ENERGY AND WATER OMBUDSMAN
Victoria Listen Assist Resolve

Credit collection and default listing
March 2018

Background
EWOV receives and investigates complaints about credit and collection issues, including situations where customers have been default listed, or debts have been sold by energy or water providers to credit reporting agencies. This statement outlines EWOV's view of what is fair and reasonable in these situations.

Considerations during an EWOV investigation
Each complaint is reviewed on its individual merits and its outcome will depend on the circumstances of the complaint. However, for credit and default listing complaints EWOV will usually consider:

1. jurisdiction and whether EWOV can investigate the matter
2. a timeline of events and the relevant facts
3. the timeliness of collection action and default listing
4. laws and codes
5. current good industry practice and past outcomes for similar investigated complaints
6. energy or water provider policies and their application
7. special customer circumstances.

1. Jurisdiction and whether EWOV can investigate the matter
EWOV's Charter enables EWOV to investigate matters relating to billing disputes as well as credit and payment services[1]. EWOV interprets this as including complaints about high bills, catch up bills, estimated bills, billing delays, bill payments or refunds and payment options offered to customers as well as complaints about the collection processes of an energy or water provider, such as debt collection and the registering of customers with credit reporting bodies. EWOV's Charter also states that EWOV can investigate complaints involving the conduct of an energy or water provider's employees, agents, contractors or officers[2].

Generally, where a credit or default listing matter relates to an energy or water debt, EWOV will have jurisdiction and will investigate the issue. This includes situations where the debt has been sold by the energy or water provider to a third party[3]. In addition to any complaint about the actions of the energy or water provider, the customer may have concerns about the actions of the third party debt collector or credit reporting body. In those cases, EWOV may suggest that the matter also needs to be raised with the appropriate credit or financial dispute resolution body.

[1] EWOV Charter Clause 2.7(b)
[2] EWOV Charter Clause 2.9
[3] EWOV is the appropriate dispute resolution body to investigate issues relating to Victorian energy or water providers, including issues relating to debts or defaults. In these cases, EWOV will consider whether the energy or water provider complied with any relevant regulatory requirements prior to the sale of the debt. In some instances EWOV may suggest an energy or water provider needs to buy back a specific debt.

2. A timeline of events and the relevant facts

For this type of complaint it is important for EWOV to establish:

- The amount and age of the debt.
- Whether the amount of the default listing is correct.
- If the amount listed is incorrect, the difference between the amount listed and the correct amount.
- The process followed by the provider before default listing or selling the debt, including whether any steps in the process were missed or incorrectly completed.
- Whether the customer was notified that they had an overdue debt, they could be default listed or the debt could be sold, and when any notification occurred.
- Whether the customer gave the provider correct personal details, such as a forwarding address.
- The usual method of communication between the customer and the provider, for example via post or email.
- Whether the customer followed up with the provider if bills or notices were not received.
- Whether there was any dispute about the billing, the overdue amount or the credit management process.
- Whether there were any arrangements in place to pay the debt.
- Whether there were hardship indicators, and any steps taken by the provider once it became aware of the customer's financial situation.
- The timeliness of default listing by the provider – was it too early[4] or too late[5]?
- Whether the provider made appropriate use of all the relevant contact information available, for example failing to use correct address details even though these were available.
- Whether the provider or customer complied with any other legal obligations, such as appropriately addressing a billing dispute, applying "out of code" billing adjustments required for catch up bills or offering appropriate time to pay a catch up bill amount[6]. If other legal obligations have not been met the listed debt may be incorrect, or the debt may not yet be "overdue".
- Whether the customer was default listed for their own energy or water use or consumption by a third party, and whether the customer knew or was related to the third party.
- Any proof or documentation available to support the actions taken by the provider prior to default listing or selling the debt. EWOV expects that copies of the actual documents sent to the customer will be provided.
- Any proof or documentation available to demonstrate payments made by a customer, or advice received that the debt would not be default listed or sold.
- Any communications between the customer and provider which could amount to a contract variation, such as a payment agreement part way through the collections process.
- Actions of the customer and provider relating to the whole complaint, including whether one party seems to bear greater responsibility for the issue.
- Whether the customer or provider initiated communications.
- The impact of the default listing or sale of the debt on the individual customer.

