

Position Statement Issue 4

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Default Listings on Individuals' Credit Information Files

This Position Statement describes how the Credit Ombudsman Service Limited ("COSL") deals with complaints about default and serious credit infringement listings recorded on a borrower's credit file by a credit provider.

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1. Introduction

- 1.1 This Position Statement is intended to provide both Financial Services Providers and Complainants with guidance as to how we consider complaints about default listings. In preparing this Position Statement, we have considered relevant law, applicable industry codes of practice, good industry practice and fairness.
- 1.2 This Position Statement will be reviewed upon the enactment of the Australian Privacy Amendment Legislation which, among other things, introduces new Australian Privacy Principles that will form the basis for specific obligations relating to the regulation of credit reporting.
- 1.3 This Position Statement should be treated as a guide only because any decision we make will ultimately be based on the particular facts of each case.
- 1.4 Credit reporting in Australia is governed by Part IIIA of the Privacy Act 1988 (Cth) ("the Act")¹ and the Credit Reporting Code of Conduct ("the Code").² A credit provider must comply with the Act and the Code when listing a default on an individual's credit file.³
- 1.5 The Code applies only to consumer credit.⁴ Commercial credit is generally unaffected other than in exceptional circumstances.⁵
- 1.6 In November 2010, the Office of the Privacy Commissioner was integrated into the Office of the Australian Information Commissioner ("AIC"). Consumers, credit providers and credit reporting agencies can access information through the AIC's website⁶ regarding privacy information in Australia.

2. Types of credit infringements

- 2.1 There are two types of credit infringements:

- (a) an overdue payment; and
- (b) a serious credit infringement.

3. Overdue payments

- 3.1 A credit provider may only report an overdue payment to a credit reporting agency if:
 - (a) 60 days has elapsed since the day on which the payment was due and payable;
 - (b) the borrower has been notified by the credit provider that a default may be listed on their credit file (either before or at the time of the listing);
 - (c) the credit provider has taken steps to recover the amount of the overdue payment;⁷
 - (d) the credit provider has sent a written notice to the last known address of the borrower⁸ which:

¹ Part IIIA of the Act regulates the collection, use and disclosure of consumer credit information. Generally commercial credit information, and its circulation, is unaffected. However, the National Privacy Principles apply to both.

² Credit Reporting Code of Conduct, issued by the Privacy Commissioner under section 18A of the Privacy Act, September 1991, and including all amendments as at March 1996.

³ Section 18B of the Act provides that a credit reporting agency or credit provider must not act in any way that breaches the Code.

⁴ Credit is defined in the Privacy Act 1988 to mean consumer credit, that is, a loan obtained by an individual from a credit provider for domestic, household or family purposes.

⁵ For example, where consumer credit information relating to an individual is disclosed in the context of a commercial credit application. The specific agreement of the individual concerned must be obtained.

⁶ www.privacy.gov.au; www.oaic.gov.au

⁷ Privacy Act 1988 (Cth), section 18E(b)(vi)

- (i) informs each borrower of the overdue payment; and
 - (ii) requests each borrower to pay the amount outstanding; and
- (e) COSL has not received or is not dealing with a complaint from the borrower.⁹
- 3.2** The credit provider must only list payments which are overdue for 60 days or more and about which the borrower has been informed in writing. Therefore, any payments which are overdue for less than 60 days and/or which the borrower has not been notified in writing about, should not be included in the default listing.
- 3.3** The amount reported as an overdue payment may vary depending on the type of loan contract the borrower has entered into.¹⁰ For example, a loan contract may state that the entire balance of the loan becomes due in a single payment on the occurrence of a certain event. If the event occurs, the amount reported as an overdue amount will be the entire loan balance (and not just the payments that may otherwise have been overdue for 60 days).
- 3.4** A credit provider may list a default against a guarantor in relation to consumer credit if:¹¹
- (a) the credit provider is not prevented under any State or Commonwealth law from commencing proceedings against the guarantor to recover the overdue payment;
 - (b) the credit provider has given the guarantor notice of the borrower's default;
 - (c) 60 days have elapsed since the day on which the notice was given; and
 - (d) the credit provider has taken steps to recover the amount of the overdue payment from the guarantor.¹²
- 3.5** A default listing relating to an overdue payment remains on an individual's credit file for five years.¹³ This information can significantly impact on a consumer's ability to obtain credit, and therefore accuracy and the ability to dispute a listing is vital.

