AUSTRALASIAN
RETAIL
CREDIT
ASSOCIATION

Dr Anna Dacre
Committee Secretary
Standing Committee on Social Policy and Legal Affairs
House of Representatives
Parliament House
CANBERRA ACT 2600
spla.reps@aph.gov.au

Dear Dr Dacre,

Inquiry into the Privacy Amendment (Enhancing Privacy Protection) Bill 2012

The Australasian Retail Credit Association (ARCA) appreciates the opportunity to provide this submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs inquiry into the Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (the Bill).

ARCA has also provided a submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Bill. We have proposed a range of suggested amendments for the Bill, and we support its expedient passage.

ARCA is the industry association for Australia's credit reporting agencies and major banking and financial services organisations. ARCA exists to promote best practice in credit risk assessment and responsible credit, as well as promoting better standards in consumer credit reporting.[1] ARCA takes a leadership role in examining retail credit issues, and developing and supporting policies for the betterment of the retail credit industry.

ARCA Members are motivated by the opportunity to improve the quality of credit reporting information in Australia through improvements to the existing credit reporting regime, as well as the introduction of more comprehensive credit reporting.

Evidence in other markets where comprehensive reporting has been implemented indicates these reforms support significant benefits to the community, including more informed credit decisions which have driven positive economic activity. There is every reason to believe that Australia will experience the same benefits from this implementation. There is every reason to believe that Australia will experience the same benefits from this implementation.

The development of reforms to Australia's credit reporting arrangements has been an ongoing process for many years – since prior to the referral to the Australia Law Reform Commission consideration of Australia's privacy protection arrangements.[2] During that period, ARCA has endeavored to build a better understanding in government of the power of exchanging consumer credit reporting data to benefit not only businesses, but also to achieve wider economic and social aims. This includes making submissions to the Australian Law Reform Commission inquiry into privacy, and the Senate Finance and Public Administration inquiry into the Exposure Draft provisions of the Privacy Amendment Bill relating to credit reporting.

1 A list of ARCA Members is available at www.arca.net.au
2 See ALRC Report No. 108

We commend to the Committee the work of the Senate Finance and Public Administration Committee in their examination of the exposure draft provisions relating to credit reporting last year. For reference, ARCA has included a copy of that inquiry's recommendations in Appendix A, including ARCA's view on each recommendation.

Since establishment in 2004, ARCA has attempted to make clear that the changes to privacy arrangements to enable more comprehensive credit reporting need to strike an appropriate balance between privacy protection and benefits to the public.

A government-led consumer education campaign relating to the changes to the Privacy Act, including credit reporting, is considered essential by ARCA. The reform of the Privacy Act is a significant law reform which has the potential to drive positive consumer and industry behaviour. International experience shows that where consumers are engaged to explain the reforms and the potential positive impacts on their personal financial situation, the reforms are better implemented and there is a wider positive financial impact shown in the broader economy (see Appendix C).

ARCA understands that the Australian Government intends to convene a roundtable of all stakeholders that have a consumer education responsibility in the context of these reforms, to begin to coordinate activities as the reforms progress towards implementation. ARCA fully supports the efforts of the Government to bring stakeholders together to progress such an important issue and we look forward to participating in such a process.

ARCA's submission is limited to only those parts of the Bill related to credit reporting matters. We have enunciated industry's concerns with the Exposure Draft provisions and proposed recommendations to address these issues. These are contained in the body of our submission.

ARCA has convened a roundtable of 11 industry associations and three Credit Reporting Bodies (CRBs) to consider the development of the new Credit Reporting Code of Conduct (CR Code). We are aware that many of these groups will make their own submissions to this Inquiry. Where those submissions speak to matters relating to credit reporting, ARCA supports aligned industry views on such matters.

For any inquiries regarding this submission, please contact Matt Gijselman, Chief Industry Advisor, Australasian Retail Credit Association on [redacted] or by email [redacted].

Yours sincerely,

[redacted]

Damian Paull

CHIEF EXECUTIVE OFFICER

AUSTRALASIAN
RETAIL
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SUBMISSION ON THE PRIVACY AMENDMENT (ENHANCING PRIVACY PROTECTION) BILL 2012

EXECUTIVE SUMMARY

ARCA welcomes this opportunity to provide feedback on the *Privacy Amendment (Enhancing Privacy Protection) Bill 2012* (the Bill). Noting that the credit reporting provisions will operate within the wider amendments to the Privacy Act, ARCA will restrict our comments to those matters concerning credit reporting.

ARCA has a range of suggested amendments for the Bill. Nonetheless, ARCA supports its expedient passage.

PART A: KEY MATTERS OF CONCERN

1. Cross border data sharing
2. Restrictions on the use of de-identified data
3. Commencement arrangements
4. Corrections and complaints

PART B: SUGGESTED ENHANCEMENTS

1. Inconsistencies of definitions and the breadth of their applications
2. Data quality, including compliance and monitoring
3. Penalties
4. No disclosure of freeze to a Credit Provider during a ban period
5. Practical implementation for group entities

Where practical, recommendations to address our concerns are included.

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SUBMISSION ON THE PRIVACY AMENDMENT (ENHANCING PRIVACY PROTECTION) BILL 2012

A. KEY MATTERS OF CONCERN

1. Cross border data sharing

The Bill requires that credit eligibility information (CEI) be subject to a newly determined "Australian link" for the disclosure of credit reporting information. Part IIIA of the Bill restricts a Credit Provider from disclosing CEI to recipients that do not have an 'Australian link', i.e. recipients that are not formed, incorporated or created, or do not carry on business, in Australia.

In general terms, this will mean that an Australian-based entity will not be able to disclose CEI to an offshore agent or related entity for legitimate business purposes, unless that offshore agent or related entity has an 'Australian link' as defined above.

This is even where, consistent with new Australian Privacy Principle (APP) 8, the disclosing organisation takes steps to ensure the offshore entity is subject to the same standards of conduct and controls in relation to the CEI.

ARCA is concerned that this restriction is in excess of the cross border protections applied to other types of information under the Privacy Act. For example, the Bill will allow an organisation to disclose health information to the same offshore entity without an Australian link as long as it has complied with APP 8.

It is ARCA's view that effective protection of an individual's information can be delivered by complying with APP 8.

ARCA recommends that the Bill be amended so that:

- In the case of offshore disclosure, APP 8 applies to credit information in the same way it applies to other forms of personal information; and
- If there is a privacy breach, in respect to data disclosed offshore, liability for the breach rests with the disclosing entity and individuals are able to seek redress for the breach through the regulator, unless that breach has been made despite reasonable steps taken by the disclosing entity to prevent a breach, and the offshore entity improperly discloses the data.

