FINANCIAL OMBUDSMAN SERVICE

Financial Ombudsman Service Limited
ABN 67 131 124 448
GPO Box 3, Melbourne VIC 3001
T 1300 78 08 08
F 03 9613 6399
E info@fos.org.au
W www.fos.org.au

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The Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Colleague,

Privacy Amendment (Enhancing Privacy Protection) Bill 2012 – Review of Credit Reporting

We refer to the Committee's enquiry into the *Privacy Amendment (Enhancing Privacy Protection) Bill* 2012 ("Enhancement Bill"). That bill makes substantial amendments to the *Privacy Act* 1988 and in particular introduces a more comprehensive credit reporting regime.

FOS engagement with Credit Listing disputes

The Financial Ombudsman Service ("FOS") is an independent, non profit, external dispute resolution service ("EDR Scheme"). FOS's role is to resolve dispute between Applicants and Financial Services Providers. FOS will seek to resolve disputes by conciliation and negotiation, but ultimately has power to make a binding determination upon Financial Services Providers.

FOS is required by its Terms of Reference to do what is fair in all the circumstances, having regard to legal principles, applicable industry codes or guidance, and good industry practice when determining a dispute.

It is our understanding that FOS is the principal dispute resolution body dealing with credit listing disputes in Australia. FOS received 928 credit listing disputes for the period 1 July 2011 – 30 June 2012.

As at 13 June 2012 FOS had 284 open credit listing disputes, of which 69 were in investigation. Many of the disputes that proceed to investigation ultimately result in a written decision. FOS receives an extensive range of credit listing disputes, including disputes relating to both consumer credit and commercial credit listing. Nonetheless default listing disputes remain the primary source of disputation.

In the 2011/2012 year we also resolved a number of systemic issue investigations that resulted in the following action by the relevant Financial Services Providers:

- amendment of a total of 4,506 incorrectly made credit listings; and
- removal of a total of 7,720 incorrectly made credit listings; and
- removal of 2,770 incorrectly made serious credit infringement listings.

In addition, the systemic issue investigations often result in additional outcomes of value such as:

- An undertaking by the relevant Financial Services Providers that, where a listing was incorrectly made and has been either amended or removed, the Financial Services Provider will consider any claims made for non financial loss as a result of the listing; and
- Process reviews by the relevant Financial Services Provider including amendments to internal process and procedure documents and Notices of Demand.

As the principal external dispute resolution provider in the field, FOS is concerned that any enhancements to the regulation of credit listings results in both a reasonable and fair regime, but also provides clear guidance so as to ensure that all parties are clearly able to determine when it is appropriate to make a listing.

In that context we note that there are different requirements set out in the legislative scheme, the Credit Reporting Code of Conduct and what is generally viewed as good practice. Greater consistency of the requirements between the legislation, Code and good practice should assist all parties better understanding of, and compliance with, their rights and responsibilities.

Current Issues in Credit listing

Default Listings

Disputes concerning the appropriateness of default listings remain the major area of credit listing complaints to FOS.

Section 18E of the *Privacy Act* 1988 currently provides that an individual can be credit listed where they are at least 60 days overdue in making a payment and where the credit provider has taken steps to recover the whole or part of the amount of credit outstanding.

Paragraph 2.7 – 2.10 of the *Credit Reporting Code of Conduct* additionally provides that the credit provider must have sent a written notice to the last known address of that individual advising of the overdue repayments.

It is accepted as good industry practice, that the intention to list should be brought to the attention of the individual at the time the demand for the payments is made. It is also generally viewed as good industry practice that such notice of intention to list ought to be proximate to the time of the default listing. Where the loan is regulated by the National Consumer Code, a default notice pursuant to Section 88 requires that the creditor inform the debtor that the debt may be included in a credit reporting agency's credit information file (see s 88(i) of the NCC.)

We note that the *Issues Paper: Credit Reporting Code of Conduct – 2012 Review* supports proximate notification of the intention to list. Notably, the Enhancement Bill does not incorporate such a requirement. It may be that proximate notice of intention to list will be included as a requirement under a revised *Credit Reporting Code of Conduct.* In any event, clear guidance on the requirement for proximate notice of the credit provider's intention to default list should be provided.
In view of the importance of this issue it is our view that it would be preferable that such guidance be included in the legislative scheme.

Commercial Listings

Currently the *Privacy Act* 1988 provides very limited regulation of commercial credit listings. The requirements relating to default listings and serious credit infringements contained in section 18E of the *Privacy Act* 1988 apply only to consumer credit listings.

As we apprehended it, that the Enhancement Bill continues this regime and, in particular, provides no guidelines on when it is appropriate to list a default relating to a commercial credit contract.

FOS receives a significant number of complaints relating to commercial credit default listings.

