Attorney-General's Department

By Email:

29 July 2024

Dear Sir/Madam,

Minimal asset procedure discussion paper

Thank you for the opportunity to provide a submission in response to the **Minimal Asset Procedure Discussion Paper** (the Paper).

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 (CPs), including through the credit reporting system. Appropriate access to this information helps CPs make better lending decisions, and also helps to ensure that individuals do not receive more credit than they can afford. 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 1988* (Privacy Act). It is from this perspective that we are responding to the Paper.

Arca's submission focuses on:

- The legal form of the potential Minimal Asset Procedure (questions 9 and 10); and
- The amount of time information about entering into the minimal asset procedure should appear on the NPII (question 16, noting there are also implications for questions 12 and 14).

For completeness, we note that Arca does not have a view about the desirability or otherwise of establishing a Minimal Asset Procedure. Our comments in this submission are intended to assist Government to implement such a procedure in the most effective and appropriate way; they should not be taken as an indication that a proposal *should* proceed.

Credit reporting background and context

Part IIIA of the Privacy Act contains the laws that set out how Australia's credit reporting system operates. These laws detail the types of information CRBs are allowed to collect and disclose as part of their credit reporting businesses. One such type of information is *personal insolvency information*, which includes information about bankruptcies, debt agreements (under Part IX of the Bankruptcy Act) and personal

insolvency agreements (under Part X of the Bankruptcy Act).[1] The law also specifies how long this information can be retained by CRBs; the retention period for personal insolvency information is five years.[2]

Legal form of the minimal asset procedure

Arca suggests that any Minimal Asset Procedure be a tailored form of bankruptcy, rather than some other legal creation. We favour this approach because:

- **It is consistent with the policy objective of a Minimal Asset procedure**: As we understand it, the purpose of a Minimal Asset Procedure is to provide for an easier way to deal with an insolvency where there is no prospect of a return to creditors (and as such where the full requirements and duration of a bankruptcy provides no additional benefit). This outcome can be achieved by creating a new form of bankruptcy and tailoring – it is not strictly necessary to create a new legal form. Additionally, taking this approach appropriately reflects the significance of the debtor's situation (i.e. that they are insolvent, and a legal process is needed to provide them with a fresh start), while allowing for particular requirements that provide negligible value to be modified as needed.
- **It involves fewer, simpler flow-on changes**: Ensuring that an individual who uses the Minimal Asset Procedure is bankrupt means that the normal consequences associated with bankruptcy follow without need for further changes to the law. By comparison, establishing a new legal mechanism would require flow-on changes to other legislation (such as the Privacy Act) which would:
    - increase the risk that some flow-on changes/consequences are missed, leading to different and unintended outcomes for those using the procedure (relative to a traditional bankruptcy);
    - increase the compliance and transitional costs for those with rights or obligations under the relevant laws – this could include CRBs, CPs and other creditors; and
    - increase the complexity of the resulting law reform process for Government.
- **It ensures that information about those who have gone through the procedure is available within the credit reporting system**. If a person using the Minimal Asset Procedure is bankrupt, then information about that bankruptcy will be personal insolvency information stored within the credit reporting system without the need for legislative changes. As outlined below, we consider that this outcome is essential to the operation of any new procedure and fully aligned with international practice and good decision making by CPs. An implementation approach that relies on the existing legal framework as much as possible may minimise transition/compliance costs for parties such as CRBs (in terms of the information they can collect as part of their credit reporting business).

Should Government decide to create a new legal form for the Minimal Asset Procedure (i.e. if use of such a procedure is not a 'bankruptcy'), then we consider it essential that information about the minimal asset procedure be personal insolvency information for the purposes of Part IIIA of the Privacy Act, ensuring that information about the use of the procedure can be available through the credit reporting system. The reasons for this position are:

- **Consistency of treatment with bankruptcies, debt agreements and personal insolvency agreements:** Information about all of these matters is included in the credit reporting system, and there is no basis for differential treatment for the Minimal Asset Procedure (i.e. this is meant to be an simpler option for insolvencies where there is no capacity to pay and no realistic prospect of a distribution to creditors – that can be achieved without needing to change how/when information about the insolvency is included in the credit reporting system).

[1] Section 6U of the Privacy Act.
[2] See section 20X of the Privacy Act.

