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ARCA consultation on variations to the CR Code

The Australian Retail Credit Association (ARCA) is seeking feedback on variations to the *Privacy (Credit Reporting) Code 2014 (Version 2.3)* (**CR Code**) in response to the proposals contained in the Final Report of the 2021 Independent Review of the CR Code (the **Review**). This follows an earlier round of consultation with interested stakeholders.

The Review's final report contained 45 proposals, including 19 which suggested variations or amendments to the CR Code in some form. These proposals range from large, complex matters where the Review suggested that implementation options should be developed through consultation to technical drafting matters raised by credit reporting bodies (**CRBs**) and credit providers (**CPs**).

ARCA as Code Developer

The Review endorsed ARCA's role as CR Code developer. Subsequently, in July 2023, the OAIC invited ARCA, as CR Code developer, to submit an application to vary the CR Code to give effect to the proposals from the Review. We intend to submit such an application in December 2023.

For the purposes of preparing our application, we are running a policy development and consultation process that is consistent with Proposal 10 of the Review and the OAIC's recently-updated Guidelines for developing codes (the **Guidelines**). As part of that process, we have:

- held initial discussions with industry participants, Government, EDR schemes, consumer advocates and other interested stakeholders; and
- established a 'CR Code Working Group' of CRBs and CPs from within ARCA's membership, to provide feedback on operational challenges with the more complex proposals.
- conducted a 'first round' of formal consultation, prior to the drafting of any code provisions, seeking feedback on policy settings and implementation options for all the relevant Review proposals;

Subsequent steps of our CR Code update process include:

- a 'second round' of formal consultation, updating all stakeholders on the outcomes of the first round, and seeking feedback on the potential drafting of the CR Code – **this document is a component of the second round of consultation, and should be read alongside the Consultation CR Code released for this purpose;** and
- throughout the process, bilateral engagement as required – including in response to the first and second rounds of consultation.

The consultation process

The ‘second round’ consultation process involves a draft of CR Code containing the proposed variations (the **Consultation CR Code**) for public feedback for a minimum of 28 days, consistent with the requirements of section 26Q of the Privacy Act and the Guidelines.

The Consultation CR Code contains a number of minor changes associated with Proposal 4; specifically, solely associated with using the template developed by the Office of Parliamentary Counsel. None of these changes are intended to affect how the CR Code operates. As a result, ARCA has also released:

- A version of the Consultation CR Code which includes all changes *other* that those linked to Proposal 4 (the **Classic Template Version**). The Classic Template Version is intended to make it easier for stakeholders familiar with the CR Code to identify the substantive changes being proposed.
- A document tracking any changes in numbering from the CR Code to the Consultation CR Code (the **Comparison Table**).

This document is intended to provide context to the Consultation CR Code. It explains our work to date on each of the 19 proposals for variations to the CR Code, and includes:

- a brief description of the rationale for the proposal
- the feedback received on the proposal during the first consultation round
- the rationale for the proposed draft variations (where relevant), and how we intend them to operate in practice
- specific questions on which we would particularly welcome stakeholder feedback.

The proposals are listed in the Summary Table, along with an overview of the material in this document. Additionally, ARCA is seeking feedback on proposed CR Code variations to address two other issues with the definition of ‘maximum amount of credit available’ in (the current) paragraph 6 of the CR Code.

Further information about the consultation process, and access to all the documents mentioned above, is available on ARCA’s website.

Stakeholder feedback

ARCA welcomes any comments stakeholders may wish to provide. We would appreciate any written comments by **Thursday 16 November 2023**. We are also happy to meet to discuss proposals and stakeholder views.

If you have any questions or feedback about the CR Code or ARCA’s process, please contact crcode@arca.asn.au.

Summary table

Proposal	Summary of consultation document	Consultation CR Code ref
Proposal 4 – Amend CR Code source notes column and blue row lines The source notes column and the blue rows of the CR Code should be reviewed to ensure that they clearly outline the purpose of the relevant paragraph and the applicable law.	ARCA is consulting on using the template for legislative instruments prepared by the Office of Parliamentary Counsel for the CR Code. This code would be supported by cross-references and notes to relevant Privacy Act provisions. In order to minimise the effect of the change on entities bound by the CR Code, current paragraph-level numbering would be retained.	The entire Consultation CR Code
CCLI Definitions (Proposals 6, 15 and other issues) **Proposal 6 – Amend the CR Code to accommodate other entities reporting CCLI** Paragraph 6 of the CR Code should be amended to clarify how 'account open date' and 'account close date' definitions apply to telco/utility providers. Targeted consultation should be undertaken to understand how the 'credit limit' and 'credit term' definitions can apply to these products. **Proposal 15 – Amend the CR Code to clarify the definition of 'account close' in respect of CCLI** Amend paragraph 6 of the CR Code so that consumer credit is reported as closed on the earlier of these events occurring – credit is terminated, credit is charged off, or credit is repaid. **CCLI Issue A – 'Maximum amount of credit' and certain revolving credit** **CCLI Issue B – 'Maximum amount of credit' and reverse mortgages**	ARCA is consulting on specific definitions of 'account open date' and 'account close date' for credit provided in the context of a telecommunications or utility service. ARCA is consulting on a varied definition of account close in section 6 of the Consultation CR Code. ARCA is consulting on a varied definition of 'maximum amount of credit' for revolving credit contracts that ensures the previous non-zero limit of a closed revolving contract where the maximum amount of credit available was only set to zero as part of the closure process. ARCA is consulting on a specific definition of 'maximum amount of credit' for a reverse mortgage.	Section 5: Definitions of • day on which the consumer credit is entered into • day on which the consumer credit is terminated or otherwise ceases to be in force • maximum amount of credit available • reverse mortgage
Proposal 13 – Amend the CR Code to require CRBs to publish their CP audits and submit these to the OAIC Amend paragraph 23 to require CRBs to publish their CP audits and submit these to the OAIC. These reports can be redacted as needed to ensure they do not include personal or commercially sensitive information.	ARCA is consulting on a variation to impose a new obligation on CRBs to publish an additional composite report about their audit programs, including a detailed description of those programs and a summary of the findings in each financial year. ARCA is also seeking feedback on whether additional information, such as audit reports or information which identifies certain credit providers, should be submitted to the OAIC.	
Proposal 17 – Amend CR Code to clarify definition of 'month' to more flexibly accommodate CP reporting practices Further consideration should be given to amending paragraph 1.2(i) of the CR Code to clarify the definition of 'month'. Any amendments should be guided by the principles that reporting should reflect an individual's expectations around their repayment obligations and reflect their repayment behaviour.	ARCA is consulting on a varied definition of 'month' in the definition section of the Consultation CR Code. This definition includes all of the components of the current definition, so that all currently compliant 'months' would still be allowed under the varied Code.	s23(13) of Schedule 2
Proposal 19 – Amend CR Code to introduce positive obligations related to statute barred debts Paragraph 20.6 of the CR Code should be amended to require: • CRBs to remove statute barred debts from individuals' credit reports where it is reasonable for them to have been aware of the statute of limitations • CPs to take reasonable steps to inform CRBs when a debt has or will become statute barred when disclosing default information, CPs to provide CRBs with the date that the debt became overdue.	ARCA is not consulting on amendments to give effect to this proposal. Based on the feedback received during the first consultation, as well as subsequent discussions with the Reviewer, we consider that amendments to the Privacy Act are needed to address the issues underpinning this proposal. We will make submissions to the upcoming review of Part IIIA of the Privacy Act to suggest changes to the law to this effect.	Section 5: Definition of month

Proposal 21 – Amend CR Code to specify that s 21D(3)(d) notice must be a standalone notice • Amend paragraph 9.3 to specify that the s21D(3)(d) notice must not bundled with any other correspondence.	ARCA is consulting on a variation to the requirements around s21D(3)(d) notices that include this requirement in section 9 of the Consultation CR Code.	Not applicable
Proposal 24 – Amend the CR Code regarding notification obligations Paragraph 4 of the CR Code should be reviewed and amended to provide further clarity around notification obligations. These amendments should ensure that the notification obligations in the CR Code remain fit for purpose taking account of the Privacy Act.	ARCA is consulting on a requirement for CPs to provide their customers with additional information before they can rely on the notification mechanism currently set out in the CR Code. For these purposes, ARCA will prepare a short statement which advises consumers about a small number of key matters, including that their consent is not generally required in order for their information to be disclosed to a CRB. CPs would need to provide a copy of this statement to consumers in hard copy or electronic form.	s9(3)(d) of Schedule 2
Proposal 28 – Amend the CR Code to allow CRBs to offer individuals an automatic extension to the ban period Paragraph 17 of the CR Code should be amended to allow CRBs to offer individuals with an automatic extension to the ban period at the time they initially request a ban, where appropriate.	ARCA is not consulting on amendments to give effect to this proposal. Our experience since the Review was released suggests that there are broader issues with the credit reporting system's responses to identity theft and fraud which can only be addressed through changes to the Privacy Act. In the context of these issues, and the upcoming review of Part IIIA of the Privacy Act, additional work to implement Proposal 28 at this time may involve significant expense for CRBs with limited benefits for individuals. We will make submissions to the upcoming review of Part IIIA of the Privacy Act to suggest changes to the law address the issues related to this proposal.	s4(3)(a) of Schedule 2
Proposal 29 – Amend the CR Code to clarify the evidence that a CRB needs to implement a ban period and/or extension Amend paragraph 17 of the CR Code to provide more detail about the expected level of evidence a CRB can require from an individual in implementing/extending a ban period.	ARCA is consulting on variations which specify how CRBs should determine whether there are reasonable grounds to believe that an individual has, or may be, the victim of identity theft or fraud	Not applicable
Proposal 31 – Amend CR Code to require a CRB to record and alert an individual of access requests during a ban period The CR Code should be amended to require CRBs to make a record of access requests during a ban period and alert individuals of any attempts to access this information during that period.	ARCA is consulting on variations which require CRBs, on an opt-in basis, to offer individuals access to services which provide them with notifications of access requests during a ban period.	s17(10) of Schedule 2
Proposal 32 – Amend CR Code to require CRBs to provide information on accessing other CRB's credit reports Amend paragraph 19 to specify that when an individual seeks access to their credit report from a CRB, the CRB must tell the individual about how they can access other CRBs' credit reports.	ARCA is consulting on a variation to the current paragraph 19 of the CR Code to include this requirement.	Section 5: Definition of ban notification service s17(2), 17(3) and 17(6) of Schedule 2
Proposal 33 – Amend CR Code to specify that CRBs must provide physical copies of credit reports upon request Amend paragraph 19 to specify that CRBs must provide individuals with physical copies of their credit reports on request.	ARCA is consulting on a variation to the current paragraph 19 of the CR Code to include this requirement.	s19(3)(a) and 19(8)(d)(ii) of Schedule 2
Proposal 37 – Amend CR Code to enable correction of multiple instances of incorrect information stemming from one event Amend paragraph 20 to introduce a mechanism to correction of multiple instances of incorrect information. The code developer should consult to determine the best approach.	ARCA is consulting on variations to require CRBs and CPs to consider, when deciding what evidence to ask for to form a view on a correction request relating to unsuccessful enquiries, the burden on the individual and the existence of other evidence. For these purposes, ARCA would work with Members to produce best practice guidelines about the evidence needed for these types of corrections.	s19(3)(b) and 19(6)(e) of Schedule 2

