

11 February 2022

CP350 Consumer Remediation: Further consultation

Thank you for the opportunity to provide a submission on CP350 *Consumer Remediation: Further consultation* and the draft *Consumer Remediation* regulatory guide.

ARCA is the peak industry association for businesses using consumer information for risk and credit management. Our Members include all segments of the consumer credit industry including banks, mutual ADIs, finance companies and fintech credit providers, as well as 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.

Credit reporting is a core focus for ARCA. On that basis, we note our concern with the statement in Table 1 (at page 41) that remediation in relation to the provision of an unfair or inappropriate loan or consumer lease “should consider the following remedies... removing adverse information on a consumer’s credit report”.

Legal background - Corrections

As a starting point, the circumstances in which credit information held by a credit reporting body should be ‘corrected’ are set out in Part IIIA of the *Privacy Act 1988* and the *Privacy (Credit Reporting) Code 2014* (the CR Code). Broadly, credit information held by a credit reporting body should be corrected¹ if it is ‘inaccurate, out-of-date, incomplete, irrelevant or misleading’ (see section 20S of the Privacy Act).

The obligations of credit providers and credit reporting bodies to undertake any necessary corrections is subject to the oversight of the Office of the Australian Information Commissioner (which includes a specific guidance related function in section 28 of the Act).

¹ Where that ‘correction’ could include updating or destroying the information.

We consider that it is the role of the OAIC to provide guidance on the correction of credit information in the case of customer remediations. The guidance in the draft regulatory guide risks creating a parallel correction regime for Australian Credit Licensees.

As set out below, the guidance to remove ‘adverse information’ also does not reflect the legislative framework under the Privacy Act and CR Code.

The corrections process

The credit information is held by the credit reporting body, and it is that body’s obligation to consider whether the information needs to be corrected (as per section 20S). While, in cases of remediation programs, the corrections process will ordinarily be initiated by a request from the credit provider to the credit reporting body, the decision to correct the information is ultimately up to the credit reporting body (and subject to section 20S). Credit information that is not ‘inaccurate, out-of-date, incomplete, irrelevant or misleading’ should not be simply ‘removed’ by the credit reporting body. Nor should the credit provider ask for the credit reporting body to ‘remove’ that information without a proper assessment of whether the removal is the right approach under section 20S.

‘Adverse information’

Further, the concept of ‘adverse information’ is problematic as this term is not used in the Privacy Act and has no clear meaning. For example, if a customer has been given credit in breach of the National Consumer Credit Protection Act’s responsible lending obligations – and the customer has struggled to make their loan repayments - the customer will likely have a sporadic repayment history information (RHI) record.²

That is, the customer’s RHI could include records of payments being made on time in some months (i.e. RHI=0) and payments not made in other months (i.e. RHI=1 or higher). How does the guidance to remove ‘adverse information’ apply in this context? Would it require the removal of the entire 24-month RHI record, or only those records in months that are not RHI=0? Either approach could be problematic. The first approach could remove a customer’s valuable credit history (if the history was generally ‘good’ with only limited instances of RHI=1). The second approach would result in the customer having a ‘patchy’ RHI history where some months show RHI=0 and other months are blank.³

The above is only one example of the complexity of how credit information should be ‘corrected’ as part of a customer remediation process. Further, it demonstrates that the concept of ‘adverse information’ risks introducing subjective concepts into a system that is intended to be purely objective. We do not consider that it is possible or appropriate for ASIC’s regulatory guide to provide the level of detailed guidance that is appropriate, and we consider that it is more appropriate for the principles relating to ‘corrections’ to remain the exclusive domain of the Privacy Act/CR Code and any guidance that the OAIC chooses to issue.

Alternative guidance

We agree that the regulatory guide should draw licensees’ attention to the need to consider whether credit information that has been disclosed to a credit reporting body needs to be

² See <https://www.creditsmart.org.au/learn-about-credit/whats-in-a-credit-report/> for a description of RHI.

³ Importantly, it is not possible to ‘correct’ the record to RHI=0 if the customer did not, in reality, meet their contractual obligation for that month.

corrected because of the licensee's misconduct or other failure. However, given the above, we believe the reference to credit reporting within the regulatory guide should be removed from the list of 'remedies' and replaced with a separate comment along the lines of:

A licensee must also consider whether credit information (including consumer credit liability information, repayment history information and default information) held by it is, because of the misconduct or other failure, inaccurate, out-of-date, incomplete, irrelevant or misleading (as per the Privacy Act 1988 and the Privacy (Credit Reporting) Code 2014). If the licensee considers that it is, it must correct the information held by it and, if the licensee has previously disclosed any of that information to a credit reporting body (or anyone else), notify the relevant credit reporting body of that correction (and those other recipients).

If you have any questions about this submission, please feel free to contact me or Michael Blyth.

Yours sincerely,

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