AUSTRALIAN RETAIL CREDIT ASSOCIATION APPLICATION FOR RE-AUTHORISATION – INTERESTED PARTY CONSULTATION

Submission by Legal Aid Queensland

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Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to provide a submission in response to the Australian Retail Credit Association ARCA application for re-authorisation — interested party consultation.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and is required to give this "legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ's Civil Justice Services Unit lawyers provide advice and representation in banking and finance, credit and debt, credit reporting and default listings, insurance and consumer law, including to clients who have issues with their credit reports on a regular basis. This submission is informed by that knowledge and experience.

Re-authorisation

LAQ is of the view that it is inappropriate that reauthorisation of the Principles of Reciprocity and Data Exchange Code (PRDE) is granted until:

- Consumers have been resourced to respond to and have been consulted in relation to the proposed amendments to the PRDE; and
- Governance arrangements and administration of the PRDE meet minimum standards in the ACCC and ASIC guideline dealing with the development of industry codes[1].

The Consultation Process

The PRDE required a review of the PRDE within three years of its authorisation. The PRDE when it was developed consulted with a variety of stakeholders including consumers. For the current review of the PRDE the Australian Retail Credit Association (ARCA) has not engaged with consumers as to the scope of the review and engaged Price Waterhouse Cooper PWC to conduct the independent review. Neither ARCA or PWC have consulted with consumers as part of the review.

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[1] ACCC Guideline for developing effective voluntary codeshttps://www.accc.gov.au/system/files/Guidelines%20for%20developing%20effective%20voluntary%20industry%20codes%20of%20conduct.pdf and Regulatory Guide RG 183 Approval of financial services sector codes of conduct https://download.asic.gov.au/media/1241015/rg183-published-1-march-2013.pdf)

We acknowledge that the PRDE is primarily a code to regulate the sharing of information between industry subscribers but it is our view that the reviewer should have consulted with consumers as part of the review process for the following reasons:

- Consumers were consulted and participated in the development of the original PRDE;
- The data being exchanged is consumer data;
- Consumer groups had raised concerns about the original PRDE and how it affected the rights of individual consumers; and
- ASIC Regulatory Guide 183 requires that an independent reviewer should base its review on the same processes used to develop the Code which includes consultation with consumers.

The Administration and Governance of the PRDE.

Effective administration requires that the body or person charged with overseeing the operation of the Code is independent of the industry that is subscribing to the Code. It should include representatives from all stakeholders including consumer representation. The ACCC and ASIC guidelines set out the criteria for consumer representation (https://www.accc.gov.au/system/files/Guidelines%20for%20developing%20effective%20voluntary%20industry%20codes%20of%20conduct.pdf and Regulatory Guide RG 183 Approval of financial services sector codes of conduct. https://download.asic.gov.au/media/1241015/rg183-published-1-march-2013.pdf)

The PRDE does not have an independent code committee nor does it include consumer representation in the overseeing body.

We are not convinced the "monitoring, reporting and compliance" framework under Principle 5 of the proposed PRDE is sufficiently independent and transparent in identifying systemic problems with data quality in credit files (i.e. consumer advocates will still have to rely on individual clients recognising incorrect listings on their reports).

We recommend that the Reciprocity and Data Exchange Administrator (RDEA) as a minimum must:

- include representation from consumers,
- be chaired by someone independent from the industry, and
- be adequately resourced.

Reporting must be public and encourage transparency of all decision-making and/or sanctions. Resourcing needs to include remuneration for the consumer representative as well as training so that they are able to effectively contribute to the RDEA.

Weak administration and governance of the PRDE render codes largely ineffective for addressing consumer dissatisfaction with aspects of the Code. This includes the ability to raise complaints about how the PRDE deals with as an example the reporting of Repayment History Information or defaults.

This is especially critical where there is contention between industry and consumers as to how the current law applies in this area.

General issues about the PRDE

The application for re-authorisation of the PRDE asserts there are limited public detriments. What potential public detriment is identified focuses on the effect on market competition and the potential effects on its industry participants but does not really address the significant effect the PRDE has in creating issues that

affect consumers on a daily basis. This PRDE does not exist in a vacuum and should address the real world effect it has on consumers. It needs to deal more appropriately with the issues created by how it interacts with other codes and laws that affect the consumer experience of its product.

The argument that the PRDE increases financial inclusion and decreases over-indebtedness is not supported by evidence. Comprehensive credit reporting may have resulted in consumers not obtaining credit from banks, credit unions and building societies but there is no evidence that these borrowers have not obtained more expensive credit from other credit providers. Additionally, there is no evidence that the PRDE, mandatory credit reporting or CCR has resulted in greater levels of financial inclusion or may do so in the future. In our experience consumers from lower socio-economic backgrounds, particularly those with fixed incomes, have not been able to access appropriate credit from the major lending institutions as a result of CCR or the PRDE. On the contrary in our casework experience those consumers are increasingly facing greater levels of financial exclusion with little or no access to mainstream lending.

We are of the view that greater access to third tier lenders by vulnerable consumers does not constitute evidence of greater financial inclusion or a realised benefit to vulnerable consumers.

Proposed amendments to the PRDE

LAQ and the Financial Rights Legal Centre FRLC were invited to a presentation by the Australian Retail Credit Association ARCA on the 13th May 2020. ARCA presented on the outcomes from the review provided an overview of the proposed amendments to the PRDE.

Please note LAQ has not been provided with the proposed amended PRDE. In the presentation made by ARCA on the 13th of May, we were provided with a consultation pack and the PWC report but not the amended PRDE.

The PWC report included certain recommended changes to the PRDE to reflect the views of its industry stakeholders. In principle we were not opposed to the amendments of the PRDE as reported to us in the presentation on May 13.

