11 February 2021

Treasury
Langton Cres
Parkes ACT 2600

By email: CreditReforms@TREASURY.GOV.AU

Dear Treasury,

Re: National Consumer Credit Protection Amendment (Debt Management Services) Regulations 2021 – Exposure Draft – EWON, EWOV, EWOSA and EWOQ Submission

Thank you for the opportunity to comment on the *National Consumer Credit Protection Amendment (Debt Management Services) Regulations 2021 - Exposure Draft* (**Exposure Draft**). This submission has been compiled by the Energy and Water Ombudsman Victoria (**EWOV**), the Energy and Water Ombudsman New South Wales (**EWON**), the Energy and Water Ombudsman South Australia (**EWOSA**), and the Energy and Water Ombudsman Queensland (**EWOQ**). All three organisations are members of the Australia & New Zealand Energy and Water Ombudsman Network (**ANZEWON**) (the **Members**).

The comments below reflect the collective views of the Members in relation to the Exposure Draft, in our capacity as the dedicated external dispute resolution body for energy and water related consumer complaints in our respective jurisdictions. Collectively, we have a strong interest in the development of consumer protections that will prevent consumer harm and reduce complaints in our sector.

The Exposure Draft is positive in that it requires previously unregulated entities to obtain an Australian credit licence, but we are concerned that the conditions of the licence will not apply to the conduct of those entities in relation to energy or water debts. As ombudsman services, our staff frequently deal with entities purporting to provide credit reporting assistance to energy customers, yet offering no real value despite charging significant fees. We urge Treasury to address this consumer protection gap in this or subsequent amendments to the National Consumer Credit Protection Regulations.

Our further comments are set out below.

Energy and Water Ombudsman Services experience of credit repair companies

Energy and water ombudsman services independently resolve a wide range of disputes between customers and utility service providers, ranging from billing complaints, to customer service issues, to provision of service matters, to credit related disputes.

Of those, credit related disputes are a major component of our work, and within those, collection matters are a significant subset. Still further, a large proportion of credit collection cases relate to credit reporting – often where an energy retailer has default listed a customer for non-payment, and the customer is disputing the default listing and attempting to have it removed.

To provide some context, in the 2019/20 Financial Year, *Credit>Collection* complaints were the third highest ranking complaint sub-issue for EWOV, with 1,914 cases. Of those, almost 40% (716 cases) were *Credit>Collection>Credit Rating* matters. For EWON, *Credit>Collection* complaints totalled 1,295 with 67% (875 complaints) relating to *Credit>Collection>Credit Rating.*

In handling *Credit>Collection>Credit Rating* cases, ombudsman staff frequently deal with credit reporting agencies who are purporting to have one or more default listings removed on behalf of the customer. In the experience of ombudsman staff, these entities are often problematic and can hinder rather than help the customer.

Ombudsman staff report that credit repair companies:

- Are highly variable in their competence and professionalism. Some credit repair company staff appear to have little understanding of the credit reporting system;
- Often over-promise, leading the customer to believe they can achieve default listing removals when it is not possible or not necessary to do so;
- Correlate strongly with customers in vulnerable circumstances (e.g. low income and/or CALD customers);
- Sometimes create confusion by failing to provide a signed authority to act when requested, preventing ombudsman services from progressing the case.

Credit repair companies offer no value to customers in relation to energy debt default listings. If it is possible to have an energy debt default listing removed, then ombudsman staff are able to arrange that removal on behalf of the customer free of charge. By contrast, credit repair companies charge significant fees for providing the same service. Often credit repair companies require upfront payments even if they cannot achieve default listing removals.

Frequently, credit repair companies come to ombudsman services to achieve default listing removals when they themselves have been unable to successfully contact the customer's energy or water retailer. In doing so, they often provide incomplete information or otherwise hinder the resolution process while still charging customers for the services we are providing.

The following case studies illustrate typical credit repair agency interaction with an energy and water ombudsman services and the costs imposed on customers:

"Susan"* (EWOV Case No. 2021/1025)

On 27 January 2021 EWOV received an email complaint from a credit repair agency representative on behalf of an energy customer. The email provided no contact information for the customer, no incident address and a very poor description of the issue. The email simply read:

THERE IS A FRAUDULENT ENQUIRY UNDER THIS CLIENTS CREDIT FILE. [Energy retailer – name removed] ARE NOT RESPONDING TO MY EMAILS.

Noting that this was a recurrent problem with complaints referred by credit repair agencies, the EWOV Service Officer conferred with their Team Lead and replied with a request for further information.

