



## AUSTRALIAN CREDIT FORUM Inc.

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14<sup>th</sup> July, 2013

Mr Andrew Walter,  
Assistant Secretary  
Commercial  
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CANBERRA, ACT 2600

By email: [Andrew.walter@agd.gov.au](mailto:Andrew.walter@agd.gov.au)  
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Dear Andrew,

I am writing to you on behalf of the Australian Credit Forum (ACF) as part of the consultation process in respect of the impact of the EDR membership obligation on Commercial Credit Providers (CCPs).

The Australian Credit Forum is a peak credit management body representing major providers of commercial credit in the Australian market. All forum members are therefore directly affected stakeholders in terms of the effects of the EDR membership obligations on Commercial Credit Providers due to take effect at the expiration of the temporary exemption on March 12 2015. It is our view that the proposed impact of the EDR obligations would be negative and substantial and the Australian Credit Forum is unanimous in its opposition to the proposed EDR requirements. Furthermore, rather than suggest that the EDR obligations perhaps be modified in some way resulting from the consultation process, it is our view that the exemption remain in place permanently.

### **Adoption and endorsement of AFC submission**

The ACF has been provided by the Australian Finance Conference (AFC) with a copy of its submission. The ACF respectfully adopts and endorses the submission of the AFC generally.

Your request for input during the consultation process implies that any case opposing the proposed obligations in respect of EDR membership (as per subsection 21D(2)(a)(i) of the *Privacy Act 1988*) should be based on evidence about the impact of EDR membership in support of such a case. The organisations best placed to provide information about costs of complaint handling are the EDR schemes themselves. In the meantime based on our own members' review of the issues and based on feedback to date the ACF submits the following.

#### **1. Cost Implications**

##### **Cost Uncertainty**

In the covering material provided by your department it was suggested that stakeholders have argued ... *'that the EDR membership obligation would impose an unreasonable cost on commercial credit providers with no, or little, tangible benefit. Accordingly, we would be interested in information that would allow this regulatory burden to be quantified'*. Quite apart from the fact that the potential impacts and medium to long term affects are not easily measurable at this point in time, the costs are unknown and unquantifiable.

One of the biggest concerns facing CCPs is the uncertainty over costs associated with continuing to access data concerning an individual's consumer credit information and having to participate in an EDR scheme to do so. At this stage there has been no level of comfort provided to CCPs as to the costs confronting their business. Furthermore the limited number of proposed EDR scheme managers cannot provide cost estimates with any level of certainty. It is entirely open-ended; there is effectively no cap to the potential costs that may be incurred going forward for any given CCP under the EDR obligations.

You will no doubt be aware of the criticisms of the existing EDR schemes about costs certainty and quantum. On this particular issue the ACF respectfully adopts and endorses the submission of the AFC at pages 5-6.

It is unreasonable to impose on CCPs generally and SME CCPs in particular a privacy complaint handling regime as expensive and as flawed as the current EDRs when privacy complainants can access without cost to themselves and the relevant CCP (other than opportunity costs) the complaint handling mechanism provided by the Privacy Commissioner. Lack of resources is not an adequate government response. It is unreasonable *per se* for a government committed to reducing red tape, best practice regulation and allowing business enterprises to flourish to increase government regulation and shift the costs of regulation to those enterprises or, as an unpalatable alternative, to increase the costs and risks of doing business as a result of the increased regulation.

The reality is that no finance department and no sensible finance manager would enter into a scheme where the ultimate costs are unquantifiable, unbudgetable and at the whims of complainants outside of their control.

For this reason the vast majority of CCPs, will in our view, elect not to participate in an EDR for this reason. The risk management implications from opting out are dealt with later.

### **Potential Claim activity for CCP's**

Both COSL and FOS have provided some indication of their past claim and dispute settlement rates in respect of their role in managing financial service provider (FSP) claims – being mainly claims by individuals against finance institutions. However there is no guarantee that the claim rate experienced by either of these organisations in respect of such matters would be replicated in a CCP EDR environment. Their previous claim rates are a guide only and a loose guide at that. This is especially so given the ambiguity in respect of the claim and dispute statistics in their stated figures.

