16 March 2011

Ms Christine McDonald
Committee Secretary
Senate Standing Committee on Finance and Public Administration
Parliament House
Canberra ACT 2600
Email: fpa.sen@aph.gov.au

Dear Ms McDonald

Exposure Draft of Australian Privacy Amendment Legislation – Credit Reporting

The Australasian Retail Credit Association (ARCA) appreciates the opportunity to provide this submission on the Exposure Draft provisions relating to credit reporting amendments to the *Privacy Act 1988*.

ARCA exists to promote best practice in credit risk assessment and responsible lending, as well as promoting better standards in consumer credit reporting[1]. ARCA takes a leadership role in examining retail credit issues, and developing and sponsoring policies for the betterment of the retail credit industry.

ARCA has taken advantage of the opportunity to engage with the Department of Prime Minister and Cabinet on this reform process. Throughout the development of these Exposure Draft provisions, ARCA has engaged constructively with the government, regulators and other stakeholders. While we have been satisfied with the work of the Government to understand this complex aspect of Australia's information economy and to develop a regulatory system that provides flexibility for industry and certainty for consumers, ARCA has some significant concerns with the Exposure Draft provisions.

Since establishment in 2004, ARCA has attempted to make clear that the changes to privacy arrangements to enable more comprehensive credit reporting need to strike an appropriate balance between privacy protection, benefits to the public from more responsible lending and commercial practicality.

ARCA's response is made within that context.

Benefits from introducing more comprehensive credit reporting
The introduction of more comprehensive credit reporting will bring significant benefits to the Australian community, including more informed lending decisions which have the potential to drive positive economic activity.

[1] A list of ARCA Members is included in Appendix A

The benefits of introducing more comprehensive credit reporting include:

Increased competition - lower cost of credit
Comprehensive credit reporting will promote competition in credit markets. This competition may mean credit that is more innovative, more readily available and at lower cost.

Significant international experience also supports the benefits of more comprehensive credit reporting. In 2005, Hong Kong moved to a more comprehensive reporting system. In its first review of the impacts, the Hong Kong Monetary Authority stated that:

> *"New players continue to emerge and the consumer credit market has become more competitive."* [2]

In 2004 MasterCard commissioned a report[3] which noted that following increases in the types of personal data collected and used in credit reporting in the US in the 1980s and 1990s, there was 'a wave of new entrants into the bank credit card market', leading to 'downward pressure on interest rates and fees'.

Improved data sharing is critical to the efficient operating of credit markets, resulting in improved products and rates for consumers and more efficient pricing for credit providers. As noted by the Australian Law Reform Commission (ALRC) *Report 108 For Your Information: Australian Privacy Law and Practice*, greater competition and efficiency in credit markets may have a range of flow-on benefits for individual consumers, such as lowering the cost of credit, increasing the availability of credit and reducing default rates.

Enhanced Responsible Lending Outcomes
ARCA supports strong consumer protection through the regulatory system, including the provisions of the *National Consumer Credit Protection Act 2009*, and believes that the introduction of more comprehensive credit reporting will support positive consumer outcomes.

More comprehensive credit reporting has the potential to provide significant consumer benefits, arising from improved credit market competition and efficiency, resulting in decreased levels of consumer over-indebtedness and default, lower cost and broader availability of credit. These benefits stem from the capacity of Credit Providers to both better able to assess individuals' willingness and capacity to repay.

More comprehensive credit reporting will improve the ability of Credit Providers to lend responsibly. An effective credit reporting system will help a Credit Provider to verify an individual's potential credit commitments, overcoming the cumbersome information asymmetry embedded in Australia's current credit reporting arrangements.

ARCA's view is that 'full comprehensive' credit reporting could and should be made available to all Credit Providers – not just those who are credit licensees - if they meet certain obligations.

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[2] Hong Kong Monetary Authority, Quarterly Bulletin, March 2006
[3] ACIL Tasman, *Comprehensive Credit Reporting: Main Report of an Analysis of its Economic Benefits for Australia [Prepared for MasterCard International]* (2004)

ARCA understands the need for responsible credit provision obligations to protect consumers, but limiting access to credit reporting information to only licensed Credit Providers is not the only means of achieving this outcome.

ARCA's approach to ensuring data quality

To ensure data is 'accurate, up to date, complete and relevant', ARCA strongly supports updating the current single, mandatory Credit Reporting Code of Conduct. We believe that task is best undertaken by industry and authorised by the Office of the Australian Information Commissioner (OAIC). We understand that the powers of the OAIC to authorise such a Code will be contained in legislative provisions which will also be examined by this Committee at a later stage.

