

The logo for the Australian Retail Credit Association (ARCA) is displayed within an orange square. The text 'AUSTRALIAN RETAIL CREDIT ASSOCIATION' is written in white, stacked vertically in all caps.

AUSTRALIAN
RETAIL
CREDIT
ASSOCIATION

8 December 2022

Australian Law Reform
Commission

Sent via email to:

Dear Madam/Sir

**Submission to Australian Law Reform Commission
(ALRC) Interim Report B: Financial Services Legislation
ALRC Report 139: September 2022**

Thank you for the opportunity to provide our submission in relation to *Interim Report B: ALRC Report 139, September 2022 (Interim Report B)*, the second interim report issued by the ALRC in the course of the current review of the legislative framework for corporations and financial services regulation (**the Review**).

Australian Retail Credit Association (ARCA)

ARCA is the peak industry association for businesses using consumer information for risk and credit management. Our Members include Australia's leading banks, credit unions, finance companies, fintechs and credit reporting bodies and, through our Associate Members, many other types of related businesses providing services to the industry. Collectively, ARCA's Members account for well over 95% of all consumer lending in Australia.

ARCA is also the developer of the Privacy (Credit Reporting) Code 2014 (**CR Code**), as well as drafters of the industry rules for data sharing, and the data standards for data supply. The CR Code is a legislative instrument once it is included on the Codes register maintained by the Australian Information Commissioner: see s26M of the *Privacy Act 1988*. As such ARCA has provided views below on the development and role of legislative instruments.

Scope of the Review and ARCA's submission

ARCA has previously provided a submission to the ALRC in response to Interim Report A, dated 25 February 2022.

As noted in our earlier submission, ARCA welcomes and strongly supports the Review. We consider that the Review and moves to simplify the laws that apply to financial services, has the potential to greatly benefit the development of the Australian financial services regulatory and legal landscape.

We acknowledge that the ALRC has indicated that it;

- will consider financial services legislation and regulation outside Chapter 7 of the Corporations Act 2001, where those laws are relevant to corporations and financial services; and
- welcomes feedback to Interim Report B about its specific proposals, but also other additional matters relevant to the Review's Terms of Reference.

On this basis, ARCA's submission raises issues and matters applicable to other financial services legislation and regulations, separate to the Corporations Act.

Having reviewed Interim Report B and the previous materials issued by the ALRC, we note that the Review has continued to fail to explicitly include reference to the laws and regulation of credit reporting in Australia (such as those contained within Part IIIA of the Privacy Act). We would again strongly urge the ALRC to give consideration to the laws and regulations relating to credit and credit reporting in Australia in a manner similar to the current consideration being given to the Corporations Act, even if this consideration was to be accorded as a part of a separate review.

In particular, we are of the view that those principles which the ALRC has said will guide it during the course of the Review and which are set out in the Introduction section of Interim Report A, should also apply to the laws and regulation relating to credit reporting. These principles include the requirement for legislation to be clear, to identify fundamental norms and to operate so as to promote meaningful compliance with sufficient legislative flexibility.

In relation to the matters set out within Interim Report B, ARCA has provided its feedback and commentary below.

A. Proposals which may be appropriate to apply to other legislation

There are a number of recommendations contained in Interim Report B which we consider are appropriate for application to other areas of legislation and regulation. In particular, we consider that the potential benefits which may flow as a result of these recommendations are not specific to the Corporations Act, the National Consumer Credit Protection Act 2009 (Cth) (**the NCCP Act**), and the Australian Securities and Investments Commission Act 2001 (Cth) (**the ASIC Act**) and as such, the recommendations can and should be applied to other legislation such as the Privacy Act.

These recommendations are as follows:

- Recommendation 14, which relates to repealing redundant provisions
- Recommendation 15, which relates to ongoing programs to repeal/prevent

redundant provisions

- Recommendation 16, which relates to amending unclear or outdated laws
- Recommendation 19, which relates to the publication of electronic materials designed to help users navigate the legislation
- Chapter 9 Recommendation: which relates to the Government publishing enhanced versions of key corporations and financial services legislation

Whilst not a formal recommendation, we also note and support the application of the considerations set out by the ALRC at clause 1.44 of Interim Report B to those laws relating to privacy and credit/ credit reporting, including the Privacy Act as well as the NCCP Act. Indeed, we consider these considerations lay the foundation for ‘good’ and effective regulatory and legislative design generally. These considerations are set out below and are related to whether or not, in a particular case, and in the context of legislative material (both across the legislative hierarchy and within each individual legal of the hierarchy):

- a. provisions that relate to similar subject matter, or that are similar in nature, should be grouped together;
- b. closely related provisions that overlap or are based on unnecessary distinctions should be consolidated;
- c. material should be ordered in such a way as to achieve a logical flow of ideas and concepts;
- d. the most important ideas (such as key concepts, obligations, and prohibitions) should be located upfront or otherwise in a prominent position; and
- e. using legislative blueprints, simplified outlines, diagrams, and other legislative features might help drafters to structure material logically, and might communicate to readers how legislation has been structured, and the norms that inform the rules

B. Proposed legislative hierarchy

We note that the ALRC’s proposed legislative hierarchy in Proposal B1, as well as Proposal B8, specifies that ‘scoping powers’ and ‘rule making powers’ (which are used to adjust the scope or give effect to the fundamental norms/obligations in the Act) would be granted to the Minister and ASIC concurrently.

We understand from Proposal B8 that the Rules Advisory Committee, which would need to be consulted before new scoping orders/rules are made, could include representatives from industry groups, consumer groups, and legal experts such as practitioners and academics.