Proposals 39-41 – Amend CR Code mechanism for corrections due to circumstances beyond the individual's control to: • **include domestic abuse as an example** • **extend correction requests to include CPs** **expand the correctable categories of information**	ARCA is consulting on variations to: • include domestic abuse as an example of a circumstance beyond the individual's control for the purposes of corrections of credit information • allow this type of correction request to be made to CPs as well as CRBs; and include default information, RHI and FHI as categories of information that can be corrected.	s20(8) and 20(9) of Schedule 2
• **Proposal 43 – Amend CR Code to introduce soft enquiries framework**	ARCA is consulting on variations to: • define soft enquiries and when they may be used • require that the written note of a soft enquiry be on a record related to an individual, but not included on the individual's credit report; and • require industry to take steps to inform individuals about the impact credit enquiries have on their overall credit report and how this is considered in lending decisions.	s20(10) and 20(11) of Schedule 2
Proposal 44 – Amend CR Code 'capacity information' definition to include an individual in their capacity as a trustee Amend definition of 'capacity information' in paragraph 1.2(c) include an individual acting in their capacity as a trustee.	• ARCA is consulting on a variation to the definition of 'capacity information' to include information about whether an individual is acting as a trustee	Section 5: Definitions of • hard enquiry • soft enquiry s7(3), 7(4), 7(5), 14(6), 14(7), 16(6), 16(7), 16(8), 16(9), 19(6)(c) of Schedule 2
		Section 5: Definition of capacity information

Format of CR Code (Proposal 4)

Background and feedback received

The CR Code Review proposed that ARCA review the source notes and 'blue rows' within the CR Code, to ensure that the CR Code adequately explains the purpose and effect of each paragraph and the relevant provision(s) of the law are clear. The intent of the proposal was to help map intersections between the CR Code, the Privacy Act and Privacy Regulation.

Since the CR Code Review was completed, the OAIC updated the Guidelines. Paragraph 2.32 of the updated Guidelines now makes clear that Code developers should comply with the drafting and publishing standards for legislative instruments prepared by the OPC. We understand this to includes the drafting templates prepared by the Office of Parliamentary Counsel (OPC), which manages the Federal Register of Legislation.

We received mixed feedback on Proposal 4. Some entities bound by the CR Code expressed concern about the degree of change that would occur as a result of changing templates and ensuring alignment with OPC's drafting standards. Others were less concerned, but noted the need to review the detail of any changes.

Changes for consultation

We consider that the Guidelines require us to use the OPC template; the Consultation CR Code is therefore drafted in this manner. This has necessitated numerous minor changes which do not affect the substance of the CR Code. However, we have:

- sought to minimise these changes wherever possible, as we are cognisant that non-substantive change may nonetheless add cost and complexity;
- retained 'paragraph level' numbering – for example, the entirety of Paragraph 8A of the CR Code is in Section 8A of the Consultation CR Code;
- produced the Classic Template Version and the Comparison Document, to help stakeholders engage with this process and, should the CR Code eventually be in the new template, manage any changes to internal document

We may revisit some of these matters – including the high level numbering – if feedback indicates that the steps we have taken are not helpful.

Questions

- What effect does using the OPC Template have on your organisation or stakeholders? Please be as specific as possible.
- What kind of difficulties or costs would be associated with a change in the template of the CR Code? Please be as specific as possible.
- Is there benefit in retaining 'paragraph level' numbering? If so, what is that benefit?
- Do you consider that the notes in the Consultation CR Code help to make the connections between the Privacy Act, Privacy Regulation and CR Code clearer?
- Are there any other changes we could, or should, make to respond to this proposal?

Consumer Credit Liability Information (CCLI) Definitions (Proposals 6, 15 and other issues)

Background

CCLI is a kind of credit information (and therefore can be used and disclosed in the credit reporting system), but is only described in the law in general terms. For instance, the Privacy Act and Privacy Regulation define CCLI to include information such as:

- 'the day on which the credit is entered into' (i.e. the account open date); and
- 'the day on which the credit is terminated or otherwise ceases to be in force' (i.e. the account close date);
- 'the maximum amount of credit available' (i.e. the credit limit); and
- 'the term' of the credit.

To ensure that CPs take consistent approaches, the CR Code provides additional clarity about what some terms mean. At present, the terms are defined as follows.

- **Account open date:** the current definition in the CR Code is that the day on which the credit is entered into is the day on which the individual has been unconditionally approved and the account has been generated on the CP's systems.
- **Account close date:** The meaning of this term is affected by Proposal 15. The day on which the credit is terminated/ceases to be in force is intended to be earliest of the dates on which the credit is repaid (with no further credit available), waived or charged off.
- **Credit limit:** This term has a different meaning for different types of contracts:
    - For revolving credit with no limit, a charge card contract or the sale of goods or supply of services where credit is provided – no fixed limit;
    - For revolving credit with a limit – the limit at the time of disclosure;
    - For interest-only loans – the principal amount of credit; and
    - For principal and interest loans – the amortised maximum principal amount of credit.
- **Credit term**: This term is not defined in the CR Code – the Privacy Regulation provides that information about whether the credit is fixed or revolving is CCLI, as is 'the length of the term' for fixed-term credit contracts.

Some issues have been identified with these terms, specifically:

- how they apply to credit provided by telecommunications and utility businesses (Proposal 6);
- unintended consequences from the drafting of 'account close date' (Proposal 15); and
- uncertainty identified by ARCA and CPs about the meaning of 'the maximum amount of credit' for reverse mortgages and revolving arrangements ('Other Issues').

CCLI for telecommunications and utilities credit (Proposal 6)

Many of the definitions in the CR Code have been drafted, primarily, with financial services credit products in mind. However, telecommunications and utilities businesses often provide 'credit' within the definition of the Privacy Act, and therefore can participate within the credit reporting system.

In this context, the Review received feedback that it is unclear how certain elements of CCLI data relating to account open date, account close date, credit limit and credit term should be reported by telco and utility providers.

Many of the issues in relation to these terms appear to arise from differences between the overall account (e.g. the telephone service) and the credit provided by the telco/utility provider. For example, a phone service exists from the time the service is connected until disconnection occurs, but can involve multiple credit contracts across that period if the arrangements 'roll over'. Where that occurs, it is not clear what should be reported as the account open date, account close date or the credit term.

The Review proposed that the definitions of account open date and account close date be clarified. We sought feedback and information in order to form a view about how to best proceed, noting that definitions related to service connection and disconnection may have advantages.

Stakeholders outside the telecommunications and utilities industries generally supported the concept of definitions based on service connection and disconnection, but noted the need to engage closely with affected businesses. We received detailed feedback from one ombudsman scheme about service provision in the energy and water sectors. This feedback noted that there may be issues with using connection and disconnection, as switching between retailers may not involve a hard disconnection of e.g. energy service. They suggested that 'service provision' may be a more appropriate starting point.

Changes for consultation

ARCA has prepared definitions of account open date and account close date specific to the telecommunications and utilities sectors: see the definitions of 'day on which the consumer credit is entered into' and 'day on which the consumer credit is terminated or otherwise ceases to be in force' in the definitions section in section 5 of the Consultation CR Code. Consistent with the feedback mentioned above, these definitions are based on the time at which a service is first provided, and when service provision ceases. Our intention is:

- For the energy sector, the "account open date" should effectively be the day on which:
    - the customer has given explicit, informed consent to establish an energy service contract;
    - the energy retailer owns the billing rights to the customer's service address in the energy market ; and
    - the energy retailer has generated an active account in its systems
- It may be the case that multiple technical pieces of 'credit' are treated as one 'account' for credit reporting purposes – as noted in our earlier consultation, this approach may avoid confusion and complexity, and in any event, for these types of credit information about the duration of the relationship is likely to be more useful than information about the most recent 'roll over' of e.g. a phone service contract
- if a telecommunications/utility service is disconnected/ceases but credit remains unpaid, the account is to be considered 'closed' for CCLI purposes.

We anticipate that a transition period may be necessary. We welcome feedback from stakeholders about whether this is the case and, if so, the point in the future at which the proposed definitions should apply from.

Questions

- Does the drafting of definitions of account open date and account close date in the Consultation CR Code align with our intention described above?

- Would there be a better way to draft these definitions? If so, what approach would be better?
- Do you agree with the substance of the definitions? Are there situations where a different definition would be more appropriate?
- Should there be different definitions for the telecommunications and utilities sectors? If so, how should these definitions differ?
- If you are a telecommunications/utility service provider, how much time would be needed to transition to the proposed definition(s)?

Clarifying the definition of 'account close date' in respect of CCLI (Proposal 15)

Paragraph 6.2(d) of the CR Code defines 'the day on which the consumer credit is terminated or otherwise ceases to be in force', commonly known as the account close date. That definition states that the account close date means the date the credit is repaid, or the earlier of the date on which the credit is waived and the date on which the credit is charged off.[1]

The intention behind the wording used in the CR Code is that:

- the three situations are non-optional (i.e. if an account has been charged off, a CP cannot choose to wait until it is repaid or waived to report it as closed); and
- where a credit account has been charged off but a debt remains outstanding, the credit should be reported as closed.

