AUSTRALIAN
RETAIL
CREDIT
ASSOCIATION

Principles of Reciprocity and Data Exchange (PRDE)

Application for revocation of existing authorisation number A91482 and substitution of new authorisation

ARCA submission in response to interested party submissions

28 August 2020

CONTENTS

1. General observations regarding Interested Party submissions

Thank you for your letter dated 10 August 2020 setting out the interested party submissions received by the ACCC as part of ARCA's application for re-authorisation of relevant provisions of the PRDE.

This submission sets out ARCA's response to the issues that the ACCC has identified would be of assistance to it.

ARCA welcomes and concurs with the feedback from the Insurance Council of Australia and the Australian Institute of Credit Management, both experienced industry bodies representing their constituent members and their interests.

ARCA recognises the importance to Legal Aid Queensland (LAQ) and Financial Rights Legal Centre (FRLC) of the consumer issues raised in their submission, however it submits that some of the issues raised in the submissions are misconceived and do not give rise to grounds for the ACCC to not re-authorise the relevant provisions of the PRDE. ARCA sets out in further detail below its response to each of these issues.

At the outset, ARCA is firmly of the view that the experience of consumers is critical to the functioning of the credit reporting system. ARCA has consistently worked closely with consumer advocate groups and financial counsellors on a number of key matters including:

- The development and subsequent variations of the Privacy (Credit Reporting) Code (CR Code) – which is the relevant code of conduct relating to credit reporting, and for which ARCA was code developer (as requested by the Privacy Commissioner)
- The creation and maintenance of ARCA's consumer education website, CreditSmart (www.creditsmart.org.au) and development of content tailored to consumers
- A range of ongoing policy issues including responsible lending guidance, credit repair reform, the impact of COVID-19 and industry responses. As part of this advocacy work, ARCA has provided submissions on issues concerning credit repair (and broader debt management firms) reform and improved regulation of the small amount credit contract (SACC) sector supporting positions adopted by consumer advocate groups.

ARCA enormously values the input and guidance offered by consumer advocate groups and financial counsellors, and particularly the insights that this engagement provides on the 'lived experiences' of consumers and the impact the operation of the credit reporting system has on consumers.

In this context, ARCA submits that the type and depth of engagement with consumer advocate groups and financial counsellors in respect to the review of the PRDE was appropriate, and differs to ARCA's other consumer engagement for the following reasons:

(a) The PRDE is not a consumer-facing document but a set of data exchange rules designed to support comprehensive credit reporting (CCR).

(b) It is a '*set of agreed principles that CRBs and CPs agree to abide by to ensure that those CRBs and CPs have trust and confidence in their credit reporting exchange*'[1].

[1] PRDE introduction (page 1)

(c) It is voluntary industry developed agreement that governs the relationship between credit reporting bodies (CRBs) and credit providers (CPs) by agreement.

At the heart of the consumer groups' submission and expectations regarding consultation is a misconception regarding the purpose of the PRDE and the scope of what it is capable of dealing with. Many issues raised by the consumer groups go to the assumption that the PRDE can solve broader policy issues of CCR relating to the consumer-credit provider relationship, including financial hardship reporting, and the correction of default information. While these are important issues, ARCA submits that these are not issues appropriate (or capable) to be dealt with in the PRDE.

As recognised by AICM's Interested Party submission to the ACCC, '*broader issues of credit reporting are not the subject of the re-authorisation, but the re-authorisation of the PRDE ensures that structures established can continue to be leveraged for better credit*'[2].

The PRDE must operate within the framework of the Privacy Act, Privacy Regulation and CR Code. The PRDE does not alter the rights consumers have under the existing legislative framework for credit reporting, other Acts and Codes.

ARCA sets out below its response to each of the key contentions highlighted by the ACCC as useful points of feedback in its letter to ARCA on 10 August, starting with the consumer advocates contention that the PRDE should meet guidelines for industry codes issued by ASIC and the ACCC, given that contention is central to many of the other issues raised.

2. The PRDE as an industry code and the need for consumer representation.

2.1. Overview

The ACCC letter dated 10 August 2020 summarises consumer advocate concerns including the suggestion that the PRDE should not be re-authorised until it meets minimum ACCC and ASIC guidelines for industry codes applicable to other contexts. In particular, the advocates suggest that the PRDE Administrator should be chaired by someone independent from the industry; and should be adequately resourced to enable meaningful consumer representation, which it currently lacks.

