Acting Assistant Commissioner, Digital ID and Implementation
Office of the Australian Information Commissioner (OAIC)

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By Email: consultation@oaic.gov.au

21 February 2025

Dear ,

Response to consultation on proposed variation to the Credit Reporting Code

Thank you for the opportunity to provide feedback on the proposed variation to the Privacy (Credit Reporting) Code 2024 (the **CR Code**), which would have the effect of allowing the OAIC to postpone reviews of that code for up to two years.

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. Arca has acted as the CR Code Developer since the commencement of the CR Code framework in 2014.

Arca does not object to the proposed variation. However, we do have some feedback to provide about:

- matters which may require further consideration by the OAIC in advance of a review of the CR Code in 2027; and
- other minor typographical errors which the OAIC may be able to address through this variation.

More generally, Arca continues to strongly support the CR Code and the process for regular reviews. Our experience has been that the process of regular reviews, followed by Arca-developed improvements and updates, has provided significant flexibility to an otherwise static legislative framework. Reviews have led to reforms benefitting industry and consumers, and allowing for technical issues with definitions to be addressed.

Our feedback on the proposed variations is set out below.

Feedback - General

Arca does not object to the proposed amendments to the CR Code. We acknowledge that, for the reasons set out in the OAIC's consultation, it may be advantageous to delay the next Review of the CR Code to allow for more clarity about:

- the Government's response to the Review of Australia's Credit Reporting Framework; and

- the effectiveness of the variations made in response to the 2021 Review of the CR Code.

Matters which may require further consideration by the OAIC in the medium term

However, Arca believes that there are several issues relating to the CR Code which will require OAIC consideration before the deferred review would commence in March 2027. Our support for a deferral – and the proposed CR Code variations – is on the basis that the OAIC would still be willing to consider these matters, and potentially request applications to vary the CR Code in response, ahead of a review process.

More detail about the relevant issues, and the reasons why Arca believes that prompt consideration will be needed, are set out below.

- **Soft enquiries framework:** As you're aware, the 2021 CR Code Review proposed the creation of a soft enquiries framework in the CR Code, and the concept of laws around soft enquiries was also supported by the Review of Australia's Credit Reporting Framework.

  Depending on the Government's response to the Review of Australia's Credit Reporting Framework, there may be a need for amendments to the CR Code to create a soft enquiries framework before the next CR Code Review. The prompt creation of a framework is necessary to achieve the benefits set out in the 2021 CR Code Review final report, such as facilitating consumer choice and competition, and driving more consistency in industry practices about enquiries and access to credit reporting information in the context of applications for credit.

- **The definition of account closure – bankruptcy situations:** Arca has identified that the operation of the definition of the ***day on which the consumer credit is terminated or otherwise ceases to be in force*** (i.e. when an account is closed) does not deal with situations where secured credit is discharged following a bankruptcy. The particular issue is set out below:
  - Section 153 of the Bankruptcy Act means that the effect of a bankruptcy being discharged is that the individual is released from most provable debts. However, this does not affect the right of the security holder (e.g. a CP) to enforce their security to ensure payment of the debt.
  - There can be situations where a bankrupt individual continues to make their payments towards a secured debt (e.g. a mortgage) during – and even after – the bankruptcy period to ensure that the security is not enforced.
  - We understand that the legal effect of s153 of the Bankruptcy Act is such that there is no more credit and that, as such, reporting of information through the credit reporting system must cease (even though there is an active mortgage that, incorporates some of the same terms as the discharged credit contract).
  - However, it is not clear that a discharge meets any of the limbs of **"*day on which the consumer credit is terminated or otherwise ceases to be in force*",** particularly for secured debts where certain rights remain. If this is the case, it would mean that the account would appear open indefinitely.

  There is a need for certainty and clarity in relation to the treatment of such situation. Arca identified this issue as it was finalising amendments to its most recent CR Code application in August and September 2024. However, due to the timeframes associated with that application, we were not in a position to propose specific amendments. Arca proposes to work with Members and the OAIC on this issue; we do not believe that this issue could be set aside until 2027 or later.

- **The definition of account closure – charged off:** Arca has identified that there could be some inconsistencies about when CPs determine an account is closed under limb (b)(iii), the 'charged off' limb. The OAIC and Arca may wish to consider whether the CR Code has a role to play to ensure greater consistency in practices.
- **Grace periods and RHI reporting:** We understand the intent of the CR Code provisions around RHI reporting and grace periods is, where a grace period is relevant, to wait for that period to expire before reporting RHI for the relevant month. Where the payment is ultimately more than 14 days overdue, the intention is for this to be reflected with RHI = 1, whereas a payment made within the grace period should not show as overdue.

