



AUSTRALIAN CREDIT FORUM Inc.

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14th February, 2014

The Commonwealth Attorney-General
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600

ATTENTION: Joshua Faulkes

BY EMAIL TO: josh.faulks@ag.gov.au

Dear Attorney-General,

PRIVACY ACT REQUIREMENT FOR COMMERCIAL CREDIT PROVIDERS TO BELONG TO AN EDR SCHEME TO ACCESS THE CREDIT REPORTING SYSTEM

The Australian Credit Forum was formed over 40 years ago by a group of professional credit executives, members of the legal profession including solicitors, barristers, Administrators, Liquidators, representatives of a number of consumer and commercial credit reporting bureaux and mercantile/debt collection agencies. Most of the Forum's current membership consists of professional National Credit Managers working for a broad range of national and international companies providing commercial credit to their company's customers.

It has been brought to the Forum's attention that the pending changes to the Privacy Act make it a requirement that where a commercial credit provider obtains and provides credit related information on a consumer in relation to commercial credit eg Sole Trader, Partnership or Director they MUST belong to an approved EDR scheme.

For a government which proclaimed on the world stage "*Australia is open for business!*", has declared a 'war on red tape' and introduced the "*Repeal Day*" initiative, it will be completely inconsistent, counter-productive and contrary to those aims to allow the commencement on 12 March 2014 of the amendments to the *Privacy Act* without exempting commercial credit providers from the requirement to belong to an EDR scheme.

From 12 March 2014, Australian businesses, small and large, unless exempted, will face a novel choice when extending commercial credit to a sole trader, partnership or a company where an individual is providing a personal guarantee. This is a choice they have not previously had to make since the commencement of the credit reporting industry in Australia. The choice is this:

- Will we continue our long-established practice of trying to manage our exposure to the risk of credit default by getting a credit report from a credit reporting body about those individuals?

OR

- Will we run the greater risk of credit default due to inadequate information by no longer getting those reports because if we become a member of an EDR scheme we will be burdened with the unnecessary costs (direct and indirect), the red tape of private bureaucracy, injustice and delay in collection of overdue debtors which will inevitably come with EDR membership?

The position of the Privacy Commissioner

The position of the Privacy Commissioner is unequivocally that all businesses, small or large, which are accessing the Australian credit reporting system need to be a member of a recognised EDR scheme in order to continue to do so from 12 March 2014. After 12 March 2014 credit reporting bodies will not be able to provide their existing commercial credit provider customers with credit reports about an individual unless the customer is a member of an EDR scheme recognised by the Privacy Commissioner.

EDR schemes

The applicants to the Privacy Commissioner for recognition as EDRs are:

1. Telecommunications Industry Ombudsman Limited;
2. Credit Ombudsman Service Limited (COSL);
3. Financial Ombudsman Service (FOS);
4. Energy & Water Ombudsman NSW; and
5. Energy Ombudsman Western Australia.

They are schemes set up to deal with disputes between consumers and telecommunications providers, financial service providers and utilities. They will now deal with privacy complaints by consumers about their members.

It is the view of the Privacy Commissioner and the above EDR schemes (under their membership rules) that once a commercial credit provider becomes a scheme member the EDR scheme will determine all disputes between the commercial credit provider and the individual, not just privacy disputes. Surely that is an unintended legislative consequence of a provision designed to ensure that consumer credit providers are members of an EDR scheme. It should also be self-evident that the existing schemes are ill-suited to deal with B2B disputes.

