AUSTRALIAN RETAIL CREDIT ASSOCIATION

25 February 2022

Australian Law reform Commission

Australian Law Reform Commission (ALRC)
Interim Report A: Financial Services Legislation
ALRC Report 137: November 2021

Thank you for the opportunity to provide our submission in relation to Interim Report A: ALRC Report 137, 2021 (**Interim Report A**), the first interim report issued by the ALRC in the course of the current review of the legislative framework for corporations and financial services regulation (**the Review**).

Australian Retail Credit Association (ARCA) – background & experience

ARCA is the peak industry association for businesses using consumer information for risk and credit management. Our Members include Australia's leading banks, credit unions, finance companies, fintechs and credit reporting bodies and, through our Associate Members, many other types of related businesses providing services to the industry. Collectively, ARCA's Members account for well over 95% of all consumer lending in Australia.

ARCA is also the developer of the Privacy (Credit Reporting) Code 2014 (**CR Code**), as well as drafters of the industry rules for data sharing, and the data standards for data supply.

ARCA has also developed a specialised knowledge of the Privacy Act and in particular Part IIIA, as evidenced by its previous submission to the Attorney General's Department which was provided in response to the current Privacy Act review and which noted a number of issues and themes in relation to the operation of the Privacy Act and in particular, Part IIIA. We ***attach*** a copy of this submission at Annexure A, with this correspondence.

Through our broad experience across a range of legislation relating to consumer lending (such as the Privacy Act, the National Consumer Credit Protection Act 2009 (**NCCP Act**) including the National Credit Code (**Credit Code**)), we have had to recognise and respond to the complexity, and at times inconsistency in approaches, which appear within and between different legislation and related legislative instruments.

It is our experience that these differences in approach and inconsistences create a number of challenges for all stakeholders (industry, consumers, financial counsellors, etc.,) including;

- creating difficulties in terms of the ability for stakeholders to understand their obligations and rights resulting in the potential for technical non-compliance with a particular set of rules or regulations,
- giving rise to differing interpretations of legal and regulatory requirements which can generate operational inconsistencies and inefficiencies, and
- the increased potential for disputes.

In light of this experience, ARCA recognises and appreciates the importance of legal and regulatory simplicity and consistency, particularly in respect of interrelated and at times, overlapping, legislative regimes such as the Privacy Act and the NCCP Act.

Scope of the Review and ARCA's submission

We would like to note at the outset that ARCA welcomes and strongly supports the Review. We are of the view that the ALRC's review into the simplification of the laws that regulate financial services in Australia has the potential to greatly benefit the development, and help shape the ongoing evolution of, the Australian financial services regulatory and legal landscape.

However, having reviewed Interim Report A and the previous materials issued by the ALRC, we are concerned by the apparent limitation of the Review to incorporate consideration of the laws and regulation relating to credit reporting in Australia.

For instance, we note that page 94 of Interim Report A the ALRC has set out a financial services regulatory ecosystem map, which the ALRC describes as a "...*visualisation categorising the main sources of regulation for corporate and financial services*." Whilst this ecosystem map refers to the NCCP Act and '*other relevant Commonwealth Acts'* it does not refer to the Privacy Act and nor does it contain any reference to credit reporting.

The regulation of credit and credit reporting is an extremely important aspect of the Australian financial services regime and we strongly urge the ALRC to give consideration to those laws and regulations relating to credit and credit reporting during the course of the Review and in particular, when formulating its ultimate recommendations in the Final Report. Enhanced data exchange enables financial institutions to undertake stress testing analysis and determine their capital position on a risk-adjusted basis, improve their ability to manage credit risks and facilitate sound credit allocation decision-making. This, in turn, promotes macro-financial stability and enables a more productive allocation of resources in the economy, as well as reducing the risk of disequilibria in asset markets.

In light of the above we consider that failure to give appropriate consideration to the laws relating to the regulation of both credit and credit reporting would result in an important element of the financial services legal system being overlooked and that the consideration of these laws and regulations should be considered against those principles which the ALRC has said will guide it during the course of the Review and which are set out in the Introduction section of Interim Report A. These guiding principles include the requirement for legislation to be clear, to identify fundamental norms and to operate so as to promote meaningful compliance with sufficient legislative flexibility.