While the concept of the Code is referenced throughout the Exposure Draft provisions relating to credit reporting, ARCA's preferred position is for the Code to be mandated by the Act – and in that context we will be reviewing the provisions relating to the powers of the OAIC when they are released later this year.

Data quality is essential to ensuring an effective and accessible credit reporting system. As noted in the Exposure Draft provisions, the provision of 'accurate, up to date, complete and relevant' data is a fundamental responsibility of participants in the credit reporting system.

To ensure that data quality is at the heart of the credit reporting system, ARCA proposes that the amended Code has specifically built-in arrangements to facilitate an ongoing commitment to data quality.

ARCA proposes that data quality be addressed in a holistic fashion via a three pillar approach consisting of:

1) a single data standard,
2) the requirement of reciprocity, and
3) an effective adequately resourced means of independent oversight.

Ensuring a consistent data standard will facilitate data quality across the credit reporting system. A single data standard will ensure transparency through the credit reporting system and will give a clear understanding of what data is in the system. ARCA fully supports a flexible approach that can accommodate different a standard *between* each industry sector – but also consistency *within* each sector.

Reciprocity is the foundation for ensuring accurate, up to date, complete and relevant credit reporting information. ARCA believes that credit reporting information must be shared on the principle that Credit Providers should contribute all of their chosen level of data (negative, full or partial comprehensive) to receive all data at the same level in return. Reciprocity is required to encourage users of credit reporting to provide their data, which in turn will ensure the most holistic picture of a consumer's credit profile possible. This profile will ensure more responsible lending decisions are made by users of the credit reporting system. ARCA believes the most effective way of ensuring data is accurate, up to date, complete and relevant is to ensure *reciprocity* is a key feature of *compliance* with the credit reporting system, rather than a *commercial or business decision* taken on a case by case basis.

Finally, and perhaps most significantly, ARCA proposes the establishment of an independent committee to drive compliance with the Code. We propose the committee comprise representation from both industry and consumer advocates. While we would expect to finalise arrangements in consultation with industry and the regulator, ARCA proposes that this committee would support the work of the regulator, maintain industry focus on compliance with the Code, and to undertake compliance tasks associated with the Code.

Specific issues with the Exposure Draft provisions

ARCA is concerned that the legislative and regulatory arrangements as envisaged by the Exposure Draft provisions could prove extremely cumbersome and complex as to cause significant unintended consequences. There are specific concerns with relation to consumer complaints handling, data standards, and compliance. Given the benefits of more comprehensive credit reporting, as highlighted above, it is imperative that industry and government work effectively to address these concerns.

ARCA has enunciated industry's concerns with the Exposure Draft provisions and proposed recommendations to address these issues. These are contained in the body of our submission.

For additional information, or to discuss to content of this submission, please contact Matt Gijselman, Chief Industry Advisor, ARCA on . ARCA looks forward to continuing to work productively with the Committee to implement more comprehensive credit reporting for the benefit of Australia's credit consumers.

Yours sincerely

Stephen Balme
Managing Director

Submission on Exposure Draft Provisions Relating to Credit Reporting

Executive Summary

Whilst we recognise that history and public concern necessitates a robust regulatory response surrounding credit reporting, ARCA is concerned that in a modern information economy, the Exposure Draft provisions could be overly prescriptive and complex in detailing how some data will be regulated relative to other data. There are 16 different classifications of data in the Draft provisions, and there is a risk that by so heavily and intricately regulating data, innovation could be restrained.

While acknowledging that credit reporting may require some unique treatment beyond the proposed Australian Privacy Principles, the level of prescription in particular regarding operational matters should be reduced. By including more by way of principles to drive outcomes, adequate controls can be implemented with a greatly reduced risk of creating 'practicality' issues from prescribing how those outcomes are to be achieved.

The current level of emphasis on *how* outcomes are achieved runs a high risk of the Act becoming quickly dated, thwarting innovation, and not being sufficiently flexible to deal with unforeseen situations.

Blanket prohibition on exchange of data

The Exposure Draft provisions are structured as a 'blanket prohibition' on the exchange of a number of prescribed groups of information, and then very specific exceptions for exchange of information relative to credit reporting activities.

Such an approach seems to be based on an assumption that the only need to exchange such types of information is for the purposes of credit reporting. This approach may have the result of prohibiting exchange of the same information for other purposes that were never intended – purposes that are currently allowed and in fact may be vital to the functioning of the payments system and other aspects of financial activity.

