

Re: CP 303 *Credit cards: Responsible lending assessments*

Australian Securities and Investments Commission
Via email: creditcards@asic.gov.au

31 July 2018

Thank you for the opportunity to provide a submission on CP 303 *Credit cards: Responsible lending assessments*. We've also taken this opportunity to provide some observations in respect of REP 580 *Credit card lending in Australia* – noting that the work done on that report has informed the position taken by ASIC in the consultation paper.

By way of background, the Australian Retail Credit Association (ARCA) is an industry association with the objective of enabling better lender decisions and improved responsible lending through the disclosure, exchange and application of data – both through the credit reporting system and other trustworthy and permitted sources.

ARCA's members are drawn from both credit providers and credit reporting bodies. Credit provider members include the thirteen largest APRA regulated banks, and a broad range of fintechs, finance companies, and credit union and mutual credit providers. Furthermore, the four national credit reporting bodies are all ARCA Members.

Noting ARCA's purpose, this submission highlights the need – as evidenced by ASIC commentary in CP 303 and REP 580 - for credit card providers to have access to additional sources of data to properly assess and manage credit card arrangements.

Importantly, in CP 303 and REP 580, ASIC has set out additional regulatory expectations that will require credit card providers to have access to reliable data sources to meet those expectations - see *Annexure One* for a detailed discussion. In this regard, we note that some of the commentary in CP 303 and REP 580 is not necessarily described by ASIC as being a regulatory 'requirement'; rather ASIC – using various descriptions – has positioned the commentary as being 'consistent with' a licensee's obligations under the *National Consumer Credit Protection Act* (NCCP).

Regardless of the language used, we have commented on the types of data that a provider may require if credit card providers are to treat ASIC's expectations as mandatory 'requirements'. We have not sought to comment on the appropriateness of those requirements.

Data availability:

In REP 580, ASIC notes that the upcoming Open Banking regime will assist providers to meet some of the regulator's new requirements. Whether that will be true will depend on the way in which the Open Banking regime is developed – including what data is made available through the regime. For example, the extent to which the 'product data' to be made available through Open Banking will assist providers to understand a consumer's existing credit card obligations (as required by the assumption described in CP 303.51) will depend on the structure and content of the data sets that are delivered through the Open Banking regime.

Although it may be appropriate to rely on Open Banking data to meet some of ASIC's new requirements, we are concerned that the regulator considers that the Open Banking regime will provide the solution to certain of the regulator's new requirements – particularly those that require the provider to understand the transactional history of the consumer.

Open Banking is based on the principle of giving a consumer a right to share their data with people and businesses of the consumer's choice. Maintaining the consumer's right to choose when and with whom to share their data is fundamental to the regime. Imposing a *requirement* on the credit provider to access the consumer's data through the Open Banking regime is a distortion of that founding principle and will place consumers in the position of having to prioritise their desire for the product over their privacy. That is, the credit card provider will be placed in a position of making the application for – and, potentially, the ongoing use of – the product conditional on the consumer giving access to the data through Open Banking.

For example, Issue 6 (as described in REP 580) will require providers to access detailed data regarding a consumer's previous use of credit cards and, potentially, other forms of credit (see Appendix 1 for a discussion of the data required). While stated as being 'consistent with' the provider's 'obligations to engage in credit activities efficiently, honestly and fairly', rather than a requirement of the NCCP's responsible lending regime, it appears that this new requirement is intended to ensure that the credit card product is suitable to the consumer based on the consumer's actual prior use of credit cards, i.e. the card is likely to meet the consumer's 'requirements and objectives' (as that term is used in the NCCP's responsible lending regime).

The Australian Law Reform Commission in its report, *For Your Information: Australian Privacy Law and Practice* (ALRC Report 108), recognised - and entrenched - the relationship between a licensee's responsible lending obligations and the availability of relevant information through the credit reporting system. Where the licensee is under an obligation to assess the suitability of the credit there should also be a 'credit provider right to data' to allow the licensee to meet that obligation (as opposed to the Open Banking regime which provides a 'consumer right to data').