Where the difference lies is that the new obligations for CCPs will inevitably attract an increase in spurious complaints, especially involving guarantors of debt, sole trader debtors, particularly by organisations either directly or indirectly involved in business re-construction or restructure. That is, organisations whose role is to minimise financial damage, slow down legal proceedings and provide an escape route for businesses (and owners) that are imminently likely to fail. In such cases there is an incentive, both for the consultant and for the complainant as the debts are more likely to be higher than for consumers (with the complainants own personal assets potentially exposed to the debt) hence the stakes are quite likely much higher. As for numbers, the AGD only has to look at the statistics for corporate failures to get a sense of the scale of corporate distress and the magnitude of potential claims (if only a small percentage do so) based on the wrong reasons regardless of whether they don't pass the initial stages of claim disengagement.

## **One Sided Cost Implications of EDR Schemes**

The way the EDR scheme is proposed, these organisations cited above and complainants generally can effectively slow down proceedings and recovery activity at minimal cost to the complainant whereas the EDR cost to the CCP substantially increases and is out of proportion to the debt or obligation incurred. As it stands the CCP would bear the cost of any actions brought by a complainant (no matter how vexatious) whereas there is no disincentive for a complainant to lodge an illegitimate claim. This situation has the potential to attract if not exacerbate claims thus leading to higher EDR obligation costs for CCPs. Furthermore it has the potential to escalate the claim rate well above those experienced by COSL and FOS in regards to consumer claims.

## **2. Opt Out Implications**

Given that CCPs would effectively be heading into an environment of unknown costs and without such costs being justified, the vast majority of CCPs will simply opt out of accessing Consumer data and will elect **not** to participate in an EDR scheme.

The consequences of the opt-out strategy will mean that

- (i) Access to the Consumer Regulated file will not take place. The 'character' assessment commonly used in risk management by virtue of searching a directors or business partners personal file will not be exercised.
- (ii) Access by CCPs to consumer credit default – particularly on guarantors and sole traders will no longer take place
- (iii) This will lead to an increased risk (where assessments are undertaken without full knowledge of past behaviour).
- (iv) In a worst case scenario CCPs may elect to simply not deal with non-incorporated legal entities – thus prejudicing the business prospects of small businesses operating as partnerships, trusts and sole traders. This outcome should not be underestimated.
- (v) Existing small business customers may have terms of credit reduced or closed completely
- (vi) If the CCP does proceed to provide credit, it is likely the terms of such credit will be harder to what would otherwise have been the case had Consumer Credit data file been accessed.

## **3. Commercial Credit as distinct from Consumer Credit**

The reference material states that *'EDR membership obligation as set out in the Privacy Act applies uniformly to all credit providers'*. Unfortunately this statement makes no allowance as to whether the type of credit is commercial as distinct from consumer.

The case for concern with respect to Consumer credit does not bear the same significance as it does with Commercial credit where the core subject of credit is not an individual but a separate trading legal entity.

## **Business Risk as Distinct from Consumer Risk**

There is a fundamental difference between the activities of the FSPs and CCPs. Whereas FSPs deal with individuals in their own right, CCPs deal with individuals by virtue of their role within business as separate legal entities. The EDR implications for business are significant. CCPs provide lines of credit facilities hence incur exposure to other enterprises.

The levels of exposure on average are expected to be many times larger than what would be the case with the average consumer. That is, both the amounts and risks are greater.

Every business has a right to protect itself from corporate default; every business has a right to protect its capital. Every business should have a right to be able to access information which will assist in evaluating a prospective or existing customer so as to minimise or mitigate its risk. In order to equip a business with the necessary background upon which to make an informed decision a CCP needs (if it so chooses) to access information on an individual – who as a director, partner, proprietor or guarantor – represents a guide as to the character on the key individual behind the risk being undertaken by the CCP. The person is also potentially personally liable for the debts incurred in the operation of their business which is being provided a line of credit by the CCP.