We have set out below in detail under section A, a discussion of a number of issues and unintended consequences which arise in connection with, or as a result of, the current legal and regulatory landscape and which we believe could be addressed through applying the ALRC's five principles to the credit and credit reporting regulatory system. Such an approach could involve grouping together in one place (for instance, in a single piece of legislation or regulatory instrument), the high level provisions of the laws relating to credit and credit reporting, with related instruments providing clarity and operational detail so as to assist with consistency and compliance with the laws.

Further, we consider that those related instruments providing detail and operational guidance, should be contained within a format which is capable of being modified in line with changes to the credit and credit reporting landscape and which does not necessarily require the passage of laws via Federal Parliament. Such a format should ensure sufficient 'flex' so that regulation can keep pace with innovation and the development of new types of financial products and services (for instance, the introduction of Buy Now Pay Later (**BNPL**) products).

In terms of the stated scope of the Review, we note that the ALRC has advised that while chapter 7 of the Corporations Act is a key area of focus for the Review, in developing recommendations it will also consider financial services legislation and regulation not contained within the Corporations Act, but which are relevant to corporations and financial services. In this context, we note the ALRC's statement that "*The ALRC's recommendations will have implications for legislative design well beyond Chapter 7 of the Corporations Act…"*

In addition, we note that while the ALRC has specifically invited submissions in relation to the 16 proposals and 8 questions set out within Interim Report A, stakeholders are *"…also welcome to comment on other issues that they consider relevant, and that may not be addressed by particular proposals or questions."*

In light of these statements, ARCA proposes to provide its feedback and commentary under the following three categories:

A. Financial services legislation and regulation not contained within chapter 7 of the Corporations Act, with reference to legislation and regulation predominantly relevant to the regulation of credit and the credit reporting regulatory framework.

B. Commentary in relation to certain proposals and questions contained within Interim Report A. In particular, Recommendation 7, Recommendation 9, Recommendation 12 and proposal A6.

C. Commentary in relation to matters which are referred to within Interim Report A but which do not fall within the stated proposals and questions.

A. ARCA's feedback – Financial services legislation and regulation not contained within chapter 7 of the Corporations Act

It is our view that certain aspects of the laws surrounding the regulation of credit and credit reporting (and in particular, Part IIIA of the Privacy Act and its relationship to the NCCP Act and the Credit Code) raise a number of issues which are similar to the issues and themes being considered by the ALRC in the course of the Review and as such, are appropriate for

noting. While not directly related to the Corporations Act, these issues demonstrate the problems caused by complex, and often inconsistent, regulatory regimes.

Specifically, it is ARCA's position that:

i. Similar to financial services law generally, the laws surrounding the regulation of credit and credit reporting is fragmented and can be potentially difficult to navigate, with relevant parts of the law located within differing regulations, codes, statutes or instruments.

For example, an individual seeking to navigate the laws relating to credit reporting would (subject to the particular area or matter being considered) be required to have reference to differing laws and regulations, including provisions contained within;

- Part IIIA of the Privacy Act and the Privacy Act generally,
- the CR Code,
- the NCCP Act, including the Credit Code,
- Privacy Regulation 2013,
- documentation relevant to various legislation which is created from time to time and which amends primary legislation (for example, the National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Act 2021, (**the Amending Act**) which amongst other outcomes, introduced the reporting of Financial Hardship Information (**FHI**) within the Australian credit reporting system).

An industry participant (as opposed to a consumer) which wants to participate in the comprehensive credit reporting regime (including that created under the mandatory CCR regime) would also need to consider the business-to-business rules and data standards under which credit reporting information is exchanged between credit providers, comprising the Principles of Reciprocity and Data Exchange and the Australian Credit Reporting Data Standards.

ii. Key terms are defined and treated differently within legislation and between related statutes and regulations, resulting in legal uncertainty and inconsistency. For example, the definition of a 'credit contract' and the treatment of the term 'credit', differs between the Privacy Act and the NCCP. As a result of the differing definitions of credit and credit contract, various issues and potentially unintended legal consequences arise, particularly when new and emerging types of financial services products and arrangements are introduced into the community.

