Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

11 October 2024

Dear Sir/Madam,

Arca submission on the Privacy and Other Legislation Amendment Bill 2024 [Provisions]

Thank you for the opportunity to provide a submission as part of the **Senate Legal and Constitutional Affairs Legislation Committee's inquiry** into the **Privacy and Other Legislation Amendment Bill 2024 [Provisions]** (**the Bill**).

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.

The Bill, if enacted, would give effect to many of the Government's commitments in response to the Privacy Act Review Report. Arca has made numerous submissions as part of, and following, that review, including: most relevantly, **our submission in response to the Review's Final Report**.[1] We draw these submissions to the Committee's attention. We also note that further reforms to the Privacy Act are needed to address other issues, such as whether it is permitted to report suspected cases of domestic abuse to relevant support services.[2]

Arca's submission to the Committee focuses on Part 15 of the Bill, which requires APP Privacy Policies to contain information about certain kinds of automated decisions (and the kinds of information used to make those decisions).

Automated decisions and credit

Automated decision making is widely used by credit providers – for instance when making decisions about whether or not to provide credit, and, if so, at what cost. It is important to note that this type of automated decision making provides significant benefits to consumers and the economy. Appropriate

[1] Arca also provided submissions in response to the Review's Issues paper and Discussion paper.
[2] This issue is explained in detail in Arca's submission to the Parliamentary Joint Committee on Corporations and Financial Services' inquiry into the financial services regulatory framework in relation to financial abuse in Australia: see Recommendation 6 and the discussion at pages 9 and 10.

uses of substantially automated decision making within an overall robust risk framework allows for faster credit decisions, as well as increased consistency in decisions, auditability of processes, all while lowering the overall cost of credit for consumers and meeting their expectations about the simplicity and speed of acquiring a new service. We note that the Bill does not restrict the use of automated decision making, but instead focuses on improving disclosure; Arca supports this underlying position.

However, the Bill and explanatory materials do not outline how specific the disclosures about automated decision making need to be. This is a material issue that should be solved as:

- In the absence of guidance, entities may focus on reducing their legal risk by making their disclosures as complete as possible, reducing their likely effectiveness as lengthy disclosures can be confusing and are often unread by consumers. Under this approach we note the disclosures would be very lengthy: credit algorithms can use hundreds of pieces of information as inputs.
- In the absence of more detail or guidance, APP entities will likely take different approaches to how much information to disclose – divergence in industry practice around disclosure will increase consumer confusion and uncertainty.
- There are good policy reasons – beyond the burden on consumers of engaging with long, complex disclosures – to avoid very detailed descriptions of automated decision making in the credit context. These reasons are outlined below.

All credit providers generally use some form of automated decision making as part of their businesses of supplying credit. These credit algorithms are proprietary in nature, and laws requiring very detailed disclosures about precisely what information is used and how that occurs could be mis-used by competitor firms.

Additionally, there are moral hazard risks with very detailed disclosures about how credit algorithms work. For instance, these risks include:

- consumers seeking to falsify information based on what is used in credit decisioning processes to increase their changes of obtaining a loan they would otherwise be unable to afford, placing them at substantial risk of harm if/when they cannot make the repayments; and
- fraudsters similarly seeking to falsify information to obtain credit (e.g. in someone else's name), with no intention of repaying the loan.

In addition to harming consumers, these situations also harm credit providers – they bear the cost of loans that cannot be/ are not repaid, and these situations increase the chance they are exposed to excessive credit risk outside their risk appetite or that tolerated by their regulators. As such, Arca is concerned that the broad drafting of the requirements around automated decision making could lead to expectations of very detailed disclosures which could cause harm.

Although it could be possible for the OAIC to provide guidance on the specificity of disclosures required, this is not the best solution as:

- The amount of information about the policy intent of the reforms in e.g. the Explanatory Materials, meaning that the regulator may not have strong grounds on which to provide that guidance; and
- There is uncertainty about the outcome – both in terms of what the guidance may say, and also whether a Court would agree with that guidance should a dispute occur.

Rather, we recommend that either:

- **The requirements in Part 15 of the Bill be more specific** – for instance, a new subclause could be added setting out that subclauses 1.7 and 1.8 do not require APP entities to set out every single piece of information used by a computer program, or the effect the information has on the decision

- **The explanatory materials provide more guidance** – Although the materials explain what decisions the reforms apply to in detail,[3] there is no detail on what level of disclosure is required.[4] A similar level of detail about the types of disclosure required, or even a statement that the words in APP 1.8 require general descriptions rather than very granular detail, would address the risks outlined above, reducing the cost of implementing the reforms and increasing the likelihood that disclosures are not excessively complicated and therefore ineffective for consumers.

Yours sincerely,

Richard McMahon

General Manager – Government & Regulatory

[3] See, e.g., paragraphs 334-340 of the Explanatory Memorandum, which provides detailed guidance about when the disclosure obligations apply.
[4] See paragraph 341 of the Explanatory Memorandum, which merely restates the law.