Data exchange with New Zealand

Finally, we note that with particular regard to New Zealand that this arrangement is likely to be temporary, as noted in Explanatory Memorandum, at page 92,

> *"Consideration will be given to the sharing of credit reporting information with New Zealand, which has a very similar credit reporting system and close economic ties with Australia. When this occurs, it will be necessary to develop specific legislative provisions to amend the credit reporting system set out in Part IIIA to establish the arrangements by which credit reporting information will be shared with New Zealand."*

ARCA recommends that the Government provide clarity as to future intentions regarding data sharing with New Zealand.

2. Restrictions on the use of de-identified data

ARCA considers that s.20M may lead to unnecessary restrictions on research and development undertaken by both industry and government.

De-identified information is, by definition, credit reporting information that is no longer personal information. ARCA considers it unnecessary and inappropriate for the use and disclosure of this information to be regulated by the Privacy Act.

Business relies heavily on the ability to use de-identified data to encourage innovation, develop new products, refine existing processes and provide better value for consumers and shareholders alike. The use of de-identified information is critical to the ongoing research and development of tools to develop better credit information services and better risk assessment tools that enhance responsible lending practices.

ARCA suggests that, rather than allowing the regulator to make rules to restrict the use of de-personalised data, we believe that the Bill should proactively allow for the use of depersonalised data. Fundamentally, the Bill should provide for a prohibition on re-identifying data, rather than focus on controlling de-identified data.

ARCA recommends that the Government remove s.20M from the Bill entirely, and refer the question of the economic value of depersonalised data to the Productivity Commission for inquiry. Such an inquiry is likely to provide a range of reforms for the Government to consider in relation to the regulation of this important economic tool.

3. Commencement arrangements

ARCA notes that the Bill provides for the commencement of the new credit reporting regime nine months after the Bill receives Royal Assent. By trying to implement the reforms in a nine month window, there is a risk that consumers will experience real negative impacts from the credit reporting changes, through issues such as

- the implementation of the complaints handling arrangements,
- incomplete reporting of credit reporting information in the new environment, and
- incomplete or inadequate training of Credit Provider staff.

ARCA has worked extensively with government officials to build a better understanding of the complexity of the credit reporting industry, both in the Department of Prime Minister and Cabinet and also now in the Attorney General's Department. We have also engaged widely, beyond our membership to better engage with consumer advocates, other industry sectors, and critically the regulator.

While the reforms to credit reporting have been supported by some of Australia's largest Credit Providers and CRBs for many years; for most organisations impacted by these reforms, they have been unable to formulate a business plan, allocate capital or commence technology development due to regulatory uncertainty. This may result in their inability to commence the new regime within the mandated timeframe.

The introduction of these reforms will see a massive increase in data exchanged between Credit Providers and Credit Reporting Bodies, in the order of 100 fold increase. In addition, these reforms enhance consumer protections and oversight, which extend beyond those previously envisaged by industry.

The implementation arrangements associated with the reforms to credit reporting will be a significant factor as to whether or not industry, consumers and the wider economy can access the significant potential positive outcomes relating to increased access to responsible credit, a better regulatory environment and increased economic activity.

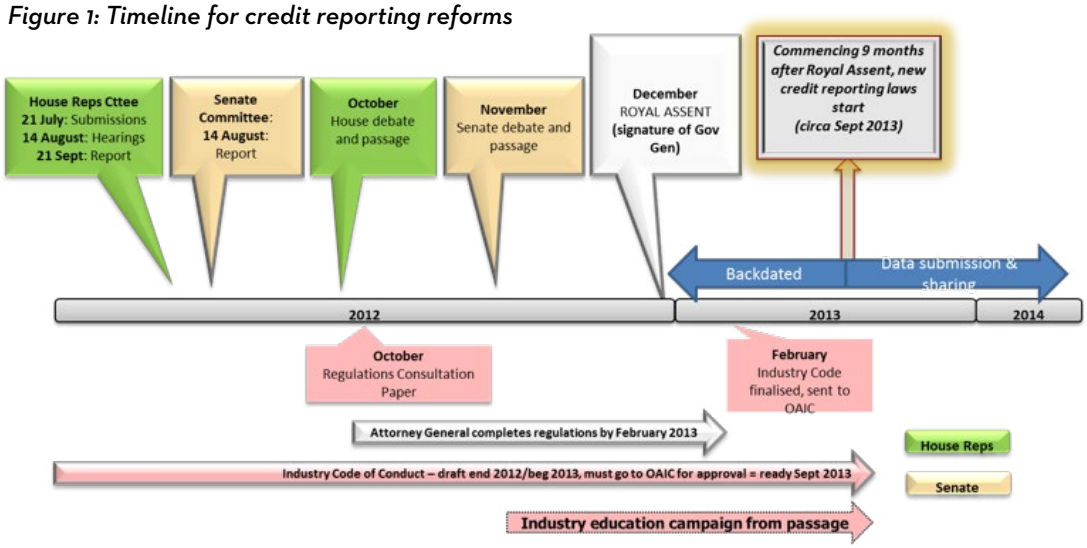
While some organisations are well advanced in their preparation to these reforms, others have noted that they have been unable to design and build the solutions, as they have not known the final shape of the reforms and the impact on their business. Limited available skills, combined with complex business processes, and highly regulated and defined scheduled opportunities to make institution-wide technology changes means that many ARCA Members may find it extremely difficult to implement the required system, training, documentation, and process changes in the proposed timeframe.

The reality of the process attached to the reforms to credit reporting means that there is very little time available for industry to see the final legislative and regulatory detail before the regime is due to start. Given that credit reporting is an integral part of the way more than $1.1 trillion dollars of consumer credit is granted and managed in Australia, it is critical that adequate time be provided to undertake this reform in a controlled and structured manner.

For example, if the Parliament sees fit to debate and pass the Bill late 2012 or early 2013 – which ARCA would fully support – then the regime would commence late in 2013. On a practical matter, it is usual for major banking and finance institutions to apply a technology change freeze from late November, to ensure core banking services are not impacted during the peak Christmas period – meaning that changes to technology systems may need to be postponed to early 2014.

ARCA expects to see the final regulations in early 2013 at the earliest. Finally, the regime is not complete without a Credit Reporting Code of Conduct, which is endorsed by the OAIC, which in turn is contingent upon the finalisation of the Bill and final regulations.

Figure 1: Timeline for credit reporting reforms



The development of the Credit Reporting Code of Conduct is fundamental to the purpose of ARCA. However, we recognise that the new Code will be binding upon non-ARCA members, capturing non-traditional, non-ASIC licensed Credit Providers such as utilities and telecommunications providers. Thus, ARCA has developed a Code development process that will lead to a comprehensive and broadly supported, industry-developed CR Code. The Code development process developed by ARCA includes the appointment of a professional Code Drafter, and an Independent Reviewer to ensure the process remains transparent and in line with best practice.