4. Serious credit infringement

- 4.1** A serious credit infringement (also known as a "clearout") is an act done by a borrower that:
- (a) involves fraudulently obtaining or attempting to obtain credit; or
 - (b) involves fraudulently evading or attempting to evade his or her credit obligations; or
 - (c) may be considered as a reasonable indication that the borrower no longer intends to comply with his or her credit obligations.¹⁴
- 4.2** An overdue payment alone is not grounds for reporting a serious credit infringement. To be a serious credit infringement, it must be reasonable to infer that the individual no longer intends to comply with and is deliberately avoiding his or her credit obligations.
- 4.3** A credit provider must exercise caution when reporting a serious credit infringement against an individual.¹⁵

⁸ Where there are joint debtors who live at different addresses, a notice must be sent to each of them separately.

⁹ Rule 17.2(d), COSL Rules – 8th Edition

¹⁰ Credit Reporting Code of Conduct, para 55C

¹¹ Privacy Act 1988 (Cth), section 18E1(ba)

¹² Privacy Act 1988 (Cth), section 18E1(ba)

¹³ Privacy Act 1988 (Cth), section 18F(2)(c)

¹⁴ Privacy Act 1988 (Cth), section 6

¹⁵ Credit Reporting Code of Conduct, para 65

- 4.4** A credit provider is not required to notify an individual before reporting a serious credit infringement to another credit provider or law enforcement authority.¹⁶
- 4.5** A serious credit infringement remains on an individual's credit file for seven years.¹⁷ As with a default listing, this can significantly impact on a consumer's ability to obtain credit, and therefore accuracy and the ability to dispute a listing is vital.
- 4.6** A borrower may have little or no opportunity to provide a reasonable excuse for failing to respond to the credit provider. This is because the credit provider is not required to wait 60 days after the payment due date before reporting a serious credit infringement. We therefore consider that a serious credit infringement should be 'downgraded' to a default listing or removed entirely if it is subsequently demonstrated that the borrower did not attempt to defraud the credit provider or to permanently evade his or her credit obligations.
- 4.7** If a credit provider has reported a joint serious credit infringement in relation to an outstanding amount, and is satisfied that one of the individuals has been released from the obligation to repay that amount through a court order or legal agreement, the credit provider must ask the credit reporting agency to remove the serious credit infringement listing from that individual's credit file.

5. Obligations of the credit reporting agency

- 5.1** When a credit reporting agency becomes aware that information provided by a credit provider in relation to an overdue payment or serious credit infringement is inaccurate, the credit reporting agency must:¹⁹
- (a) notify the credit provider in writing that the overdue payment or serious credit infringement against the individual was listed inaccurately;
 - (b) request the credit provider to determine whether other listings made by it were also inaccurate and to conduct an investigation into such listings; and
 - (c) inform the Privacy Commissioner in writing of the above.
- 5.2** Credit reporting agencies must maintain annual records showing the occurrence of serious credit infringement listings made by individual credit providers where the listings had not previously been reported as overdue payments. The records must be made available when requested by the Privacy Commissioner.²⁰

6. Obligations of credit provider

- 6.1** If an overdue debt reported to a credit reporting agency is later paid off, the credit provider must, as soon as practicable, inform the credit reporting agency that the individual has ceased to be overdue in making the payment. If the individual claims that he or she is not overdue in making the payment, this must also be reported to the credit reporting agency. The credit reporting agency must note this in the individual's credit file.
- 6.2** If a credit provider reaches agreement with a customer to pay off an overdue amount by instalments, and it has previously notified the amount as overdue, it may (but is not obliged to) tell the credit reporting agency about the arrangement so that they can put a note on their file.²¹

¹⁶ Credit Reporting Code of Conduct, para 64

¹⁷ Privacy Act 1988 (Cth), section 18F(2)(g)