On obtaining the customer's contact details, EWOV will contact the customer directly and inform them that we are a free service, and they do not have to pay a credit repair agency to negotiate the removal of an erroneous default listing.

It is more efficient for EWOV to deal with the customer directly than a credit repair agency acting on their behalf - who is charging for work that we can undertake at no cost to the customer.

EWON Case Study 363447

On 6 December 2019, EWON received a complaint from a credit repair agency engaged by a customer about a credit default listed on 19 December 2017 for $2,250.00. The customer said that he had paid the credit repair agency $1,000.00 and if the default credit listing is removed, he will incur further costs of $500.00.

We explained that he can contact EWON directly for assistance and it is free. We asked if he would like the credit repair agency to continue representing him for his complaint with us, and the customer said that he would. We investigated the complaint and identified that the customer's outstanding balance was not 60 days overdue as required to impose a default credit listing and therefore the default credit listing was non-compliant.

The retailer acknowledged this and arranged for it to be removed.

*** - Customer names changed for de-identification purposes.**

Linking of proposed licence conditions to "credit activity"

Under s4A(1) of the Exposure Draft, the provision of debt management services (which is defined to include "*credit reporting assistance*"[1]) is designated a "prescribed activity" for the purposes of item 6 of the table in subsection 6(1) of the *National Consumer Credit Protection Act 2009* (Cth) (**Act**).

The relevant table sets out what constitutes a "*credit activity*", and item 6 states (emphasis added):

> *"the person engages in an activity prescribed by the regulations **in relation to credit**, being credit the provision of which the National Credit Code applies to, or would apply to if the credit were provided."*

Under Part 2 of the Act, entities engaging in credit activities are prohibited from engaging in credit activities without a credit licence[2], so by defining debt management services as a prescribed credit activity in this manner,

[1] *National Consumer Credit Protection Amendment (Debt Management Services) Regulations 2021 (Exposure Draft)*, s4A(2)(b)
[2] *National Consumer Credit Protection Act 2009* (Cth), s29(1)

the Exposure Draft proposes to require debt management firms and credit repair companies to obtain an Australian credit licence, or be liable to penalties under the Act.

Holding such a licence will require those entities to meet a 'fit and proper person test'[3] and undertake their activities 'efficiently, honestly and fairly'[4] – amongst other requirements.[5]

This construction frames the activities of credit repair agencies purely in terms of credit products. Further, under s4C of the Exposure Draft "*credit reporting assistance*" is defined as (emphasis added):

- suggesting the consumer apply for a change to information collected or held by a credit reporting body ***in relation to a credit contract*** for which the consumer is the debtor; or
- assists the consumer to apply for a change to information collected or held by a credit reporting body ***in relation to a credit contract*** for which the consumer is a debtor; or
- suggests that the customer makes a complaint or claim to the credit provider, AFCA or ASIC regarding information held or collected by a credit reporting body ***in relation to a credit contract*** for which the consumer is a debtor, (or institutes proceedings to take action in relation to such a complaint); or
- assists the customer to make such a complaint, or institute such proceedings.

Under the Act, the term *"credit contract"* carries the same meaning as in s4 of the National Credit Code[6] (**Code**), which states:

> *"For the purposes of this Code, a credit contract is a contract under which credit is or may be provided, being the provision of credit to which this Code applies."*

Finally, *"credit"* is defined[7] as being provided if under a contract:

> *(a) payment of a debt owed by one person (the debtor) to another (the credit provider) is deferred; or*
>
> *(b) one person (the debtor) incurs a deferred debt to another (the credit provider).*

In the case of energy and water related debts the contract in question is not a credit contract – but a contract of supply of essential services, and consumers can accrue debt by failing to pay for a good that the utility company has provided (i.e. energy or water). If the consumer does this then the utility provider may make a default listing on their credit file, but the default listing does not relate to a credit contract.

Under the Exposure Draft, the conduct of credit repair agencies in relation to default listings for energy debts (and other non-credit contract related debts) will not fall within the parameters of their licence, or be caught by the definition of *"credit reporting assistance"*.

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[3] *Ibid*, s37(1)(c)
[4] *Ibid*, s47(1)(a)
[5] *Ibid*, s47
[6] *Ibid*, s5(1)
[7] *Ibid*, s3

This creates the anomalous situation where licence conditions will apply to credit repair agencies when they provide credit reporting assistance related to credit contract default listings, but not energy or water debt related default listings. Clearly this represents a significant consumer protection gap, and is of concern to us as energy and water ombudsman services – particularly as we see systemically poor conduct by credit repair agencies on a regular basis.