[4] For example, before the debt was 60 days overdue or outside the timeframe requirements of the relevant notices.

[5] For example, beyond the timeframes following the relevant notice, or more than 12 months after the debt was able to be listed (discussed further below at points 3 and 4).

[6] For example, requirements under the *Energy Retail Code* version 10a Clauses 6.1 and 6.2, the *Energy Retail Code* version 11 Clauses 29 and 30, the *Customer Service Code - Urban Water Businesses* Clause 4.8, or the *Rural Water Customer Service Code* Clause 3.7.

- Any other relevant information depending on the facts of an individual complaint, as the above list is not exhaustive.

3. The timeliness of collection action and default listing

EWOV expects that any collection action and steps to default list a customer must be reasonable and timely. Timely action ensures the effects of a debt are not unreasonably or unfairly prolonged. To be timely, EWOV considers appropriate collection action or default listing will take place within 12 months. The 12 months commences at the point where the debt is 60 days overdue and the amount can be listed.

Despite a legal requirement for default listings to be removed when the debt becomes statute-barred[7], our case handling experience indicates that in practice it is still more common for a listing to be removed when the timeframe from the listing date has passed rather than when it becomes statue-barred, prolonging the effect of the debt.

EWOV considers there is a difference between a legal obligation and a legal entitlement. The ability to list a default is not an obligation on a credit provider, rather it is an entitlement. The exercise of such an entitlement should be done in a timely and reasonable manner. EWOV considers it is fair and reasonable to expect a provider to carry out appropriate credit recovery, including default listing, within a reasonable period of time, such as 12 months from the date the provider has the right to exercise this entitlement. Where this has not been done, EWOV will ordinarily require removal of the default listing.

4. Laws and codes

EWOV expects customers and providers to meet their legal and regulatory obligations. Obligations under laws and codes represent minimum standards. Consideration of what is fair and reasonable includes, but is not limited to, the legal requirements.

When investigating credit default listing complaints, EWOV considers whether the default listing complies with any relevant regulatory obligations and whether refusal to remove a listing appears to be fair and reasonable in the particular circumstances. Similarly, EWOV will consider whether any sale of the debt complies with any legal obligations, and whether a provider's decision to sell the debt was fair and reasonable in the circumstances.

Customers are often denied credit while their credit history shows a default. Therefore, EWOV expects that providers will comply with their legal obligations in an accurate, reasonable and timely way when default listing or selling debt. EWOV considers that taking longer than 12 months from the date a debt becomes overdue to default list or sell a debt unfairly and unreasonably prolongs the effect of the debt.

The credit reporting regime changed significantly on 12 March 2014. Prior to that date, credit reporting obligations for most providers[8] arose under the version of the *Privacy Act* 1988 (*Privacy Act*) in force at the time and the *Credit Reporting Code of Conduct*. Since 12 March 2014, credit reporting obligations generally arise under the current version of the *Privacy Act* and the *Privacy (Credit Reporting) Code 2014*.

[7] Discussed further at point 4 - Laws and codes.

[8] As statutory corporations, water providers are not subject to the same regulatory requirements as energy providers.

The notification requirements that must be satisfied before a default may be listed on an individual's credit report are those set out in the version of the *Privacy Act* and the relevant code in force at the time the listing was made.

Requirements for default listings made prior to 12 March 2014

Before a provider was able to default list a customer for an overdue amount, the debt needed to be at least 60 days overdue and the provider needed to have taken steps to recover the amount outstanding[9]. In addition, a customer's personal information was not able to be disclosed to a credit reporting agency unless, when the information was initially collected, the customer had been informed that this disclosure may happen[10]. A provider was also required to reasonably believe information disclosed to a credit reporting agency was correct[11].

A provider was not able to give information to a credit reporting agency about a customer being overdue in making a payment where the law stopped the provider from recovering the debt[12]. Normally, the law will stop a provider from recovering the debt if more than six years has passed since the debt became due[13].