The Review found that in some instances, debt buyers appear to have purchased charged-off (but not repaid) debts from an original CP, but continued to report CCLI and no account close date. Although such a practice is permitted by the current definition, its effect is that debts can potentially live on in the credit reporting system indefinitely, at odds with the data retention provisions in the Privacy Act. The Review proposed addressing this by changing the definition of account closure so that accounts are treated as closed on the earliest date one of these events occurs: credit is terminated, credit is charged off, or credit is repaid.

We consulted on amending the definition of account close date in this manner. The feedback we received supported amending the definition to address the issue the Review identified. One stakeholder did note the potential effect on individuals should a change incentivise debt buyers to disclose default information instead. However, as identified by the Review, the effect of current practice is that:

- the intended operation of the law and definitions is not being realised;
- the CCLI being disclosed does not reflect an open account under which the consumer can obtain credit – so is not accurate and is likely to confuse;
- the information could remain in the credit reporting system indefinitely – unlike default information.

<u>Changes for consultation</u>

ARCA has prepared a change to the definition of account close date to give effect to this proposal: see the definitions section – specifically the definition of *day on which the consumer credit is terminated or otherwise ceases to be in force* in section 5 of the

[1] This definition applies for CCLI disclosed from 1 July 2018. A different definition applies for CCLI disclosed earlier.

Consultation CR Code – as well as subsection 6(4) of Schedule 2. The way in which the three options (credit is terminated, credit is charged off, credit is repaid) are worded has not been changed, as the intention is not to alter what it means for credit to be terminated, charged off or repaid.

We believe the new definition should apply as soon as possible. However, we are open to receiving feedback on whether this is a change that would require a transitional period (i.e. whether there are grounds for the old definition remaining in the CR Code for a short period of time, overlapping with the amended definition).

Questions

- Are there any issues with how the Consultation CR Code would implement this proposal? If so, what are they?

Other issues – 'maximum amount of credit' and revolving credit (CCLI Issue A)

For revolving credit contracts, the CR Code defines the 'maximum amount of credit available' to mean the credit limit that applies at the time the information is disclosed to a CRB. This definition causes issues where a revolving credit contract has been closed, and the CP is subsequently disclosing the final set of information. At that time, the credit limit of the contract is likely zero, so the previous non-zero limit could be replaced by a zero.

For this reason, we consulted on a change to the CR Code to clarify that the amount that should be reported is the credit limit at the time of disclosure or, for closed accounts where the limit is set to zero as part of the closure process, and the last non-zero limit.

We received limited, but mixed feedback on this proposal. At least one CP supported making the change, while another was not supportive, noting that past limits may not be directly relevant to considerations about servicing further/future credit.

Changes for consultation

ARCA has prepared a change to the definition of maximum amount of credit available to address this issue: see the definitions section – specifically paragraph (c) of the definition of *maximum amount of credit available* in section 5 of the Consultation CR Code – as well as subsection 6(4) of Schedule 2. The new definition would make clear that:

- Where a limit on a revolving product is set to zero solely as part of an account closure process, the limit immediately before the closure process begun should be reported; and
- In all other cases, the limit should be reported as it is currently (including zero limits where these otherwise occur).

We acknowledge that at least one CP was not supportive of this change. However, we think that where the only reason for reporting a limit of zero was a CP's particular processes for closing accounts, it is a better reflection of the individual's past consumer credit for the previous limit to remain until the retention period expires. Importantly, the credit will still show as 'closed', as a closed date would continue to be reported. This change should also lead to more consistent reporting across CPs, as change processes should no longer influence what is disclosed to CRBs.

At this stage we consider that new definition and the old definition in paragraph (b) could both be available to CPs for 12 months.

Questions

- Are there any issues with the drafting of this change in the Consultation CR Code? If so, what are they?
- If you are a CP that currently reports credit limits of zero for closed revolving credit products:
    - How much time would you need to adjust your systems to align with the new definition?
    - What would the cost of this change be?

Other issues – 'maximum amount of credit' and reverse mortgages (CCLI Issue B)

As noted above, the CR Code sets out specific definitions for 'the maximum amount of credit available' under a contract (commonly known as the credit limit) for different kinds of consumer credit. However, it is not obvious what figure should be reported for a reverse mortgage.[2] For the purposes of regulation under the *National Consumer Credit Protection Act* 2009 (**National Credit Act**), a reverse mortgage is a credit contract where the debtor's total liability may exceed maximum amount of credit that may be provided under the contract without the debtor being obliged to reduce that liability. The extent to which the total liability exceeds the maximum amount the CP is willing to lend when the contract is entered into depends on factors such as the amount of credit which the individual accesses, the prevailing interest rate, the contract's duration and the value of the mortgaged property.[3] This is not ascertainable until the reverse mortgage comes to an end.

Because of this uncertainty, we consulted on amending the CR Code to include a specific definition for reverse mortgages, noting that some of the options included:

- the highest amount of credit the CP would allow the individual to draw down; or
- the greater of the maximum amount of credit the CP would allow the individual to draw down and the total liability under the contract.

Stakeholders generally supported amending the CR Code including a specific definition for the maximum amount of credit under a reverse mortgage. The majority of comments received preferred a definition based on the greater of the maximum amount of credit and the debtor's total liability.

Changes for consultation

ARCA has prepared a change to the definition of maximum amount of credit available to include a specific definition for reverse mortgages: see the definitions section – specifically paragraph (g) of the definition of *maximum amount of credit available* in section 5 of the Consultation CR Code – as well as subsection 6(4) of Schedule 2. We have also included a definition of reverse mortgages which refers to the definition in the National Credit Act – we expect that given the specific regulatory obligations which apply to these products, it should not be difficult for CPs to determine what constitutes a reverse mortgage.

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[2]

[3] Reverse mortgages are subject to a 'no negative equity guarantee' – a CP cannot recover more than the adjusted market value of the property.

Although stakeholders generally preferred a definition that incorporated the concept of the debtor's total liability, we have reviewed the Privacy Act and do not believe that this would be sufficiently consistent with the meaning of 'amount of credit' in section 6M of that Act. Total liability is more akin to the 'balance' of the credit account – a datapoint which is not currently included in the credit reporting system. While we believe that balance would be a beneficial addition to the CCLI dataset, a change of that nature would require law reform.

For this reason, we have prepared a definition based on the largest amount of debt the CP would allow the debtor to defer (i.e. the principal amount of credit). We seek feedback from CPs that provide reverse mortgages to inform the time needed to comply with a new definition specific to reverse mortgages.

Questions

- Are there any issues with the definition in the Consultation CR Code? If so, what are they?
- If you currently disclose CCLI for reverse mortgages, would you need to change your systems to align with this new definition? If so, how much time would you require to comply?

Publication of CRB Audit reports (Proposal 13)

Background and feedback received

The Privacy Act and the CR Code impose obligations intended to ensure the quality and security of information within the credit reporting system. To this end, the Privacy Act requires CRBs and CPs to enter into agreements requiring CPs to ensure that information reported is accurate and that information is protected from disclosure and misuse. CPs must also obtain independent audits to ensure their compliance with the agreements: s20N(2) and 20Q(2) of the Privacy Act.

Paragraph 23 of the CR Code sets out who may conduct audits and requires CRBs to publish information each year, including the number of audits conducted, any systemic issues identified and action taken in response.

The Review considered the framework in the CR Code relating to agreements and audits, as well as obligations relating to training and policies. The Review noted the limited visibility of current processes and considered that a lack of transparency affects both confidence in, and the effectiveness of, the audit programs and their objectives. The material required to be published about audits under paragraph 23.11(o) of the CR Code is not sufficiently specific to provide the transparency the Review sought.

For that reason, the Review proposed that reports of CRBs' audits of CPs be published alongside the CRB's credit reporting policies and annual website reports (Proposal 13). Any publication would be subject to redactions to exclude personal or commercially sensitive information.

We previously consulted on a new obligation to publish audit reports, as well as identifying that a consolidated report (by each CRB, of all audits conducted that year) might have some advantages. Entities that were bound by the CR Code expressed concern with the proposal; this included comments to the effect that:

- The relationships between CRBs and CPs and their terms (enforcement rights, dispute resolution, audits) are all confidential. In this context reports on audits could pertain to this information, which could be extremely difficult to effectively redact for public release.
- Findings of audit reports may be contested, so any new requirement would need to allow for disagreements to be resolved before publication occurs.
- Publication of named audit reports is not necessary to achieve the objectives of the proposal (to provide more transparency into audit processes, thereby increasing confidence that the current framework is appropriate).

We also received one suggestion for the publication of additional statistical information under a CRB's annual report. However, the majority of the feedback received favoured, or was open to, a consolidated publication.

Changes for consultation

ARCA considers that a new obligation to publish information is needed to provide the transparency the Review sought. Put another way, we do not consider that additional statistical information alone is sufficient to address the Review's concerns. However, we acknowledge the concerns raised by stakeholders about the publication of audit reports. Based on this feedback, we do not believe that the publication of individual audit reports is a necessary step to providing transparency. Additionally, publishing audit reports does have drawbacks, both around the consistency and volume of what may be published, as well as concerns in cases where the findings are not in dispute.

For this reason, the Consultation CR Code contains a new obligation on CRBs to publish information each year about their audit programs: see subsection 23(13) of Schedule 2. The new obligation contains detailed requirements intended to elicit CRBs to provide written information about their obligations and how they ensure compliance (including through the use of the audit programs). This will include general information about the types of factors that influence the number and nature of audits are conducted. The intention is that this description will provide greater transparency and confidence, especially when supported by de-identified information about audits and their findings.

The Review proposed that audit reports also be provided to the OAIC. Our preliminary view is that some of the issues raised by public release of reports would not be triggered by such a requirement. We seek feedback from stakeholders about whether the CR Code should require CRBs to provide audit reports to the OAIC.

Questions

- Does the drafting of subsection 23(13) of Schedule 2 to the Consultation CR Code align with our intention described above?
- Are the types of matters CRBs would need to publish information on appropriate? Why or why not?
    - Should any additional matters be included, such as the monitoring of the risk indicators mentioned in paragraph 23(3)(c) of Schedule 2 to the Consultation CR Code?
- Should the CR Code require CRBs to provide reports of audits to the OAIC? If not, why is such a requirement not necessary?

