AUSTRALIAN
RETAIL
CREDIT
ASSOCIATION

[redacted]
Banking Code Consultation Team
Australian Securities and Investments Commission
120 Collins Street
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**By Email only:** BankingCode@asic.gov.au

22 January 2024

[redacted]

**CP373 Proposed changes to the Banking Code of Practice**

Thank you for the opportunity to provide a submission in respect of ASIC's consideration of the updated Banking Code of Practice.

ARCA is the peak industry association for businesses using consumer information for risk and credit management. Our Members include credit providers, credit reporting bodies and, through our associate Members, related businesses providing services to the industry. Our credit provider Members include most of the banks that are signatories to the Banking Code, as well as a diverse range of mutual banks, consumer finance companies, specialist motor vehicle lenders, and fintechs.

ARCA's submission in relation to the Banking Code of Practice is limited to matters that relate to credit reporting.

Our focus on credit reporting issues in the updated code reflects ARCA's key role in creating and managing the industry frameworks for the operation of the credit reporting system in Australia:

- Through a subsidiary, the Reciprocity and Data Exchange Administrator Ltd, ('RDEA'), we administer the business-to-business set of rules, the Principles of Reciprocity and Data Exchange (PRDE) and the related Australian Credit Reporting Data Standards (ACRDS). These documents set out what credit information signatories must share through the credit reporting system, as well as how that information is to be shared. The PRDE first received ACCC authorisation in 2015 and was reauthorised in 2020 for a further six years. There are over 100 credit provider signatories to the PRDE, including all but two banks that are signatories to the BCoP, representing over 95% of consumer credit accounts in Australia. The PRDE plays a role in the mandatory CCR regime in the National Consumer Credit Protection Act. The effect of section 133CZA of the Act and regulation 28TB of the National Consumer Credit Protection Regulations is that other credit providers need to be

PRDE signatories in order to receive comprehensive credit reporting information supplied by a major bank.

- In the role of 'code developer', ARCA drafted the original Privacy (Credit Reporting) Code 2014 (CR Code) as well as all subsequent variations to the CR Code, including the changes in relation to the introduction of the hardship reporting regime introduced on 1 July 2022. The CR Code forms part of the legal framework for credit reporting under the Privacy Act; once approved by the OAIC, the CR Code is a legislative instrument.

ARCA also manages the consumer education website CreditSmart (which is funded by ARCA Members) . The website (creditsmart.org.au) gives information to consumers explain how the credit reporting system works in clear, simple and consistent terms, and is referenced by many ARCA Members, other credit providers and consumer representatives.

**Overall feedback on updated BCoP**

We note that the updated BCoP has a limited scope in relation to credit reporting matters. Subject to our specific comments in relation to paragraph 171 and 172, we support this approach.

The credit reporting system does not involve a straightforward bilateral customer/bank relationship (for which an industry code can specify additional conduct obligations). Rather, it creates a data exchange system in which any credit provider – regardless of size or type – can participate and, in doing so, facilitates the efficient, responsible and fair provision of credit to all Australians.

As set out in our feedback to the most recent independent review of the BCoP (see Annexure), Part IIIA of the Privacy Act and the CR Code create a comprehensive regulatory framework that balances the interests of all stakeholders, and applies consistently to all consumers regardless of the credit provider with which they are dealing. If there were a need for additional consumer protections relating to credit reporting, these protections should be included in the CR Code so that they apply to all credit providers (and not just BCoP subscribers).

We note that ARCA has recently applied to the OAIC seeking variations to the CR Code. The variations we have sought improve consumer protections in respect of credit reporting, including in relation to the provision of s21D(3)(d) default notices, ban periods and reporting of information for individuals who have experienced domestic abuse. Importantly, those changes – if approved – will apply consistently across all credit providers and all consumers will receive the benefit of the protections.