Problems with EDR schemes in B2B disputes

1. They are fundamentally unfair and unjust as:
 - a. The credit provider pays both for scheme membership and the EDR scheme's costs. The charters of all the EDR schemes provide that it is free to the "consumer".
 - b. If the credit provider gets legal assistance in a hearing or Conciliation Conference the "consumer" is also entitled to legal assistance at the credit provider's expense.
 - c. A determination of an EDR scheme is binding on the credit provider but not the "consumer". If the EDR scheme finds against the "consumer" and dismisses the complaint, those same arguments can be re-run in any later court case.
 - d. An EDR scheme does not follow due process as we understand it, rather conducts an investigation.
 - e. An EDR scheme does not necessarily decide matters according to law, but to "fairness".
 - f. An EDR scheme will not be bound by any of its previous decisions.
 - g. Because the rights are so loaded in favour of the "consumer" (which can be any wealthy individual) they are likely to be a vehicle for oppression of commercial credit providers, particularly those defined as small businesses under the Act. It will become routine for lawyers advising individual clients or guarantors who cannot or will not pay for goods or services provided to lodge a complaint with an EDR scheme about privacy or some issue going to the amount owed so as to engage the EDR processes and delay the credit provider in collecting overdue debts.
 - h. A credit provider which wants to challenge an EDR scheme decision has to pay the full legal costs of "consumer" and the EDR scheme of that challenge as well as its own costs. That means a bad decision made contrary to either or both the law and the facts is unchallengeable in a practical sense.
2. The EDR schemes are slow. Anecdotal evidence is that FOS can take up to 2 years to make a determination and COSL about 6 months. During this time the credit provider cannot take any legal action to recover its debt. Thus, if the EDR scheme dismisses the "consumer's" complaint the credit provider will have paid for the privilege of being delayed for at least 6 months from commencing action

to recover a debt due to it. "*Justice delayed is justice denied.*" The EDR schemes bring injustice not just by their tardy processes but because those processes must be completed before the credit provider can bring or continue recovery action.

3. Notwithstanding these defects, the EDR schemes' jurisdiction is economically significant including subject matter up to \$500,000.00 and the ability to make compensation orders up to \$280,000.00.
4. The EDR schemes are costly. The COSL website shows investigation fees of between \$300.00 and \$2,500.00 and determination fees of between \$2,500.00 and \$5,000.00. Anecdotally, FOS is even more expensive. There is also the additional cost of delay to the credit provider in being able to enforce his rights and the indirect costs of having to deal with an additional set of processes before being able to enforce its rights.

A double paradox

The first paradox: The amendments to the Act don't require a commercial credit provider to belong to an EDR scheme so that a consumer's privacy complaint can be dealt with by the EDR. That is because if the "consumer" is not satisfied with the credit provider's response, if the credit provider is not a member of an EDR scheme the Act provides that the complaint is then escalated to be dealt with by the Privacy Commissioner. The only reason a commercial credit provider has to belong to an EDR scheme is to be able to better assess the credit worthiness of an applicant for commercial credit who is an individual (or a guarantor) by getting a report from a credit reporting agency.

The second paradox: Much of the Explanatory Memorandum and the Privacy Commissioner's public utterances emphasise the enhanced information which will be available to all credit providers as a result of the amendments to the Act. However, because of the problems with EDR schemes identified above it is likely that most commercial credit providers, particularly small business operators, will opt out of getting credit reports so as to avoid having to join an EDR scheme. Thus, instead of enhancing the ability of commercial credit providers to assess or monitor the credit worthiness of applicants for commercial credit after 12 March 2014, the amendments to the Act will have the opposite effect in practice. Those commercial credit providers which don't join an EDR scheme will lose the benefit of access to details of all consumer loans to and credit inquiries about the "consumer", judgment information and credit risk scoring tools which may be offered.

Why now?

Our industry associations and lawyers have been seeking clarity from the Privacy Commissioner for some time but were told to wait until the Credit Reporting Code of Conduct had been adopted and the *Regulations* issued. That having occurred without any exemption for commercial credit providers the Privacy Commissioner has this week said that any exemption through the *Regulations* must come from your office.

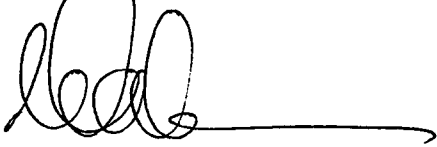
A suggestion

We ask that commercial credit providers be exempted from the requirement to belong to an EDR scheme and suggest that the following might be an appropriate *Regulation*:

For subparagraph 21D(2)(a)(i) of the Act, a credit provider which discloses credit information about an individual to a credit reporting body following receipt of an application for commercial credit from that individual, is prescribed.

We look forward to your prompt response.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Eric R Milne', with a long horizontal line extending to the right.

**Eric R Milne LICM, CCE
Chairman Australian Credit Forum**