Legislation should aim to foster and encourage business growth and enterprise and not shackle it – which is what this EDR obligation is going to do.

#### **4. Limited EDR Providers – Limited Competition**

While there are a total of seven organisations listed as EDR providers, [specifically 3 x Energy (EWON, EWOV, EWOWA); 2 x Finance /Credit (FOS and COSL); 1 x Telecommunications (TIO); 1 x Tolls (TCO)] there are in fact only two which are likely providers to CCPs.; COSL and FOS. Both of these organisations are reluctant participants and of these it is only COSL which seems interested to engage with CCPs. So far it would appear that FOS is undecided as to whether they will provide services to CCPs. As a result FOS has not been able to confirm pricing and is in the process of redefining their funding model at present.

If FOS participates, at best, there are only 2 providers. This greatly reduces competition in terms of the provision of EDR services to the CCP market. At worst and if FOS doesn't engage with CCPs, the CCPs would be left with only one EDR provider. Therefore if the legislation were to continue as is proposed beyond March 12, 2015 then the EDR obligations would effectively enforce all CCPs to engage in an uncompetitive marketplace.

#### **Limited EDR Alternatives - Enforcement**

How can the OAIC therefore proceed to provide stewardship over an EDR compliance regime which compels businesses and CCPs in particular to deal with a single provider in a given marketplace? This requirement effectively represents an enforced engagement in an uncompetitive market. The compliance obligations are therefore clearly anti-competitive.

#### **COSL – Adequate Capability to Service CCPs?**

Quite apart from the obvious lack of EDR providers, COSL's entire history has been focused on consumer based matters and not commercial. CCP matters present a different set of challenges to consumer issues. It begs the question of whether COSL is adequately equipped to handle CCP Privacy Act related EDR matters in the unfortunate event there are no alternatives and that the EDR obligations are implemented and the EDT moratorium is removed post March 12, 2015.

Indeed by COSL's own admission the industry it serves in the past has been frustrated about such matters as discontinue enforcement actions once a complaint is received by an EDR scheme. Arguments presented such as opportunity costs to FSPs, lack of maximum time limits to handle complaints, the use of EDR complaints as delaying tactics and the

quarantining of debt have been effectively ignored by ASIC in their ruling on the matter. This attitude would not be acceptable to business and CCP's and there is no reason to believe ASIC's attitude would be any different with respect to CCP's and EDR compliance.

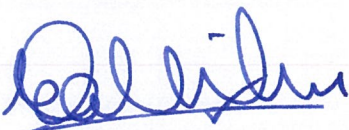
### **Poor Preparation and Poor Lead up to the Proposed EDR regime**

The current position is only marginally better than it was at the deadline date of March 12, 2014. At that point in time the legislation was poised to enforce EDR obligations on a major segment of the Australian business community when there were **no** EDR service providers either able to or willing to deliver such services at the time. The 11<sup>th</sup> hour exemption was most likely a reprieve driven more about the realisation that there were no EDR service providers in the market willing to cater for CCP's than it was about reasons of seeking industry consultation. Clearly the obligations were ill considered leading up to March 12<sup>th</sup>, 2014. We therefore ask that unlike the inadequate lead up and lack of understanding concerning the full impacts of EDR compliance for CCP's in the past, that the OIAC is more prepared to consider the negative implications and impacts on CCP's and the commercial credit industry as part of this current consultation process. In short we need more time and more detailed consideration and consultation on this matter.

In summary we believe the arguments in favour of a permanent exemption for CCP's in respect of their obligations to participate in an EDR are compelling:

1. Nobody (No CCP) wants it
2. It will add to increased bureaucracy and red tape
3. It will add to the uncertain costs of running a (CCP) business
4. It will apply a hand brake to all CCP businesses particularly SME based CCP's
5. It is about business not individuals; Commercial interests are distinct from Consumer rights
6. It will add to the cost of credit given that CCPs will be uncertain about a person's consumer credit history

Sincerely,



Eric R A Milne LICM CCE  
Chairman  
Australian Credit Forum Inc