**Paragraph 171 (previously 178)**

We note that this clause has been retained from the previous version of the BCoP. Overall, we have no material objection to its continued inclusion. However, based on recent credit reporting developments (particularly those relating to hardship reporting), we make the following observations (particularly in relation to subparagraph (c) which requires a subscriber bank to tell the customer of any 'adverse consequences' of entering into an arrangement):

i. Prior to the introduction of the financial hardship reporting reforms, a customer's repayment history information could potentially show missed payments

notwithstanding a hardship arrangement being put in place and the customer complying with that arrangement (which we consider would be an 'adverse consequence' of that arrangement). That is no longer the case. On that basis, we are unsure in what circumstances the acceptance of a new arrangement (which otherwise meets the condition of being a "form of changes to your agreement") will have 'adverse consequences' in relation to the customer's credit history (see paragraph (v), below, for our observation in relation to arrangements that do not meet that condition).

ii. The recording of financial hardship information in relation to the hardship arrangement is not, and should not be considered to be, an 'adverse consequence'. The existence of financial hardship information should "prompt prospective lenders to make further inquiries in order to assess a consumer's situation holistically and potentially offer them a more suitable product" and in doing so "facilitates better and informed lending decisions".[1]

iii. Likewise, the reporting of missed repayment history information if the customer does not meet the terms of the varied arrangement should not be treated as an adverse consequence of accepting the new arrangement. Rather, it is an adverse consequence of not meeting that new arrangement. We believe that some banks may have taken a different view, which has resulted in consumer messaging that creates unnecessary customer concern (and which could result in consumer mistrust of the hardship reporting regime).

iv. While the reporting of financial hardship information is not an adverse consequence, paragraph 8A.4 of the CR Code separately requires credit providers to explain what will be disclosed to a credit reporting body if a financial hardship arrangement is put in place. ARCA is working with its Members and external stakeholders to develop improved scripting for use by credit providers when meeting this CR Code obligation. Our intention is for that wording to be made available for use by all credit providers; regardless of whether they are a bank or not (and regardless of whether they are an ARCA Member).

v. The statement that this provision "does not apply to minor instances of help we provide" does not change a bank's obligation to provide the information under paragraph 8A.4 of the CR Code when "an overdue payment arrangement" is put in place (where a deferral, refund or fee waiver may trigger that obligation). That is, a bank may be required under paragraph 8A.4 to explain how the 'help' may result in repayment history information being recorded as missed (if that is going to be the case).

**Paragraph 172 (previously 179)**

We understand that this paragraph has been updated to apply only to small businesses to avoid unnecessary duplication with Part IIIA / CR Code (which already set out a process for notifying customers of defaults in relation to consumer loans). We strongly support this approach.

However, we make the following observations:

i. The paragraph has retained the statement, "You can also independently obtain a copy of your report directly from a credit reporting body". In the previous version of the BCoP this statement reflected an individual's statutory right to obtain their

[1] Paragraph 2.12, *National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Bill 2019 Explanatory Memorandum*

consumer credit report from a credit reporting body. Now that this paragraph is limited to small businesses only, there is no equivalent statutory right. While, as a matter of commercial practice, a commercial credit reporting body is likely to offer a service under which anyone may obtain a credit report for the small business, this will be for a fee and the ability to access the information will depend on whether the information relates to a corporate entity or individual. Noting that the statement was not intended to create substantive obligations (and cannot impose such obligations on third parties, including credit reporting bodies) we suggest that this sentence be removed.

ii. There is no specific legal requirement for commercial credit providers to provide notice to small business customers when reporting defaults to a commercial credit reporting body. While it is open to subscriber banks to agree to introduce this step in respect of their own customers, we note that it should not be treated as an expectation on all commercial credit providers. To the extent that AFCA will consider industry codes of conduct when assessing industry best practice, we would be concerned if this paragraph led the ombudsman to conclude that this step was required of all commercial credit providers given those providers have had no say in creating this new obligation.

If you have any questions about this submission, please feel free to contact me on [redacted] or at [redacted]

Yours sincerely,

[redacted]

[redacted]
GM, Policy & Advocacy / RDEA CEO

AUSTRALIAN RETAIL CREDIT ASSOCIATION

**ANNEXURE**
**ARCA SUBMISSION TO INDEPENDENT REVIEW OF BCoP**

[redacted]

**Independent Review of the Banking Code of Practice**

6 August 2021

**By email:** submissions@bankingcodereview.com.au

**2021 Independent Review of Banking Code of Practice**

Thank you for the opportunity to provide a submission on the review of the Banking Code of Practice (Banking Code).

ARCA is the peak industry association for businesses using consumer information for risk and credit management. Our Members include credit providers, credit reporting bodies and, through our associate Members, related businesses providing services to the industry. Our credit provider Members include most of the banks that are signatories to the Banking Code, as well as a diverse range of mutual banks, consumer finance companies, specialist motor vehicle lenders, and fintechs.