For this reason, we note that if ASIC's new requirements are to be implemented by credit card providers in an efficient and effective manner, the credit reporting system (as established by Part IIIA of the *Privacy Act*) should be updated to include the additional information described in Appendix 1.¹

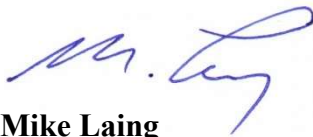
¹ Additionally, we note that making this data available through the credit reporting system will mean that the access to and use of that data will be strictly regulated by the Privacy Act – at this stage, the manner in which data obtained under the Open Banking regime may be used appears to be solely limited by what the customer 'consents' to.

In particular, in respect of Issue 6, this would involve making available the actual account balance and actual repayments made under the contract so that the incoming credit card provider can assess whether, based on the consumer's previous use of credit cards, the new credit card is suitable for the consumer – based on this information, the incoming provider could assess whether the consumer is regularly repaying their entire balance, was steadily repaying an existing balance or was maintaining (or growing) their balance. This would allow the credit provider to offer a product that matches the consumer's 'actual needs and use' (as per RG 580.70).

Given ASIC's developing view of what is required of credit card providers – and the need for additional data to be made available to meet those requirements – we would welcome the opportunity to discuss with ASIC how that data can be made available through, as appropriate, the Open Banking regime and the credit reporting system.

If you have any questions about this submission, please feel free to contact me on 0414 446 240 or at mlaing@arca.asn.au or Michael Blyth on 0409 435 830 or at mblyth@arca.asn.au.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'M. Laing', is written over a light blue circular stamp.

Mike Laing
Executive Chairman

ANNEXURE ONE:

Data sources needed to satisfy ASIC’s new requirements on credit card providers

	CP/REP reference	Description of ASIC’s new requirement	Data required
1.	CP 303.51 – Assumptions regarding other credit cards	When assessing whether a credit card is ‘not unsuitable’, the provider must assume that the consumer is making repayments on any other credit card contracts based on repaying those cards over a three-year period (regardless of the contractual terms of those contracts). The provider must use the highest applicable interest rate under the card in their calculations.	<p>To make this assessment accurately the provider would need to understand those other credit card contracts.</p> <p>The data required would include:</p> <p><i>i. Limits on those other cards</i></p> <p>This information is available through the current credit reporting system (subject to credit providers moving to comprehensive credit reporting as expected).</p> <p>However, as some lenders apply ‘sub-limits’ to the use of credit cards (e.g. to limit the use of cash advances), a provider would also need to understand those limits in order to apply the correct interest rate to those different balances. This information is not available through the credit reporting system.</p> <p>We are not aware of whether information regarding ‘sub-limits’ will be available through Open Banking.</p>