Current market conditions - a sharp rise in energy debt

While energy complaint numbers have been low during the COVID-19 pandemic (perhaps because energy regulators have required energy retailers not to disconnect customers)[8], energy debt has nevertheless risen sharply.

In November 2020 the Australian Energy Regulator (AER) reported[9] that almost 60,000 households had taken advantage of retailer offers during the pandemic to defer paying their energy bills, and long-term residential energy debt increased by 21% between March 2020 and November 2020, to $124.5 million.

If anything, the impact of the pandemic on small business customers was even sharper – energy debt increased from $35 million in March 2020, to $45 million in June 2020.

In March 2020, the AER released its first Statement of Expectations (**SoE**) to support customers during the COVID-19 period. Under the most recent update, retailers are expected to "*defer referrals of customers to debt collection agencies for recovery actions, or credit default listing*". After the SoE expires, (currently scheduled for 31 March 2021), it is likely that there will be an increase in credit default listings.

Further, we receive some complaints from customers who find out that they have a default credit listing years after it was made, when they apply for some form of credit. This may be because the retailer did not notify them at the time, or they moved to a different property (which is common amongst low income customers) and did not receive the notification.

It is therefore likely that default listings made post the current SoE (i.e. post 31 March 2021) will not be visible for to customers for some time - until circumstances occur when the impact of a listing makes it visible.

EWON Case study – Delay in finding out about, what turned out to be, an incorrect default listing.

On 13 August 2019, EWON received an email complaint from a credit repair agency acting on behalf of a customer. The advocate wrote that a default had been listed on the customer's credit file on 14 July 2016 for $641.00. The customer was not aware of the listing until he applied for financial assistance. He did not recall receiving any notifications from the retailer or a mercantile agent in relation to the debt, or being at risk of a default credit listing.

[8] Australian Energy Regulator, *Statement of expectations of energy businesses: Protecting customers and the energy market during COVID-19,* 30 October 2020. See: AER Statement of Expectations - From 1 November 2020.pdf

[9] Australian Energy Regulator, *Annual Retail Markets Report 2019-20*, 30 November 2020. Available at: https://www.aer.gov.au/news-release/aer-report-reveals-rise-in-energy-debt-for-small-business-and-households

On being made aware of the default listing, the customer paid the debt in full. EWON investigated and in response the retailer advised that the default had been listed incorrectly, because the final bill was not sent to the customer by his preferred communication method.

The retailer arranged for the default listing to be removed.

Given current market conditions, it is reasonable to expect a wave of energy bill defaults in the coming months, and a subsequent wave of default listings by energy retailers. This is turn will create the potential for an increase in credit repair agency activity, seeking to negotiate the removal of erroneous energy debt default listings – or promising to remove legitimate default listings, when they cannot. Very often, the customers engaging these agencies will be in vulnerable circumstances and will be charged a significant fee for this "service". Unfortunately, many customers are not aware that their energy and water ombudsman can undertake the work free, with a greater degree of professionalism and without making unrealistic or misleading promises.

Credit repair agencies do not advise customers that ombudsman schemes provide a free service, despite credit repair agency marketing which positions them as providing consumers with financial support / budgeting advice. This raises issues about the poor ethical conduct of these agencies i.e., they prevent customers from making informed decisions which would be of financial benefit to them, particularly at a time when customer vulnerability is heightened ie unable to secure needed financial support. While ombudsman services do inform customers who have engaged credit repair agencies to act on their behalf that we provide a free service and they do not need to use a credit repair agency to make a complaint to us, this occurs after consumers have already signed binding contracts and paid fees to the credit repair agency.

In closing, the Members request that Treasury revisit the Exposure Draft and widen the definition of "*credit reporting assistance*" as well as applicable licence conditions, so that the conduct of credit reporting agencies is as stringently regulated in relation to energy and water debts, as it will be in relation to credit contract debts. Alternatively, we request that Treasury commit to a further round of amendments in the short to medium term, to address this clear gap in consumer protection.

We trust these comments are useful. Should you need further information or have any queries, please contact Zac Gillam, Senior Policy and Stakeholder Engagement Officer at EWOV, at zac.gillam@ewov.com.au or on (03) 8672 4285.

Yours sincerely,

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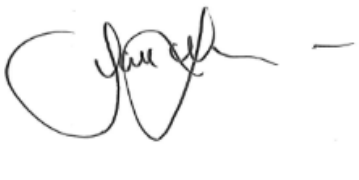

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