ARCA submits that in developing the PRDE we did consider the guidelines for industry codes issued by regulators and that these guidelines have been applied in an appropriate manner for a code that deals with business to business (B2B) obligations. The nature of the PRDE means that consumer representation in its governance is both unnecessary and inappropriate given consumer related issues are covered by the CR Code and are the responsibility of the Office of the Australian Information Commissioner (OAIC) and other entities such as the Australian Financial Complaints Authority (AFCA). It would be particularly inappropriate for a consumer representative to be involved in disputes between industry participants. Instead, governance of the PRDE should be a matter for industry and PRDE signatories. Industry already recognises the value of independence and requires the PRDE Administrator to be chaired by an Independent Director. The current Independent Director was selected after an openly advertised and rigorous recruitment process. The successful

[2] Australian Institute of Credit Management, interested party submission, 5 August 2020

candidate Mr Peter Wilson AM is a highly experienced Director with broad experience in both the private and public sector. [3]

ARCA's view is that while the design of the PRDE operation and governance was significantly informed by industry code guidelines such as those developed by ASIC and the ACCC (and others such as those issued by the OAIC), these guidelines should not be used as a template for how the PRDE must operate. This is because the guidelines issued by regulators are directed towards industry codes which incorporate obligations industry participants have to consumers. For credit reporting the obligations industry participants have to consumers are dealt with in the CR Code. Hence, the focus of the PRDE is on setting the rules for a data exchange between industry participants and, as part of that framework, identifying obligations industry participants have to each other. Any evaluation of its operation and governance must be undertaken on that basis.

ARCA also notes that the concerns raised by consumer advocates are similar to those raised by them when the original application to authorise the PRDE was submitted in 2015, including the proposal that decision-making bodies include consumer representation. ARCA's response then was that "*The PRDE does not directly involve consumers and falls outside the Privacy Act obligations, and compliance outcomes will only directly impact on PRDE signatories, and not the public at large. As a result, it is not appropriate for consumers to have a role in PRDE compliance …. Consumers already have extensive rights under the Privacy Act to raise issues with the operation of the credit reporting system through external dispute resolution (EDR) schemes and the OAIC*"[4]. In its final determination the ACCC also noted the consumer advocate calls for consumer representation, but ultimate concluded that "*the ACCC accepts that this is not necessary, noting that the PRDE does not directly involve consumers*"[5]. ARCA submits that nothing has changed since 2015 to challenge this conclusion.

ARCA submits that the suggestion that it should comply with guidelines that are wholly inapplicable to the PRDE and relate to wholly different circumstances is without basis and not practically feasible. Furthermore, to require applicants for authorisation to satisfy guidelines that do not apply before qualifying for authorisation would be directly inconsistent with the framework for analysis set out in the Competition and Consumer Act 2010.

The relevant test for re-authorisation of the PRDE is that the specific terms sought to be authorised (i.e. the principles of reciprocity, consistency and enforcement) result in significant public benefits that outweighs any potential public detriment. The appropriate counterfactual for the ACCC to consider is a world with and without the PRDE (and its authorised terms), not one where the ACCC is to compared the PRDE with a hypothetical 'PRDE' with alleged 'better terms' and 'better governance'. Such an analysis is not consistent with the legislative provisions of the Competition and Consumer Act 2010.

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[3] https://www.linkedin.com/in/peter-wilson-am-a916a255/?originalSubdomain=au

[4] Australian Retail Credit Association (ARCA) 29 May 2015, Principles of Reciprocity and Data Exchange (PRDE), ARCA submission in response to market inquiries, p8

[5] Australian Competition and Consumer Commission (ACCC), 3 December 2015 August 2011, Determination: Application for authorisation lodged by Australian Retail Credit Association Ltd in respect of the Principles of Reciprocity and Data Exchange, Authorisation number A91482, para 264, p42