			<p>ii. <i>Applicable interest rates, and the terms applying to those rates (e.g. fixed or variable; honeymoon rate; home loan ‘package’ discounts etc)</i></p> <p>The interest rates applying to a product, and any contractual terms affecting those rates, are not available through the credit reporting system.</p> <p>The standard interest rates applicable to a product are likely to be available through Open Banking. We are not aware of whether the interest rates applying to a particular credit contract will be available through Open Banking (i.e. the standard rates plus or minus the customer’s margins).</p> <p>We are not aware of whether the terms that apply in relation to the interest rate (e.g. fixed or variable; honeymoon rate; home loan ‘package’ discounts etc) will be available through Open Banking – either on a standard basis or in relation to a particular credit contract.</p> <p>iii. <i>Applicable interest fees, and the terms applying to those rates (e.g. home loan ‘package’ discounts)</i></p> <p>The fees applying to a product and any contractual terms affecting those fees are not available through the credit reporting system.</p> <p>As with interest rates, we expect the standard fees to be available through Open Banking. We are not aware of whether the fees applying to a particular credit contract will be available through Open Banking.</p> <p>We are not aware of whether the terms that apply in relation to the fees (e.g. home loan ‘package’ discounts</p>
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			<p>etc) will be available through Open Banking – either on a standard basis or in relation to a particular credit contract.</p> <p>As noted in our submission, we would be concerned if a consumer was required to provide ‘consent’ to access data in respect of their particular credit contracts through the Open Banking system (noting that we assume that providers will not need consent to access standard ‘product’ information through Open Banking).</p> <p>We also note that it is impractical to require the consumer to identify which specific credit card they have with their other providers; it is likely that the consumer will simply state that they have a “ABC Bank credit card”, rather than the particular type of card. Therefore, there will also be a need for a provider to be able to specifically identify which product the consumer currently holds in order to obtain the correct product information through Open Banking. This could potentially be done through the use of a common product identifier between the credit reporting system and the Open Banking regime.</p>
2.	Issue 6, REP 580 - Credit card providers must provide tools to assist with product choice	<p>Providers should provide tools to help consumers choose credit cards to suit the consumers ‘actual needs and use’.</p> <p>Based on the commentary in REP 580 we understand that this is intended to identify whether, in respect of their existing cards, the consumer is regularly repaying their entire balance, was steadily repaying an existing balance or was maintaining (or growing) their balance. Based on this assessment, the consumer could be encouraged to take out a ‘rewards’ credit card, a lower cost card, or, potentially, a different type of credit product.</p>	<p>This assessment goes well beyond whether the consumer can repay the proposed credit card contract without substantial hardship (and within the prescribed time period proposed in CP 303).</p> <p>This requirement involves the provider making an assessment of the consumer’s actual behaviour in respect of their existing credit card products.</p> <p>In order to do this, the provider would need to understand how the consumer has used, and paid off, those cards. At a minimum, this would require the credit provider to have access to:</p> <p>i. <i>Month-by-month balances</i></p>

			<p>This information is not available through the credit reporting system.</p> <p>We expect that this information would be available, subject to the consumer express consent, through the Open Banking regime.</p> <p>ii. <i>Actual repayments to the card</i></p> <p>This information is not available through the credit reporting system.</p> <p>We expect that this information would be available, subject to the consumer express consent, through the Open Banking regime.</p> <p>iii. <i>Required repayments to the card</i></p> <p>This information is not available through the credit reporting system.</p> <p>We are unaware whether this information would be available through the Open Banking regime (noting that this may not be a simple matter of applying the minimum payment percentage rate to the balance if there are balances that require another form of payment, such as instalment balances).</p> <p>We note also that a consumer's use and payment behaviour on their credit cards cannot be looked at in isolation of their other credit products. For instance, a consumer may be prioritising the repayment of other credit products over the credit card. In order to properly understand the consumer's behaviour the same information should be available in respect of all the consumer's credit products.</p>
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3.	Issue 1 – ongoing assessment of the product	Credit card providers must proactively look for signs of problematic credit card debt.	<p>As noted above, a consumer’s behaviour in respect of their credit card cannot be looked at in isolation of their other credit products. For instance, what is considered ‘problematic credit card debt’ will differ depending on whether the behaviour is exhibited on one card only compared to multiple cards (potentially across multiple providers).</p> <p>For this reason, the same information as noted in Item 2 is required in respect of this requirement.</p> <p>We note that, if this information is to be obtained through the credit reporting system, the Australian Information Commissioner may need to provide confirmation that the access and use of the credit reporting data in these circumstances comes within the permitted purpose of ‘assisting the individual to avoid defaulting on his or her obligations’ (see section 21H, <i>Privacy Act</i>).</p> <p>If this information was to be obtained through the Open Banking regime, it would mean the consumer would be required to provide an ongoing consent to the provider to access their data. If the consumer subsequently exercised their right under Open Banking to remove that consent, we expect that the provider would have to withdraw the product and, potentially, place the consumer into default.</p>
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