Arca

Senior Manager, Regulatory Reform & Implementation
Australian Securities and Investments Commission (ASIC)

By Email: rri.consultation@asic.gov.au

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Dear Ms Morgan

Response to Consultation Paper 382 *Low cost credit contracts* (CP 382)

Thank you for the opportunity to provide feedback on the draft regulatory guidance (RG 000) for providers of low cost credit contracts (LCCCs), set out in the attachment to CP 382.

As you are aware, Arca is an industry association focussed on the use credit reporting and consumer data. We bring together Australia's leading credit providers and credit reporting bodies to improve data protection and use, and also to make credit more visible, accessible and easily understood. Our vision is to make credit work for all Australians.

Our feedback on CP 382 focuses on the discrete issues set out below. To assist you to cross-reference our feedback against your proposals and questions, we have produced the table below.

Topic	Relevant RG 000 reference	Relevant proposal in CP382
Wider context and other obligations relevant to regulation 28HAD	RG 000.30-33	B2
Descriptions of information required to be obtained through credit reporting system	RG 000.30-33	B2
Protected increases and access to additional information	RG 000.54	B5
Review of unsuitability assessment policies	RG 000.59 and Table 3	B6
Modified obligations other than responsible lending	Section E	B8

Wider context and other obligations relevant to regulation 28HAD

As set out in RG 000 at RG 000.30-33, regulation 28HAD requires licensees providing LCCCs who have opted into the modified responsible lending regime to seek to obtain certain information from a credit reporting body (CRB).

There are three levels of participation within credit reporting, specifically:

- **Negative tier** – which involves providing and/or accessing all of the information within the credit reporting system (credit information defined in section 6N of the *Privacy Act 1988*) *other than* consumer credit liability information (CCLI), repayment history information (RHI), financial hardship information (FHI) or information derived wholly or partly from the excluded information types. Examples of information accessible at the negative tier include enquiries (statements about information requests), default information and payment information.

- **Partial tier** – which involves providing and/or accessing the negative information set *plus* CCLI and information derived wholly or partly from CCLI. Examples of additional information which can be accessed by a credit provider participating at the partial level includes the open and close dates of credit products held by an individual, as well as the limits of those products.

- **Comprehensive tier** – which involves providing and/or accessing all credit reporting information i.e. the partial information set *plus* RHI and FHI. Credit providers participating at the comprehensive level can access information about whether an individual has met their monthly payment obligations and whether those obligations have been affected by a financial hardship arrangement.

The effect of regulation 28HAD is that, in general terms, the licensee must seek to obtain negative-level information from a CRB in respect of LCCCs of up to $2,000 (as per the exposure draft regulations released 5 February), and partial-level information from a CRB for LCCCs with a limit above that amount.

However, there are other obligations outside the ASIC-administered framework which will also apply to licensees providing LCCCs. In particular, the **Principles of Reciprocity and Data Exchange** (PRDE) provides for reciprocal exchange of data and has associated obligations for achieving that outcome. In short, credit providers wishing to access either the partial or comprehensive information sets must become PRDE signatories and supply their own data at that level to the credit reporting system. The effect of the PRDE provisions is that a licensee who has even a small number of LCCCs which require the information in regulation 28HAD(4) to be obtained MUST participate at the partial tier and supply partial information about all of their credit products, even LCCCs with limits of up to $2,000.

RG 000 does not contain any information about the obligations which apply to credit providers which participate in credit reporting, such as the PRDE obligations or those in Part IIIA of the *Privacy Act 1988* (Privacy Act). While the RG does not need to describe these obligations in detail, some general information will avoid the risk that licensees are unaware of the interaction of different legal instruments. As such, we consider that the relevant section of RG 000 should be amended to provide some general information about the other obligations that will apply to licensees under the Privacy Act and the PRDE.

Descriptions of information required to be obtained through credit reporting system

Paragraphs RG 000.31 and 32 describe the types of credit information which a licensee must seek to obtain under regulation 28HAD(4).

We observe that it might be worth sharpening the definitions of the various types of credit information – particularly default information, which is described in RG 000.31(c). Importantly, not all situations where an individual is 60 days or more overdue in making a payment of at least $150 will lead to default information being reported. There are other criteria in the Privacy Act and the **Privacy (Credit Reporting) Code 2024** (CR Code) which must be complied with before default information can be reported, and even then credit providers may not take the steps required to report a default due to e.g. hardship assistance, dispute or other reasons. We suggest that the description of this piece of information be refined such that it does not suggest that all missed payments that meet the criteria in s6Q(1) of the Privacy Act.