Despite the absence of any guidance in either the *Privacy Act 1988* or the *Credit Reporting Code of Conduct* we note that the Privacy Commissioner's Office in its *Credit Reporting and Advice Summary - April 2001* stated that where there was to be a listing of an individual with respect to an overdue commercial credit payment, the notification of the prospect of listing was a desirable business practice. FOS agrees with, and has adopted, that position.

In circumstances where the Privacy Commissioner has taken this view it is appropriate that that position be incorporated either into the Enhancement Bill if it is to be made a mandatory requirement, or if it is to be viewed as good practice then it ought to be stated as such in a revised Credit Reporting Code of Conduct.

Certainly, it is in the interest of all stakeholders that the requirement be clearly stated.

Financial Hardship

A common, and increasing, basis for Applicants' complaints as to the inappropriateness of a default listing is that the Applicant was suffering financial hardship and was default listed at a time when they were in negotiation with the credit provider concerning a repayment proposal.

Although the *Privacy Act* allows a Financial Services Provider to default list a borrower when the amount listed is overdue by at least 60 days, and a demand has been made for payment, it may not always be appropriate to do so.

The *National Credit Code, Code of Banking Practice,* and good industry practice place some obligation upon a Financial Services Provider to work with the borrower to try and help the borrower to overcome their financial difficulty ("hardship provisions"). For example clause 25.2 of the *Code of Banking Practice* provides that:

> *"With your agreement, we will try to help you overcome your financial difficulties with any credit facility you have with us. We could, for example, work with you to develop a repayment plan."*

FOS takes the view that this obligation requires a Financial Services Provider to make a genuine attempt to deal with an Applicant's request for assistance due to financial hardship and make reasonable efforts, in cooperation with the borrower, to reach a commercially sensible resolution.

In this context where a borrower is in default but has made a request for hardship assistance, it is our view that the Financial Services Provider ought not default list the debtor:

a) while the hardship application is under consideration by the Financial Services Provider.

b) where the debtor has genuinely put forward a reasonable hardship variation request and the Financial Services Provider has not given it reasonable consideration

It is unfortunate that the Enhancement Bill has not dealt with the issue of the interrelationship between the hardship provisions and default listings.

Again we believe there is an opportunity to obtain greater clarity and consistency in the industry by providing some guidance as to a Financial Services Provider's obligations to consider a debtor's financial hardship application prior to proceeding to a default listing.

Default Listings – 12 Month Time Period

An issue of some controversy is whether it is good practice for a Financial Services Provider to enter a default listing within 12 months of a default. Some EDR Schemes such as the Telecommunication Industry Ombudsman have adopted a general approach that an overdue account should not, in the absence of specified circumstances, be credit listed more than one year after the account became overdue.

Neither the *Privacy Act 1988,* the Enhancement Bill, nor the *Credit Reporting Code of Conduct* provide guidance to whether there is any effective 'time limit' on a entering a default listing. Given the different positions taken by various EDR Schemes, the current Enhancement Bill provides an opportunity for clarity be provided on this issue.

It is our view that mandating in legislation a 12 month 'limitation period' is not sufficiently flexible to deal with the broad range of financial circumstances that give rise to default listings In particular, in FOS's experience a 12 month limitation period may not always be appropriate n a sector, such as the Financial Services Industry where contracts involve significant sums over often long periods of time.
The introduction of what is, in effect, a requirement to default list within 12 months of default is likely to result in a Financial Services Provider listing defaults within 12 months where they might otherwise not do so, and where it would be inappropriate to otherwise do so.

As you are aware, default listing a customer has serious consequences. A 12 month time period would cause conflict with the approach required to be taken by Financial Services Providers with respect to applications for hardship assistance by a borrower.

It is our view that a Financial Services Provider should not enter a default listing against a borrower where the borrower is complying with a hardship variation or is otherwise engaged in negotiations with the Financial Services Provider even though the borrower may be more than 60 days overdue in making payments.

A 12 month time period also has the capacity to conflict with the Financial Services Provider's obligations to engage with debtors to provide hardship variations.

Outside of negotiated hardship arrangements, Financial Services Providers will on many occasions, make a decision not to default list a borrower, even though the borrower is more than 60 days in default. For example if sufficient regular repayments have been made to satisfy their internal collection policies, even if the total arrears are not paid.

Take the following example:

> *D borrows $5,000 repayable by 48 instalments of $135 / month (including interest). D makes his monthly payments on time for the first 24 months. He misses his 25th monthly payment (January 2012) as well as the February and March repayments. He makes his April and May payments on time but misses the June payment and then makes monthly payments of $100 thereafter for a further year before ceasing to make any further payments.*

In this example the Financial Services Provider is entitled to default list D in March 2012. However at that time the Financial Services Provider may take the approach that the consumer is making sufficient repayments to be acting in good faith and so justify a lenient approach. The Financial Services Provider is receiving the majority of its repayments and save for sending reminder and collection letters, may take no further action.