This seems to be the consequence of the removal of the definition of a credit information file included in the current Part IIIA from the new Exposure Draft provisions. In the current Part IIIA the regulations focus on what could or could not be done with regard to a credit information file, thus limiting the regulation to that activity rather than the wholesale prohibition of various types of information which might form part of an exchange.

In the normal course of business, Credit Providers undertake many different exchanges of information to facilitate activities totally unrelated to credit reporting, for example the settlement of the payments system.

The more information that is prescriptively controlled, the greater likelihood of unintended consequences occurs in two ways:

- Including something in the blanket prohibition then requires every necessary exception for the use of that data item to be addressed.
- Excluding something from the blanket prohibition then means that item is only controlled by the broader Australian Privacy Principles.

ARCA recommends that consideration be given to the reintroduction of some of the mechanisms used in the current Part IIIA that limit the breadth of the Act and associated regulations, specifically through the use of defining a 'credit information file'.

Complexity

The difficulty of training staff to follow such complex laws is likely to result in potentially large numbers of unintentional human error breaches, and it could be exceptionally difficult for staff to know clearly what they are and are not allowed to do with a specific element of information.

To err on the side of caution, staff may choose to 'hide' behind the provisions of the *Privacy Act* - using it as an excuse for not providing information, even if they are permitted to do so legally.

This may result in consumers becoming frustrated, and difficulty in realising the benefits associated with the introduction of more comprehensive credit reporting.

Similar to the above, issues with the technicality of implementation, simpler 'outcome-based' rules (principles) will enable processes and procedures to be developed that fit the circumstances of the consumer's situation.

Recommendations to reduce complexity of the legislative framework are included below.

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Key concerns

ARCA has identified a number of key concerns with the Exposure Draft provisions of the *Privacy Act* reforms relating to credit reporting.

These key concerns relate to the following aspects of the Exposure Draft provisions:

1. **Blanket prohibition on data exchange:** Limited exceptions to a basic prohibition on information interchange could arguably lead to overly complex restrictions on organisation functions unrelated to credit reporting.

   ARCA proposes that the legislation re-introduce the definition of a 'credit information file' as a basis of alleviating this problem.

2. **Regulation of de-personalised data:** Regulating the use of de-personalised data has no tangible benefit to the public, given that such information is no longer private and can not be attributed to an individual. Moreover, such regulation places Australia at a competitive disadvantage compared to other countries in that such restrictions serve to discourage research and innovation in the information economy.

   ARCA proposes that de-personalised information should not be regulated, as is currently the case.

3. **Handling of consumer complaints:** ARCA identifies as a potential problem the requirement that the first party of contact with an individual who purports to have incorrect information must notify every recipient of same. What seems a simple requirement is complex due to the degree of prescription in how this operational process is to be executed.

   ARCA recommends that the arrangements for dealing with consumer complaints are reviewed to ensure consistency with other regulatory and best practice requirements.

4. **Risk inherent in requiring Credit Reporting Agencies to 'police' breaches of their contracts with data providers:** The provisions of Cl 116 and 118 of the Exposure Draft are not sufficient enough to ensure compliance with the requisite quality and security requirements essential for the integrity of credit information.

   ARCA recommends these parameters are addressed in the proposed Code of Conduct.

5. **Definitional concerns:** ARCA has identified a number of definitional issues.

   ARCA recommends a comprehensive review of definitions to ensure they accurately reflect the policy intentions of the government.

Additionally, ARCA has identified a range of concerns with the drafting of the provisions, ranging from definitional matters through to issues detailing how enforcement arrangements will be managed. Many of these concerns relate to the highly prescriptive drafting of the Exposure Draft provisions and the unintended consequences that may flow from such a complex regulatory approach. These additional issues are also noted below.

1. Blanket prohibition on data exchange

ARCA believes that the regulatory method applied to data in the Exposure Draft provisions will lead to an unnecessarily complex regulatory system.

By applying a basic prohibition on the exchange of credit reporting information with limited exceptions, there is a significant risk of regulatory overreach and overly complex compliance requirements.

For example, the limitations on the 16 different classifications of information contained in the Exposure Draft provisions could arguably lead to restrictions on organisation functions unrelated to credit reporting, such as the vital settling of exchanges, account direct debits and balance transfers that financial institutions undertake as part of their fundamental role in the financial system, and therefore the economy.