ARCA has well-developed project plans to track the development of the new Code. The final Code is not expected to be made available to the regulator until mid-2013, assuming the process proceeds as currently planned. Therefore, assuming the regulator is satisfied that the Code meets the requirements as stipulated in the Bill and declares the Code valid and operable, there is very little time for our Members to make final arrangements to ensure they are compliant with the credit reporting regime – or indeed the whole Privacy Act – assuming a nine month timeframe.

ARCA recommends that the Government implement a four-step commencement process:

1. Establish a set time once the Bill and Regulations have been finalised for the CR Code to be developed by industry
2. Require the regulator to either approve the CR Code developed by industry or make a determination that they will draft the CR Code on the basis that the industry drafted Code was not consistent with the requirements of the Bill (in a material way) within a specified time period
3. If the regulator determines it must draft the CR Code, set a time period for such drafting
4. From the point at which either there is a registered CR Code set a commencement date for the new privacy regime

Such an approach would ensure that the reform was not left open-ended, but did allow for a practical amount of time for the activities required to finalise all of the law's components and for industry to adequately prepare for compliance.

ARCA recommends that the entirety of the reforms commence at the same time.

4. Corrections and complaints

ARCA realises that effectively dealing with consumer complaints is central to the overall success of the credit reporting system and is also critical to the consumer experience in relation to our Members.

There are several areas of concern about the practicality and commercial sensitivity of the way in which the Bill requires these matters be handled. For example, ARCA notes that many organisations are already covered by other legislative and regulatory requirements relating to complaints handling – with requirements that vary greatly to what is proposed in the Bill.

Definitional issues with complaints

The obligations relating to Requests for Correction are made overly complicated by the breadth of the Credit Provider definition and how that definition is used relative to this process.

The definition of a Credit Provider is very broad and is not restricted to those who participate in the data exchanges relating to credit reporting. An entity can be deemed to be a Credit Provider purely on the basis that they extend credit for a period greater than 7 days (under Section 6G (2)).

As drafted, an individual may request a Credit Provider to correct personal information if that Credit Provider holds 'any one' of the following types of information:

1. Credit Information (which under 6N (a) can be as little as identity information); or
2. CRB derived information; or
3. CP derived information

This would suggest that an entity that has no affiliation with the credit reporting system – has neither supplied, used nor disclosed credit information (CI), credit reporting information (CRI) or (credit eligibility information) CEI can be compelled to take up and manage an issue about such information by an individual.

There appears to be several unintended consequences from such a situation;

- Businesses that have historically played no part in the credit reporting system may be required to be involved. This is highly likely to be an unintended and unwelcome imposition in particular on small businesses who just happen to offer payment terms extended beyond 7 days.
- Developing the capability to cater for the potential exchange of information that would be needed to meet the obligations as currently written in the Bill – in particular the extremely large and varied number of potential participants - would be unduly complex.
- Such a broad system would increase the risk of potentially inadvertent disclosures of personal information – an unintended negative consequence.

Timeframes for managing complaints

While the Bill is prescriptive in relation to timeframes relating to complaints, ARCA notes that there is little information regarding timeframe requirements for dealing with requests for corrections.

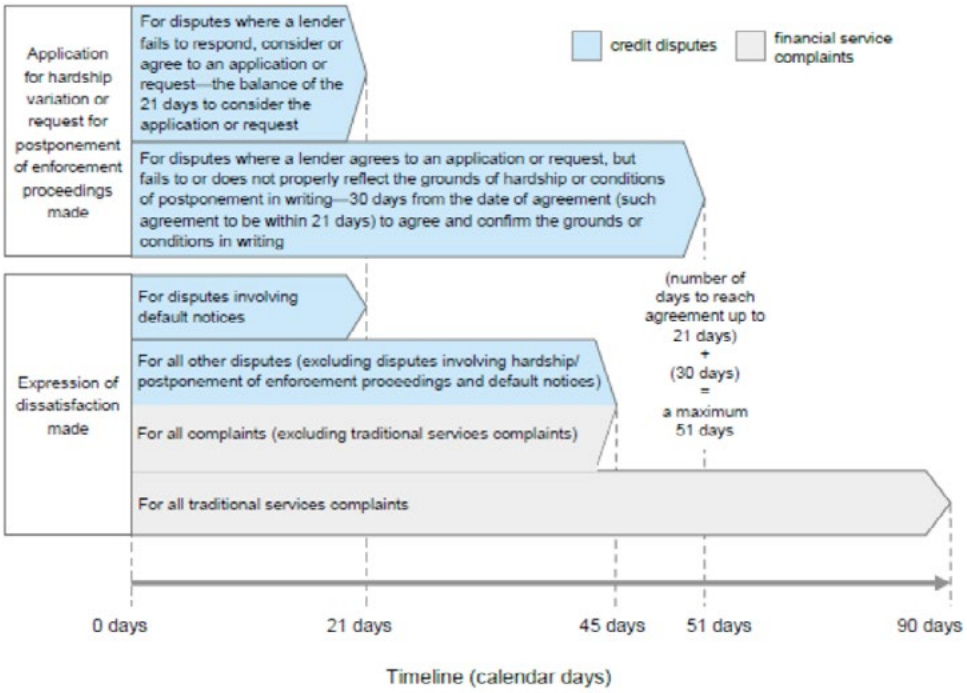
Financial industry participants already comply with *Regulatory Guide 165: Licensing: Internal and external dispute resolution* (RG165)[1] from the Australian Securities and Investments Commission (ASIC) which applies to all credit licensees, and contains specific timelines (specifically that industry is managing timelines on a business day basis) and procedures to apply to complaints processes. The Bill currently proposes timeframes to acknowledge and respond to complaints which are in direct conflict with those in RG165 (for example, RG165 has a standard response within 45 days – not 30 days as noted in the Bill for complaints related to credit reporting).

Additionally, AS ISO 10002-2006 is widely recognised as best practice for managing consumer complaints, and it is widely applied across sectors and scalable to suit a range of organisations in Australia. ARCA strongly recommends aligning the timeframes in the Bill's with existing obligations for complaints handling and sees no tangible benefit for the misalignment. For example, the ePayments Code directs subscribers to comply with AS ISO 10002-2006 and RG165 instead of establishing its own timeframes and standards.

1 See http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg165-published-20-4-2011.pdf/$file/rg165-published-20-4-2011.pdf

Figure 2 below shows the mismatch between timeframes allowed for managing internal complaints processes.

Figure 2: Maximum IDR timeframes



In addition, the Bill suggests that the first party contacted (the respondent) must undertake (presumably themselves) to notify 'everyone' who has received the disputed information, collate the necessary information to respond to the complaint, and then respond on behalf of all relevant parties. What seems to be a simple requirement under the Bill becomes complex because of the degree of prescription of how an operational process must work, rather than simple articulation of the outcome that it seeks to deliver.