  However, the actual wording of s8(2) and s8(4) of Sch 2 to the CR Code is ambiguous about whether this outcome is permissible, particularly as:

  - whether or not the payment is overdue is to be determined with reference to the final day of the relevant month (not necessarily subsequent events); and
  - the RHI code of 1 is available where the payment is 15-29 days overdue at that time.

  The ambiguity appears to have arisen as a result of unrelated amendments to the provisions over time for other purposes. Arca believes the ambiguity should be addressed at the next convenience.
- **Reporting where no payment due**: There has been an ongoing question for industry regarding the appropriate RHI reporting in a month in which no payment is due (for example, where a credit card has a zero balance and no activity). We understand two options may be adopted:
  - reporting 'RHI=0', even though this may suggest the customer has actively made a payment; or
  - not reporting RHI for that month.

  We consider either approach is not ideal. The first option suggests that the customer has actively made a payment, while the second option may cause other problems (e.g. non-reporting of RHI may also be the result of other matters, including technical problems or suppression of reporting due to domestic abuse).

  We consider that the upcoming influx of BNPL accounts into the system makes it more important that this issue be resolved. That is because it may be more common for a consumer to hold several BNPL accounts, while only using one at a time or not using any for extended periods. In addition, the National Consumer Credit Protection Regulations 2010 will require BNPL providers to seek to obtain information about an individual's existing BNPL accounts. Ensuring that information is as meaningful as possible is important.

  OAIC and Arca could consider whether the CR Code could or should be amended to deal with this issue. One option could be considering whether, for example, there should be an additional reporting code reflecting "no payment due in month". We note that such a change would require some lead-time due to the need for a new version of the Australian Credit Reporting Data Standards (ACRDS) to support any amendment.

Other issues may arise before the next CR Code Review in 2027. If this occurs, Arca's strong view is that the OAIC should dedicate resources to promptly consider and respond to those issues. Put another way, we do not view a deferral of the next CR Code Review as an appropriate reason for further work to enhance the CR Code to be postponed. More

generally we note that CR Code changes requiring corresponding changes to the ACRDS have a long lead time; changes left until the completion of a Review which commences in 2027 may not be fully implemented before 2030.

Other minor issues

The most recent version of the CR Code involved a very significant rewrite of the Code's provisions. This was necessary to ensure that the drafting and format of the CR Code reflected its status, once registered, as a legislative instrument. The Explanatory Statement to the CR Code also outlines the operation of each provision, even those which have been in place for numerous years without substantive amendment.

Given the scope of the CR Code rewrite, it is inevitable that there were some minor typographical errors. This variation presents an opportunity for such errors to be corrected. In particular, Arca suggests that the following errors be corrected:

- **Reference to grace periods**: Paragraph 8A(12)(f) of Schedule 2 to the CR Code refers to grace periods for the purposes of RHI reporting, and includes a cross reference to subsection 8A(3). However, the requirements around grace periods are set out in section 8(2) of Schedule 2.

  The reference to s8A(3) is an error. In the previous version of the CR Code, the corresponding reference (in then para 8A.4(f)) was to the provision that is now section 8(2). Accordingly, we suggest that the cross-reference be updated to s8(2) of Schedule 2.

- **Typographical error:** Paragraph 19(14)(b) of Schedule 2 to the CR Code contains the following sentence:

  > *For the purposes of this paragraph, the **boy** would ordinarily describe 3 – 5 types of credit information which typically have the biggest impact on the credit score of individuals within that credit rating band* (emphasis added)

  In this sentence, the word 'boy' is an error; the intended word was 'body' (as in credit reporting body). We suggest this error be corrected. It may also be desirable to add a semicolon to the end of this paragraph.

We also suggest that the Explanatory Statement to any varied CR Code include material on the operation of all provisions in the Code. The Explanatory Statement is a useful piece of guidance for CRBs and CPs on the intended operation of the Code, and can help entities to read the Code alongside the requirements of the Privacy Act. The current Explanatory Statement should form the basis of the next version, with only minor amendments necessary.

Thank you again for the opportunity to provide feedback on the proposed variation of the CR Code. Please contact me if you would like to discuss Arca's feedback.

Yours sincerely,

Richard McMahon

General Manager – Government and Regulatory