The definition of a 'credit information file' in the current provisions of the *Privacy Act* allows for the construction around it of a regulatory system based on access to that specific information. Without such basis the regulatory framework is based around general classifications of information itself – with complexity and ambiguity the result.

For example, the overly broad definition of a *credit reporting business* in Cl 194 could mean that Credit Providers get caught within the scope of CRAs. While this could easily be addressed through the introduction of a 'dominant purpose' test, more fundamentally, as noted above, there is a risk that an overly prescriptive regulatory framework for one specific sector of Australia's information economy will lead to a perversion of current business practices without the microeconomic benefits that the introduction of more comprehensive credit reporting should facilitate.

For example, Cl 104 provides that CRAs are exempt from the Australian Privacy Principles in relation to credit information, CRA derived information, *and CP derived information* – which suggests that CRAs can be in possession of CP derived information. Similarly, Cl 130(2) suggests that Credit Providers can be in possession of CRA derived information. This raises a concern about whether information retains its initial classification, regardless of whose hands it is in. For example, when a CRA discloses credit reporting information (which by definition may contain an element of CRA derived information) to a Credit Provider, does the information become credit eligibility information in the hands of the Credit Provider? ARCA's view is that it should.

If information were to retain its original classification regardless of whose possession it is in, the technological implications would be significant in that data would be required to be classified and quarantined for differing treatment each time it passed from either a Credit Provider or a CRA. Each data set would need to have classification identifiers included, and the same data, could be differently classified depending on whether or not it has been sourced through a CRA or if it has been accessed from internal systems.

These issues are directly linked with our broader concerns over the approach to definitions, as outlined below.

ARCA Recommendation: The Government should investigate the re-introduction of a defined 'credit information file' as the basis for regulation of credit reporting data, as is currently the case in the Privacy Act. Alternatively the uses and disclosures of information (and therefore the definitions in the Exposure Draft provisions) should depend upon who holds that information.

2. Regulation of de-personalised data

ARCA notes with some concern the provisions relating to de-identified credit reporting information at Cl 115. We note that the issue of de-identified data has not previously been raised either in the ALRC report, or in the Australian Government's response to that report.

The approach taken to the regulation of de-identified data is an example of this attempt to so prescriptively regulate one aspect of Australia's information economy, without considering the principles for which it is being regulated. Restricting the uses of de-identified data through the *Privacy Act* is an unusual approach to information management, particularly as this data is no longer 'private' information.

By including such a prescriptive restriction on the uses of such information, this would place a potentially enormous restriction on the research and development of innovative, new risk assessment tools - as any use of such data to develop these new tools would need to be approved in advance by the regulator on the basis of the research being in the public good; a challenge to build the case *before* the analysis is actually undertaken.

Consequently, the inclusion of provisions that would place new, complex obligations that would incur significant administrative costs on Credit Reporting Agencies for no discernable consumer benefit should be reviewed. The ability of CRAs to maximise the effectiveness of de-identified data benefits not only Credit Providers through better and more effective service but also consumers through product innovation, and better and more targeted risk assessment to promote responsible lending.

ARCA Recommendation: As de-identified information is beyond the broadest scope of the Australian Privacy Principles, Cl 115 relating to de-identified information should be removed from the Exposure Draft provisions altogether.

3. Handling of consumer complaints

ARCA realises that effectively dealing with consumer complaints is central to the overall success of the credit reporting system, and effective complaints handling is critical not only for consumer confidence in the credit reporting system but is also critical to the consumer experience of our Members.

ARCA proposes requiring both CRAs and Credit Providers to develop processes to holistically deal with consumer concerns in relation to the contents of their credit report – from gaining access, to requesting investigation and/or correction of data to dealing with complaints about their data or

their treatment in relation to the processes relating to credit reporting. We note and agree with the proposal that complaint handling and correction are detailed as separate procedures.

Work is already underway to review the end-to-end process of capturing issues from investigation, to correction (if required), to notification. Analysis of the performance of this process (to enable proactive efforts of remediation and prevention) are expected to form part of future consumer handling processes. ARCA proposes to include in the Code extensive mechanisms to facilitate compliance with these processes via practical, transparent and effective means.

There are several areas of concern about the practicality and commercial sensitivity of the way in which the Exposure Draft provisions requires these matters be handled. For example, ARCA notes that organisations are already covered by other legislative and regulatory requirements relating to complaints handling. Financial service providers already comply with *Regulatory Guide 165: Licensing: Internal and external dispute resolution* (RG165) from the Australian Securities and Investments Commission (ASIC) which applies to all credit licensees, and contains specific timelines (specifically that industry is managing timelines on a business day basis) and procedures to apply to complaints processes. The Exposure Draft currently proposes timeframes to acknowledge and respond to complaints which are in direct conflict with those in RG165 (for example, RG165 has a standard response within 45 days).