However, some of the recommendations in the PWC report were amendments that we would not support and how these were to be reflected in the PRDE were not included in the presentation made to LAQ and the FRLC.

Also, it was not made clear how the PWC recommendations in its report are reflected in the proposed amendments.

We have concerns about the recommendations that were provided in the PWC report and would like to better understand how these recommendations are addressed in the proposed amendments to the PRDE. For example, recommendation 9 in the PWC report refers to giving access to comprehensive data to commercial only credit providers which we oppose particularly if that includes access to Repayment History Information and/or where the commercial only credit providers are not members of an approved external dispute resolution scheme

We are unable to comment further about the assertions made by ARCA as to the benefits of the PRDE to consumers until we have had the opportunity to be part of a review of the PRDE and have an opportunity to view and comment on the amended PRDE.

Recommended minimum amendments to the PRDE

Consumer advocates and particularly the FRLC have consistently raised the following issues that need addressing in the PRDE:

a. Repayment History Information (RHI) reporting for customers in hardship; and

b. Exceptions for listing defaults where there has been a negotiated settlement.

These must as a minimum be addressed in the in the current PRDE for the protection of consumers.

a. Repayment History Information (RHI) reporting for customers in hardship;

The PRDE does not resolve the problem of consistency in treatment of hardship variations on credit reports.

This is a problem for Credit Providers (CPs) that will sign up under the comprehensive tier level of the PRDE to provide and receive RHI about consumers. There is currently no permanent and enforceable resolution in Australia for how CPs are expected to record RHI when a consumer has entered into a repayment arrangement due to financial hardship. The National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Bill intention was to resolve this issue but it was not passed by the Parliament.

LAQ and consumer advocates have expressed our views on this issue on a number of occasions with ARCA and the Office of the Australian Information Commissioner (OAIC). The following is a brief summary of our position:

- RHI must be reported in a way that accurately reflects the hardship variation entered. For example:
  - if a hardship arrangement allows a debtor a moratorium or variation on payments for a certain period, RHI should reflect whether the debtor is making payments in accordance with the arrangement, not the original contract; and
  - CPs should carefully explain (and confirm in writing) whether a variation will have any impact on a debtor's credit file.
- Additionally, the way RHI is reported should avoid operating in a way that discourages debtors from seeking a hardship variation.

ARCA would agree that the current situation (where there is a lack of uniformity over how RHI will be reported) is unacceptable.

In our view, it should be clear under the current PRDE Principle 1 that where a CP has chosen to contribute comprehensive information under the PRDE, the CP must not disclose a payment as overdue if the individual entered into a hardship arrangement. During the period of the hardship arrangement, RHI 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 (the CR Code).

'Hardship arrangement' should also be defined broadly in the definitions section of the PRDE. For example, it should state that hardship arrangement includes “any kind of agreement, arrangement or understanding, whether formal or informal, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings” and the consumer has formally agreed with a CP to a moratorium or variation on payments for a certain period of time due to financial hardship.

There has been widespread non-compliance with this requirement as well as considerable inconsistency as to how that data is recorded by credit providers. This has been heightened during COVID, where lenders will report RHI differently for any COVID related variation with some credit providers choosing not to report any data (which is problematic as some CP's interpret the failure to report as evidence that the borrower is in hardship) whilst other CP"s report RHI as “0”

CP's are also planning to report RHI differently once COVID relief is at an end, depending on whether:

- the borrower was in default prior to COVID, or
- they can meet ongoing payments or

- they are seeking a further variation.

This is unsatisfactory from a data quality basis and unfair to individual borrowers.

b. Exceptions for listing defaults when there has been a negotiated settlement

The PRDE does not provide exceptions to the listing of defaults. In our view there are maybe legitimate circumstances where default listings ought not to be listed. These legitimate circumstances fall into 3 categories:

- where there is an ongoing dispute between the parties that has not been resolved;
- the CP has entered into a binding settlement agreement with regards to the listing; or
- the CP is acting in accordance with a recommendation or determination of the Australian Financial Complaints Authority AFCA.

The PRDE must allow for exceptions to the listing of default information by CP's.

Future Reviews

ARCA is currently seeking to have a re-authorisation process occur every 6 years to enable the PRDE to be adequately reviewed and amendments implemented before the PRDE is reauthorized. In our view the PRDE ought to be regularly reviewed and that those reviews comply with *ASIC Regulatory Guide 183 Approval of financial services sector codes of conduct*, the *ACCC Guideline for the development of effective codes of conduct* as well as the authorization guideline.

It is important that the PRDE is able to:

(a) respond to developments and changes in industry products and technology;
(b) respond to emerging issues relating to the consumer experience impacted by the PRDE; and
(c) identify and respond to gaps in the PRDE

LAQ does not support the PRDE being re-authorised every 6 years as in our view the re-authorisation process appears to be the only formal opportunity for consumers to voice their concerns in relation to the impact of the PRDE on consumers. In addition, the initial PRDE was required to be reviewed within 3 years, yet the review process did not begin until after 3 years and was not finalized until nearly 5 years after the date of the initial authorisation. Our concern is that if a re-authorisation is only required every 6 years the review of the PRDE may not be completed until just prior to the application for re-authorisation.

In addition, as acknowledged by ARCA, amendments to the credit reporting regime envisaged in National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2019 have not passed. If these changes pass they are likely to affect the operation of the PRDE.

In our view it is appropriate given that significant legislative changes are pending and the time taken to complete the current review, that a review of the PRDE should be conducted, completed and changes implemented to allow an application for re-authorisation to be made and approved within 5 years.

It's critical that funding is made available to consumer stakeholder groups to allow them to participate in reviews of the PRDE and to the reauthorization process.