We note the ALRC’s statement that in relation to the exercise of these powers, the ALRC proposes that an advisory committee be established by the Corporations Act which must be consulted by the Minister or ASIC (as the case may be) — in addition to the public — before new scoping orders or rules are made. This body, which the ALRC has referred to for the purpose of Interim Report B as the ‘Rules Advisory Committee’, is described as potentially

comprising representatives from industry groups, consumer groups, and legal experts such as practitioners and academics.

In the ALRC's view:

- the Rules Advisory Committee should possess sufficient technical expertise to effectively assist the Minister and ASIC in their delegated law-making functions, and
- the committee's composition and appointment processes should facilitate sufficient independence from the Government.

We also understand that there is the potential for this proposed legislative hierarchy model to be applied to other key financial services legislation such as the ASIC Act and the NCCP Act.

As a starting point, ARCA is very supportive of the intention of the ALRC to improve the ability for individuals to engage with corporate and financial services law. We agree that there is a need to address the complexity, uncertainty and lack of navigability of the law governing corporations and financial services (particularly the Corporations Act).

We consider that as a result of placing all relevant rules, laws and exclusions, within one of three clear, defined, legislative sources the proposed legislative hierarchy goes some way to achieving this outcome. That is, instead of laws and regulations being spread across various instruments, orders, regulations etc., (as is currently in the case in the context of the Corporations Act) the proposed model would limit the sources of legislation and regulation, to either the Act, a scoping order or a rules book. We are supportive, in principle, to this method of 'grouping' or combining, all applicable rules, regulations, exclusions, etc., within three clearly identifiable documents.

However, we consider that the proposed legislative hierarchy does raise a number of issues which will need to be addressed to ensure its proper operation, and which include the following:

- Even taking into account the various limits and factors which the ALRC proposes to apply to the 'scoping' and 'rule-making' powers (such as the imposition of sunset terms and consultation requirements), the proposed hierarchy will introduce the ability for the Minister's office to have a direct and significant impact upon the operation of laws, in terms of both the scope of the law(s) and the rules which will be required to be complied with, in order to ensure legislative compliance. These are significant powers, which we consider are more appropriately exercised by either the legislator or alternatively, an entity which is not subject to the political persuasions and views of a single minister and their portfolio.

To elaborate, we are concerned that the 'scoping' and 'rule-making' powers can have quite a significant impact on the operation and effect of legislation – which can have flow on consequences for industry and consumers. This means that rules that have a significant effect will potentially be made without Parliamentary oversight and may also be crafted by individuals who do not have the necessary technical and specialist knowledge and expertise to ensure that these rules operate in the manner intended (or which otherwise, do not give rise to unintended consequences).

Vesting such power in a limited fashion also raises issues of whether there is appropriate separation of powers between the legislature and executive. Questions may also arise in relation to how the actual, or perceived risk of misuse of power would be remedied, in instances where simply voiding or disallowing a rule or scoping order which has been made and which has been in force, may not be sufficient to address potential issues or harms caused.

- By providing this joint ‘scoping’ and ‘rule-making’ power to both ASIC and the Minister’s office, there is the potential for reduced oversight of the Minister’s office when it discharges its powers when compared to an organisation such as ASIC. For example, actions taken by the Minister and their personnel, may be outside the scope of review or oversight as a result of parliamentary privileges.
- Whilst we note the reference to changes to the Corporations Act being made to require consultation with the ‘Rules Advisory Committee’ it is unclear precisely what measures will be implemented to ensure that those individuals and organisations which are appointed to the committee are politically and philosophically independent of the Minister’s office. It is also unclear precisely which individual(s) or office, will be responsible for the selection of committee representatives as well as the criteria which will be utilised in their selection. Furthermore, we consider that there should be a clear and detailed description in relation to the role of the ‘Rules Advisory Committee’ as well as the process which will be implemented to ensure that membership is comprised of individuals and organisations, with the appropriate breadth of knowledge, experience and expertise, relevant to the subject matter being considered at any given time.
- The application of the legislative hierarchy may not be appropriate for all legislative instruments. In particular, we do not consider that the model would be appropriate for application to the Privacy Act, which we consider benefits from the current process by which amendments are made subject to legislative processes or as otherwise set out within the Act.

C. Role of technical experts in the development of ‘rules’

As noted earlier, ARCA is the developer of the CR Code, which (once registered) is a legislative instrument created pursuant to the Privacy Act. Through its extensive experience developing and varying both the CR Code and technical frameworks such as the Australian Credit Reporting Data Standards, ARCA is able to ensure that a high level of technical and policy expertise and knowledge, is reflected within such legislative and non-legislative instruments and ‘rules’. Also, as an organisation independent of Government, ARCA is able to create, review and amend the CR Code in a manner which is more efficient, agile and forward facing than larger government or bureaucratic organisations as well as provide greater operational efficiencies to the creation and/or amendment of legislative instruments.

Under the legislative hierarchy proposed by the ALRC it is unclear if, and what role or input, technical experts such as ARCA- would have within the development of scoping orders and thematic rule books. In particular, whilst technical experts such as ARCA may be appointed as representatives upon the Rules Advisory Committee it is unclear if, and to what extent, the insights and views of an expert organisation such as ARCA, must or would be, taken into account by the Minister's office and ASIC and/or how any potential conflict between the views of representatives on the committee is to be resolved.

Should the proposed hierarchy be expanded to other legislations such as the Privacy Act, we consider that removing the ability for specialist experts such as ARCA to produce and amend legislative instruments, will lead to a significant deterioration in both the quality and the efficiency by which legislative instruments (such as those which set out technical rules applicable to primary legislation) are produced and that relegating such organisations to the status of committee representative will not reduce or mitigate, this outcome.

I would welcome the opportunity to discuss this submission further and if you have any questions, please feel free to contact me.

Yours sincerely

Mary Vancea
General Manager: Legal & Policy
Australian Retail Credit Association