2.2. The relevance of OAIC, ASIC, and ACCC guidelines for industry codes for the PRDE

The suggestion that the PRDE should not be re-authorised until it meets minimum ACCC and ASIC guidelines for industry codes is based on misconceptions around both the focus of the guidelines issued by the regulators, and the role of the PRDE (and how this is limited by the legal framework surrounding credit reporting). ARCA's strong view is that the code guidelines issued by these regulators are based predominantly on the requirement that the code is a consumer facing code, which has direct relevance to the relationship between the industry participant and the consumer, and which, in some instances, may seek to give the consumer more rights or impose greater obligations on industry participants than exists as part of the existing legislative framework. The same cannot be said of the PRDE which is a code governing conduct of industry participants, with no direct consumer interaction and the indirect consumer benefits are simply about enabling CCR participation and, in some instances, promoting adherence to the legislative framework (such as adopting data standards to promote contribution of high data quality), rather than creating any new rights or obligations. In this respect, it is relevant to consider not only the guidelines on industry codes issued by ASIC and the ACCC, but also the guideline issued by the OAIC, who is the primary regulator for credit reporting.

2.3. OAIC and codes of conduct

In considering the PRDE as a "code" and the need for consumer representation, it is first necessary to understand the current legislative framework for credit reporting. Today, this framework includes three elements:

- The Privacy Act, of which the credit reporting components commenced in March 2014. The Act sets out broadly the key definitions relating to credit reporting, the obligations of CPs and CRBs when collecting, using and disclosing credit information, credit reporting information and credit eligibility information. The Act has been drafted to prohibit certain behaviour, and also grants power to the Privacy Commissioner to investigate and penalise breaches.
- The Privacy Regulation provides additional clarity as to some of the definitions within the Privacy Act, including the definitions of consumer credit liability information (CCLI), repayment history information (RHI), credit provider and credit reporting business.
- The CR Code is a code of practice about credit reporting which sets out how the credit reporting provisions of the Privacy Act are to be applied or complied with e.g. how the use, access, corrections and complaints provisions operate, and how CCLI, RHI, default information, payment information, and serious credit infringements should be reported. CRBs and CPs are both bound by the code.

Importantly, the legislative framework and especially the CR Code, have a strong focus on what information may be included in the credit reporting system, who may access that information, and what that information can be used for. The OAIC's guidelines for developing enforceable codes under the Privacy Act (under which the CR Code was developed) make it clear that the purpose of a code *"is to provide individuals with transparency about how their information will be handled. Codes do not replace the relevant provisions of the Privacy Act, but operate in addition to the requirements of the Privacy Act. A code cannot lessen the privacy rights of an individual provided for in the Privacy Act …… A breach of a registered*

code will be an interference with the privacy of an individual"[6]*.* The CR Code is therefore inherently centred on the individual consumer and their privacy.

The OAIC's guidelines reinforce this by saying *"As a breach of any provision of a registered code is an interference with the privacy of an individual, a code should limit itself to provisions which outline the specific obligations of entities' bound by the code"*[7]*.* Hence, the CR Code can only deal with issues emanating from the Privacy Act as it applies to credit reporting and the privacy of an individual.

Technical and operating issues relating to "how" the credit reporting should operate including any industry rules around participation (such as those contained in the PRDE that deal with reciprocity, consistency of data contribution, or data standards) are clearly outside the scope of the OAIC's guidelines for Privacy Act codes of conduct, because they do not deal with the privacy of individuals and are not obligations created by the Privacy Act. Put another way, while the legislative framework for credit reporting sets out the requirements for the collection, use and disclosure of new types of comprehensive information, the legislative framework is silent on how or why CPs would exchange that information with other participants in the system.

Hence, while the CR Code and the rest of the legislative framework deals with the consumer related aspects for credit reporting, a gap existed for a business to business code of conduct that would deal with how businesses would actually participate. The PRDE fills this gap. As a B2B code, it does not and cannot create new rights or amend the terms of the consumer-focused legislative framework for credit reporting. The Explanatory Memorandum to the original 2012 legislation which enabled CCR recognised the potential need for a B2B code and its clear distinction from the CR Code. *"The industry may choose to address some credit reporting issues (such as reciprocity between industry participants in the credit reporting system) which will not be regulated by the credit reporting provisions. It would be a matter for industry to determine what, if any, additional issues should be included. As these matters would fall outside the credit reporting provisions they would not require approval by the Privacy Commissioner"*[8].

2.4. ASIC and financial service sector codes of conduct

It is also clear that the focus of ASIC's guideline on the development of financial service codes of conduct is on codes that directly relate to the conduct of industry towards consumers.