Flexibility around the definition of 'month' (Proposal 17)

Background

For credit reporting purposes, the term 'month' is used in the Privacy Act in the context of repayment history information (**RHI**), financial hardship information (**FHI**) and financial hardship agreements (**FHAs**). While there are no express requirements in the law about how frequently repayments must be made, the provisions around RHI, FHI and FHAs often refer to 'monthly payments' or 'monthly payment obligations'. It is industry best practice for the 'month' for RHI reporting purposes to end on the date the individual's payment is due.

There is a definition of month in the CR Code, which displaces the definition in section 2G of the Acts Interpretation Act 2001.[4] The CR Code definition provides that a month means a period:

(i) starting at the start of any day of one of the calendar months; and

(ii) ending on any of the following days, as determined by the CP:

1) immediately before the start of the corresponding day of the next calendar month; or

2) where the day before the corresponding day of the next calendar month is a non-business day, the end of the next business day following that day; or

3) if there is no such day – at the end of the next calendar month.

ARCA has identified three scenarios where there may be issues with this definition. The effect of the issues is that in some cases, common or preferable 'months' for RHI reporting purposes do not align with the definition of 'month' in the CR Code. The three examples are below.

Example 1: CP 'months' ending on the 29th, 30th or 31st day of the month can be out of alignment with 'months' permitted by CR Code definition

If a CP wishes to end the month on 29th, 30th or 31st of a calendar month there may be times when the month used by CP systems does not meet the CR Code 'month' definition.

Payment due date	Month based on CP systems	Possible Month CR Code	Issues
30 April	31 Mar – 30 Apr (31 days)	31 Mar – 30 Apr	Period meets 'month' definition
30 May	1 May – 30 May (30 days)	1 May – 31 May	Period **too short** for the 'month' definition
30 June	31 May – 30 Jun (31 days)	31 May – 30 June (or, if carried forward from the previous month, 1 Jun – 30 Jun)	Period meets 'month' definition

[4] The CR Code is a legislative instrument once included on the Codes register, and as such, in the absence of a contrary intention the Acts Interpretation Act would apply to it as though it were an Act: see s13(1) of the *Legislation Act 2003*.

30 Jul	1 Jul – 30 Jul (30 days)	1 Jul – 31 Jul	Period **too short** for the 'month' definition
30 Aug	31 Jul – 30 Aug (31 days)	31 Jul – 30 Aug (or, if carried forward from the previous month, 1 Aug – 31 Aug)	Period meets month definition

These discrepancies largely arise from the different number of 'days' in every calendar month.

Example 2: Further example of issues with CP 'months' ending near the end of a calendar month

In this example, a CP generally sets payments as being due on the 29th of each month, so that individuals have a consistent understanding of when their payments must be made. In most years, there will not be a 29 February. Where a CP has systems that automatically move the payment date back rather than forward (as is generally what the law requires), this can mean the 'month' for the purposes of RHI reporting is not consistent with the CR Code definition. This issue can be exacerbated by non-business days, such as weekend days;. In the example below, there is no 29 February, and the weekend falls on 1 and 2 March.

Payment due date	Month based on CP systems	Possible Month (CR Code)	Issues
29 December	30 Nov – 29 Dec (30 days)	30 Nov – 29 Dec	Period meets 'month' definition
29 January	30 Dec – 29 Jan (31 days)	30 Dec – 29 Jan	Period meets 'month' definition
1 March (no 29 February, and 1 March not a business day)	30 Jan – 3 Mar (33 days)	30 Jan – 28 Feb	Period **too long** for the 'month' definition
29 March	3 Mar – 29 Mar (26 days)	2 Mar – 1 Apr (or, if carried forward from the previous month, 1 Mar – 31 Mar)	Period **too short** for the 'month' definition
29 April	30 Mar – 29 Apr (31 days)	30 Mar – 29 April (or, if carried forward from the previous month. 1 Apr – 30 Apr)	The period 30 Mar – 29 Apr meets the month definition in the CR Code, but is out of alignment with the month that would apply if the earlier months were compliant (1 Apr – 30 Apr')
29 May	30 Apr – 29 May (30 days)	30 Apr – 29 May (or, if carried forward from the previous	The period 30 Apr – 29 May meets the month definition in

		month, 1 May – 31 May)	the CR Code, but is out of alignment with the month that would apply if the earlier months were compliant (1 May – 30 May)

Example 3: Revolving products with different payment dates each calendar month can also cause problems

The CR Code 'month' definition may not adequately cater for some revolving products, such as where the payment due date and the cycle date is not the same date each month. This occurs even if there are relatively consistent 30 or 31 days between payment due dates; CPs may use such dates to create equivalence to a typical calendar month while ensuring that twelve months equates to 365-366 days. If the payment due date or cycle date is used to establish the period to assess RHI, the month may not comply with the CR Code 'month' definition.

Payment due date	Month based on CP systems	Possible Month (Acts Interpretation Act / CR Code)	Issues
5 December	7 Nov – 7 Dec (31 days)	7 Nov – 6 Dec	Period **too long** for the 'month' definition
4 January	8 Dec – 6 Jan (30 days)	8 Dec – 7 Jan (or, if carried forward from the previous month, 7 Dec – 6 Jan)	Period **too short** for the 'month' definition
4 February	7 Jan – 6 Feb (31 days)	7 Jan – 6 Feb	Period meets 'month' definition
6 March	7 Feb – 8 Mar (29 days)	7 Feb – 6 Mar	Period **too long** for the 'month' definition

The Review considered examples such as these, and concluded that the definition of 'month' in the CR Code may need to be amended to:

- provide flexibility in reporting information such as RHI; and
- resolve situations where a strict interpretation of the meaning of a 'month' would result in a poor outcome for individuals.

A guiding principle for any variations in response to the Review's proposal was that RHI reporting should reflect an individual's expectations around their repayment obligations and their repayment behaviour.

We consulted on the potential for changes to be made in response to the Review while noting that any changes would need to be:

- carefully considered, to avoid unintended consequences due to the variety of different situations that may arise; and

- optional in nature (i.e. such that a CP retains discretion about 'when' the month ends), in order to provide the flexibility envisaged by the Review, reduce the need for systems changes and reflect the different number of days, and non-business days, that may fall in each month.

All stakeholders who provided feedback supported changes being made, so long as current practices that are compliant with the CR Code definition of month remain compliant.

Changes for consultation

ARCA have prepared two new limbs to the definition of month in section 5 of the Consultation CR Code. This approach would mean that any period which is currently a 'month' would continue to comply with the definition. However, CPs would now also be able treat the following periods as 'months':

- any period of between 28 and 31 days (i.e. the month ends on a day between 27 and 30 days after the day the month starts); and
- in certain specific circumstances, periods of 26 or 27 days.

We have chosen this drafting approach as we wanted the definition to be as simple and intuitive as possible, in order to cover the widest number of potential situations of the kind described in the examples. We consider that periods of 28 to 31 days would be generally acceptable given that there are calendar months of these lengths within a standard year (although, as the examples above highlight, sometimes the length of a month for CR Code purposes is unrelated to the length of the relevant calendar months).

There appear to be limited instances where a shorter period may be needed. These generally arise when the 'end' of a previous month is effectively delayed due to non-business days. In that scenario, such as the RHI reporting 'month' from 3 March to 29 March in example 2, is further shortened. With this scenario in mind, we have prepared changes to permit 'months' of 26 or 27 days, but only where preceding non-business days are the cause. Our intention is for this to resolve the issues identified and facilitate the type of conduct which could promote consumer understanding (such as consistent 'end days'), while limiting the situations where 'month' may depart from a period of time people would commonly associate with 'month'.

Questions

- Does the drafting of definition of month in the Consultation CR Code align with our intention described above?
- Would there be a better way to draft this definition? If so, what approach would be better?
- Are you aware of any situations that currently occur that would not be covered by the expanded definition of month?

Positive obligations about statute barred debts (Proposal 19)

Paragraph 20.6 of the CR Code requires CRBs to, on request by an individual, correct credit information by destroying default information for statute-barred debts (i.e. where the CP is prevented by a statute of limitations from recovering the amount owning). The Review considered the operation of paragraph 20.6 and accepted evidence that few individuals make use of that provision. Additionally, the Review received evidence of defaults which were disclosed to CRBs shortly before the debts became statute-barred. In those situations,

evidence of the missed payments would have been on the individuals' credit reports, and therefore affecting their ability to obtain further credit, for substantially more than the five-year retention period (including when the debt could not be enforced).

The Review concluded that the current arrangements involve a substantial imbalance of power that ought to be corrected. To that end, the Review proposed obligations on:

- CRBs to remove statute-barred debts from individuals' credit reports where it is reasonable for them to have been aware of the statute of limitations;
- CPs to take reasonable steps to inform CRBs when a debt has or will become statute-barred;
- when disclosing default information, CPs to provide CRBs with the date that the debt became overdue.

However, it can be very difficult to determine whether a given debt is statute-barred. The statute of limitations period varies depending upon the nature of the debt and the laws which apply to the underlying contract. Whether the individual has last acknowledged the debt will determine when the statute of limitations period starts; it is not always clear whether an individual's conduct amounts to an acknowledgement for the purposes of the various limitations Acts.

For this reason, we sought feedback from stakeholders on the challenges of implementing the proposed obligations, as well as on what other options may be available to the power imbalance – and in particular the risk of late disclosure of defaults – that led to Proposal 19. The feedback we received included:

- General support for addressing the problems identified by the Review.
- CPs provided input which suggested that it would be extremely difficult to supply the information a CRB would require. CRB feedback suggests they would be highly reliant on the information received from CPs.
- Many stakeholders either noted, or supported other options for addressing the underlying issues (see below).

The options noted by ARCA and/or proposed by stakeholders included:

- A general obligation to require CPs to, if they intend to disclose default information, do so within a reasonable period;
- The development of a time period beyond which default information cannot be disclosed;
- A requirement that, if a CP has disclosed default information to a CRB, that same default cannot be listed with another CRB at a materially later time; or
- Changes to the retention period for default information which would link retention of default information to the date on which the debt first became overdue (i.e. so delays with disclosing default information would reduce the amount of time the information is retained).