Aside from our advocacy role as the representative association for industry, ARCA plays a key role in creating and managing the industry frameworks for how the credit reporting system operates in Australia:

- Through a subsidiary, the Reciprocity and Data Exchange Administrator Ltd, ('RDEA'), we administrator the business-to-business set of rules, the Principles of Reciprocity and Data Exchange (PRDE) and the Australian Credit Reporting Data Standards (ACRDS). These documents set out what credit information signatories must share and how that information is to be shared. The PRDE first received ACCC authorisation in 2015 and was reauthorised last year. There are 60 credit provider signatories to the PRDE, including 15 banks that are also signatories to the Banking Code, representing over 95% of consumer credit accounts in Australia.
- In the role of 'code developer', ARCA drafted the original *Privacy (Credit Reporting) Code 2014* (CR Code) as well as all subsequent variations to the CR Code. ARCA is currently acting as code developer for the required CR Code changes in relation to

the introduction of the new hardship reporting regime under the *National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Act 2021* (Mandatory CCR and Hardship Act)

ARCA also manages the industry-funded consumer education campaign CreditSmart. The website (creditsmart.org.au) gives information to consumers to understand how the credit reporting system works in clear and simple terms, and is referenced by many ARCA Members, other credit providers and consumer representatives.

Our feedback to this review is directed at issues relating to credit reporting, specifically:

i. General approach to credit reporting in the Banking Code and supporting guidelines;
ii. Issues relating to paragraph 179 of the Banking Code; and
iii. Approach to the Mandatory CCR and Hardship Act.

## i. General approach to credit reporting

We support the intent of the Banking Code to improve customer service and provide greater protections for bank customers, and recognise that, in some areas, it sets higher standards than the law.

However, we would be concerned if the Banking Code shifts the balance of rights and protections embedded in the legislative framework in Part IIIA of the Privacy Act and the CR Code. The credit reporting system exists to benefit all Australians by addressing the information asymmetry that puts credit providers at an information disadvantage when approached by potential borrowers. Credit providers, through the credit reporting system, are given a 'right' to access data about the potential borrower to improve the efficient, responsible and fair provision of credit to all Australians.

There is, of course, a tension between giving credit providers that 'right' and ensuring the privacy of individuals. In recognition of this, Part IIIA and the CR Code create a comprehensive regulatory framework that balances the interests of all stakeholders. If the Banking Code creates new consumer rights or expectations, or reduces the value of the information reported in the credit reporting system, then that impacts all users of the system, and not just those subject to the Banking Code. In this respect, it should also be recognised that the credit reporting system also contributes to enabling competition between lenders by giving all lenders – regardless of size or whether they are an ADI or non-ADI – access to the same data. Hence, reducing the information value of information in the system will reduce its ability to do this.

Even differences that do not directly impact the information that is disclosed by a credit provider to a credit reporting body (such as the additional 'notice' requirements discussed in section (ii) below), may create distortions or uncertainty for consumers and the credit industry. For example, a consumer who holds credit products from multiple credit providers – both banks and non-banks – may be confused if they receive notice of 'negative' RHI being disclosed by banks, but not by their other lenders. This may then cause consumers to complain about the conduct of their non-bank lender, even though the non-bank lender has complied with the law.

Importantly, the purpose of the CR Code is to operationalise the Part IIIA requirements for credit reporting, where the CR Code may build on the obligations in Part IIIA. If banks consider that additional consumer protections are required, it may be more appropriate that

those protections be included in the CR Code so that they apply to all credit providers and benefit all Australian consumers. Creating a system whereby the protections afforded to customers of subscribing banks, differs from those provided to customers of non-subscribing credit providers, is potentially not in keeping with the intended application and scope of either the CR Code or Part IIIA. We note that the OAIC is about to commence a further Independent Review of the CR Code, which is an opportunity for banks to propose any additional consumer protections that they consider are necessary.

Further as signatories to the PRDE, many banks have adopted the requirements of that business-to-business set of rules. Obligations within the PRDE have been subject to ACCC authorisation since 2015. Any separate agreements or understandings by the banks – whether in the Banking Code or in "guidelines that sit outside the Code" (as described on page 10 of the Consultation Note to the review) – that purport to set out circumstances in which credit information should not be reported, cannot be inconsistent with the obligations within the PRDE (at least as far as those banks are also signatories to the PRDE). Again, signatories to the PRDE cover the entire credit industry, and it is not open to any sector of the industry or individual participant to unilaterally vary their participation. The PRDE already has mechanism for review and following appropriate consultation, any changes to the PRDE apply equally to all PRDE signatories.