> *"We believe that codes sit at the apex of industry self-regulatory initiatives. To us, a code is essentially a set of enforceable rules that sets out a progressive model of conduct and disclosure for industry members that are signed up.* ***Codes should therefore improve consumer confidence in a particular industry or industries****.*
>
> *It is not mandatory for any industry in the financial services sector to develop a code. Where a code exists, that code does not have to be approved by ASIC. However, where approval by ASIC is sought and obtained,* ***it is a signal to***

[6] Office of the Australian Information Commissioner (OAIC), September 2013, Guidelines for Developing Codes, para1.5-1.6

[7] Ibid, para 1.7

[8] Privacy Amendment (Enhancing Privacy Protection) Bill 2012 Explanatory Memorandum, Section 10.3, p31

> ***consumers that this is a code they can have confidence in. An approved code responds to identified and emerging consumer issues and delivers substantial benefits to consumers.***
>
> *We believe that the primary role of a financial services sector code is to raise standards and* ***to complement the legislative requirements that already set out how product issuers and licensed firms (and their representatives) deal with consumers.****"*[9] *[emphasis added]*

Therefore, it is clear that an ASIC approved code would be visible to the consumer, directly benefit the consumer, and the conduct would complement existing legislative requirements for industry towards consumers. In 2018 the Australian Banking Association's (ABA's) Banking Code of Practice was the first industry code ASIC approved under its powers. In approving the Banking Code of Practice, ASIC noted that the Code would *"form part of the contracts between the banks and their customers*"[10].

While the PRDE does benefit consumers through the incentives it creates to participate in CCR, any consumer benefit is not directly received through activity undertaken under the PRDE. Moreover, it is highly unlikely that consumers would even be aware of the existence of the PRDE or its associated data standards. And again, the ASIC guideline is focused on enhancing legislative requirements that are owed to consumers, and not industry issues such as reciprocity which relate to obligations between industry participants. Based on their regulatory guide, it seems clear that the PRDE is not a code that would or could be authorised by ASIC.

2.5. ACCC and industry codes of conduct

The ACCC describes the purpose of voluntary industry codes of conduct as setting out *"specific standards of conduct for an industry in relation to the manner in which it deals with its members as well as its customers"*[11]. The ACCC also notes that effective codes *"potentially deliver increased consumer protection and reduced regulatory burdens for business"*[12]. In relation to the role of consumers and their advocates in these codes, the ACCC indicates that *"Consumers play an important role in the development of business to consumer codes, code administration and consumer dispute resolution schemes"*[13] i.e. the ACCC guidelines explicitly recognise that consumer representation is important for B2C codes - which the PRDE is not.

In terms of credit reporting, the CR Code approved by the OAIC deals with consumer related rights and industry obligations. For disputes, consumers have access to both the OAIC and dispute resolution scheme operated by AFCA.

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[9] Australian Securities and Investments Commission (ASIC) March 2013, Regulatory Guide 183: Approval of financial services sector codes of conduct, paras 183.2-183.4
[10] Australian Securities and Investments Commission (ASIC) 31 July 2018, Press Release 18-223MR ASIC Approves the Banking Code of Practice
[11] Australian Competition and Consumer Commission (ACCC), August 2011, Guidelines for developing effective voluntary industry codes of conduct, p1
[12] ibid
[13] Ibid, p8

As a B2B industry code, the PRDE addresses with obligations industry participants have to each other. The framework used to develop and operate the PRDE is very much aligned to the ACCC's guidelines for industry codes. As suggested by the ACCC's guidelines[14]:

- the purpose of the PRDE is very clear;
- its rules are designed to achieve its purpose (and some of those rules require authorisation from the ACCC);
- the administration of the PRDE allows for those stakeholders directly impacted by the PRDE (i.e. the PRDE signatories who must be credit reporting bodies (CRBs) or credit providers (CPs)) to be represented on the Board of the Administration entity;
- the coverage of the PRDE enables participation on the same terms by all CRBs and CPs (irrespective of whether they are ARCA Members or not);
- a complaints handling/dispute resolution process exists, and has provisions allowing disputes to be decided by CRB and CP peers or through independent arbitration, and also has sanctions for non-compliance;
- The PRDE also has an inbuilt review mechanism which includes period review by an independent party whose report must be provided to PRDE signatories;
- Significant work has also been done by ARCA to promote the PRDE to industry.

The fact that the PRDE has achieved such a high level of participation and support from both ARCA Members and non-members is testament to the PRDE's success as a voluntary industry code.