We note that these options would generally be easier to implement than Proposal 19, as they do not involve CRBs or CPs seeking to determine whether certain debts are statute-barred. Rather, they rely on limiting the extent to which default information is disclosed late (for options 1-3) or the period of time it is retained for should late disclosure occur (Option 4). Most stakeholders preferred one or more of these options.

Our analysis, and our discussions with the Reviewer, indicate that these approaches may be preferable solutions to the problems relating to statute-barred debt. We intend to further explore these options, although consider that law reform would be required – potentially to the definition of default information and/or the retention period provisions in the Privacy Act. We will pursue this reform through the upcoming review of Part IIIA of the Privacy Act.

Standalone notices given under s21D(3)(d) of the Privacy Act (Proposal 21)

Background and feedback received

CPs cannot disclose default information to a CRB unless 14 days have passed since they have given the individual a written notice (a **s21D(3)(d) notice**) of their intention to do so. Paragraph 9.3 of the CR Code provides additional detail about s21D(3)(d) notices, including the addresses they must be sent to and their timing relative to other notices about an individual's default.[5]

The Review proposed that s21D(3)(d) notices should be given without other correspondence, as it may improve consumer awareness of the impending listing of the default.

We consulted on the appropriateness of changes to paragraph 9.3 of the CR Code to give effect to this proposal. The majority of stakeholder feedback was supportive of the change. The two main issues raised were:

- The new requirement should not prevent the provision of information about matters which are genuinely helpful to the consumer: e.g. information about contacting the CP to discuss hardship assistance, or details of the National Debt Helpline
- The potential lack of clarity about the meaning of 'standalone'.

There was no feedback provided which suggested that other documents are currently being provided with a s21(3)(d) notice.

Changes for consultation

ARCA has prepared a change to the requirements around s21D(3)(d) notices to include a requirement that the notice not be accompanied by other correspondence that would have the effect of reducing the prominence of the messages of the notice: see paragraph 9(3)(d) of Schedule 2 to the Consultation CR Code.

The wording relating to reducing the prominence of the messages of the notice is intended to address the feedback we received and provide scope for e.g. information about hardship assistance to be provided, but not for other, more general correspondence. We have intended to reinforce this with a note under the definition of 'section 21D(3)(d)' notice in the Consultation CR Code which provides that material about how to request hardship assistance can be included in the notice: see section 5. We also consider that the Explanatory Statement accompanying a new Code should set this out in detail.

Questions

[5] Section 6Q requires the individual to receive a written notice about the default earlier in the process; the CR Code requires that 30 days elapse between the sending of this notice and a s21D(3)(d) notice.

- Does the drafting of paragraph 9(3)(d) of Schedule 2 to the Consultation CR Code align with our intention described above?
- Would there be a better way to draft the prohibition on sending other correspondence with a s21D(3)(d) notice? If so, what is that way?

Notification obligations in the credit reporting framework (Proposal 24)

Background

Section 21C of the Privacy Act requires CPs to notify an individual that they are likely to disclose their information to a CRB. Paragraph 4 of the CR Code expands on this obligation to also require CPs to notify individuals:

- that the CRB may include the information in reports provided to other CPs to assist them to assess the individual's creditworthiness;
- that failures to repay the loan and/or serious credit infringements may be disclosed to the CRB;
- of how they can access the CP and CRB's policies about managing their information;
- of their various rights, including to seek corrections, complain, and to opt-out their information being used by a CRB to pre-screen for direct marketing purposes.

Paragraph 4.2 makes clear that CPs can comply with these obligations by publishing a statement on its website, bringing that statement (and the website) to the individual's attention and informing them of the key issues (and that a hard copy may be provided on request).

The Review heard that that there has been an increase in the number of complaints based on individuals not having consented to the disclosure of their credit information. The potential cause identified by the Review was the risk that 'individuals are not appropriately informed about when information is going to be disclosed'. With that in mind the Review proposed:

- a holistic review of the notification regime within the credit reporting framework;
- reviewing the notification requirements in paragraph 4 of the CR Code to ensure they are achieving their objectives: i.e. to appropriately inform individuals about the circumstances in which their information will be used and disclosed
- that consideration be given to mechanisms that ensure that notifications are meaningful.

We sought feedback from stakeholders on the causes of confusion and complaints, when complaints about not consenting to the disclosure of information commonly arise, current practices relating to the mechanism in paragraph 4.2 of the CR Code and potential solutions.

We received wide-ranging feedback from stakeholders on this topic, and thank those stakeholders for their input. That feedback included:

- Reservations from some about the quality of disclosures that consumers receive, which could lead to confusion.
- Recognition that consumers may not engage with all the disclosures that they are given, noting that the disclosure is given at a time when they receive a large number of other documents that may be higher priority.

- Suppositions that limited understanding of credit reporting generally could drive some of the confusion.
- Confusion about enquiries is a key issue – one CRB noted that 33% of their complaints about disputed enquiries related to claims that the individual did not consent (when no consent is generally required). The potential for confusion is heightened by the fact that an enquiry may relate to an application that was unsuccessful, or not show the brand name that an individual may have expected e.g. due to white labelling arrangements

Changes for consultation

Informed by the feedback received ARCA has prepared a change to what is currently paragraph 4.2 of the CR Code. This change would mean that, before relying on that mechanism to inform consumers, a CP would need to provide consumers with a short, prominent statement relating to credit reporting and enquiries: see paragraph 4(3)(a) of Schedule 2 to the Consultation CR Code. It would not be sufficient to make the consumer aware that information is on the CP's website. The purpose of this statement is to provide a single short, simple piece of information to consumers, and reduce the risk that more complicated or detailed information is not read or ignored.

We acknowledge that individuals receive a very significant amount of disclosure and that further disclosures could exacerbate problems. However, we intend for this change to increase the prominence of the most important piece(s) of information, simplifying the overall messages consumers receive about credit reporting at the time an enquiry is made. The full detail currently provided will still be available for review for individuals who wish to do so. If it is effective, a single short statement could raise awareness and engagement with the detail.

We propose to work with our Members and other stakeholders to produce a statement for this purpose. Our current thinking is that the most critical messages are:

- The individual's information will be disclosed to the CRB
- Why the information is being disclosed
- That the consumer does not need to consent for the information to be disclosed

We envisage no more than a short paragraph – and potentially less if possible. We welcome feedback on this approach and the messages that should be prioritised

Questions

- Does the drafting of paragraph 4(3)(a) of Schedule 2 to the Consultation CR Code align with our intention described above?
- If you are a CP, what cost and impost on your operational processes would result from this variation?
- What are the most important things for an individual to be told when their information is disclosed to a CRB?
- Is there anything else we should consider when working with Members on what information should be provided under paragraph 4(3)(a)?
- Is there anything else that can be done to make obligations to notify individuals more effective? If so, what are those steps?

'Automatic' requests for credit ban extensions (Proposal 28)

Section 20K of the Privacy Act establishes a framework for individuals to request that credit reporting information about them not be used or disclosed. This functionality, known as a credit ban, is available where the individual, or the relevant CRB, has reasonable grounds to believe that the individual has been affected by fraud. At first instance a credit ban is in place for 21 days, although upon a request from the individual the CRB may extend the ban for any period it considers appropriate.[6] Current practice amongst CRBs is for extensions to be 12 months long.

Paragraph 17 of the CR Code provides additional requirements for CRBs about the operation of credit bans, including the steps that the CRB must take immediately after receiving a request for a ban, and requirements to advise the individual about the upcoming end of a credit ban period.

The Review considered the operation of the credit ban provisions. There was consistent feedback from stakeholders that the initial ban period of 21 days is insufficient to protect victims of fraud from data misuse and harm, but as this is set out in the Privacy Act it cannot be altered by the CR Code.

The Review concluded that an interim solution was appropriate. It proposed enabling CRBs to provide an option to individuals, when they request a ban, to 'automatically' extend the ban period where warranted by the circumstances. Acceptance of this option would constitute a credit ban extension request under s20K(4) of the Privacy Act.

We sought feedback on whether amendments to the CR Code would be necessary to implement this proposal, as well as whether there were any other issues with the provisions relating to credit bans.

A majority of stakeholders supported steps to implement the proposal, with a general preference for consistency across CRBs and an 'automatic' extension period of less than 12 months. Some stakeholders however did note some of the risks associated with automatic extensions, including the potential for individuals to not recall the ban when they subsequently apply for credit.

Since the time of the Review, there have been numerous large-scale data breaches. These events have led to very significant use of the credit ban provisions, which has highlighted shortcomings with that framework. Bans cause friction and difficulties for all parties (including the individuals they protect – when they apply for credit without recalling the need to lift the ban) and prevent uses of information that unambiguously help the individual. Additionally, removing bans can be complicated, and require the individual to contact CRBs they did not originally contact to place a ban.

Our assessment is that the laws relating to credit bans will require substantial amendments following the review of Part IIIA of the Privacy Act. To prepare for that review, we have commenced work to scope better solutions for protecting individuals. One such option is a "fraud flag" which could allow some limited, beneficial uses of credit information while still protecting victims of fraud/identity theft from having new credit taken out in their name. Another option is substantial amendments to the credit ban provision.

[6] When a ban is placed, the law requires the individual to hold the belief about the presence of fraud. For an extension, it is the CRB who must believe on reasonable grounds that the individual may have been affected by fraud: see s20K(4)(c) and Proposal 29.

We foresee a significant risk that effort to implement this proposal may soon be redundant, particularly as change is needed in any event, irrespective of whether credit bans are retained or replaced with a different concept. If bans are retained, changes to address known issues are likely to make automatic extensions redundant (as the ban period would be extended), or to require significant re-work.

With that in mind, and the potential for superior solutions, we do not intend to make changes to the CR Code in respect of 'automatic' extensions at this time. We intend to continue our work on how to better protect individuals from the risks of fraud and identity theft (in line with other work underway across Government) and will pursue reform through the upcoming review of Part IIIA of the Privacy Act.