To manage consumer complaints effectively, it is essential for relevant parties to manage and resolve the complaint wherever possible. However, the first point of contact may not always be best placed to manage a complaint. It may be more appropriate to refer the consumer to the most appropriate respondent. The timeframe for providing the consumer with a determination should not start until the relevant party has received the complaint.

Communications regarding complaints

Section 23B of the Bill states that the respondent for the complaint must, within seven days, give the individual written notice that acknowledges the complaint and sets out how the respondent will deal with said complaint. The majority of complaints are resolved within 48 hours[2]. As such, a written acknowledgement letter would be unnecessary, wasteful and irritating for the consumer in the majority of cases. We suggest that it should be acceptable for other methods of communication to be allowed on the basis that a formal record is retained, such as a file note made in a customer relationship/complaints management system, or tape recording of voice communications.

2 See for example: http://www.anz.com/aus/corporateresponsibility/customer/customerc.asp

In exceptional circumstances, such as in a complex complaint involving multiple parties, it may be necessary (as noted in the Bill at s.23B(5)(b)) to extend the period for resolving such a complaint. In these circumstances the respondent should be allowed to notify the consumer with due reason for the extension, without the need for written consent from the consumer. The CR Code should include compliance reporting to ensure that such arrangements are not being used inappropriately.

First point of contact complaints handling

Under the Bill provisions, whichever organisation a consumer first makes a complaint to regarding a credit reporting matter will be responsible for resolving that complaint.

> *For example a consumer could be a customer of X telecommunications provider and visit their local store in Melbourne to upgrade their mobile phone. X could refuse to offer the handset on a plan due to their credit report which could be impacted by an entry from Y utilities provider in Darwin, who was the utility provider for the apartment the customer was renting when they were contracting for six months in Darwin two years ago. The customer thought they had transferred the contract to their flatmate but the transfer was not finalised and the Bill still remains unpaid for that period. The Bill would require X to resolve the credit reporting complaint for the customer.*

Unless the complaints handling process in the Bill is amended, it will require a complex system to be developed between the multitude of Credit Providers and CRBs who use the credit reporting system to manage the finalisation of consumer complaints. Such a system would increase the risk of inadvertent disclosure, remove the ability of the consumer to deal directly with the cause of the complaint, and is against industry practice and good business practice regarding customer service.

ARCA recommends that the Bill allow the first point of contact to refer the consumer to the relevant organisation, backed by oversight from the regulator.

B. SUGGESTED ENHANCEMENTS

1. Inconsistencies of definitions and the breadth of their applications

The credit reporting provisions of the Bill are structured so as to prohibit any exchange of credit reporting-related data, with limited exemptions to allow for certain types of data to be exchanged under specific circumstances. This data exchange is governed by definitions ascribed to data classification types.

The Bill identifies 17 different classifications of information. ARCA submits that this leads to unnecessary complications and duplication.

ARCA recommends that a single definitions directory is included in the Bill which includes all defined terms relating to credit reporting from both the Bill and the Explanatory Memorandum.

ARCA has identified a number of issues associated with the definitions as set out in the Bill, as set out below.

i. Meaning of Repayment History

Information allowed to be disclosed through s.6V does not align with how Credit Providers determine missed repayments (more commonly called delinquency).

ARCA agrees with the Government's position that Credit Providers should have access to information relating to an individual's repayment history.

Further ARCA believes that to best ensure an effective credit reporting system, the definition of repayment history should align with how Credit Providers communicate to customers through account statements and other verbal and written correspondence.

A definition aligned with existing processes will ensure customers are better able to reconcile information contained on their credit report with other information received from their Credit Provider, such as account statements and other communications. This will result in greater consistency and ease of understanding by consumers. This would also result in fewer requests for corrections on information that is in fact accurate, and provide more consumer confidence in the credit reporting system.

Finally, this would close a potential weakness in the credit reporting system that would otherwise be likely to be exploited by "credit repair" organisations who, often for a substantial fee, seek to have factually correct information deleted from a credit report by exploiting technicalities.

To achieve this outcome, ARCA proposes the following: rather than requiring Credit Providers and CRBs devise an alternative means of calculating missed payments (delinquency) via the very limited disclosure of the date a payment was due and the date it was subsequently paid, the definition should allow the inclusion of an indicator for whether the individual is up to date with their payments, and if not, an indicator of how long their oldest overdue payment has been outstanding. A missed payment may be paid in multiple parts, adding to the complexity of how to report or track such payments in the credit reporting system.

> ARCA recommends that the definition of repayment history allow the inclusion of an indicator for whether the individual is up to date with their payments, and if not and indicator of how long their oldest overdue payment has been outstanding.

ii. Meaning of Credit Provider

Based on the Bill and comments within the Explanatory Memorandum relating to s.6G, the definition of a Credit Provider only seems to require the provision of credit – not the involvement in the exchange of data relating to credit reporting. The 'substantial part of the business test' in s.1 seems to be 'overruled' by s.2, resulting in substantial unintended consequences.

This is highly likely to be an issue skewed to small businesses who offer credit as a minor aspect of their business.

Example one, a Car Rental Agency: in the event that the rental extends beyond 7 days, they would seem to be considered a Credit Provider even though a Car Rental Agency is likely to have never utilised the credit reporting system.

Example two: Within the definition, the term "issues credit cards" casts some question over who might be involved - technically credit cards can only be issued by an entity that holds an SCCI licence from APRA, yet anyone involved in the process of taking an application seems to be potentially included (for example, the retail clerk who serves a customer who visits an electronics store and applies for interest free credit to purchase a television). Carrying that a step further any retailer who facilitates the provision of credit merely by handing out applications would also seem to be included.

Finally, the Bill enables regulations to rule a group out of being a Credit Provider even if they fall within the definition of a Credit Provider. The overall result of this definition is a high degree of complexity – likely to lead to confusion and unintended consequences.

ARCA recommends that the definition of Credit Provider is amended to ensure they are tied to accessing and using the credit reporting system.

iii. Meaning of Credit Reporting Body

There is a concern that a Credit Provider could fall within the definition of a CRB given the removal of the dominant purpose requirement from the "Credit Reporting Business" definition (see s.6P).

Rather than amending the definition to reinsert the dominant purpose requirement, the Government has attempted to instead give a level of comfort by stating in the Explanatory Memorandum:

> *"A Credit Provider is permitted to disclose certain information to another Credit Provider in certain circumstances. It is recognised that this sharing of information is necessary to support the credit reporting system and sharing information in these circumstances does not make the Credit Provider subject to the obligations of a CRB."*

ARCA recommends that the dominant purpose test be reinserted to provide clarity in the Bill rather than any associated documents.

iv. Individual may request the correction of credit information etc

An individual is able to make a request for the correction of their information to a Credit Provider and the provider must, if it does not hold the information or cannot be satisfied that the information should be corrected, take steps to consult another Credit Provider or a CRB to assist in resolving the individual's request.

