Assistant Commissioner, Regulation and Strategy
Office of the Australian Information Commissioner (OAIC)

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By Email only:

25 March 2024

Dear

Response to Consultation paper: Remaking the Privacy (Credit Related Research) Rule 2014

Thank you for the opportunity to provide feedback on the re-making of the Privacy (Credit Related Research) Rule 2014 (the **Research Rule**), and for the additional time allowed to respond to your consultation.

Arca is an industry association focussed on the use credit reporting and consumer data. We bring together Australia's leading credit providers and credit reporting bodies to improve data protection and use, and also to make credit more visible, accessible and easily understood. Our vision is to make credit work for all Australians.

Arca strongly supports the re-making of the Research Rule. We have responded to your questions below, and in doing so have suggested some potential amendments to aspects of the rule to make its operation more effective and simple for CRBs without jeopardising data safety or security.

Feedback - General

We consider that the Research Rule is an important part of the legal framework governing credit reporting bodies (**CRBs**). Subject to the comments below, we consider the rule is operating effectively, and in any event should be re-made before its sunsetting date in October 2024. The Research Rule enables CRBs to conduct a range of research activities that benefit themselves, credit providers (**CPs**) and, by extension, consumers. Specifically, the Research Rule allows CRBs to:

- retrospectively review the effectiveness of their credit ratings and credit scores by comparing point-in-time scores with subsequent events and performance for certain cohorts; and
- assist CPs to review and determine the effectiveness of their lending decisions, such as to improve their compliance with e.g. the responsible lending obligations and to ensure that subsequent consumers receive good outcomes from their credit products.

The Research Rule facilitates improvements to products and services offered by both CRBs and CPs. Additionally, analysis conducted in reliance on the Research Rule can maximise the

effectiveness of other obligations designed to protect consumers from harm and/or ensure they receive good outcomes. Some CRBs noted to us that research can also allow them to demonstrate the benefits/uplift they can provide new prospective CPs; as such the Research Rule can indirectly increase competition and the availability of data within the credit system (subject to the associated safeguards).

The sections below outline our specific feedback on the provisions of the proposed remade Research Rule and the questions in the consultation paper. We have only answered questions where we have substantive feedback to provide.

Question 2 – section 5: Conducting research in relation to credit

We consider that this section is operating effectively. However, we have received feedback from some Members that some participants are uncertain about the meaning of 'research in relation to credit', and the kinds of activities permitted by this term in combination with section 6.

Questions 3 to 5 – section 6: Permitted purposes of conducting research

Although we consider that this section is generally operating effectively, there is an opportunity to explain/enhance the drafting of the section to address the uncertainty alluded to in questions 4 and 5. Specifically, this uncertainty is:

- what is covered by 'other consumer protections' in subsection 6(c) of the proposed remade rule; and
- what is meant by 'the general benefit of the public' in subsection 6(d) – including in situations where there are both public benefits and private, commercial benefits for CRBs and/or CPs.

Arca considers that the permitted purposes for research in relation to credit under the remade rule should include:

- research that assists an entity to comply with its legal obligations (including, but not limited to, the responsible lending obligations and the design and distribution obligations); and
- research for any other purpose that benefits the public, including where there is also a private benefit for some other party (e.g. the CRB, a CP, or a third party providing services to the CP for the purposes described above).

Put simply, we do not consider that the 'purposes' for research should be read narrowly, especially considering that there are a range of other protections that apply. These other protections include the de-identification of the information and the restrictions on use (i.e. solely for the purposes of the research). We suggest that either the drafting of the remade Research Rule, or the Explanatory Statement that accompanies such a rule, make these matters clear.

Question 7 – section 8: disclosure of de-identified information

Some of Arca's Members have noted that subsection 8(2) can present operational impediments.[1] Two impediments, and some matters the OAIC may want to consider, are outlined below.

[1] Issues with the conditions in section 8 of the Research Rule have been raised previously. We support these issues – including our earlier suggestions – being explored during the re-making process.