We note, for example, that the ABA's *Preventing and responding to family and domestic violence Industry Guideline*[1], states that banks "should not enter negative credit information if a customer is affected by family violence and domestic violence". In our capacity of administrator of the PRDE (through ARCA's subsidiary the RDEA), we recognise and agree with the intent of the ABA's industry guidelines. We also note that we have had productive engagement with the ABA regarding those guidelines, during which we noted that we would look to develop an industry-wide approach to the reporting of default information in cases of domestic abuse.

However, while the ABA's domestic violence guideline recognises that a bank may be required by law (i.e. the Mandatory CCR regime) to report default information, it does not recognise that banks that are signatories to the PRDE are also required to report default information "within a reasonable timeframe"[2]. Hence, in developing industry guidance under the PRDE, we will consult with all relevant industry stakeholders – including banks, non-banks and credit reporting bodies[3] - and that the resulting guidance will apply equally to all industry participants (which are PRDE signatories).

> **Recommendation 1:** The Banking Code, and supporting guidelines, should not shift the balance of rights and protections embedded in the legislative framework in Part IIIA of the Privacy Act and the CR Code applying to credit reporting.
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> **Recommendation 2:** The Banking Code, and supporting guidelines, should not set out circumstances in which credit information will not be contributed to a credit reporting body if those circumstances are inconsistent with existing obligations such as those in the PRDE.

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[1] https://www.ausbanking.org.au/wp-content/uploads/2021/05/ABA-Family-Domestic-Violence-Industry-Guideline.pdf

[2] See paragraph 20, https://www.arca.asn.au/docs/2365/prde-version-20-effective-6-january-2020

[3] We will also consult closely with non-industry stakeholders, including consumer advocates, domestic abuse experts and EDR schemes.

### ii. Issues relating to paragraph 179 of the Banking Code

The 2019 version of the Banking Code introduced the following provision:

> ***We will tell you if we report your default activity to a credit reporting body***
>
> *179. We will tell you if we report any payment default of yours under your loan to a credit reporting body. You can also independently obtain a copy of your report directly from a credit reporting body.*

Soon after the introduction of that provision, ARCA was asked by several of its Members (which were signatories to the Banking Code) as to the meaning of paragraph 179. Those Members were concerned that paragraph 179 would require signatories to:

a. Send another notification to customers after disclosing 'default information' to a credit reporting body, even though Part IIIA and the CR Code already establishes a notification regime; and
b. Send an entirely new form of notification to customers each time the bank discloses 'negative' repayment history information (RHI)[4] to a credit reporting body, even though there is no such obligation in Part IIIA or the CR Code.

As discussed in section (i), above, Part IIIA and the CR Code establish a comprehensive regulatory framework for credit reporting – which we consider should be applied consistently across all segments of the consumer credit industry. In the case of (b), the 2017 Independent Review of the CR Code[5] conducted on behalf of the Office of the Australian Information Commissioner (OAIC) considered, and did not recommend, the introduction of a requirement that a credit provider should notify the customer each time 'negative' RHI was disclosed to a credit reporting body.

In response to our Member queries, and in our capacity as industry association, we sought clarification from the ABA as to the intended operation of paragraph 179 (including based on the discussions that had led to the introduction of the paragraph). However, our efforts to clarify the meaning of that paragraph were unsuccessful as there appears to be little record kept of the reasoning behind the paragraph and neither the ABA nor Banking Code Compliance Committee were able to assist with understanding the intended meaning; with each body referring ARCA to the other body for clarification.

As a result, there is continuing uncertainty as to the meaning of paragraph 179.

Accordingly, we recommend that the meaning of paragraph 179 be clarified. If the intent of the paragraph reflects the same notices required under the CR Code then the Banking Code should reference that obligation.

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[4] RHI is a record of whether a customer has paid their minimum payment each month, which is held by a credit reporting body on a rolling 24-month basis. This form of credit information was introduced into the credit reporting system in 2014, although credit providers did not commonly start to share the information until 2018 onwards. If paragraph 179, in fact, requires banks to notify customers of any 'negative' RHI that is disclosed to a credit reporting body, the notification may need to be sent any time a payment is more than 14 days overdue (and every month thereafter if the account remained overdue).