For example, under BNPL arrangements the credit provided to an individual pursuant to the arrangement is usually exempt under the NCCP Act and is therefore not subject to the requirements of that Act.

However, the definition of 'credit' at section 6M of the Privacy Act does not require the relevant contract, arrangement or understanding to be regulated by the NCCP Act. Rather, the Privacy Act adopts an expansive approach when defining 'credit', which at a high level requires there to be a contract, arrangement or understanding under which a payment obligation in respect of debt is deferred.

Accordingly, under the Privacy Act, a BNPL arrangement (which is not regulated by the NCCP Act) can be deemed to be 'credit' and therefore, capable of being the subject of credit reporting.

We have set out below in sub-paragraph (iii) a discussion of some of the consequence which flow as a result of the differing definitions and treatment of these terms.

iii. There are instances in which the impact of certain provisions of the NCCP Act and the Credit Code upon the operation of Part IIIA of the Privacy Act is unclear, or otherwise results in legal uncertainty or poor outcomes for stakeholders.

For example, the Amending act allows for the reporting of FHI in respect of a 'financial hardship arrangement' (**FHA)** made in relation to consumer credit. The new subsection 6QA(1) of the Privacy Act (as contained in the Amending Act) sets out when an FHA will exist. Relevantly, an arrangement can only exist if:

"…(b) the National Credit Code applies to the provision of the credit…"

As noted earlier, BNPL arrangements are generally not provided pursuant to a credit contract to which the Credit Code applies and as such, are not capable of being the subject of the reporting of FHI, per the Privacy Act.

It is unclear if it was the intention of the legislator for BNPL arrangements to specifically be excluded from the operation of the reporting of FHI or if this is an unintended consequence arising from the differing treatments and definitions of 'credit' between the Acts. This is a particularly relevant issue for BNPL providers which are the subject of mandatory credit reporting requirements (i.e., an 'eligible licensee' as referred to in the Amending Act) and which hold an Australian Credit Licence.

For those BNPL providers which are also eligible licensees under the Amending Act, there is an obligation upon the provider to supply mandatory credit information in relation to the provision, or possible provision of consumer credit within the meaning of the Privacy Act. As such, credit provided in relation to a BNPL arrangement will be captured within the mandatory credit reporting regime and an eligible licensee will be required to report, amongst other mandatory credit information, repayment history information (**RHI**).

Whilst RHI is usually reported in relation to the repayment terms set out in the individual's contract or arrangement, the Amending Act operates so that if an FHA is in place, the eligible licensee will be required to determine RHI by reference to the monthly payment obligation as it is affected by the FHA. As noted above, BNPL arrangements are not capable of being the subject of an FHA (because the Credit Code does not apply to the provision of the credit) and as a result, RHI cannot be reported for those BNPL arrangements the subject of the hardship arrangement.

The resulting effect of the application of these differing laws can be described as follows:

- Credit providers which hold an Australian Credit License can disclose RHI for a BNPL account and eligible licensees (i.e. the major banks) must disclose RHI for those products:
- However, credit providers cannot report FHI for BNPL accounts even if they agree to an arrangement with a customer experiencing financial hardship:
- Therefore, a credit provider would report RHI that reflects the missed payments during the arrangement even if the individual was complying with the terms of the hardship arrangement (again, eligible licensees must report those missed payments regardless of the arrangement):
- For a consumer, this means that even hardship arrangements from the same credit provider but for different products may be reported differently, which is unlikely to meet consumer expectations and potentially lead to consumer confusion and complaints.

This outcome appears to be directly inconsistent with the stated intent of the recent hardship reporting reforms. Without further steps being taken, this would – in relation to BNPL products – embed the poor outcomes that the Amending Act was intended to solve and we consider this is a direct result of the inconsistences in definitions within the NCCP Act and Privacy Act.

Another example of the impact provisions of the NCCP Act can have upon the operation of Part IIIA of the Privacy Act, is in relation to BNPL providers who do not hold an Australian Credit Licence. Sections 20E(4) and 21D(3)(c)(i) of the Privacy Act require a credit provider to hold an Australian Credit Licence in order to be able to disclose and access RHI (or information derived from RHI). As noted previously, BNPL arrangements and products are not regulated by the NCCP Act (including the Credit Code) and as a result a BNPL services provider which does not otherwise engage in credit activities, may not be required to hold an Australian Credit License.