¹⁸ Credit Reporting Code of Conduct, para 2.11

¹⁹ Credit Reporting Code of Conduct, para 1.4

²⁰ Credit Reporting Code of Conduct, para 1.18

²¹ Credit Reporting Code of Conduct, para 2.10

7. Credit files and credit reports must be accurate

- 7.1** A credit provider or credit reporting agency in control of credit reports or credit files must:²²
- (a) take reasonable steps to ensure that personal information in the credit file or credit report is accurate, up-to-date, complete and not misleading;
 - (b) have safeguards to protect the credit file or credit report against loss, unauthorised access, use, modification or disclosure and any other misuse;
 - (c) if the credit provider or the credit reporting agency is required by law or otherwise to produce the credit file or credit report, take all necessary steps to prevent unauthorised use or disclosure of personal information contained in the credit file or credit report; and
 - (d) ensure that any commercial defaults are not listed on an individual's consumer credit file.²³

8. Alteration of credit files and credit reports

- 8.1** The credit reporting agency in control of a credit file must take reasonable steps to ensure that appropriate alterations are made such that the personal information contained in the file or report is accurate, up-to-date, complete and not misleading at all times.²⁴
- 8.2** If an individual asks the credit provider or credit reporting agency to include into their credit file the individual's statement setting out the alterations that need to be made to their file, the credit provider or credit reporting agency must take reasonable steps to comply within thirty days of receiving the request.

9. Our approach to complaints about default listings and serious credit infringements

- 9.1** If a borrower alleges that a credit provider has incorrectly listed a default or serious credit infringement on his or her credit file:
- (a) we will ask the borrower to:
 - (i) consider this Position Statement;
 - (ii) check whether they received a notice in terms of paragraph 3.1(d);²⁵ and
 - (iii) provide us with any documents, information and other evidence as may be requested; and
 - (b) we will ask the credit provider to show us that it listed the default or serious credit infringement in accordance with paragraph 3 or 4 (as the case may be).
- 9.2** If a borrower claims that the credit provider did not notify them that a credit infringement might be reported to a credit reporting agency, we will ask the credit provider to provide us with evidence of the notification. The notification may have appeared in:
- (a) the loan application;
 - (b) the loan contract;
 - (c) a Privacy Act disclosure form or similar document; or

²² Privacy Act 1988 (Cth), section 18G

²³ Privacy Act 1988 (Cth), section 18K(6)

²⁴ Privacy Act 1988 (Cth), section 18J(1)

²⁵ Privacy Act 1988 (Cth), section 18J(2)(a) and (b)

²⁶ But only where the complaint is not about a serious credit infringement because no such notice is required in such cases - Credit Reporting Code of Conduct Para 64

- (d) the written notice of arrears.
- 9.3** If a borrower claims that the credit provider listed a default without first providing them with the notice referred to in paragraph 3.1(d), we will ask the credit provider to prove, on balance, that the written notice was sent to the borrower's last known address.
- 9.4** For example, we may ask the credit provider to provide us with:
- (a) a copy of the actual notice that was sent to the borrower; or
 - (b) if the actual notice is not available, a copy of the template of the notice, information on how the relevant fields were completed, a contemporaneous record (such as file notes) showing that the notice was sent to the borrower and the date on which it was posted or served.
- 9.5** If it appears that the credit provider sent the notice to an out-of-date or incorrect address:
- (a) we will ask the credit provider to show us its record of the borrower's last known address, as well supporting documentation such as file notes or copies of written communications received from the borrower;
 - (b) we will ask the borrower for a copy of any written communication that proves they informed the credit provider of their new address; and
 - (c) if the borrower is not able to provide us with this, we will ask the borrower to describe how they informed the credit provider of their new address as well as:
 - (i) the date they contacted the credit provider;
 - (ii) the name of the person they spoke to;
 - (iii) details of the information they gave the credit provider; and
 - (iv) any records they may have made about the information they provided to the credit provider.
- 9.6** If the credit provider used the services of a third party (such as a mailing house) to serve the notice of the overdue payment, we may request:
- (a) a copy of the notice;
 - (b) evidence²⁷ that it was sent to the borrower; and
 - (c) evidence of the date on which the notice was sent.
- 9.7** In order to list a serious credit infringement (other than in relation to fraud), a credit provider must have formed a reasonable opinion that the borrower does not intend to pay the debt. We will treat a credit provider as having formed such an opinion if it can show us that it:
- (a) repeatedly attempted to contact the borrower through known methods of communication available to it, but was unsuccessful²⁸;

²⁷ The evidence may be in the form of a report listing the names and addresses of recipients of the mail-out. The credit provider should black out or remove the personal information of any person who is not party to the complaint before providing us with the report.