The evidence needed to put in place or extend a credit ban (Proposal 29)

Background

Under the Privacy Act, in order to request a credit ban, an individual must have reasonable grounds to believe they have been, or will be, a victim of fraud (including identity fraud). The Explanatory Memorandum to the Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (the **Explanatory Memorandum**) states that generally '… an individual who is able to explain why they believe they have been, or are likely to be, the victim of fraud would satisfy this requirement'.

However, for extensions to a credit ban, this belief must be formed by the relevant CRB in order for an extension to be put in place. The Explanatory Memorandum provides some context about what a CRB may do/consider when deciding whether to form such a belief:

> A credit reporting body could ask the individual to demonstrate the basis for their belief that they are, or may be, the victim of fraud. This would depend on the circumstances of each case, but would not necessarily require any court based evidence (such as the arrest of a person who is alleged to have committed the fraud). In some cases, the risk of fraud may continue for a significant period and the credit reporting body should make a judgement in the circumstances of the appropriate period of time for the extension. It is not intended that an individual would be placed under additional stress by the imposition of short extension periods that have to be regularly renewed if the circumstances do not warrant this approach.[7]

The Review received feedback from stakeholders that the current requirements for individuals to support an allegation of fraud are too high. One stakeholder stated that individuals may not be able to extend a ban until they gain a police report number, which they can only do if they prove misuse has occurred. This would in effect mean that individuals must wait for data misuse to occur, rather than being able to prevent that misuse.

The Review concluded that the Explanatory Memorandum is clear that the ban extension process should not be unduly onerous or cause additional stress for individuals. To that end the Review proposed Review proposes that amendments to the CR Code which:

- In respect of extensions, recognise that CRBs must make a case-by-case assessment about whether there are reasonable grounds to belief that fraud has occurred; but

[7] See page 143 of the Explanatory Memorandum.

- clarifies that CRBs do not require detailed, documentary evidence to support their belief that they have been a victim of fraud.

We sought feedback on developing a new provision to give effect to the proposal. In doing so, we set out our view that a CRB could ask the individual about why they are seeking the extension and/or their beliefs in respect of fraud, and that further evidence or inquiries are more likely to be needed where the individual's responses give rise to reasonable grounds to consider that they have *not* been affected by fraud.

We received limited but supportive feedback. One CRB noted that the need to ask for documents as evidence could make the process more complicated for individuals (which we consider was the issue the Review was trying to address).

Changes for consultation

ARCA has prepared a draft new provision to clarify when additional evidence would be required to extend a credit ban: see subsection 17(10) of Schedule 2 to the Consultation CR Code. This provision would operate by making clear:

- A CRB could ask the individual why they believe they have been, or are likely to, be a victim of fraud, as well as why they have asked for the ban to be extended;
- The CRB can only then request additional information if the responses, or the circumstances of individual's extension request, indicate that there are reasonable grounds to believe they have *not* been the victim of fraud.

This provision is intended to clarify that, if the individual's responses appear reasonable in all the circumstances, there would be grounds for the CRB to form the view necessary to allow them to extend the credit ban. The reference to "the circumstances of the individual's request" (in the second dot point above and paragraph 17(10)(b) in the Consultation CR Code) is added for consistency with the requirement for the CRB to make a case-by-case assessment; it is **not** anticipated that this could support a general approach of requesting additional material such as an email confirming the occurrence of a data breach, a police report number or an Australian Cyber Security Centre (ACSC) incident number.

Questions

- Does the drafting of subsection 17(10) of Schedule 2 to the Consultation CR Code align with our intention described above?
- Is there a better way to put beyond doubt that, in most cases, additional evidence should not be needed for a CRB to form a reasonable belief about extending a ban request? If so, how should such a requirement be drafted?

Alerting individuals of attempts to access their information when a ban is in place (Proposal 31)

Background

Where a credit ban is in place, the relevant CRB must not disclose the individual's credit reporting information. Additionally, if a CP requests that information, paragraph 17.2 of the CR Code requires the CRB to inform the CP of the ban period and its effect.

CRBs are not currently required to advise the individual that there has been a request for their credit reporting information during a ban period. The Review sought feedback on a possible option to support victims of fraud by allowing free alerts to the individual where there has been an attempt to access their credit reporting information during a ban period. The rationale for this option was that alerts would assist individuals to know that someone is still trying to access their report, and may support any fraud proceedings, or support an application for an extension to the ban period. This was ultimately the subject of a proposal in the review, with the Review stating it is worth exploring the possibility of this further in consultation with CRBs.

We sought feedback from stakeholders about the potential value of such alerts, noting that there may not be an immediate use for the alerts, and that the effect of the disclosure under paragraph 17.2 is almost certainly that any subsequent credit applied for would be rejected. We also sought feedback about whether such a service to notify individuals of access attempts could or should be offered on an opt-in basis.

Changes for consultation

ARCA has prepared a series of changes for consultation that would require CRBs to offer a notification service free-of-charge on an opt-in basis. The changes include:

- A definition of the service – known as a **ban notification service** – as a free of charge service where the CRB will notify an individual of requests from a credit provider, mortgage insurer or trade insurer for credit reporting information relating to that individual when a ban period is in effect (section 5 of the Consultation CR Code)
- A requirement that, from a given future date, that CRBs offer a ban notification service: paragraph 17(2)(a) of Schedule 2 to the Consultation CR Code
- A clarification that the CRB can collect contact information for the individual for the purposes of operating the ban notification service: paragraph 17(2)(b) of Schedule 2 to the Consultation CR Code;
- A requirement to explain to the individual, when a ban is put in place, that they may opt into the ban notification service: subparagraph 17(3)(b)(ii) of Schedule 2 to the Consultation CR Code;
- A requirement to notify an individual who has opted in in the same circumstances where currently CRBs notify CPs and insurers under paragraph 17.2 of the CR Code: subsection 17(6) of Schedule 2 to the Consultation CR Code.

The feedback we received indicated that many stakeholders saw value in a notification, such as providing possible evidence for a ban extension or in proceedings against a perpetrator of the fraud or identity theft. At least one stakeholder noted that the notification service should be free of charge. We are inclined to agree with this feedback, and have drafted the Consultation CR Code on that basis.

One CRB provided information about some of the technical challenges which would need to be overcome to offer such a service. We thank them for their input, which has helped us shape the provisions. We note:

- The provisions have been drafted to make clear that the CRB can collect the individual's contact details and must provide any notifications using those contact details. If the individual has provided the wrong details, the intention is that the CRB would have still met their CR Code obligations

- At present, when a ban request is made, the CR Code requires a CRB to explain to the individual that they can consent to the CRB notifying other CRBs of the request. Those CRBs are then required to treat the notification as if the individual had contacted them directly – see paragraph 17.1 of the CR Code / subsections 17(3) and (4) of the Consultation CR Code. The intention of the provisions about ban notification services is that where an individual consents to the original CRB notifying other CRBs of the ban request, they could also consent to the original CRB notifying other CRBs of their desire for a ban notification service (and providing their contact information for that purpose). Where that occurred, those other CRBs would need to provide notifications.
- Alerts may not need to contain sensitive information – it may be sufficient to let the individual know there has been an attempt to access their information, and the name of the CP or insurer who attempted to do so.

We acknowledge that CRBs may need time to make changes to their systems to offer ban notification services. We seek feedback from stakeholders about an appropriate period of implementation time (i.e. when, in effect, the new provisions should commence).

Questions

- Does the drafting of the new provisions in section 17 of the Consultation CR Code align with our intention described above?
- Are there any issues with the offering or operation of ban notification services that we do not appear to have considered? If so, what are those issues?
- How soon should CRBs be required to offer a ban notification service?

Information about how to access credit reports (Proposal 32)

Background

Individuals can access their credit information that has been disclosed to CRBs under s20R of the Privacy Act. The document the individual receives in response is their 'credit report'. Access to a credit report must be free of charge if the individual has not requested access within the previous three months. The obligations in s20R are supplemented by paragraph 19.4 of the CR Code, which specifies what must be included in the report and adds restrictions on direct marketing.

However, as a CP may choose which CRBs it discloses information to, different CRBs hold different information about the same individual. As a result, an individual must request multiple credit reports to obtain full visibility of the credit information that is held about them.

The Review considered whether individuals should be able to receive their credit reports by making just one access request to any of the CRBs. Although some stakeholders suggested such a requirement, a coordinated access regime would cause problems for CRBs, each of which have their own identity verification processes. The Review ultimately proposed when an individual seeks access to their credit report from a CRB, the CRB be required by the CR Code to also provide the individual with information on how they can access their credit reports held by other CRBs.

We sought feedback on varying paragraph 19 of the CR Code to give effect to this proposal. All of the stakeholders who responded to our questions on this proposal supported the potential amendments.

Changes for consultation

ARCA has prepared a change to the CR Code to give effect to this proposal. The new provisions would set out that when a CRB provides a service through which an individual may obtain their credit report, they must provide information about how the individual may obtain their credit report from other CRBs: see paragraph 19(3)(a) of Schedule 2 to the Consultation CR Code. The intention is that it would be sufficient for a CRB to provide a brief description of the need to contact other CRBs in order to obtain all their credit reporting information, as well as the contact details of the other CRBs.

In order to provide a consistent experience for individuals, we have also suggested that when individuals request their credit eligibility information from CPs, they receive similar information about CRBs: see sub-paragraph 19(8)(d)(ii) of Schedule 2 to the Consultation CR Code. In this situation CPs are already required to advise individuals that they should request access to credit reporting information held by CRBs; providing the contact details for the three CRBs should be sufficient for this new provision.

Questions

- Does the drafting of the new provisions in paragraph 19(3)(a) and subparagraph 19(8)(d)(ii) of Schedule 2 to the Consultation CR Code align with our intention described above?
- Would there be a better way to draft these obligations? If so, what approach would be better?
- Would there be any issues with CPs also providing contact details of CRBs as proposed in sub-paragraph 19(8)(d)(ii)?

Access to physical copies of credit reports (Proposal 33)

Background

As noted above, individuals can access their credit information (e.g. a credit report) from CRBs under s20R of the Privacy Act. However, the law and the CR Code are silent about the form in which this access occurs.

The Review received feedback from some stakeholders which noted that accessing reports can be difficult for vulnerable individuals who do not have an email account or access to the Internet. In response, the Review proposed an obligation on CRBs under paragraph 19 of the CR Code to require them to provide a physical copy of a credit report on request.

