

Senate Economics Legislation Committee
Parliament House
Canberra ACT 2600

5 July 2023

Privacy Act Review Report 2022

Thank you for the opportunity to provide a submission to the [Senate Standing Committees on Economics' inquiry](#) into the [Treasury Laws Amendment \(2023 Law Improvement Package No. 1\) Bill 2023](#) (the **Bill**).

The Australian Retail Credit Association (**ARCA**) is the peak industry association for businesses using consumer information for risk and credit management. Our Members include banks, mutual ADIs, finance companies and fintech credit providers, as well as all of the major credit reporting bodies (**CRBs**) and, through our Associate Members, many other types of related businesses providing services to the industry. ARCA's Members collectively account for well over 95% of all consumer lending in Australia.

While ARCA is broadly supportive of the Bill and what it aims to achieve, we wish to provide feedback on two aspects:

1. The amendments giving effect to ALRC recommendations in Schedules 1 to 3 to the Bill, specifically the changes to create single glossaries in the *Corporations Act 2001* (**Corporations Act**) and the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**); and
2. The amendments in Schedule 5 intended to support the incorporation of [ASIC Credit \(Electronic Precontractual Disclosure\) Instrument 2020/835](#) (**ASIC Instrument 2020/835**) into the National Consumer Credit Protection Regulations 2010 (**National Credit Regulations**).

Our submission to this inquiry into the Bill follows previous ARCA submissions to the [ALRC's Review of the Legislative Framework for Corporations and Financial Services Regulation](#) (**ALRC Review**), as well as on previous bills seeking to move matters currently in ASIC legislative instruments into the primary law.

1. Schedules 1 to 3 – implementing ALRC recommendations

As a matter of principle, ARCA strongly supports the ALRC Review. We are of the view that the ALRC Review has the potential to greatly benefit the development, and help shape the ongoing evolution of, the Australian financial services regulatory and legal landscape. With

that in mind ARCA supports the implementation of ALRC recommendations through Schedules 1-3 of the Bill.

ARCA has previously stated its view that the ALRC Review should also address the law governing credit reporting.¹ We observe:

- Similar to financial services law generally, the laws surrounding the regulation of 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.
- Similar to financial services law generally, some key terms are defined and treated differently within between related statutes and regulations, resulting in legal uncertainty and inconsistency;² and
- The principles underpinning the ALRC's review are just as relevant to the law governing credit reporting as they are to other aspects of financial services law.

The Minister is required to cause a review (the **Part IIIA Review**) into a key component of the law governing credit reporting: see section 25B of the Privacy Act. The Part IIIA Review, which must be completed by October 2024, provides an opportunity to consider how the laws in Part IIIA of the Privacy Act can be simplified in line with the ALRC's work to date. Matters of this nature could be reflected in the Part IIIA Review's terms of reference.

Recommendation 1: The upcoming review of the Part IIIA of the Privacy Act should, among other things, consider the extent to which the law governing credit reporting should be amended consistent with the findings and recommendations of the ALRC's Review of the Legislative Framework for Corporations and Financial Services Regulation.

2. Schedule 5 – electronic provision of documents relating to consumer credit

As set out in the Explanatory Memorandum, Schedule 5 to the Bill amends the Corporations Act and the National Credit Act to transfer amendments to/exemptions from those acts currently contained in ASIC legislative instruments into the primary law.

ARCA is supportive of amendments to move longstanding, settled exemptions and modifications from ASIC legislative instruments into primary legislation. Such changes:

- reduce the overall complexity of the legal framework, making it easier for entities to determine and comply with their obligations;
- mitigate against the risk that the legislative instruments will not be fully considered by subsequent law reforms, leading to inconsistencies and practical challenges for industry;
- reduce the effort required by ASIC, and others, to maintain the status quo and review/re-make the instruments as required; and

¹ See, for example, ARCA's submission in response to the ALRC's Interim Report A, available [here](#).

² An example of such a term in the credit reporting context is 'credit' which has different definitions under s6M of the Privacy Act and the National Credit Act.

- provide additional certainty to all parties about whether the exemptions and modifications will be retained.

The Bill has the effect of transferring two ASIC legislative instruments to the primary legislation. There are many more instruments suitable for a transfer in this manner, and we support further work to review and transfer additional instruments into the primary law in this way.

ASIC Instrument 2020/835

One of the instruments transferred into the primary law is ASIC Instrument 2020/835. This instrument exists because of drafting defects with section 16 of the National Credit Code (Schedule 1 to the National Credit Act) and regulation 28L of the National Credit Regulations. Without ASIC Instrument 2020/835:

- the additional method for giving disclosure documents electronically described in regulation 28L (i.e. that the document may be given by making it available for electronic access, subject to several conditions) would not be available for precontractual statements required by section 16 of the National Credit Code; and
- in order to be given electronically, the precontractual statement would need to be given in accordance with section 187 of the National Credit Code and the general framework in the *Electronic Transactions Act 1999*, which differs from the regulation 28L.

We support the change to make it possible for the National Credit Regulations to specify how precontractual statements may be given. While we note that the Bill does not contain the wording that would be inserted into the National Credit Regulations, ARCA's view is that the new regulation should replicate the effect of regulation 28L and ASIC Instrument 2020/835 without amendment.

However, ARCA's view is that the law governing how credit documents can be given electronically is complex. In this regard we note:

- there are many other documents which can or must be given under the National Credit Code, such as statements of account, which cannot be given using a mechanism of the kind in regulation 28L;
- ASIC has made available a mechanism for AFS licensees to give documents under the Corporations Act electronically by making them available for retrieval (the 'publish and notify' method outlined in [RG 221](#)), but for legal reasons this mechanism is not available for documents given under the National Credit Code; and
- the legal challenges with giving credit documents electronically have previously been identified by ASIC and other stakeholders: See Section D of [ASIC's Consultation Paper 224](#) and submissions in response, particularly by groups who hold, or represent those who hold, Australian credit licenses.

ARCA considers that there is an opportunity for Government, consistent with its initiatives to modernise business communications and improve the technology neutrality of Treasury portfolio legislation, to review how credit documents can be given electronically, and whether the law allows it to be done in sufficiently easy and consistent ways. Measures to facilitate documents being given electronically can:

- make the giving of those documents more efficient and effective for businesses;

- align with consumer expectations; and
- provide potential for disclosures that are given to be more engaging and interactive.

Recommendation 2: Government should review how credit documents can be given, with a view to:

- **make it easier to give credit documents electronically; and**
- **better align the giving of credit documents with the way that AFS licensees can give documents under the Corporations Act to their customers (including by electronic means).**

Yours sincerely,