First issue: Comparative research and inability to link results

There is concern that the requirement imposed by paragraph 8(2)(a) inadvertently prevents more detailed comparative research, such as about the relative benefit to a CP from additional data from more than one CRB.

For example, a CP may wish to consider whether services from multiple CRBs would have improved their scoring or credit decisioning. Under the Rule, research can be conducted using de-identified information from multiple CRBs on the same cohort of individuals/credit accounts. However, at least one CRB has interpreted the de-identification requirement to mean that the results of the research cannot be linked to any internal keys within the CP, which prevents detailed comparative analysis (i.e. there is no way to determine that one line of data from one CRB aligns with the same account as another line of data from the other CRB).

To address this situation, the OAIC should consider whether the Research Rule could allow for the linking of research results to one another, or to analytical tables within a CP, while still prohibiting the full deidentification of the information (which would be inconsistent with the premise on which the rule is made under section 20M of the Privacy Act). If the OAIC considers that some or all of this conduct is currently permitted by the Research Rule as drafted, the Explanatory Statement should describe what conduct is permitted in more detail. Doing so would reduce confusion and differences in practices, while maximising the benefits from any research conducted.

Second issue: More than one party involved in research

Many CPs who wish to conduct research under the Research Rule to assess the effectiveness of their lending decisions may outsource some of the analysis or review to a third party. The presence of an additional party in the research is made more complicated by paragraph 8(2)(c), which currently required the CP to separately disclose the information to each contractor or agent. We have heard from CRBs that this adds complexity and burden for no demonstrable benefit.

We appreciate the intent of the rule in paragraph 8(2)(c) is likely to be to control the dissemination of the deidentified information, and recognise that the design of the legal framework means that it is not appropriate for the Research Rule to impose requirements on third parties other than the CRB. Nonetheless, our view is that the OAIC should consider whether paragraph 8(2)(c) of the Research Rule could be redrafted to allow for simpler flows of deidentified information within the confines of the research being conducted. Some possible options for redrafting paragraph 8(2)(c) for consideration are set out below.

- **Limited on-disclosure permitted**: Under this option, section 8 could be amended so that CRBs are required take reasonable steps to ensure that any entity that receives the information is *only* permitted to disclose the de-identified information to other parties involved in conducting, assessing or reviewing the research. The drafting could require that each of those parties agree in writing to only send the information to other such parties and otherwise comply with the limits referred to in section 8. Such a requirement could provide certainty that the information will not be widely circulated inappropriately while making the conducting of research simpler and more efficient.

- **On-disclosure with consent**: Under this option, section 8 could be amended to require CRBs to take reasonable steps to ensure that any entity that receives the information is only permitted to disclose the de-identified information to other parties with the consent of the CRB. Guidance in the Explanatory Statement could indicate

that the CRB should have regard to the matters in section 8 (or any other matters) when considering whether to provide consent. This option could potentially provide the OAIC with a degree of oversight of the on-disclosure, given a specific CRB decision is required before the disclosure occurs.

- **On-disclosure to a credit provider:** Under this option, section 8 could be amended to require CRBs to take reasonable steps to ensure that any entity that receives the information is only permitted to disclose the de-identified information to a credit provider connected to the research. As noted in our correspondence on this topic in 2016, if a credit provider were to reidentify the information:
    - the re-identified information would be credit eligibility information (and regulated under the Privacy Act); and
    - the re-identified information **could not be used by the CP**, as the relevant uses for credit eligibility information set out in section 21H of the Privacy Act do not align with the purposes of the research set out in the Research Rule.

  These restrictions have the effect of making any reidentification by the CP extremely unlikely, as there is no incentive to do so.

Other drafting options, such as deeming third parties as being in the shoes of the information recipient, could also address the problems described above. We would welcome the opportunity to discuss and consider the options outlined above – or any other option the OAIC considers – in more detail. Please let Arca know if further, more detailed, input would be beneficial.

Thank you again for the opportunity to provide input into your considerations about the remaking of the Research Rule. As noted above, we strongly support the remaking of the Research Rule. Please contact me if you would have any questions.

Yours sincerely,

Richard McMahon

General Manager – Government and Regulatory