Under Subdivision C 21V, it is not clear how a customer could determine if Credit Provider derived information was incorrect without access to "the methodology, data analysis methods, computer programs, or other information that the Credit Provider may use to manage their credit eligibility information or to analyse the credit reporting information to produce the Credit Provider derived information".

We do not support requiring CRBs or CPs to have to disclose commercially sensitive information as a consequence of enabling consumers to request corrections to derived data. We believe this position is consistent with similar legislative frameworks, for example the national credit framework.

Disclosures of credit reporting policy requirements, to be made under Sections 20B (4) (c) and 21B (4) (c), in conjunction with consumer education efforts are expected to help individuals better understand how their credit reporting data is used in decision making and enable them to understand how their credit related conduct can influence those outcomes.

ARCA recommends that while a customer should be able to request a correction to credit information, the customer should not be able to access Credit Provider derived information, including the methodology, data analysis methods, computer programs, or other information that the Credit Provider may use to manage their credit eligibility information or to analyse the credit reporting information to produce the Credit Provider derived information.

v. Matters expected to be included in the CR Code

The Explanatory Memorandum expects some items to be dealt with in the CR Code, without provision for such matters in the Bill.

ARCA is concerned that in the case of such matters there is a risk that the regulator will take a strict view of their powers under the Bill, and may not approve parts of the CR Code that deal with other matters.

For example:

- Preclusion of Disclosure of Trade Secrets – The Explanatory Memorandum says an organisation does not have to disclose, yet the Bill makes no such provision.
- Provision of a response to the Credit Provider re: a request for a credit report when there is a Ban – the Explanatory Memorandum says this is allowable, but the Bill does not seem to enable this.

ARCA recommends that matters to be dealt with in the CR Code are aligned between the Bill and the Explanatory Memorandum.

vi. Definitions of pre-screening and direct marketing

The Bill specifically prohibits the use of credit reporting information, by CRBs, for the purpose of direct marketing (see s.20(G)(1), in the Explanatory Memorandum).

The Bill then provides for a specific exemption in relation to credit information the activity referred to as "pre-screening" provided consumer credit liability information and repayment history information (the new more comprehensive data sets) is not included in the activity (see s.20(G)(2)(c) and s.20(G)](2)(c) in the Explanatory Memorandum).

The Explanatory Memorandum states that the purpose of pre-screening is to remove individuals from a direct marketing offer and not to allow credit providers to target identified individuals with direct marketing offers.

Pre-screening has not been defined in the Bill but is described in the Explanatory Memorandum (p138) as a "direct marketing process by which direct marketing credit offers to individuals are screened against limited categories of credit information about those individuals to remove individuals from the direct marketing credit offer..."

ARCA supports the direct marketing prohibition in subsection 20(G)(1).

It should be clear that the prohibition on the use of the new more comprehensive data sets should expressly cover both direct and indirect use in a pre-screening process.

ARCA is supportive of the intent of these prohibitions which should be reflected clearly in revised Credit Reporting Code of Conduct and in the provisions of the Bill.

> ARCA recommends that it is made clear in the regulatory framework that the indirect use of consumer liability information and repayment history information cannot be used for direct marketing and pre-screening.

2. Data quality - accurate, complete, up to date and relevant

High data quality and maximising industry participation are fundamental to a valuable and successful credit reporting system. Data quality and data security are fundamental components of the credit reporting system – without confidence in the quality of data, the participation of industry, and confidence in security and protection arrangements, trust in the entire system is eroded. ARCA has well developed proposals for ensuring data is accurate, complete, up to date and relevant, which are included at Appendix B.

i. Compliance framework

Obligations are placed on both Credit Providers and CRBs at sections 21Q and s20N respectively to ensure data is kept accurate, complete, up to date and relevant. CRBs must take reasonable steps in the circumstances to ensure credit reporting information is accurate, up to date and complete, whilst Credit Providers must adhere to these requirements with respect to credit eligibility information. Further controls are placed on the collection by CRBs of data to ensure use and disclosure is relevant.

ARCA believes that an effective compliance framework is essential to ensure broad support for the credit reporting system. To that end, ARCA is making arrangements to include, alongside the new CR Code arrangements, the introduction of industry-wide Principles of Reciprocity and a single data standard, which will form part of the wider credit reporting regulatory framework. By requiring Credit Providers and CRBs to abide by widely applied behaviour standards, data quality in the entire system is improved – benefiting consumers, the regulator and industry.

ARCA supports the view of the World Bank that effective participation in the credit reporting system can drive benefits for consumers – and that withholding data from the system could potentially lead to organisations not subject to reciprocity arrangements to contribute incomplete and inaccurate information[3].

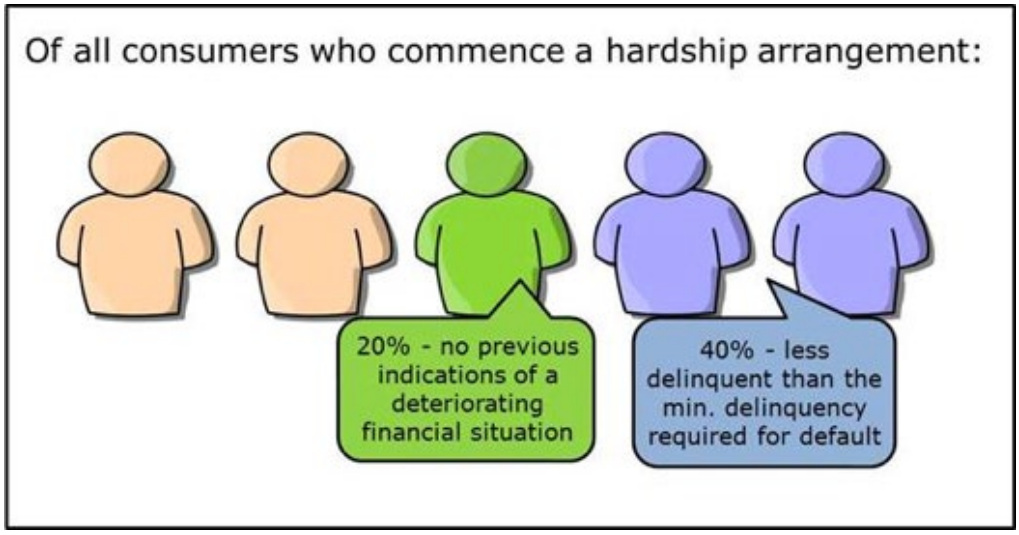
ARCA recommends that the Government specifically mandate the development of Principles of Reciprocity and a single data standard by industry in order to structurally satisfy the requirement for up to date, complete, accurate and relevant credit reports.

ii. Addressing hardship

Consumers will sometimes be impacted by circumstances beyond their control. ARCA is concerned that the provisions at s.6S may not provide the flexibility that would enable accommodation of unusual circumstances, such as a natural disaster.