3. Concerns around consultation with consumer advocates following the independent review of the PRDE by Price Waterhouse Coopers (PWC)

Before responding to consumer advocate concerns over consultation, it is important to understand the context of PWC's review of the PRDE, which occurred after only relatively limited operation of the PRDE. That is, it was conducted only twelve months after CCR participation had commenced in a substantive manner (with NAB's commencement of data sharing in February 2018), and only six months after all the major banks had contributed 50% of their data into the system. At this stage, the PRDE framework was in early stages of being used and any review beyond early operation to a consideration of the fundamental principles underpinning the PRDE would be premature.

PWC, as independent auditor, determined the appropriate scope of the consultation in line with the objectives of the review:

(a) The scope of the PWC independent review is clearly set out in section 1.2 of the report. It is concerned with the "*terms and operation of the PRDE. Broader policy considerations or issues that would require changes to the CR Code and Privacy Act do not fall within the scope of this review…*" [15]

(b) In accordance with the scope, PWC as independent auditor (not ARCA) determined as appropriate to consult with stakeholders who were able to provide valuable insights into the terms and operation of the PRDE.

(c) PWC set out its approach to consultation clearly in its report, available on the public record. The consultation process it recognised called for insights gained from the "*operation of the PRDE"*. Accordingly, the stakeholders identified

[14] Ibid pp6-13

[15] Reciprocity and Data Exchange Administrator, *Review of the Principles of Reciprocity & Data Exchange*, July 2019, s 1.2.

included mainly signatories and non-signatory CPs, CRBs and relevant industries – each of whom represented parties who *could* be signatories to the PRDE.

In light of the above, ARCA submits the PWC consultation was appropriately conducted. PWC's consultation focused on the limited operative, technical and procedural operation of the PRDE since its initial inception. As noted above, the PRDE governs the terms of exchange of data between CPs and CRBs (who are signatories). Consultation with PRDE signatories and likely signatories was relevant to inform the review, given these parties could provide input on their initial interaction with the PRDE framework. Consumers and consumer groups are not signatories to the PRDE and are not able to provide such insights.

ARCA's subsequent process to consult on proposed amendments to the PRDE focussed on both the amendments to the PRDE considered necessary to give effect to PWC's recommendations, and a range of other changes already identified by the PRDE administrator. Again, many of these amendments were designed to resolve more technical or operational issues with the PRDE. Notwithstanding the above, consumer advocates were informed of and provided with an overview of the operation of the PRDE, including the Independent Review, and were briefed on the types of amendments being considered, ahead of ARCA's application to the ACCC . While consumer groups have a valid interest in CCR generally and their relationships with CPs, ARCA's obligations under the PRDE require it to prioritise consultation on any amendments with PRDE signatories (given it relates to their obligations under the PRDE). ARCA's view is that the nature of our consultation on the PRDE amendments and our engagement with consumer advocates was appropriate and reflected the very limited 'broader' issues addressed by the amendments.

Our responses in this submission to the other issues raised by the consumer advocates also supports the rationale for the level of engagement we undertook, in that the consumer advocate expectations around consultation reflect their perception that the PRDE should be evaluated as a consumer code of conduct, and that the PRDE could deal with broader policy issues already covered by the legislative framework for credit reporting – assertions that ARCA does not support.

As noted above, ARCA submits that the relevant test for re-authorisation of the PRDE is that the specific terms sought to be authorised (principles of reciprocity, consistency and enforcement) result in significant public benefits that outweighs any potential public detriment. The appropriate counterfactual for the ACCC to consider is a world with and *without* the PRDE (and its authorised terms), not one where the ACCC is to compare the PRDE with a hypothetical 'PRDE' that may or may not have been arrived at had consumer groups been involved in the independent PWC review. Such an analysis is not consistent with the legislative provisions of the Competition and Consumer Act 2010.

4. How the recommendations in the PWC Review have been incorporated in the revised PRDE.

Following our engagement with consumer advocates referred to above, in which we briefed consumer advocates on the operation of the PRDE including the Independent Review and proposed PRDE amendments, by email to ARCA in May 2020, LAQ submitted that it was "not clear how the PWC recommendations in its report are reflected in the proposed amendments." This email was provided, with LAQ's consent, at Appendix G Attachment 2 of ARCA's application to the ACCC. LAQ raised this issue again in its interested party submission to the ACCC.