We sought feedback on our intention to implement this proposal, as well as complementary changes to ensure that there is a non-online means of requesting a credit report. We note that the barriers to accessing information that the Proposal intends to solve will not be fully addressed if the only means of requesting a credit report is through a CRB's website. The stakeholders who provided feedback generally supported our approach, although one CRB did note that any changes should not make hard copy the preferred or default way to request a credit report.

Changes for consultation

ARCA has prepared draft changes to the CR Code to give effect to this proposal. This includes a new requirement to provide credit reports in hard copy if that is what the access seeker requests: see paragraph 19(6)(e) of Schedule 2 to the Consultation CR Code.

Additionally, we have proposed a new requirement that CRBs offer a means other than their website for requesting credit reports: see paragraph 19(3)(b) of Schedule 2 to the Consultation CR Code. This is not intended to preclude CRBs from allowing individuals to request access online, or to make non-online the 'primary' or default method of requesting a credit report. Consistent with the CR Code, we also envisage that CRBs may also impose identity verification requirements for non-online requests; nonetheless we consider it important that a non-online means of requesting information is available for individuals who may struggle to request their information through the CRB's website.

Questions

- Does the drafting of the new provisions in paragraphs 19(3)(b) and 19(6)(e) of Schedule 2 to the Consultation CR Code align with our intention described above?
- Would there be a better way to draft these obligations? If so, what approach would be better?

A simpler process for correcting multiple pieces of incorrect information (Proposal 37)

Background

The Privacy Act contains a number of obligations on CRBs and CPs requiring them to correct information. Generally, both CRBs and CPs must take reasonable steps to correct information:

- if they are satisfied that the information is inaccurate, out-of-date, incomplete, irrelevant or misleading for a purpose for which it is held (I.e. correction on their own volition or following notification from a CRB or CP): see s20S and s21U; and
- in similar situations as above but upon the request of the individual: see s20T and s21V.

Paragraph 20 of the CR Code provides additional detail about these obligations and the various steps that need to be taken. This includes paragraph 20.4, which imposes a requirement on CRBs and CPs to determine whether the information needs to be corrected as soon as practicable. Where they determine that information needs to be corrected, the reasonable steps requirements in the Privacy Act are satisfied if they:

- correct the information within 5 days (if in response to an individual's request) or otherwise as soon as practicable;
- take reasonable steps to ensure that any future derived information is based on the corrected information; and
- take reasonable steps to ensure that any derived information based on the uncorrected information is not disclosed or used to assess creditworthiness.

There is no specific mechanism, or additional set of requirements, for instances where one event or set of circumstances mean that multiple pieces of information require correction. For example, this means that individuals who are the victim of fraud or identity theft, and have numerous credit enquiries made in their name by a third party, could need to separately request the correction/removal of each enquiry, providing evidence each time about the same underlying set of factual circumstances.

The Review considered whether processes could be simpler where multiple pieces of information require correction. There was universal support for this proposition, with some

stakeholders noting the difficulty for individuals to try to remove many credit enquiries relating to different CPs from their report, including where they may not be aware of which CPs have been approached. The Review concluded that a simpler process should be available to correct multiple instances of incorrect information stemming from a single event, and that CRBs may be best placed to coordinate such requests.

We sought feedback from stakeholders on what types of 'information' and 'events' any simpler process should apply to, as well as how decision making should work in the context of a simplified process (including one coordinated by CRBs). In doing so we noted that:

- numerous enquiries resulting from a single fraud/identity theft event could be a useful situation for any process to focus on; and
- A CRB coordination role that involved the CRB making decisions about whether the enquiries were fraudulent would be a significant departure from current practice, but could drive consistent decision making relating to the single underlying event in question.

We received a significant amount of feedback from a wide range of stakeholders on this proposal. In general:

- Consumer stakeholders strongly supported the proposal, noting the difficulties with the current approach (and the resulting harm and burden for individuals), as well as the importance of minimising the need for the individual to retell their story.
- CPs generally favoured retaining responsibility for making decisions about whether enquiries made to them were fraudulent. This was also the strong view of one CRB. The clear inference from these submissions is that CPs are best placed – and have more available information at-hand – to assess whether certain enquiries are fraudulent. It may also be the case that shifting responsibility for a subset of enquiries (i.e. those where credit was not granted and that stem from a single event) could complicate the approach to corrections generally and unintentionally result in less consistent decision-making overall.
- CPs and CRBs also noted that complex processes could be challenging to complete within the 30 day timeframe imposed by the law.

We welcome this feedback and acknowledge the difficulty in designing a process that is both more workable for individuals (noting that those individuals have experienced a significant, harmful event) that also aligns with which parties within the credit reporting system are best placed to make certain decisions.

Changes for consultation

Based on the feedback received, we have drafted a new requirement for CRBs and CPs in this context: see subsections 20(8) and 20(9) of Schedule 2 to the Consultation CR Code. This provision would require CRBs and CPs, when determining what evidence to request from individuals who have sought to have one or more unsuccessful enquiries corrected, to have regard to the burden on the individual of providing that evidence, as well as the existence of other information which could be relevant to the decision around correcting information.

The intention of this requirement is to promote more consistency about the evidence/supporting material sought when individuals seek to correct multiple pieces of

incorrect information stemming from a single event. As a result, the burden on the individual associated with seeking these corrections should reduce.

We envisage that this requirement would be supported by best-practice guidelines prepared by ARCA and its Members around the information collected to assess whether an unsuccessful enquiry should be corrected. It would follow that, for instance, CRBs and CPs would need to consider whether asking for slightly different / small amounts of additional information over and above the guideline requirements was appropriate given the burden on the individual of retelling their story. We may need to revisit this approach – and further consider options that involve more significant change – if it is not possible to develop and fully implement guidelines of this nature.

Questions

- Does the drafting of the new provisions in subsections 20(8) and 20(9) of Schedule 2 to the Consultation CR Code align with our intention described above?
- Would there be a better way to draft these obligations? If so, what approach would be better?
- What information should a CRB or CP ask for when considering a request to correct one or more unsuccessful enquiries?
- Is there anything else that a CRB or CP should be required to have regard to under subsection 20(8)?
- Is the requirement that the individual mention an event of fraud or identity theft (in paragraph 20(9)(b)) a useful part of the provisions? Why or why not?
- If you are a CP, what information do you currently require to form a view on whether an enquiry that did not result in credit being granted should be corrected?

Changes to the process for correcting information that arises out of circumstances beyond the individual's control (Proposals 39, 40 and 41).

Background

The Privacy Act contains a number of obligations for CRBs and CPs to correct information. Generally, both CRBs and CPs are required to take reasonable steps to correct information:

- If they are satisfied that the information is inaccurate, out-of-date, incomplete, irrelevant or misleading for a purpose for which it is held (I.e. correction on their own volition or following notification from a CRB or CP): see s20S and s21U; and
- In similar situations as above but upon the request of the individual: see s20T and s21V.

Paragraph 20 of the CR Code provides additional detail about these obligations and the various steps that need to be taken. Paragraph 20.5 is part of this framework, and outlines a mechanism through which certain default information is to be corrected where, the event giving rise to the default was outside the individual's control. Paragraph 20.4 includes a mechanism for using the powers in the Privacy Act to amend information that is manifestly incorrect on its face (e.g. arises due to error, fraudulent behaviour or identity theft)

This mechanism in paragraph 20.5 is available where:

- the default in question has led to a new arrangement (see s6S(1)(c) of the Privacy Act) or has been paid off and payment information has been disclosed; and

- the individual requests the CRB correct the relevant default information, on the basis that the overdue payment occurred because of unavoidable consequences of circumstances beyond the individual's control.

In these situations, where the information is inaccurate, out-of-date, incomplete, irrelevant or misleading, it must be destroyed.[8]

The Review proposed three distinct improvements to paragraph 20.5:

- **Including situations of domestic abuse in the example list of circumstances outside the individual's control (Proposal 39).** This change would put beyond doubt that information about defaults that were the unavoidable consequences of domestic abuse could be removed from credit reports.

- **Allowing for the individual's request to be made to the CP, and not the CRB (Proposal 40).** At present requests under paragraph 20.5 must be made to the CRB.

- **Expanding the types of data that can be removed on the basis that their existence was due to circumstances beyond the individual's control (Proposal 41).**

We sought feedback on our intention to implement proposals 39 and 40, as well as feedback on the approach we should take to proposal 41. When doing so we noted the existence of paragraph 20.4, and that that mechanism is likely far more appropriate for correcting CCLI and enquiries data (i.e. if such data requires correction, it is likely wrong on its face). We also discussed some approaches to what "correcting" RHI in this context could involve.

Changes for consultation

ARCA has rewritten the current paragraph 20.5 and implement proposals 39, 40 and 41 of the Review. The new provisions are subsections 20(10) and 20(11) of Schedule 2 to the Consultation CR Code and would operate as follows:

- Requests can now be made to a CP or a CRB;
- Key wording – such as the information 'only existing due to unavoidable consequences of circumstances beyond the individual's control' – remain the same to make clear that aspects of the mechanism's current operation are not meant to change;
- Domestic abuse is included as an example; the remainder of the list of example circumstances is unchanged
- The provision could be used to correct any default information, repayment history information or financial hardship information

All of the feedback we received was supportive of including domestic abuse as an example of circumstances beyond the individual's control. Some CPs noted that they would already correct credit information in these situations. Most of the feedback we received supported allowing correction requests of this type to be made to a CP. The one response that was explicitly non-supportive noted that cases could be disputed through external dispute resolution. In our view, the treatment of disputes about corrections is unlikely to change

[8] The CRB must consult with the CP that disclosed the information when making this assessment: see paragraph 20.5(a).

based on whether the request is made to a CRB or a CP; allowing individuals to request corrections be made by a CP under this mechanism could reduce the burden of seeking correction and is aligned with the way the law is drafted.

Feedback was more mixed on expanding the types of data that could be corrected. Some stakeholders were supportive; others noted the historical basis of paragraph 20.5 as well as the risk of a rise of spurious correction requests. On balance we concluded that, if the unavoidable consequences of circumstances beyond the individual's control are sufficient justification for correcting some credit information, that same justification could equally apply to an expanded set of information. Additionally, correcting some default information for these purposes may give rise to a need to correct RHI which also exists due to the same circumstances, so there is a rationale for expanding the provision.