In addition to dealing with natural disasters, industry data provided to ARCA suggests that when a consumer commences a hardship arrangement, approximately 20% have no previous indications of a deteriorating financial situation. More significantly, a further 40% or so are less delinquent than the minimum level of delinquency required to qualify for a default listing and it is these consumers that can be better serviced by allowing arrangements to commence prior to a formal default listing.

Figure 3: Consumers who enter hardship arrangements



ARCA notes that "hardship arrangements" as identified under the *National Consumer Credit Protection Act 2010* are not "new arrangements" under the Privacy Act. Such new arrangements are envisaged to occur only if the account has been in default.

If the restrictions on credit reporting do not cater for instances of pre-default hardship – as recommended by the Senate Finance and Public Administration inquiry (at Recommendation 11) into the credit reporting provisions – then the credit reports of such consumers would start to show delinquency issues that are indistinguishable from situations where this is not the case. Hence, making it very difficult for such consumers to obtain credit when they may need it.

3 See http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/Credit_Reporting_text.pdf

If the person pays under concessional terms and no missed payments are recorded - without some indication of hardship - they will look no different to a consumer who pays but is not on concessional terms. Without some indication of whether or not an account is under concessional terms (is under a pre-default hardship arrangement), the data about their repayment history will be 'misleading' whether the person pays or not.

Given "Hardship" itself is being amended separately via the *Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011* – which is currently before the Parliament but has not yet passed through both Houses, ARCA recommends that hardship arrangements are addressed in the CR Code, which will allow better alignment between the *Privacy Act* and the *National Consumer Credit Protection Act* arrangements.

3. Penalties

ARCA supports a strong regulatory environment, supported by an appropriately funded and appropriate robust compliance framework for the new credit reporting regime, backed by a broad-based industry and consumer education campaign to promote the benefits of the new framework for all stakeholders.

These features are key elements in ensuring consumers receive the full benefits associated with the introduction of more comprehensive credit reporting.

We support a functional penalty regime which will deliver benefits to consumers and the industry. To that end, we are concerned that the provisions at sections 22D, 22E and 22F, which stipulate penalties for a related body corporate; credit manager; or adviser are half that for CRBs or Credit Providers.

Additionally, with respect to sections 25 and 25A specifically, the provisions relating to court ordered compensation seem to be manifestly unfair to Credit Providers and CRBs. The window for an application for compensation, at six years, is longer than nearly all of the retention periods for the data, with most retention periods ending at five years, save for SCIs which exist for seven years.

It would seem possible (and potentially an avenue for abuse) that data that has long since been destroyed - in accordance with the law – is called into question. Whilst the consumer may have retained the relevant records, by law the CRBs and Credit Providers would have been required to destroy theirs.

Finally, if a breach happens en masse as a result of an unintended act - such as a processing error – we note that the penalty, if equal to the number of penalties for each instance, could be enormous. Such an imposition could be an unreasonable penalty, depending on the circumstances of the breach.

ARCA recommends that, as in the case of the Corporations Act, activities, which are not willful and deliberate, should be approached with a lesser set of penalties. Further to this actions on the part of a data sharer should be able to mitigate penalties in appropriate circumstances.

4. No disclosure of freeze to a Credit Provider during a ban period

Section 20K makes no allowance for the CRB to inform a Credit Provider who has requested the CRI during a ban period that the consumer has requested a freeze on their credit file.

So long as the CRB:

- holds the CRI; and
- reasonably believes that the individual is or might be a victim of fraud; and
- the individual has requested the ban then;

the CRB "despite any other provision in this Division, must not use or disclose the information (CRI – which includes identify information) during the ban period."

There are no exceptions listed.

In contrast the Explanatory Memorandum makes clear an expectation that CRBs can in fact alert the requesting Credit Provider of the presence of a ban.

The Explanatory Memorandum states:

"The purpose of this provision is to limit the consequences of actual or suspected fraud on the individual. However, CRBs are not prevented from informing Credit Providers of the fact that a ban period is in place in relation to an individual's credit reporting information. Informing Credit Providers of the ban period may assist them in preventing the perpetrator of the alleged fraud from causing further harm to the individual or others. It is expected that further procedural details around notification of Credit Providers of a ban period will be set out in the registered CR Code."

Section 20T(4) is a carve out that enables exchanges between CRBs and other CBRs or Credit Providers for the purposes of dealing with corrections. ARCA recommends that a similarly worded carve out in Section 20K be included to address the mismatch between the Bill and Explanatory Memorandum.

5. Practical implementation for group entities

ARCA notes that there are unintended practical difficulties with section 21G which emerges by restricting non-Australian Credit License entities from being able to have disclosed to them repayment history information in Groups who contain both Australian Credit License and non-Australian Credit License entities. For example, a customer may apply to a bank (an Australian Credit License holder) for a residential investment loan at the same time as applying to an equipment financing entity (a non-Australian Credit License holder) for an equipment finance product. The same bank officer may be involved in taking the applications for both. The applications would also normally be considered together by a combined credit assessment department. Trying to keep the repayment history information segregated would be extremely problematic.

ARCA recommends that the Bill be amended so that the repayment history information restriction doesn't apply to related bodies corporate in such circumstances.

APPENDIX A:

APPENDIX A: ARCA'S VIEWS ON RECOMMENDATIONS FROM SENATE FINANCE & PUBLIC ADMINISTRATION COMMITTEE INQUIRY INTO THE CREDIT REPORTING EXPOSURE DRAFT PROVISIONS

RECOMMENDATION 1
3.21 The committee recommends that consideration be given to locating the credit reporting provisions in a schedule to the Privacy Act.

ARCA view: Agree

RECOMMENDATION 2
3.55 The committee recommends that the Exposure Draft be reviewed to ensure that the provisions are clear and concise.

ARCA view: Agree

RECOMMENDATION 3
3.56 The committee recommends that the definitions be reviewed to ensure consistency across the Privacy Act and, to the extent possible, that definitions are standalone provisions.

ARCA view: Agree

RECOMMENDATION 4
3.67 The committee recommends that the Exposure Draft be amended to incorporate all of the relevant requirements of the Australian Privacy Principles for both credit reporting agencies and Credit Providers, in addition to the more specific or different requirements for credit reporting.

ARCA view: Agree

RECOMMENDATION 5
3.97 The committee recommends that the Department of the Prime Minister and Cabinet undertake consultations to ensure that the needs of industry and consumers are addressed during the lead up to the implementation of the new credit reporting regime.

ARCA view: Agree

RECOMMENDATION 6
3.98 The committee recommends that the Office of the Australian Information

Commissioner consult with industry and consumer advocates to provide guidance on any consumer education campaigns in relation to the new credit reporting system.

