

Attorney-General's Department

By email only: OnlinePrivacyBill@ag.gov.au

6 December 2021

Dear Sir/Madam

Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 (the Online Privacy Bill)

Thank you for the opportunity to provide a submission in response to the draft Online Privacy Bill.

The Australian Retail Credit Association (ARCA) is the peak industry association for businesses using consumer information for risk and credit management. Our Members include banks, mutual ADIs, finance companies and fintech credit providers, as well as all of the major credit reporting bodies (CRBs) 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, upon request of the Office of the Australian Information Commissioner (OAIC), has acted as Code Developer for the Privacy (Credit Reporting) Code 2014 (the CR Code) which gives effect to Part IIIA of the Privacy Act (which, in turn, sets out the legislative framework for credit reporting in Australia¹). ARCA is also the author and administrator of the Principles of Reciprocity and Data Exchange (PRDE) which sets out industry agreed rules and standards for participation in comprehensive credit reporting (CCR). As an industry agreement with potential impacts on competition, an application for authorisation of some aspects of the PRDE was made to the ACCC (most recently in June 2020) and a new authorisation took effect from 6 January 2021².

¹ For details on ARCA's most recent application to the OAIC to vary the CR Code see <https://www.oaic.gov.au/engage-with-us/consultations/consultation-on-application-to-vary-the-cr-code>

² <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/australian-retail-credit-association>

Extension of Online Privacy Bill to CRBs

ARCA's primary concern with the draft Online Privacy Bill is that it appears to capture CRBs who are conducting a credit reporting business within the scope of OP organisation (as providers of data brokerage services) (draft section 6W(3))³. ARCA submits that capturing CRBs as OP organisations is inconsistent with the policy intent of the Online Privacy Bill, and at odds with the operation of Part IIIA of the Privacy Act. When considered further, it appears that this capture is unintended and ought to be rectified.

We have set out our position in detail below.

How are CRBs conducting a credit reporting business captured?

CRBs conducting credit reporting businesses (as defined in section 6P of the Privacy Act) will collect personal information (which includes credit information) for the purpose of holding and disclosing that information in the manner allowed by operation of Part IIIA of the Privacy Act. However, this activity also appears to meet the requirements of providing data brokerage services, set out in draft section 6W(3). That is, as is set out in draft section 6W(3), data brokerage services involve the collection of personal information for the purpose of then disclosing that information.

Further, the collection of personal information by CRBs occurs through use of an electronic service, as information is generally collected through online portals and other means of electronic data collection. This further aligns with the proposed data brokerage service definition in draft section 6W(3) and 6X, which seek to capture information collection through electronic service.

How is capturing CRBs inconsistent with the policy intent?

The Explanatory Paper for the draft Online Privacy Bill clearly articulates the policy intent as targeting the misuse of personal information by social media and online platforms, and seeking to adapt the existing Australian Privacy Principles (APP) to social media and online platforms. That is, the draft Online Privacy Bill is a response to gaps identified through the Digital Systems Inquiry, notably in the existing coverage of the APPs in online forums.

Broadly, we are supportive of this policy intent.

However, we highlight that capturing CRBs is inconsistent with the policy intent. The activities of CRBs when conducting credit reporting businesses is already extensively regulated by Part IIIA of the Privacy Act, and the Privacy (Credit Reporting) Code (CR Code). There is no legislative gap to fill.

Instead, by capturing CRBs, the draft Online Privacy Bill creates inconsistent and competing regulation of CRBs, which has the potential to undermine the effective regulation and operation of Part IIIA of the Privacy Act.

For instance, under the draft Online Privacy Bill it is proposed that OP organisations will be subject to the OP Code, which will include requirements around privacy policies, notification,

³ We note that the draft Bill may also extend to CRB-related entities who sit outside the scope of the credit reporting business. This submission does not purport to address the coverage of the Online Privacy Bill to those entities

consent, and the ability for individuals to cease to use or have disclosed their personal information upon request⁴.

Part IIIA and the CR Code already includes extensive requirements in respect to privacy policies, notifications to individuals and consumer protections including rights to correction and complaints. Further, Part IIIA and the CR Code recognises the importance of the credit reporting system as providing an objective record of an individual's creditworthiness. There is no ability for an individual to request to have their information used or disclosed (unless, of course, that information is incorrect).

Moreover, the business model of a CRB should not be confused with an OP organisation. Information collected by CRBs is sourced from credit providers (CPs) also under terms emanating from Part IIIA of the Privacy Act. Information is not sourced directly from consumers (though consumers have rights to access information supplied about them, and correct if justified).

For these reasons, it is clear that the OP Code should not apply to CRBs when operating their credit reporting businesses. Part IIIA and the CR Code provide the appropriate regulatory framework for CRBs, and there is no benefit to be achieved in affecting or changing that framework.

ARCA's recommendation

ARCA recommends that CRBs conducting a credit reporting business be excluded from being OP organisations. ARCA notes that there are two means to achieve this outcome:

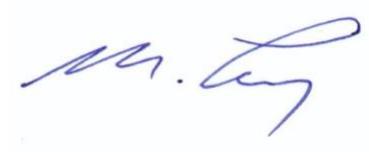
- (1) Legislative instrument by the Minister under s6W(7); or
- (2) Amending draft section 6X(2) to include a further provision the effect of which is that a service the sole purpose of which is the conducting of a credit reporting business under Part IIIA of the Privacy Act is not an electronic service.

ARCA's view is that the better approach is the amendment to draft section 6X(2). The exclusion of OP organisations under section 6W(7) is made on consideration of public interest. However, as set out in ARCA's submission above, CRBs should be excluded simply because the capture as OP organisations is an unintended consequence of the drafting. There is no need to balance public interest; capturing CRBs as OP organisations should not occur at all. In this regard, we note the existing 'electronic services' exclusions in draft section 6X(2) (for instance, payment services) are similar to activities of CRBs conducting credit reporting businesses.

If you require any further information or wish to discuss this submission further, please contact Elsa Markula, ARCA's Executive Director, Regulatory at emarkula@arca.asn.au.

⁴ We note further that the Explanatory Paper contemplates dual coverage of both the APP Code and OP Code, and how inconsistency ought to be dealt with. However, the Explanatory Paper does not contemplate dual coverage of both the OP Code and CR Code – which underscores our submission that this clearly is an unintended consequence of drafting, and not intentional

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'M. Laing', is centered on a light blue rectangular background.

Mike Laing
Chief Executive Officer