Accordingly, under the Privacy Act an unlicensed BNPL provider will not be able to access and disclose RHI despite being permitted to do so otherwise under the Act. However, those BNPL providers which do hold an Australian Credit License will be able to receive and disclose RHI.

RHI is a month-by-month record of whether a consumer has met their monthly payment obligations. It is a powerful form of credit information that can have a significant impact on a consumer's credit worthiness (both positive and negative). By not being able to access or disclose RHI without a valid Australian Credit License, this provides a potential advantage to those BNPL providers who hold such a license (and a potential disadvantage to those who do not), in terms of the credit information potentially available for them to access. The same issue is likely to distort competition in the provision of credit to small businesses, as lenders who operate across both the consumer and SME markets (and hence have an Australian Credit License) have access to credit information about customers that lenders who only service SMEs cannot have.

iv. There is potential for stakeholders to view this area of law as 'too complex' and also in need of simplification. Noting however, that the mere existence of complexity, does not if itself necessarily warrant change or amendment of the law (particularly where to do so may risk creating legal uncertainty or altering the operation of the law).

As noted above, we consider that there is significant merit in the ALRC ensuring that the Review includes the consideration of laws and regulation relating to credit and credit reporting and we this should include consideration in relation to the potential simplification of the Privacy legal and regulatory system.

B. ARCA's feedback – proposals and questions contained within Interim Report A

We have set out below ARCA's support in relation to those Recommendations contained within Interim Report A and which we believe would be appropriate for application to the credit and credit reporting legal and regulatory system as it currently operates, and which could also assist with the re-design of this regime.

i. Recommendation 7: The Corporations Act 2001 (Cth) should be amended to include a single glossary of defined terms

ARCA is supportive of recommendation 7 and considers that in addition to being of benefit to the Corporations Act, there would also be benefit in implementing Recommendation 7 to other Federal Legislation such as the Privacy Act.

In this respect we note that whilst Part II – Divisions 1, 2 and 3 of the Privacy Act set out a number of definitions (including general definitions and key definitions relating to credit reporting), these divisions do not contain all of the complete definitions of all defined terms which exist within the Privacy Act. Rather, there are a number of defined terms which appear within the Privacy Act and which are defined at different sections and under different headings.

ARCA considers that a single glossary of all defined terms included within the Privacy Act (which does not require the reader to refer to a separate section of the Act in order to locate the definition of a particular term), would greatly assist individuals to navigate the Privacy Act. In particular, a single glossary of all defined terms may promote a sense of certainty and clarity when interacting with the legislation, as opposed to the current state by which there is risk of key definitions being missed in the absence of a review of the entire Act. We also consider that a single glossary should include relevant terms (and their definitions) which appear within other legal or regulatory instruments, where it is appropriate to do so.

ii. Recommendation 9: The Corporations Act should be amended so that the heading of any provision that defines one or more terms (and that does not contain substantive provisions) includes the word 'definition'.

ARCA is supportive of recommendation 9 and again considers that in addition to being of benefit to the Corporations Act, there would also be benefit in implementing this Recommendation in respect of other Federal Legislation such as the Privacy Act. ARCA notes that there are a number of provisions within the Privacy Act which define one or more terms (and that do not contain substantive provisions) but which do not contain the word 'definition' within the heading.

By way of example, Part IIIB, division 2, section 26B of the Privacy Act contains the following definition of the term 'registered APP code';

26B What is a registered APP code

(1) A registered APP code is an APP code:

(a) that is included on the Codes Register; and

(b) that is in force.

(2) A registered APP code is a legislative instrument.

(3) Subsection 12(2) (retrospective application of legislative instruments) of the Legislation Act 2003 does not apply to a registered APP code.

Note: An APP code cannot come into force before it is included on the Codes Register: see paragraph 26C(2)(c).