Requirements for default listings made on or after 12 March 2014

Providers are now only able to default list a customer for an overdue amount if[14]:

- The amount is $150 or higher; and
- The payment is at least 60 days overdue; and
- Collection of the amount is not prevented by a statute of limitations; and
- The required notices have been provided to the customer.

Providers must send two separate written notices to a customer prior to listing a default against a customer's credit record.[15]

The first notice needs to inform the customer of the overdue payment and request payment of the outstanding amount. The first notice can be sent as soon as the payment becomes overdue.

The second notice needs to inform the customer that if the amount overdue is not paid, the provider intends to give information about the default to a credit reporting body. The provider must wait at least 30 days after issuing the first notice before it can send the second notice.

The notices must be sent to the customer's last known address, which can include an email address. The provider should consider how it usually communicates with a customer when deciding whether to use a postal or email address.

The provider has to wait at least 14 days after issuing the second notice before disclosing the default to a credit reporting body. The provider cannot wait more than three months after issuing the second notice to list the default. If the three month period has expired and the default has not been listed then

[9] (Pre 12 March 2014 version) *Privacy Act* s18E(1)(b)(vi) and *Credit Reporting Code of Conduct* paragraph 2.7
[10] (Pre 12 March 2014 version) *Privacy Act* s18E(8)
[11] (Pre 12 March 2014 version) *Privacy Act* s 18E(8) and *Credit Reporting Code of Conduct* explanatory note 53
[12] *Credit Reporting Code of Conduct* paragraph 2.8 and explanatory note 55A
[13] *Limitation of Actions Act* 1958 s5
[14] (Current version) *Privacy Act* s6Q
[15] (Current version) *Privacy Act* s6Q and s21D(3) and *Privacy (Credit Reporting) Code 2014* clause 9

the provider is required to send a further notice informing the customer of its intention to list the default, and it must also wait an additional 14 days before it is able to disclose the default.

Where a customer has made a request for hardship assistance and the provider has agreed to, or is assessing, the hardship request then the provider is not able to give information to a credit reporting body provided the customer complies with the terms of the hardship assistance[16].

In addition, providers need to take reasonable steps to make sure that the customer's personal information included in a default listing is correct[17].

Compliance with laws and codes

To show compliance with legal requirements, EWOV considers that a provider should be able to demonstrate:

- The default information disclosed is correct, or it was reasonable for the provider to believe the information was correct, for example any overdue amount claimed was correctly calculated and billed to the customer and is in fact due and payable (not subject to an instalment or other payment arrangement).
- The debt was overdue for at least 60 days at the time the default was listed and is not statute-barred.
- For listings on or after 12 March 2014, the debt is for an amount of $150 or more.
- The provider has taken any required steps to recover the debt and to provide any required notice to the customer within the correct timeframes[18].
- Notices were sent to the customer's last known address.

EWOV expects that energy or water providers would be able to provide actual copies of documentation sent to a customer to demonstrate compliance with their legal obligations[19].

Notice requirements when customers don't make agreed payments

Sometimes, after one or both required notices have been sent to a customer, the customer will agree to a payment arrangement for the debt owed. The customer may then subsequently default on the agreed payment arrangement.

EWOV sought advice from the Office of the Australian Information Commissioner (OAIC)[20] about whether the original notices would be sufficient in this type of scenario, or whether a provider would need to issue new notices.

The OAIC advice indicates that:

- when a customer and provider have agreed to a new payment arrangement which amounts to a change to the contract; or

[16] *Privacy (Credit Reporting) Code 2014* clause 9.1

[17] *Australian Privacy Principle 10 – quality of personal information*

[18] For example, for listings prior to 12 March 2014, proof that the customer had been notified at the time their personal information was initially collected that the information could be disclosed to a credit reporting agency. Generally notification or terms and conditions contained in contract "fine print" will be insufficient and separate notification will be required. For listings on or after 12 March 2014, proof that the second notice required had been sent at least 30 days after the first notice, and that any default was disclosed to a credit reporting body between 14 days and three months after the second notice was issued.

[19] Generic template documents or system generated records (for example "data successfully extracted") are not sufficient.