[5] See Issue #9, https://www.oaic.gov.au/updates/news-and-media/independent-review-of-the-privacy-credit-reporting-code-2014/

This issue reinforces our comments in section (i), above, and we suggest that caution be taken when introducing obligations in the Banking Code that might place signatories out of step with other participants in the credit reporting industry. In particular, we strongly recommend that the Banking Code does not introduce an obligation to provide notice of 'negative' RHI disclosure , as that requirement has previously been considered, and rejected, as part of a review of the regulatory framework.

> **Recommendation 3:** Paragraph 179 be clarified to confirm that it is not intended to require new forms of notification that are not required under Part IIIA or the CR Code, particularly when 'negative' RHI is disclosed to a credit reporting body.

### iii. Approach to the Mandatory CCR and Hardship Act

We note the question in section 4.9.1 of the Consultation Note as to whether the Banking Code should cover how banks will operationalise the new regimes under the Mandatory CCR and Hardship Act.

We do not consider it is necessary or appropriate for the Banking Code to cover how the Mandatory CCR and Hardship reporting regimes are to operate.

*Mandatory CCR regime*

The Mandatory CCR regime does not require any further elaboration in the Banking Code. To the extent the Mandatory CCR regime requires industry to establish rules to operationalise the requirements, the regulations[6] already recognise and apply the existing business-to-business regime (i.e. the PRDE and, as a result, the ACRDS). Any adjustments to the legislative regime (e.g. allowance for account exceptions) must be done by way of legislative instrument and other relief provided by ASIC (which would ordinarily need to be mirrored in the PRDE).

*Hardship reporting regime*

The Hardship reporting regime will be further particularised in the CR Code. ARCA is, as code developer, currently consulting on the required changes.[7] This process has, to date, taken 6 months and has involved engagement with all key stakeholders that have an interest in credit reporting (including banks, other ADIs, non-bank lenders, industry associations, consumer advocates, regulators and EDR schemes). ARCA is now conducting the public consultation process as required by the OAIC's Guidelines for developing codes.[8]

The changes that have been proposed to the CR Code by ARCA will establish rules for how and when financial hardship information (FHI) must be reported, how RHI must be reported under a financial hardship arrangement, what a credit provider must disclose to a customer about the impact of an arrangement on the customer's credit report, and how industry should generally describe FHI to consumers.

Importantly, as these requirements will be set out in the legally enforceable CR Code, they will create consistency across all credit reporting participants. As noted in the explanatory

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[6] See regulation 28TB introduced by the *National Consumer Credit Protection Amendment (Mandatory Credit Reporting) Regulations 2021*.
[7] See https://www.arca.asn.au/news/public-consultation-on-proposed-cr-code-amendments-for-hardship-reforms.html [website current as at 3 August 2021]
[8] https://www.oaic.gov.au/privacy/guidance-and-advice/guidelines-for-developing-codes/

memorandum to the Mandatory CCR and Hardship Act, consistency of what is disclosed to a credit reporting body is important to the proper and fair operation of the credit reporting system.[9]

In addition to ensuring consistency in what information is disclosed, we consider it is also important that all industry participants take a consistent approach to how credit reporting is described to consumers. Mixed or unclear consumer messaging by different segments of the credit industry will only lead to consumer confusion and make it more difficult for consumers to understand what they need to do to manage what is recorded in their credit report and, therefore, maintain their credit health. It will also have the potential to lead to high-cost credit repair firms taking advantage of consumer confusions to sell their services. The requirements proposed to the CR Code will promote consistency in consumer messaging (although we note that there is a significant need for consumer education[10]).

Accordingly, we do not consider the Banking Code, or supporting guidelines, should seek to further particularise the operation of the hardship reporting regime beyond what is in Part IIIA and what will be in the CR Code.

> **Recommendation 4:** The Banking Code, and supporting guidelines, should not cover how banks will operationalise the new regimes under the Mandatory CCR and Hardship Act.

If you have any questions about this submission, please feel free to contact me on [redacted] or [redacted], or [redacted] on [redacted] or at [redacted]

Yours sincerely,

[redacted]

[redacted]
Chief Executive Officer
Australian Retail Credit Association

[9] See, for example, paragraph 2.35, "[a]n effective credit reporting system requires like contracts and arrangements be treated alike and reported in a consistent and accurate manner."
[10] In this respect we would note that as ARCA Members many of the Banking Code subscribers support the industry funded and ARCA managed CreditSmart campaign which will provide consumer education around the new Hardship reporting regime.