²⁸ For example, a combination of any of the following: instances of returned mail; no replies to telephone messages or contact telephone numbers disconnected.

- (b) contacted any secondary contacts on the account, as previously nominated by the borrower, to ascertain the borrower's whereabouts, but was unsuccessful; and/or
- (c) received confirmation from a field agent that the borrower no longer resided at the last known address.

9.8 We will require copies of the credit provider's written communications to the borrower, along with copies of any returned mail and contemporaneous file notes of any oral communications.

9.9 Importantly, once we record a complaint, the credit provider must not list a default or serious credit infringement against the borrower for as long as the complaint remains open with us.²⁹ Otherwise, we may be obliged to report the credit provider's conduct to the Australian Securities and Investments Commission ("ASIC").

10. Where a credit provider cannot provide us with information requested

10.1 We may find that a credit provider has incorrectly listed a default or a serious credit infringement if the credit provider is unable to provide us with the documents and information referred to in paragraph 9 within a reasonable time.

10.2 It is not open to the credit provider to assert that it is not responsible for the incorrect listing of a default or a serious credit infringement because the listing was made by someone other than the credit provider; for example, the assignor or seller of the debt. Nor is it open to the credit provider to assert that it acquired the debt from a third party but did not obtain or was not provided with copies of the notices and records which would indicate that the listing was not incorrect. If the credit provider is unable to procure such notices and records from the third party or is unable to do so within a reasonable time, it is unlikely that the credit provider will be able to satisfy us that it has complied with its credit reporting obligations.

11. What we can do if a default has been listed incorrectly

11.1 If we find that a credit provider has incorrectly listed a default or a serious credit infringement, we will generally ask the credit provider to remove the listing at its own cost.

11.2 If we find that a credit provider listed a default against a borrower which could have been avoided if the credit provider had acted in good faith, we may ask the credit provider to instruct the credit reporting agency to remove the default listing.³⁰

11.3 If a default or serious credit infringement has been listed using incorrect information (for example, the amount of the overdue payment or the type of credit obtained), we will ask the credit provider to instruct the credit reporting agency to amend the listing. It is unlikely that we would require the listing to be removed.

11.4 We may also ask the credit provider to provide us with the borrower's updated credit file or credit report³¹ to confirm the removal of the listing.

11.5 We may require the credit provider to compensate the borrower for certain losses which the borrower can show he or she incurred as a result of the incorrect default or serious credit infringement listing.

11.6 Once we are satisfied that the listing has been removed, the borrower's file will be closed and the parties will be notified accordingly.

²⁹ Rule 17.2(d), COSL Rules – 8th Edition

³⁰ COSL Position Statement 2, para.10.2(b)

³¹ As defined in Section 6 of the Privacy Act 1988 (Cth)

- 11.7** If a credit provider removes an incorrect listing at our request, it is not precluded from re-listing the default or serious credit infringement provided the listing complies with the Code and Part IIIA of the Act.
- 11.8** A default listing relating to an overdue payment remains on an individual's credit file for five years.³² If an incorrect listing is removed by the credit provider and is subsequently re-listed in relation to the same overdue payment, time starts to run not from the date when the default is re-listed but from the date of the first listing.³³
- 11.9** If a default has been listed on a borrower's credit file for five years, an assignee of the debt must not subsequently re-list the default in relation to the same overdue payment. If it does so, we will ask the assignee to remove the listing at its own cost.

12. Commercial listings

- 12.1** The Act does not regulate commercial credit, although certain commercial credit information (that is, that an application for commercial credit has been made and the amount of commercial credit applied for) can be recorded on an individual's credit file.³⁴
- 12.2** We consider that it is reasonable for a credit provider to at least provide notice to the borrower of an overdue payment before listing a default on the borrower's commercial credit file. The notice may take the form of:
- (a) written notice of the arrears by post or email;
 - (b) loan statements provided to the borrower that show the overdue payments; or
 - (c) contemporaneous file notes noting the date and time the borrower was informed of the overdue payment.

³² Privacy Act 1988 (Cth), section 18F(2)(c)

³³ Privacy Act 1988 (Cth), section 18F(2)(c) - a default may only remain on a credit file for a max permissible period of 5 years, as explained in the Credit Reporting Advice Summaries.

³⁴ Privacy Act 1988 (Cth), section 18E(1)(b)(i)(B)