Similarly, the term 'registered CR code' is also defined within the body of the Privacy Act, at Part IIIB, division 2, section 26M, titled 'What is the registered CR code';

> ***26M What is the registered CR code***
>
> *(1) The registered CR code is the CR code that is included on the Codes Register.*
>
> *(2) The registered CR code is a legislative instrument.*
>
> *(3) Subsection 12(2) (retrospective application of legislative instruments) of the Legislation Act 2003 does not apply to the registered CR code.*

ARCA considers that both sections 26B and 26M referred to above, as well as other definitional sections of the Privacy Act, would be suitable for amendment in line with recommendation 9, so as to include the word 'definition' within the headings of these provisions

iii. Recommendation 12: The Office of Parliamentary Counsel (Cth) should commission further research to improve the user-experience of the Federal Register of Legislation

ARCA supports recommendation 12 and considers that there is merit in the scoping of the potential to improve the user-experience of the Federal Register of Legislation.

iv. Proposal A6: which states that "In order to implement Proposal A3:

> *….*
>
> *c. a definition of 'credit' that is consistent with the definition contained in the National Consumer Credit Protection Act 2009 (Cth) should be inserted in the Corporations Act 2001 (Cth) and in the Australian Securities and Investment Commission Act 2001 (Cth).*

We note that the ALRC proposes that there be a general definition of credit that is not supplemented by specific inclusions, to form part of the functional definition of 'financial product'. As referred to above at section A of this document, the consequences which may arise as a result of differing definitions of 'credit' existing within differing legislations, can be significant and lead to a range of (potentially unintended) consequences.

Whilst ARCA supports the intention to bring alignment and clarity to important terms such as 'credit' across differing Commonwealth legislation, we are of the view that any changes to the definition of 'credit' arising as a result of, or in connection with the Review, should be considered against the potential unintended consequences which may arise in connection with differing definitions of the terms 'credit' and that steps should be taken to ensure the term 'credit' is used consistently between regimes.

In particular, we consider that the ALRC should be mindful of, and ensure consistency with, the definition of 'credit' as contained in other legislative instruments such as the Privacy Act, so as to avoid legal uncertainty and/or unintended consequences.

C. ARCA's feedback – Potential consolidation

Provided in the context of proposal A6, we note the ALRC's comments in respect of consolidating parts of the NCCP Act, the Corporations Act and the ASIC Act so as to potentially 'remove' from the NCCP Act and consolidate, those provisions which relate to 'credit', including those provisions which duplicate or overlap with provisions which appear within the Corporations Act and the ASIC Act.

Whilst we note the ALRC's reference to these issues being considered within Interim Report C, given the wide reaching and significant implications which may arise in connection with any large-scale amendment or consolidation of the NCCP Act with other legislations, it is vital that the ALRC provide sufficient specificity and clarity in relation to the proposal, so as to enable stakeholders to provide their considered and informed feedback. Such detail, should include (but is not limited to) information in relation to:

- Precisely which provisions of the NCCP Act the ALRC intends to consider removing and consolidating with the Corporations Act and the ASIC Act, or otherwise place within another legal instrument:
- Does the ALRC's proposed consolidation involve the consolidation of all, a relatively small portion, or a significant portion of the NCCP Act, Corporations Act and ASIC Act within a single legal instrument?
- Would the proposal to consolidate include other legislation relevant to the application of some, of the legislation which is to be consolidated? For instance, the operation of Part IIIA of the Privacy Act upon certain provisions of the NCCP Act (including the Credit Code) is an important element and as such, would this proposal include consolidating provisions of other related legislation such as the Privacy Act? If not, why not?
- The impact such restructuring of the relevant Acts will have upon the remaining NCCP Act provisions:
- Detail as to the type and substance of the legislative or regulatory instrument which will contain the consolidated provisions:
- What impact amendment and consolidation of the Acts will have upon previous ASIC issued guidance.

As noted above, the existence and application of differing terms and concepts between legislation and regulatory instruments can give rise to a number of unintended consequences and inconsistencies, and as such we urge the ALRC to ensure consideration is given to the potential impacts the creation of a new 'single' consolidated legal instrument.

If you have any questions about this submission, please feel free to contact me or Mary Vancea.

Yours sincerely,

Mike Laing
Chief Executive Officer
Australian Retail Credit Association