ARCA view: Agree

RECOMMENDATION 7
3.112 The committee recommends that consideration be given to including a requirement in the provisions for the powers and functions of the Australian

Information Commissioner that a regular audit of a randomly selected credit reporting agency and a Credit Provider in Australia be conducted by the Australian Information Commissioner.

ARCA view: Agree in principle

APPENDIX A:

RECOMMENDATION 8
Recommendation 8

4.23 The committee recommends that consideration be given to a change of approach in dealing with serious credit infringements to allow for those listings, not relating to intentional fraud, to be dealt with in a different manner.

ARCA view: Agree

RECOMMENDATION 9
4.49 The committee recommends that the Exposure Draft be reviewed to ensure that the intent of the Government's response to ALRC Recommendation 57–5, that credit reporting agencies be required to advise a Credit Provider that they are unable to release information due to an individual's concerns about possible fraud, is clearly provided for.

ARCA view: Agree

RECOMMENDATION 10
4.50 The committee recommends that the time of the initial ban period be extended from 14 days to 21 days.

ARCA view: Disagree. Time periods should reflect individual circumstances of the case.

RECOMMENDATION 11
4.69 The committee recommends that consideration be given to expanding the meaning of new arrangement information to include circumstances where an individual seeks new terms or conditions for their original consumer credit before they default.

ARCA view: Agree

RECOMMENDATION 12
5.37 The committee recommends that the time period for the correction of credit information be amended to 15 days.

ARCA view: Disagree. Time periods should reflect individual circumstances of the case.

RECOMMENDATION 13
5.39 The committee recommends that that issue of extensions of time to respond to requests for correction of records be addressed in the Credit Reporting Code of Conduct.

ARCA view: Agree

RECOMMENDATION 14
5.83 The committee recommends that consideration be given to implementing the recommendations of the Office of the Australian Information Commissioner in relation to the substantiation issue.

ARCA view: Disagree. Circumstances should reflect individual circumstances of the case.

RECOMMENDATION 15
6.61 The committee recommends that the opt out provisions in section 110 be reviewed to ensure consistency with other consumer credit regulatory regimes.

ARCA view: Agree

APPENDIX A:

RECOMMENDATION 16
6.65 The committee recommends that section 115 be reviewed in light of the Office of the Australian Information Commissioner's comments relating to disclosure of de-identified information and the rules to be issued.

ARCA view: Agree

RECOMMENDATION 17
6.87 The committee recommends that the Credit Reporting Code of Conduct include requirements in relation to the standard of information provided to a consumer in relation to accessing free credit reports and those for which there is a charge.

ARCA view: Disagree. See comments in ARCA submission.

RECOMMENDATION 18
6.108 The committee recommends that consideration be given to providing in subsection 126(4) a general requirement for notification of destruction of credit reporting information to all recipients of credit reporting information in cases of fraud and not only limited to when an individual makes such a request.

ARCA view: Agree

RECOMMENDATION 19
7.23 The committee recommends that section 132 be reviewed to ensure that the disclosure obligations on Credit Providers in relation to 'credit information' protect all credit information collected by Credit Providers.

ARCA view: Agree

RECOMMENDATION 20
7.26 The committee recommends that greater clarity be provided as to the timeframes for disclosure of default information pursuant to paragraph 132(2)(e) either in the Credit Reporting Code or in guidance from the Office of the Australian Information Commissioner.

ARCA view: Disagree. Agree with Bill provisions; however, ARCA believes that the CR Code should further clarify details about the requirements prior to default listing.

RECOMMENDATION 21
8.6 The committee recommends that a definition of the term 'credit manager' be provided.

ARCA view: Agree

RECOMMENDATION 22
8.13 The committee recommends that further consideration be given to the regulation of credit eligibility information provided by Credit Providers to debt collectors that are small business operators.

ARCA view: Agree

RECOMMENDATION 23
8.39 The committee recommends that consideration be given to provide increased funding for the Office of the Australian Information Commissioner to effectively and efficiently investigate breaches of the credit reporting provisions.

ARCA view: Agree

APPENDIX A:

RECOMMENDATION 24
8.43 The committee recommends that consideration be given to the inclusion of consumer remedies, similar to those that exist in the National Consumer Credit Protection Act such as compensation, for consumers adversely affected by contraventions of the credit reporting provisions.

ARCA view: ARCA supports effective independent oversight and sanctions in the credit reporting regime

RECOMMENDATION 25
9.10 The committee recommends that the definition of 'court proceedings information' be reconsidered to ensure that summonses cannot be listed on a consumer's credit information file.

ARCA view: Agree

RECOMMENDATION 26
9.15 The committee recommends that the definition of 'identification information' be reviewed to ensure that it does not restrict the ability of credit reporting agencies and Credit Providers from meeting other regulatory requirements.

ARCA view: Agree

RECOMMENDATION 27
9.19 The committee recommends that section 181 be reviewed to provide for greater clarity and certainty in the meaning of 'publicly available information' as proposed by the Office of the Australian Information Commissioner.

ARCA view: ARCA believes this should be covered in the CR Code.

RECOMMENDATION 28
9.27 The committee recommends that the meaning of 'default information' be reviewed to ensure that statute barred debts are prohibited from being listed.

ARCA view: Agree

RECOMMENDATION 29
9.48 The committee recommends that consideration be given to the inclusion of provisions for grace periods in relation to information in repayment histories.

ARCA view: ARCA believes this should be covered in the CR Code.

RECOMMENDATION 30
9.70 The committee recommends that section 192 be reviewed to ensure that onerous conditions are not placed on individuals accessing their credit reporting information via the National Relay Service, in particular the need to provide written authorisation. Further, the committee recommends the Department of the Prime Minister and Cabinet, in undertaking the review, consult the National

Relay Service and the Office of the Australian Information Commissioner.

ARCA view: Agree

APPENDIX B:

APPENDIX B: ARCA'S APPROACH TO ENSURING DATA QUALITY

To ensure data is 'accurate, up to date, complete and relevant', ARCA strongly supports updating the current single, mandatory Credit Reporting Code of Conduct (CR Code). We believe that task is best undertaken by industry and authorised by the Office of the Australian Information Commissioner (OAIC), and we look forward to working with our industry colleagues to meet the Privacy Commissioner's requirements to register the updated CR Code.

Data quality is essential to ensuring an effective and accessible credit reporting system. As noted in the Bill, the provision of 'accurate, up to date, complete and relevant' data is a fundamental responsibility of participants in the credit reporting system.

To ensure that data quality is at the heart of the credit reporting system, ARCA proposes that the CR Code is supported by arrangements to facilitate an ongoing commitment to data quality by industry participants.

