authorisation of the PRDE be reduced to three years, with re-authorisation conditional on the formal resolution of the treatment of hardship variations on credit reports.

Ability to negotiate with creditors and the role of EDR

Representatives of consumers (which includes solicitors, financial counsellors and other caseworkers) regularly include the contents of credit reports in negotiated settlement outcomes. The External Dispute Resolution (**EDR**) services similarly resolve complaints on the basis that changes are made to the content of credit reports. Settlements are reached following disputes about the debt claimed. It is common commercial practice to settle disputes between the parties on a no admission of liability basis.

Up until now, the comprehensive credit reporting system has been a voluntary system, meaning the relevant legislation has not needed to address the voluntary removal of default listings. However, the PRDE introduces a mandatory system for signatories so the only exemptions from listing defaults are the exemptions in the PRDE, or as required by law.⁴

The only requirement by law to remove default listings is if the CRB or CP is 'satisfied' the information is inaccurate, out-of-date, incomplete, irrelevant or misleading.⁵ The obligations to correct credit information are expressly linked to the obligations on CRBs and CPs to ensure the quality of the credit reporting information they maintain.⁶ The threshold for being 'satisfied' is unclear.

Currently, it is common for a lender to refuse to formally admit that a default listing is inaccurate (for example, due to breaches of responsible lending laws), but nevertheless agree to remove a default listing as part of a legitimate settlement agreement. We are concerned that PRDE

² ACCC Draft Determination, paragraph 304.

³ ACCC Draft Determination, paragraph 309.

⁴ Nothing in the PRDE obliges a CRB or CP to do or refrain from doing anything, where that would breach Australian law: PRDE - Introduction.

⁵ *Privacy Act 1988 (Cth)* ss 20N, 20S, 21V and 21Q.

⁶ *Privacy Amendment (Enhancing Privacy Protection) Bill 2012* Explanatory Memorandum.

signatories will refuse to do this in the future, as they may not understand the interplay between the PRDE and the privacy laws (including the meaning of 'satisfied'), or see the agreement to remove defaults as an admission of liability. Should lenders refuse to remove default listings on this basis, consumers will need to take credit listing issues all the way to determination in EDR. This is an unnecessary waste of EDR resources and is contrary to the legal principle that all issues should be able to be resolved at settlement.

We consider this issue is likely to cause a lot of confusion, cost and delay if it is not clarified. In our view, it is important that the PRDE specifically state that it does not override the obligation on CPs and CRBs to remove default listings (or not list defaults) if they are 'satisfied' the information is inaccurate, out-of-date, incomplete, irrelevant or misleading. We also recommend that the EDR schemes, in consultation with relevant stakeholders, issue guidance to PRDE signatories and other CPs on the meaning of 'satisfied' and the settlement of disputes regarding default listings. The PRDE should not interfere with legitimate settlement negotiations to remove, delay or withhold from listing defaults on credit reports.

Recommendation 2

Insert a clause in the PRDE that clarifies that the PRDE does not override the obligation on CPs and CRBs to remove default listings (or not list defaults) if they are 'satisfied' the information is inaccurate, out-of-date, incomplete, irrelevant or misleading.

Recommendation 3

EDR schemes, in consultation with relevant stakeholders, issue guidance to PRDE signatories and other CPs on the meaning of 'satisfied' and the settlement of disputes regarding default listings.

Please contact Katherine Temple on 03 9670 5088 or at katherine@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

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A handwritten signature in black ink that reads "Fiona Guthrie". The signature is written in a cursive style with a period at the end.

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