- **Information about use of the Minimal Asset Procedure is <u>extremely</u> relevant to lending decisions:** Information about an insolvency is very important for a prospective CP to be aware of from a credit worthiness perspective. This is just as true irrespective of whether a traditional bankruptcy or the new procedure is used (i.e. a significant potential risk to a future CP exists irrespective of whether the creditors during the insolvency were likely to obtain a return).
- **Consistency of treatment with overseas jurisdictions:** We note the Paper refers to the No-Asset Procedure in NZ, the Debt Relief Order in England and Wales and the Minimal Asset Process in Scotland. Information about the use of each of these processes is available in those countries' credit reporting systems, and is available for the same amount of time as information about a (full) bankruptcy.[3, 4, 5] In Ireland, information about Debt Relief Notices is treated in the same was as information about bankruptcies, personal insolvency arrangements and debt settlement arrangements.[6]

Information on the NPII / available within the credit reporting system

Arca considers that if a Minimal Asset Procedure is implemented, information about the use of the procedure should be on the NPII (and within the credit reporting system) for the same amount of time as a traditional bankruptcy. Put another way, we do not support the proposal for information about the Minimal Asset Procedure to only be available on the NPII for four years. We hold this view because:

- **The procedure already allows for the individual to more quickly make a fresh start**. Given this context, there is no policy reason why the public record of what happened should be shorter. Put another way, we believe that a Minimal Asset Procedure should provide debtors with a simpler path through bankruptcy, but with a similar end result.

- **Reducing the period of time information is available for would affect the ability of CPs to lend confidently:** Reducing the amount of time the information is available to CPs (through the NPII and/or the credit reporting system) will reduce the effectiveness of a CP's lending decisions. Restricting access to information puts CPs at risk of making poor decisions about whether to provide credit and puts the individual at risk of harm (e.g. if the individual's behaviour post-discharge hasn't meaningfully changed).

  International research indicates that reducing the amount of information available to CPs – including suppressing 'negative' data – significantly reduces access to credit (i.e. even if removing negative information increases credit scores, the credit scores at which CPs are willing to lend in an environment with less data are higher, and rise by more than any increase in scores resulting from data suppression).[7] We also note that reduced information increases information asymmetries – the effect of information asymmetries, including on the entire cohort of consumers as a whole, are discussed in more detail at page 14 of **Arca's submission to the Review of Australia's Credit Reporting Framework**.

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[3] In respect of New Zealand, information about entry into a no asset procedure is within the credit reporting system and can be retained by CRBs for the same amount of time as information about bankruptcies: see Schedule 1 to the Credit Reporting Privacy Code 2020.

[4] In respect of England and Wales, see sections 3.1 and section 9 of Your Credit File Explained, a detailed guide prepared by Transunion, a UK credit reference agency (the equivalent of a CRB).

[5] In Scotland, the Minimal Asset Process is a form of bankruptcy/sequestration (see What is a Minimal Asset Process (MAP) bankruptcy in Scotland and how does it work?), and as such, information about it is included in the individual's credit report: see sections 3.1 and section 9 of Your Credit File Explained.

[6] In Ireland, this information is not held by the Central Credit Register but is publicly available through specific registers. Guidance from the Insolvency Service of Ireland on Personal Insolvency Arrangements (see pages 12 and 13), Debt Settlement Arrangements (see page 12) and Debt Relief Notices (see pages 13 and 14) makes clear the availability of this information and potential implications for future credit worthiness. See also the Bankruptcy Register.

[7] See PERC, Why Addition is Better than Subtraction: Measuring Impacts from System-wide Deletion and Suppression of Derogatory Data in Credit Reporting, (2021), especially the key findings on page 7.

- **It is consistent with treatment provided in other jurisdictions**: In New Zealand, England, Wales and Scotland, information about the uses of the equivalents of the proposed Minimal Asset Procedure is available in the credit reporting system(s) for the same amount of time as information about a bankruptcy.[8] As noted in a guide published by Transunion, an equivalent retention period irrespective of the legal mechanism uses reflects that the information remains relevant for credit reporting purposes for a consistent period of time.[9]

Contact

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

Yours sincerely,

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[8] In New Zealand, the equivalent of a retention period is calculated from the date of discharge of the bankruptcy/no asset procedure – in the case of a single use of either process, the information can be retained for four years post-discharge, and in the event of a second bankruptcy etc. the information is retained indefinitely. For the UK jurisdictions, information is available for six years (even if it is removed from the public registers earlier than that).

[9] See section 9.2 of Your Credit File Explained, a detailed guide prepared by Transunion, a UK credit reference agency (the equivalent of a CRB).