Correcting RHI in this context could be conceptually challenging for CPs and CRBs, especially where it is not obvious what the information should be corrected 'to' and suppression is not an option. For that reason, the draft provisions are focused on instances where the relevant monthly payments have been made at the time of the correction request – i.e. where the payments were late due to the unavoidable consequences of circumstances beyond the individual's control, but have subsequently been made. In these situations, it is envisaged that CPs and CRBs would correct the RHI to show the payments as being made on time. Where the payments have not subsequently been made, we envisage CPs and CRBs would need to consider whether there is any other reason for correction (i.e. under paragraph 20.4 / subsection 20(7) of the Consultation CR Code). Where this is the case, the RHI should be corrected; where the information is *not* inaccurate, out-of-date, incomplete, irrelevant or misleading, no correction should be made. We consider that this approach balances the appropriateness of extending correction rights with ensuring that CPs and CRBs have sufficient certainty about what information should be corrected *to*.

Questions

- Does the drafting of the new provisions in subsections 20(10) and 20(11) of Schedule 2 to the Consultation CR Code align with our intention described above?
- Would there be a better way to draft these obligations? If so, what approach would be better?
- Would there be a better way to approach corrections of RHI?
- Are there ever instances where FHI would need to be corrected for this purpose? If so, what are those reasons?

Introducing a soft enquiries framework (Proposal 43)

Background

The Privacy Act makes specific provision for CPs, mortgage insurers and trader insurers to obtain information from a CRB in relation to a credit application (the term used in the Act is 'information request'). Colloquially, the term 'hard enquiry' is used where an enquiry appears on an individual's credit report.

Practices have emerged which have become known as 'soft enquiries' whereby CPs and other entities rely on other provisions (e.g., about 'access seekers') in the Act and CR Code to obtain access to an individual's credit reporting information. These practices have partly arisen due to a perception that a hard enquiry may have a negative effect on overall

creditworthiness. In some instances, CPs are asked to remove records of hard enquiries that are legitimately recorded on a credit file.

Currently, neither the Act nor CR Code expressly refer to hard enquiries or soft enquiries.

The Review considered whether and how the CR Code should be amended to introduce a soft enquiries framework. Stakeholder feedback was supportive of introducing such a framework. The Review concluded such a framework did not require amendment to the Privacy Act but could fit within the existing Act provisions (and operational rules in the CR Code). The Review highlighted that any such soft enquiries framework would be supported by greater data about the impact of credit enquiries, and further that a soft enquiries framework would provide significant consumer and competition benefits.

We have conducted two rounds of consultation with interested stakeholders on how a soft enquiries framework could operate. Feedback sought to draw out stakeholder views on how soft enquiries would be differentiated from hard enquiries, in the context of supporting the overall consumer understanding of credit enquiries and also achieving the benefits highlighted by the Review.

We received a wide range of disparate feedback, but by way of summary:

- CPs and CRBs generally expressed support for CPs submitting soft enquiries directly with CRBs except where the information is provided to the CP directly by the consumer. (Further, a government body suggested that the exception should only cover unprompted disclosure of credit reporting information to the CP by the consumer.) However, some stakeholders, expressed concern that this approach would be disruptive as processes would need to be changed and that the cost of soft enquiries may be an impediment to competition.
- Generally, stakeholders supported making a hard enquiry where an application is finalised by the consumer after the consumer has made a soft enquiry through the CP. However, some stakeholders expressed concern that this approach would be unduly restrictive.
- Generally, stakeholders supported limiting the type of information that can be provided in response to a soft enquiry. However, some stakeholders disagreed with this approach, including because it may make it harder for smaller lenders to compete with larger CPs. Essentially, this feedback suggests that some lenders may want to receive in response to a soft enquiry all information that is necessary to assess whether or not to approve the application.

Changes for consultation

Following these consultations, ARCA has developed draft provisions which would create a soft enquiries framework within the CR Code. At a high level, the soft enquiries framework proposed would operate such that:

- Soft enquiries would occur only in circumstances where a consumer has sought an indicative price for credit from a CP: see the definition of soft enquiry in section 5 of the Consultation CR Code
- Use restrictions are implemented to prevent a CP relying solely on soft enquiry information to assess whether or not to approve credit: see subsections 16(8) and (9) of Schedule 2 to the Consultation CR Code;

- The information provided to a CP as part of the soft enquiry is restricted to an individual's credit score or rating, negative information (bankruptcy information, serious credit infringement and default information) and whether FHI has been reported for the consumer: see subsection 14(6) of Schedule 2 to the Consultation CR Code; and
- Consumers are provided information by CPs about the type of enquiry, how it will be recorded and the potential consequences of the enquiry see subsection 7(4) and paragraph 19(6)(c) of Schedule 2 to the Consultation CR Code.

From the consultation conducted to date, ARCA appreciates that there are strong stakeholder views about soft enquiries, and a significant challenge in achieving a balance which fosters competition (without unduly burdening smaller CPs) and promotes consumer confidence and understanding in the credit reporting system. One of the key reasons that this has been made challenging is the extent to which an informal soft enquiry framework has already developed, and is relied upon as part of existing processes (which then potentially needs to be unwound to achieve compliance with any varied CR Code).

ARCA has taken the approach that, rather than creating a framework which necessarily replicates the existing informal framework, it is critical to create a framework which best preserves the integrity of the credit reporting system and imposes restrictions to control practices that may otherwise undermine that integrity. To the extent that existing processes may need to be changed, ARCA's view is that this may be more appropriately dealt with through allowing an adequate transition period.

ARCA's view is that, in its totality, the proposed framework will:

- Impose a clear delineation between a soft enquiry and hard enquiry, such that the two processes are distinct. Importantly, a hard enquiry will continue to be a valuable dataset in relation to credit applications (but does not necessarily only reflect an approved credit application)
- Restrict the practice of using access seeker provisions as a means to access a consumer's full credit file and assess a credit application, without a record appearing on that consumer's credit report: see subsections 16(6) and (7) of Schedule 2 to the Consultation CR Code
- Consumers have the benefit of being able to 'shop around' with different CPs to understand what the cost of credit will be for each CP, and therefore make an informed decision as to whether to seek approval, without fearing that this preliminary process has an adverse effect on their credit report
- Consumer understanding is further supplemented by the consumer education requirement imposed on CPs. ARCA appreciates this requirement needs to be relatively straightforward to implement, providing very basic consumer messages. Otherwise, there is a risk that this type of requirement adds to the overall 'noise' of material provided but is not properly understood or read by consumers.

It is anticipated that there will continue to be strong stakeholder views on this aspect of the CR Code changes. The consultation questions are intended to draw out the extent to which these views indicate that aspects of the framework are unworkable or could be approached differently.

Questions

- Are there any practical challenges to implementing the proposed framework? How could these challenges be addressed?
- Do you foresee that ARCA's intended approach to the proposed framework will not achieve the policy intent or have unintended consequences? If so, please describe how and what alternative approach would achieve a better outcome or avoid these unintended consequences?
- Does the drafting of the various new and amended provisions in the Consultation CR Code align with our intention described above?
- The consumer education requirement has not yet been subject to extensive feedback. With this in mind, do you consider such a requirement is workable, and, if not, how would you propose that consumer education be achieved?

Expanding capacity information to include trustee status (Proposal 44)

Background

Paragraph 5.1 of the CR Code restricts the ability of CRBs to collect and use personal information about individuals that is **not** credit information as defined in the Privacy Act. One exception to this rule is 'capacity information', which is defined in the CR Code as information about whether the relevant individual is solely or jointly liable for the credit account or a guarantor in respect of that account. CRBs may collect this capacity information, use it to derive information of their own and disclose it alongside credit information.

However, the three categories do not cover all situations. For instance, it is potentially possible for an individual to enter into consumer credit in their capacity as a trustee for a trust, but currently there is no means to identify them as a trustee. In such cases, the individual would likely be shown as liable for the credit, even where the trust is liable (or has indemnified the trustee). This difference in treatment could affect the ability of the individual to obtain further credit in their personal capacity.

The Review considered that the CR Code should be amended to allow such that 'capacity information' includes an information about whether an individual is acting in their capacity as a trustee. ARCA has subsequently included dormant changes in Version 4 of the Australian Credit Reporting Data Standards to allow for the reporting of this information in the future.

We sought feedback on including trustee status as a type of capacity situation, as well as what should occur if an individual satisfies more than one kind of capacity information (i.e. is a trustee but liable for the credit, or a trustee who has also provided a personal guarantee).

We received mixed feedback. Of the stakeholders who supported making this change, most preferred a different hierarchy from the one we originally proposed. Some stakeholders noted other solutions, such as not reporting information on trustee loans at all. Others raised the fact that changes to capacity information could involve systems changes to facilitate correct reporting.

Changes for consultation

We have prepared a variation to the definition of capacity information to include information about whether the information about whether an individual is acting in their capacity as a trustee: see the definition of capacity information in section 5 of the Consultation CR Code.

We anticipate that the detail of these requirements could sit elsewhere, such as in industry guidelines.

We consider that those guidelines should include a hierarchy for CPs to follow when reporting capacity information. As such:

- the individual should be reported as solely or jointly liable for the credit if this is the case (irrespective of whether they are also a trustee);
- if the individual has provided a guarantee and entered into the credit as trustee, they should be reported as a guarantor;
- the individual should be reported as a trustee if they are disclosing information to a CRB about the credit, the individual is a trustee and none of the other categories are satisfied.

This change reflects feedback that it is important for the system to reflect a guarantor's potential liability for the credit.

We acknowledge that any changes would require time to implement – we seek feedback from CPs about the amount of time they would need to

Questions

- Does the drafting of the new definition of capacity information align with our intention described above?
- Do you agree with the approach for some of the detail of these requirements to be in guidelines? Would it be preferable if, for instance, the hierarchy set out above were added to the text of the CR Code?
- If you are a CP:
    - Do you disclose information to CRBs about loans to trustees who are not individually liable for the relevant credit?
    - How long would it take you to adjust your systems to align with the changes to implement this proposal?