AUSTRALIAN RETAIL CREDIT ASSOCIATION

Attorney-General's Department

By Email: _____

5 October 2023

Dear Sir/Madam

Personal insolvency discussion paper

Thank you for the opportunity to provide a submission in response to the Personal Insolvency Discussion Paper (the Paper).

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. ARCA's Members collectively account for well over 95% of all consumer lending in Australia.

Information about bankruptcies and debt agreements is of significant relevance to the credit sector and frequently used by credit providers, including through the credit reporting system. In respect of the credit reporting system, ARCA has acted as Code Developer for the Privacy (Credit Reporting) Code 2014 (CR Code) which supports the operation of the legislative framework for credit reporting contained in Part IIIA of the Privacy Act. It is from this perspective that we are responding to the Paper.

ARCA's submission focuses on two of the 'targeted short-term reform opportunities' discussed in the Paper, specifically:

- A reduction in the period of time for which a discharged bankrupt is recorded on the National Personal Insolvency Index (NPII) (from permanently to seven years from the date of discharge); and
- Amending the Bankruptcy Act so that an 'act of bankruptcy' is not taken to have occurred where a debtor submits a debt agreement proposal to the Official Receiver, or where a debt agreement proposal is accepted by creditors.

Reducing the permanent record on the NPII to seven years

We understand this proposal is intended to better balance debtor and creditor interests, and to address the potential for information being publicly available on the NPII indefinitely worsening stigma associated with bankruptcy. We support the intention of this proposal, and

do not consider that information about discharged bankruptcies needs to remain publicly available indefinitely.

Information about bankruptcies may be held within the credit reporting system, as it is a form of 'personal insolvency information' as defined in section 6U. As noted in the Paper, this information may only be retained for the later of five years after the bankruptcy starts, or two years after discharge (see Item 1 in the Table at section 20X of the Privacy Act). The Explanatory Memorandum to the Privacy Amendment (Enhancing Privacy Protection) Bill 2012, which inserted section 20X into the Privacy Act, explains the considerations behind this retention period, stating:

> *The minimum period for the retention of any kind of personal insolvency information will be 5 years, as it is considered that this is an appropriate period to provide information to credit providers to allow then to assess credit risk but to then allow individuals to have the opportunity of a fresh start to their financial affairs at the end of this period.*

It is implicit in that the retention periods for personal insolvency information – including information about bankruptcies – include a weighing of the interests of other parties in that information and the rights of the individuals to move on after the bankruptcy has discharged. These are the same considerations at play when considering the period for which information about discharged bankruptcies should be publicly available on the NPII. Given that the information in question is the same, we consider that the same result is preferable.

We also note the reference in the paper to the longer retention period under the Privacy Act for opinions about serious credit infringements (another kind of credit information). However, we do not consider that this is a compelling point of comparison for the period for which information should be publicly available on the NPII. Credit providers no longer disclose opinions about serious credit infringements (see page 77 of the Independent Review of the CR Code's final report), so it is, at best, a theoretical comparison. Additionally, opinions about serious credit infringements relate to different conduct, and contain different information, than personal insolvency information. With that in mind, the most appropriate reference point for this proposal is the retention period for personal insolvency information.

Finally, we observe that information about debt agreements does not remain publicly available on the NPII indefinitely. We support those policy settings and do not consider that this proposal should include amendments to the relevant provisions in the Bankruptcy Regulations.

Circumstances involving debt agreements which serve as an 'act of bankruptcy'

We do not wish to raise concerns with the proposal to repeal paragraphs 40(1)(ha) and 40(1)(hb) of the Bankruptcy Act.

Our understanding is that these repeals are the entire scope of what is proposed. That is, the NPII will still contain information about debt agreements, and some kinds of this information about those agreements will be capable of being held within the credit reporting system (as personal insolvency information). These outcomes are important, and we would have significant concerns if they were to change as part of the proposal. We hold this view because:

- **Change to the NPII/credit reporting system isn't necessary to address the problem articulated in the Paper:** We understand the problem the proposal is intended to address is that having the relevant matters (submitting a debt agreement proposal, or having an agreement accepted) as acts of bankruptcy could discourage the use of debt agreements out of fear that the debtor will become involuntarily bankrupt. We consider the amendments outlined in the Paper would address this problem, without change to the NPII or the credit reporting system.
- **Information about debt agreements is highly valuable in the credit context** – this information is of significant relevance to the credit worthiness of the individual involved. Access to information about debt agreements from reliable, easy to access sources ensures that lenders are able to make appropriate credit decisions – which also reflect the interests of the potential borrower – in a prompt, low cost manner. The credit reporting system helps to address information asymmetries in the credit system, supports credit providers to make good decisions and is a critical part of the economy. Changes which undermine access to this information would jeopardise those benefits.
- **Change would be difficult to achieve** – the law around debt agreements relies on the NPII, including as an indication for potential other creditors that the agreement is being proposd/considered. Wider change would therefore be complex, and not in the manner of a 'short term reform opportunity'.

If you have any questions about this submission, please feel free to contact me

Yours sincerely,

Richard McMahon

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