Appendix E of ARCA's application already provides information on the Independent Review of the PRDE, the Review Recommendations and the RDEA Response to those Recommendations[16]. This Appendix clearly sets out how each of the PWC recommendations has been addressed in the proposed amendments to the PRDE.

Overall, the Independent Reviewer made fifteen recommendations. Notably, not all recommendations suggested consideration be given to amendments to the PRDE. Appendix E, Table 3 sets out the RDEA's Response and Progress against each of the Independent Review recommendations, with cross-references to the 2020 Amendment Process Statement of Consultation, which was included at Appendix E, Attachment 6 of ARCA's application.

The 2020 Amendment Process that followed the Independent Review also addressed a number of operational and administrative matters identified by ARCA management during the operation of the PRDE. Further details on the matters addressed in this process and the process itself are included at Appendix E of ARCA's application.

5. How Repayment History Information is reported under the PRDE where credit providers have entered into financial hardship arrangements

The ACCC's letter summarises two concerns raised by consumer advocates relating to how RHI is reported for consumers in receipt of hardship arrangements – both are dealt with in this section.

Submissions provided by LAQ and FRLC in response to ARCA's application both seek further amendments to the PRDE to address issues of RHI reporting and hardship, which it is said lead to ongoing public detriment.

The submission made is that:

> *"in the absence of permanent and enforceable resolution in Australia about how financial hardship arrangements are to be reported by credit providers, the PRDE should be amended to provide clarity and consistency about how credit providers should report on this issue. It is submitted that the PRDE should be amended so that where signatories have chosen to contribute comprehensive information under the PRDE, signatories must not disclose a payment as overdue if they have entered into a financial hardship arrangement with a customer. In these circumstances, Repayment History Information should be recorded as 'current up to and including the grace period', in accordance with clause 8.2(c)(i) of the Credit Reporting Code 2014 (CR Code)"*

ARCA notes this issue is addressed in Section 4.4 of its application. ARCA is strongly of the view that the reporting of RHI for accounts subject to hardship is a critical issue and one which must be addressed.

However, as ARCA's application highlighted, the reporting of RHI for accounts subject to hardship is outside the scope of the PRDE. Further, since the authorisation of the PRDE in 2015, this policy has been the subject of review by the Attorney General's Department and is now addressed, in part, by legislation which has been tabled in Parliament, although yet to

[16] ARCA's application for re-authorisation, Appendix E, pages 18-25

be passed through the Senate. In addition, consistency in RHI reporting for accounts in hardship is also outside the scope of the PRDE and can only be achieved as part of amendment to the legislative framework, not through amendment to the PRDE.

Furthermore, even assuming it was appropriate to deal with hardship in the PRDE (which it is not) any advocated amendment to the PRDE seeking to implement a mode of reporting dealing with hardship cannot occur without due regard to the broader policy intent of the draft hardship flag legislation. For example, the legislative intent seeks to enable further information to be disclosed to differentiate hardship RHI from the RHI reported for an account for a customer not in hardship. Advocated amendments that would seek to have both hardship and non-hardship RHI reported in the same manner would be contrary to this intention.

As the draft Explanatory Memorandum states, the non-reporting of hardship arrangements through the credit reporting system:

> "can reduce the efficacy of the credit reporting framework by restricting the visibility of hardship information about a consumer that is relevant to their creditworthiness. This information asymmetry in turn affects the ability of credit providers to meet their responsible lending obligations"[17].

On this basis, the intent of the draft legislation is to create a hardship flag indicator with the result that an individual making payments subject to a hardship arrangement and who is meeting the terms of that arrangement will be both reported as 'current', but also with that information qualified by the hardship flag to indicate an arrangement is in place.

ARCA further notes that, as set out in section 2.4.6 and Appendix E of its application, it has sought to address current practices with the reporting of RHI for customers in hardship, by providing an RHI reporting exception which enables the non-reporting of RHI for those accounts. This gives effect to what has been described as the 'interim' hardship reporting solution, which stems from an agreement between the Australian Banking Association and then-Treasurer Scott Morrison[18] for how to address the reporting of RHI for hardship accounts pending a legislative solution.