[20] The OAIC registers and enforces the *Privacy (Credit Reporting) Code* 2014

- a provider represented, or otherwise induced an assumption by the customer, that the provider would not enforce its rights against the original payment terms

then payment would only become overdue according to the terms of the new payment arrangement.

In this scenario, a provider would need to issue new notices[21] before being able to list a default. New notices will be required even if the customer does not make a payment under the agreed payment arrangement.

However, the payment would continue to be overdue, and the original notices would be sufficient, if the provider made it clear that it would maintain its legal entitlements to seek an action against the original payment terms despite offering the customer a payment arrangement.

If a customer and provider have agreed to a payment plan after original notices have been issued, EWOV will consider:

a. whether the communications between the customer and the provider amounted to a change or variation of the contract terms
b. whether the provider said anything in phone calls to represent to the customer that it would not enforce its rights against the original payment terms
c. whether the provider sent any correspondence to the customer outlining that it would not enforce its rights against the original payment terms

If any of these are applicable, then EWOV considers that new notices should have been issued and the correct process and timeframes followed before a default listing occurs. If new notices were not issued before a default listing occurred, then the provider should remove the default listing.

5. Current good industry practice and past outcomes for similar investigated complaints

When assessing what is fair and reasonable in an individual complaint, EWOV expects the actions of a provider will be consistent with or exceed current good industry practice, as well as being consistent with appropriate past complaint outcomes. Other industry practice may also be relevant.

EWOV's experience in dealing with these types of complaints indicates default listings are generally removed where providers have not followed the correct process in listing a customer or where the listing is incorrect. Default listings are generally amended or updated where providers have followed the correct process, or listed the debt for the correct amount, but a customer has since paid the overdue amount.

6. Energy or water provider policies and application

Where provider policies or Customer Charters make statements or representations about how an energy or water provider will deal with credit or collection issues, including default listings or sale of debt, EWOV will consider the application of those policies. EWOV expects that providers will adhere to any statements or representations made in their policies and charters.

[21] As required by the *Privacy Act* s6Q and s21D(3) and *Privacy (Credit Reporting) Code 2014* clause 9

7. Special customer circumstances

EWOV considers any relevant special customer circumstances, including whether the collection action or default listing has had particularly adverse consequences for the individual customer. Given that customers are generally denied credit while their credit history shows a default, EWOV will need to be satisfied that the default listing is appropriate, as well as fair and reasonable in the circumstances. EWOV will need to be similarly satisfied in matters about the sale of debt.

When determining a fair and reasonable outcome EWOV will also consider the actions of the customer, for example whether the customer followed up with their provider about the missing bills and/or provided a forwarding address for communication with the provider.

Complaint resolution and outcomes

To resolve these types of complaints, EWOV may:

- Ask a provider to remove a credit default listing or buy back a debt where the provider has incorrectly or inappropriately made a listing or sold a debt, for example, if the debt amount was less than $150 or was incorrect, if the debt is statute-barred, or if inadequate notice was provided.
- Ask a provider to remove a default listing which could have been avoided if the provider had acted in good faith, including offering appropriate assessment of the customer's hardship request and hardship assistance.
- Require a customer's credit file to be updated or amended, for example, if a debt has been paid, if the listing does not correctly reflect statute-barred debt, or if a payment arrangement has been agreed to.
- Ask a provider to compensate a customer for losses incurred because of the incorrect default or serious credit infringement.
- Ask a provider to "downgrade" a serious credit infringement to a default listing or remove it entirely if the provider cannot reasonably demonstrate that the customer fraudulently obtained credit or evaded his or her credit obligations (or attempted to do so).
- Require any duplicate listing to be removed.
- Ask a provider to make any appropriate additional offers to resolve the complaint, which could include further recognition for customer service issues.

In situations where EWOV is satisfied that a provider followed the correct process to default list a customer, EWOV will generally not require the removal of the default listing. However, depending on the individual circumstances (for example, where EWOV is aware a customer has experienced family violence), EWOV may consider it is fair and reasonable for default listing to be removed even if the correct process was followed.