Protected increases and access to additional information

RG 000 provides guidance about the protected increase framework and the specific requirements on licensees relating to the information they are aware of affecting their ability to make a protected increase.

AS RG 000 notes, it is open to a licensee to seek additional information before increasing the credit limit of a LCCC. However, the drafting of paragraph RG 000.54 appears to conflate the concept of seeking additional information and conducting a new assessment, by suggesting that making any new inquiry at all requires a new assessment to be conducted (and therefore removes the ability of the licensee to make a protected increase). We don't agree that this is the better interpretation of the law.

We consider it may be possible for the licensee to ask the individual whether their circumstances have changed; an answer that they have not changed should not preclude the licensee from relying on the earlier assessment and increasing the limit. Asking this question may help give the licensee confidence that their initial assessment remains valid and reflective of the individual's circumstances.[1]

We consider that RG 000.54 should be amended to reflect that a licensee may take steps without necessarily triggering the requirement to conduct a new assessment / removing their ability to make a protected increase.

Review of unsuitability assessment policies

Table 3 in RG 000 provides guidance on the obligations to review and update unsuitability assessment policies set out in regulation 28HAF. In general terms, when conducting those reviews, licensees must:

- assess whether the policy makes it reasonably likely that the licensees will comply with sections 128 and 131 of the National Credit Act (as those sections apply to LCCCs); and
- identify any changes that would make it more likely that, if the policy is followed, the licensee will comply with those obligations.

The law around LCCCs contains amended requirements about the assessment referred to in s128(d). Section 130(2) and regulation 28HAD require a licensee to seek to obtain information from a CRB before making that assessment. Section 133BXC(3) also sets matters that the licensee must consider in the context of their inquiries about the consumer, such as the nature of the LCCC and whether the consumer is financially vulnerable. This list is not exhaustive – regard may be had to other matters as well.

Arca's view is that the combination of all these obligations means that reviews of unsuitability assessment policies **must** include consideration of whether there is any other information they could or should have obtained prior to making their assessment, such that they would have been more likely to comply with obligations in sections 128 and 131. This includes consideration of whether information would have better helped them to determine whether the consumer would be unable to comply with their obligations under the LCCC, or could only do so with substantial hardship. Specifically, when reviewing unsuitability assessment policies, we believe licensees must consider whether they would have been more likely to comply with their responsible lending obligations if they had sought comprehensive-level information from a CRB, such as RHI and FHI. RHI and FHI would provide the licensee with information about the extent to which the individual is meeting their payment obligations with other credit providers, and whether or not those obligations have been altered by a hardship arrangement – and as such may be relevant to the consumer's financial vulnerability and ability to meet payment obligations under the proposed LCCC. Retrospective analysis can be conducted on a de-identified basis with CRBs; use of information for this purpose is permitted under the Privacy Act.[2]

RG 000 contains little information about what needs to be considered in the context of a review of an unsuitability assessment policy. We consider that the guide should be expanded on the depth of review

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[1] Arca has previously suggested that the credit reporting framework in the Privacy Act be amended to allow for a credit provider to access credit reporting information before making a protected increase: see Recommendation 18 on page 60 of Arca's submission to the Review of Australia's Credit Reporting Framework. While outside the scope of CP 382 and RG 000, we continue to think this would be a beneficial change to the law.

[2] This is a common practice for credit providers considering the effectiveness of their use of additional information from credit reporting bodies. Use is permitted under section 20M of the Privacy Act and the Privacy (Credit Related Research) Rule 2024.

required – specific reference should be made to the need to consider whether more information (potentially such as RHI or FHI) would increase the likelihood of compliance with the responsible lending obligations.

Modified obligations other than responsible lending

We observe that the modified obligations described in Section E of RG 000 apply irrespective of whether a licensee makes an election under s133BXA(1). We consider that there is scope for RG 000 to make this clearer – put another way, the guide should make clear that the obligations in Section E apply in this way irrespective of any choice made by the licensee in respect of their responsible lending obligations. We consider that it is important that RG 000 is clear on this point as the operation of the modified obligations could involve significant operational complexity for some CPs. As such, raising awareness of when and how these modified obligations apply is important.[3]

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

Yours sincerely,

Richard McMahon
General Manager, Government and Regulatory

[3] Some of the issues leading to the operational complexity are described in Arca's submission in response to the exposure draft regulations – see page 2 in particular.