Suppressing RHI reporting is more aligned to the intent of the proposed legislative framework, in that RHI would not reflect that missed payments have been met (when in fact they haven't). While the interim solution does not (and cannot) include a hardship 'flag' indicator , it does result in an individual receiving hardship assistance being reported differently from a customer who is meeting their full payment obligations. As an "interim" solution, this better preserves the integrity of RHI data and means that CPs can rely on this information to support lending decisions. In turn, this means the public benefits associated with the contribution of this data into the credit reporting system are better able to be realised.

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[17] Paragraph 2.4 of the Explanatory Memorandum to the National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Bill 2019

[18] This agreement was reflected in the draft Regulations supporting the 2019 Mandatory CCR legislation, which exempted credit providers captured by the mandatory CCR provisions from being required to supply RHI where a hardship arrangement was in place. This exemption was designed to expire on 31 March 2021, after which the new Financial Hardship Information (FHI) provisions of the 2019 Bill would come into force. See National Consumer Credit Protection Amendment (Mandatory Credit Reporting) Regulations 2020 – Draft Explanatory Statement, pp2-3

ARCA submits that any further amendment to the PRDE to deal with RHI and hardship reporting as submitted by LAQ and FRLC would likely lead to unintended consequences including public detriments not fully appreciated and potentially contrary to the broader legislative intent for hardship legislation. ARCA's view is that the most appropriate means to maintain the public benefits of RHI reporting (and CCR more broadly) will be achieved through the current legislative solution and, otherwise, through the current proposed RHI reporting exception to the PRDE giving effect to the interim hardship reporting solution.

6. Exceptions to listing of defaults

6.1. Overview

Submissions provided by LAQ and FRLC in response to ARCA's application seek further amendments to the PRDE to provide exceptions to the listing of defaults, which it is alleged lead to ongoing public detriment.

LAQ submit that there are three legitimate circumstances which should be reflected in exceptions for default listing being:

- Unresolved ongoing dispute;
- The CP has entered into a binding settlement agreement; and
- A recommendation or determination by AFCA.

ARCA's strong view is that the PRDE should not be amended, as the disclosure and correction of default information is a matter for the operation of the Privacy Act and CR Code, not the PRDE.

ARCA also notes the issue of listing of defaults continues to be raised as a PRDE issue, noting this issue was also raised as part of the 2015 authorisation application process.

For the ACCC's benefit, ARCA has set out in some detail below how the Privacy Act and CR Code operate in respect to disclosure and correction of default information, and the limited role the PRDE plays in respect to reporting of default information.

6.2. Disclosure of default information

When disclosing default information, the disclosure must be in respect to an overdue payment which is more than $150, not statute-barred and which has been the subject of two separate notices. These requirements are set out in the Privacy Act and the CR Code[19].

Where there is an active dispute, the CP is required to hold collections activity[20]. Further, where an individual has disputed liability for an overdue payment, the CP is required to establish a clear basis for liability before proceeding to disclose default information. If the CP cannot satisfactorily establish the individual's liability, then it arguably cannot assert an 'overdue payment' exists – and if the CP continues to disclose default information, that such

[19] Privacy Act sections 6Q and 21D(3) and CR Code, para 9.
[20] AFCA Terms of Reference A.7.1(c); ACCC debt collection guidelines paragraphs 19(h) & 24(c)

information may be incorrect. This is an issue under the Privacy Act, that is, whether or not an overdue payment exists which may then constitute default information.

There is nothing in the PRDE which requires a CP to disclose default information in circumstances in which a dispute is on foot, noting the PRDE requirement allows for reporting within a 'reasonable timeframe' (which is for CP to determine in the circumstances, allowing for a possible dispute).

Further, where an individual has made a hardship request in respect to the overdue payment or entered into a negotiated payment arrangement, the CP will be unable to disclose default information. The CR Code (paragraphs 9.1 and 9.2) explicitly prevents disclosure of default information where a hardship request has been made and either is being determined or has been refused in the past 14 days.[21]

Where the hardship request is made and accepted by the CP, and the individual is making payments in accordance with the negotiated payment arrangement then either:

- The terms and conditions of the credit have been changed, to reflect the hardship variation made, and the previous 'overdue payment' no longer exists; or
- By entry into the negotiated payment arrangement (reflected in binding settlement terms) and adherence to the terms of that arrangement, the CP is unable to assert that an overdue payment exists.

As such, the entry into a binding settlement agreement between a CP and an individual prevents disclosure of default information by operation of either the CR Code (hardship request) or Privacy Act (meaning of default information).