In those circumstances it seems unfair that if that borrower then ceases making any payments and the account becomes delinquent , as occurred in the example, that the lender is then barred from default listing what is now a significant default due to the failure to list the initial, more minor, default that occurred over 1 year earlier.

A likely response from many Financial Services Provider's will be to no longer act with discretion and default list all overdue customers within 12 months of the account falling more than 60 days overdue.

Serious Credit Infringements

Clause 63 of the Enhancement Bill amends the definitions of 'serious credit infringement' to include the requirement that 6 months must have passed since the provider last had contact with the individual before the Financial Services Provider is able to list an individual as a serious credit infringement on the basis that they have shown an intention to no longer comply with their obligation under the credit contract.

FOS supports this amendment. As you are aware, a serious credit infringement listing is likely to prevent a borrower obtaining credit from main stream lenders in the future.

Such listings should not be lightly made and in that context it is appropriate that the Enhancement Bill include a requirement that the Financial Services Provider must have taken reasonable steps to contact an individual and that at least 6 months should have passed without contact prior to entering a serious credit infringement listing.

FOS has had disputes where individuals have gone overseas for 10 weeks on holiday to return to find that they have been listed with a serious credit infringement on the basis of having been treated as a *"clear out"*.

Referral of Complaints to EDR Schemes – Cl. 21V

Division 5 of Schedule 2 sets out the process for dealing with complaints about Credit Reporting bodies or credit providers. Under that regime the respondent to the complaint must investigate the matter and make a decision about that complaint.

If the complainant is dissatisfied with the respondent's decision then that individual may access a recognised external dispute resolution scheme of which the respondent is a member.

Division 5 does not apply to complaints relating to clause 21(V) of the *Bill.* That provision allows an individual to request a credit provider to correct personal information about that individual that the provider *holds.* As we apprehended, this provision allows an individual to seek to correct information *held* by a particular Financial Services Provider, rather than information held by a credit reporting body.

The clause recognises that information held by the Financial Services Provider may have originated from another body and so clause 21V (3) requires the Financial Services Provider to consult with that other body concerning the personal information held.

Clause 21(W) of the Bill then follows the standard complaint regime of the Bill and allows an individual who is dissatisfied with the Financial Services Provider's response to then access a recognised external dispute resolution scheme of which the provider is a member.

We are concerned that this regime will prove impractical. Many complaints lodged under this clause will relate to circumstances where a Financial Services Provider (Bank A) holds incorrect personal information, such as default information, which it may have obtained another body e.g. Energy Provider B.

Bank A enquires as to the accuracy of that information from Energy Provider B and is told that the information is correct. The complainant is unhappy with the response and takes the matter to Bank A's EDR scheme. Energy Provider B is not a member of that EDR Scheme. In those circumstances the EDR Scheme will not be able to properly investigate the dispute as it will be unable to access the relevant information which is held by Energy Provider B, and not by its member Bank A. All Bank A's EDR scheme will be able to do is consider if Bank A has followed an appropriate process in dealing with the request, but it will not be able to solve the consumer's main problem, which is correcting any wrong information at its source

The appropriate forum for the complaint would be the EDR Scheme to which Energy Provider B is a member.

This issue has the potential to cause confusion for consumers when determining where to bring a complaint. Consideration should be given to redrafting the provision to ensure that the complainant is referred to the more appropriate EDR Scheme, and that the complainant has access to that scheme.

In that context we recognise that this issue does give rise to complex issues of jurisdiction between EDR Schemes operating across a range of industry sectors.

We would be happy to expand on these issues further at a later date if that was thought useful.

Credit Repair Agencies

FOS and other EDR Schemes are concerned about the rise of complaints from various credit repair services who act on behalf of various customers. Like other Ombudsman offices, FOS is a free dispute resolution service to consumers. It is of concern to us that credit repair agencies charge their customers substantial fees for referring their customer's complaints to FOS in circumstances where the customer could come directly to FOS without charge.

Applicants approaching FOS are free to engage representatives to act on their behalf. As a matter of principle FOS has no objection to those representatives being paid by their clients. However FOS is concerned that consumers who engage such credit repair agencies are fully informed about their entitlement to have their dispute resolved at FOS without charge prior to making the choice to engage a credit repair agency for a fee. In addition to informing customers of their right to bring a dispute to EDR, it would be useful if credit providers covered by the legislation were required to inform their customers that access to EDR can be obtained at no cost to the consumer.

If you would like to discuss any of these matters further, please contact me on
or by email at

Yours Faithfully

Shane Tregillis
Chief Ombudsman