ARCA proposes that data quality be addressed in a holistic fashion via a three pillar approach consisting of:

1. a single data standard,
2. the requirement of reciprocity, and
3. an effective adequately resourced means of independent oversight.

The absence from the Bill of arrangements to facilitate a data standard and reciprocity has caused some concern with ARCA Members.

Data standards

Ensuring a consistent data standard will facilitate data quality across the credit reporting system. A single data standard will ensure transparency through the credit reporting system and will give a clear understanding of what data is in the system. ARCA fully supports a flexible approach that can accommodate a different a standard between each industry sector – but also consistency within each sector.

Reciprocity

Reciprocity is the foundation for ensuring accurate, up to date, complete and relevant credit reporting information. ARCA believes that credit reporting information must be shared on the principle that Credit Providers should contribute all of their chosen level of data (negative, full or partial comprehensive) to receive all data at the same level in return.

Allowing a Credit Provider to choose whether or not to supply data is enabling them to control what information about an individual is available for the making of credit decisions. If allowed, those who strategically withhold data (assuming others did not do the same), would constrain opportunities for an individual to seek credit alternatives elsewhere – again without the awareness or consent of the individual.

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Requiring Credit Providers to supply data into the credit reporting system in order for them to then receive data will ensure that the best possible credit decisions can be made in relation to the individual. Along with a single data standard, reciprocity is vital to ensure accurate, up to date, complete and relevant credit reporting information is available for use in making credit decisions in relation to the individual whose data is being examined.

Whether via inclusion within the scope of the Credit Reporting Code of Conduct and within the oversight purview of OAIC or via some other means – data standards, Principles of Reciprocity and an effective means of ensuring their compliance, are all fundamental to achieving the intended outcomes and benefits of credit reporting.

ARCA believes the most effective way of ensuring data is accurate, up to date, complete and relevant is to ensure *reciprocity* is a key feature of *compliance* with the credit reporting system, rather than a *commercial or business decision* taken on a case by case basis.

Independent oversight

Finally, ARCA believes that a well-resourced and skilled oversight framework is essential to ensure broad support for the credit reporting system.

APPENDIX C:

APPENDIX C: BENEFITS FROM INTRODUCING MORE COMPREHENSIVE CREDIT REPORTING

The introduction of more comprehensive credit reporting will bring significant benefits to the Australian community, including more informed credit decisions which have the potential to drive positive economic activity.

As noted in our submission to the Senate Finance and Public Administration Committee on the exposure draft provisions[1], the benefits of introducing more comprehensive credit reporting include:

Increased competition - lower cost of credit

Comprehensive credit reporting will promote competition in credit markets. This competition may mean credit that is more innovative, more readily available and at lower cost.

Significant international experience also supports the benefits of more comprehensive credit reporting. In 2005, Hong Kong moved to a more comprehensive reporting system. In its first review of the impacts, the Hong Kong Monetary Authority stated that:

> *"New players continue to emerge and the consumer credit market has become more competitive"*[2]

In 2004 MasterCard commissioned a report[3] which noted that following increases in the types of personal data collected and used in credit reporting in the US in the 1980s and 1990s, there was 'a wave of new entrants into the bank credit card market', leading to 'downward pressure on interest rates and fees'.

Improved data sharing is critical to the efficient operating of credit markets, resulting in improved products and rates for consumers and more efficient pricing for Credit Providers. As noted by the Australian Law Reform Commission (ALRC) *Report 108 For Your Information: Australian Privacy Law and Practice*[4], greater competition and efficiency in credit markets may have a range of flow-on benefits for individual consumers, such as lowering the cost of credit, increasing the availability of credit and reducing default rates.

Enhanced Responsible Lending Outcomes

ARCA supports strong consumer protection through the regulatory system, including the provisions of the *National Consumer Credit Protection Act 2009*, and believes that the introduction of more comprehensive credit reporting will support positive consumer outcomes.

More comprehensive credit reporting has the potential to provide significant consumer benefits, arising from improved credit market competition and efficiency. This will result in decreased levels of consumer over-indebtedness and default, as well as lower cost and broader availability of credit. These benefits stem from the capacity of Credit Providers to both better able to assess individuals' willingness and capacity to repay.

1 ARCA's submission No. 48 is available here: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=fapa_ctte/priv_exp_drafts/submissions.htm
2 Hong Kong Monetary Authority, Quarterly Bulletin, March 2006
3 ACIL Tasman, Comprehensive Credit Reporting: Main Report of an Analysis of its Economic Benefits for Australia [Prepared for MasterCard International] (2004)
4 Available here: http://www.alrc.gov.au/publications/report-108

APPENDIX C:

More comprehensive credit reporting will improve the ability of Credit Providers to lend responsibly. An effective credit reporting system will help a Credit Provider to verify an individual's potential credit commitments, overcoming the cumbersome information asymmetry embedded in Australia's current credit reporting arrangements.

ARCA's view is that 'full comprehensive' credit reporting could and should be made available to all Credit Providers – not just those who are credit licensees - if they meet certain obligations. We also note our support for the submission by the Insurance Council of Australia with respect to Lenders' Mortgage Insurance providers accessing credit reporting data.

ARCA understands the need for responsible credit provision obligations to protect consumers, but limiting access to credit reporting information to only licensed Credit Providers is not the only means of achieving this outcome.

APPENDIX D:

APPENDIX D: REFORMING SERIOUS CREDIT INFRINGEMENT

ARCA supported the proposal as communicated by Veda to the Senate Finance and Public Administration Committee in their additional material, No. 9[5], with respect to proposed reforms to Serious Credit Infringements (SCI).

We note that despite industry and consumer support for those reforms the Government has decided not to adopt those proposals. The Veda proposal, as supported by ARCA, during the Senate Finance and Public Administration inquiry into the Exposure Draft provisions, is included, below:

Serious Credit Infringement – new definitions

Delete existing definition of serious credit infringement; add two new definitions.

a. Un-contactable default: a default that is listed where the debtor has not responded and cannot be contacted throughout the life of the default.
    i. Duration on credit bureau – seven years
    ii. If at any point the debtor contacts the creditor/default lister, then it is re-categorised as a standard default, duration of five years from the date of original listing

b. Never paid flag: can only be listed by telecommunications or utility Credit Providers after 60 days when the Credit Provider has
    i. never received any payment on the account; and
    ii. has reasonable grounds to believe that the consumer never had any intention to make a payment on the account.
    iii. The flag is removed at the end of six months and may be converted to an un-contactable default
    iv. The Code of Conduct will provide guidance on what 'reasonable grounds' might be including evidence that the consumer is un-contactable, and/or evidence of a pattern of dishonesty
    v. The Code of Conduct will provide guidance on how to deal with compassionate reasons why some consumers might be un-contactable (eg ill-health, mental health issues, language difficulties)

5 See: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=fapa_ctte/priv_exp_drafts/submissions.htm