Where AFCA has determined that default information should not have been disclosed, then its reasons for determination should identify the basis upon which the requirements of the Privacy Act and CR Code have not been met. In those circumstances, if there is a failure to meet these requirements, the issue for AFCA to determine is what is the effect of this failure and whether it means the default information disclosed is incorrect.

6.3. Correction of default information

Where credit information or credit eligibility is inaccurate, out-of-date, incomplete, irrelevant or misleading, a CP is obliged to correct that information.[22]

As such, in each of the circumstances identified by LAQ, if default information is disclosed where the requirements of the Privacy Act and CR Code are not met, then it is required to be corrected.

Paragraph 20.5 of the CR Code expands further on situations in which a request may be made for removal of default information, including circumstances where an overdue payment occurred because of the unavoidable consequences of circumstances beyond the individual's control, such as natural disaster, bank error in processing a direct debit or fraud.

[21] CR Code, paras 9.1 and 9.2.
[22] Privacy Act, section 21U.

6.4. Role of PRDE obligations in respect to default information

Appreciating how the Privacy Act and CR Code operate in respect to the disclosure and correction of default information, the question remains: what then is the role of the PRDE in respect to default information?

The PRDE obligations will require a CP to contribute all available default information for consumer credit accounts within a reasonable timeframe of overdue payments (in respect to those accounts) falling due.

Critically, this contribution applies to 'available' default information. If issues arise as to whether or not default information (which meets the requirements of the Privacy Act and CR Code) exist, then the PRDE contribution obligation does not apply. Further, if default information is contributed for an overdue payment and it is subsequently established this information is incorrect, then, again, the PRDE contribution does not apply. Incorrect information is not 'available' default information.

This intersection of the requirements of the PRDE with the requirements of the Privacy Act and CR Code is underscored within the introduction to the PRDE where it is stated,

> *"Nothing in the PRDE obliges a CRB or CP to do or refrain from doing anything, where that would breach Australian law."*

In conclusion, ARCA's view is that the listing of defaults and the exceptions to the listing of defaults are dealt with by operation of the Privacy Act and CR Code. On this basis, ARCA submits that there is no ongoing public detriment created by the PRDE in respect to the listing of defaults.

7. The period of re-authorisation

Both LAQ and FRLC have submitted that the appropriate length of authorisation ought to be five years, rather than the six-year period sought in ARCA's application. They justify this position because of impending legislative reform and their views on the consumer consultation process.

ARCA submits that the six-year authorisation period remains appropriate. A six-year timeframe is necessary to allow sufficient time both for proper evaluation of the operation of the PRDE, as well as consultation in respect to the next independent review of the PRDE, and any further amendments required to the PRDE. A shorter timeframe is counterintuitive to seeking a sufficient period that allows for appropriate and meaningful review and consultation.

The consumer advocate arguments for a shorter authorisation period misconstrues the purpose of the PRDE, and the role consumers play as part of the PRDE framework. To begin with, the suggestion that legislative reforms will necessitate a shorter authorisation period assumes a much greater connection between any reform and the PRDE than exists (and will exist) in practice. For instance, when the hardship flag legislation is enacted, the consequential amendments to the PRDE will be minor. The hardship flag legislation will create a new form of credit information, being financial hardship information. The relevant definition of comprehensive credit information in the PRDE will need to change to include financial hardship information, and the RHI reporting exception (applicable to the pre-hardship flag reporting of RHI) will no longer be necessary.

In contrast to these minor PRDE amendments, variations to the CR Code will be critical to provide operative effect to this reform and will address matters such as the form, use and restrictions on financial hardship information. It will be the operation of the CR Code, and the review of its operation which will be critical to gauging the success or otherwise of the legislative reform. The PRDE will, by and large, be of little import to the operation of the hardship flag legislation.

It should also be noted, as has happened in the past, any future variation to the CR Code to accommodate new legislation such as hardship reporting will entail a significant consultation process with all stakeholders including consumer advocates. Again, the CR Code is the appropriate code that can deal with the issues raised by the consumer advocates.

The issues raised by consumer advocates in respect to the lack of effective consumer consultation in relation to the PRDE have been addressed above. Repeating the submissions made above, ARCA's view is that the PRDE is a B2B code and the consumer consultation has been adequate and appropriate in the circumstances.