Additionally, AS ISO 10002-2006 is widely recognised as best practice for managing consumer complaints, and it is widely applied across sectors and scalable to suit a range of organisations. ARCA strongly recommends aligning the timeframes in the Exposure Draft with existing obligations for complaints handling. For example, the current Electronic Funds Transfer (EFT) Code of Conduct draft directs subscribers to comply with AS ISO 10002-2006 and RG165 instead of establishing its own timeframes and standards.

In a further example, the Exposure Draft provisions seem to suggest that the first party contacted must undertake (presumably themselves) to notify 'everyone' who has received the incorrect information, collate the necessary information to respond to the complaint, and then respond on behalf of all relevant parties. Here too, what seems to be a simple requirement under the Exposure Draft provisions becomes complex because of the degree of prescription of how an operational process must work rather than the outcome that it seeks to deliver.

To manage consumer complaints effectively, it is essential for relevant parties to manage and resolve the complaint wherever possible. However, the first point of contact may not always be best placed to manage a complaint. It may be necessary to refer the consumer to the most appropriate respondent.

To illustrate, a consumer may complain to a Credit Provider who is not responsible for the credit reporting information (CRI) that is in dispute. Operational complexities would make it difficult for the first point of contact to effectively manage the complaint and this would adversely impact the consumer. In such circumstances, and consistent with the ALRC recommendations and the Government's response, ARCA suggests that industry should take responsibility for an effective referral process to ensure the complaint is acknowledged, managed and resolved by the relevant supplier of the disputed CRI, rather than by the first point of contact (where these are different parties). The 30 day timeframe for providing the consumer with a determination should not start until the relevant party has received the complaint. Recent industry discussions with External

Dispute Resolution (EDR) schemes (including the Financial Ombudsman Service (FOS), the Telecommunications Industry Ombudsman (TIO), and the Energy & Water Ombudsman NSW (EWON)) supported this position.

Section 158 of the Exposure Draft provisions states that the respondent for the complaint must within seven days give the individual written notice that acknowledges the complaint and sets out how the respondent will deal with the complaint. The majority of complaints are resolved within 48 hours. As such, a written acknowledgement letter would be unnecessary, wasteful and irritating for the consumer in the majority of cases. We suggest that it should be acceptable for other methods of communication to be allowed on the basis that a formal record is retained, such as a file note made in a customer relationship/complaints management system, or tape recording of voice communications.

In exceptional circumstances such as in a complex complaint involving multiple parties, it may be necessary as noted in the provisions (158 (5) (b)) to extend the period for resolving such a complaint. In these circumstances the respondent should be allowed to notify the consumer with due reason for the extension without the need for written consent from the consumer. The Code of Conduct should include compliance reporting to ensure that such arrangements are not being used inappropriately.

ARCA Recommendation: Arrangements for dealing with complaints in the Exposure Draft provisions are reviewed to ensure they complement other regulatory and best practice requirements currently imposed on industry. ARCA also recommends that the powers of the OAIC enable the regulator to develop appropriate procedures with OAIC approved EDR schemes to further improve complaint handling, CRI correction and reporting standards related to credit reporting. This power should include that all users of credit reporting belong to an OAIC-approved EDR scheme.

4. Risk inherent in requiring Credit Reporting Agencies to “police” breaches of their contracts with data providers

ARCA does not believe that the provisions of Cl 116 and 118 alone are adequate to properly ensure compliance with quality and security requirements desired for credit information. Data quality and data security are fundamental components of the credit reporting system – without confidence in the quality of data, or confidence in security and protection arrangements, confidence in the entire system is eroded.

By placing compliance with these fundamental requirements within the context of a contractual matter between CRAs and Credit Providers, CRAs are effectively being asked to police their own customers. ARCA does not believe it is in the interests of either CRAs or Credit Providers for CRAs to be held solely responsible for this compliance function.

ARCA Recommendation: Compliance with data quality and data security measures be included in the proposed Code of Conduct, rather than solely relying on contracts between CRAs and Credit Providers.

5. Definitional concerns

As noted above, ARCA has identified a number of issues associated with the definitions as set out in the Exposure Draft provisions. The Exposure Draft provisions identify 16 different classifications of information, which leads to unnecessary complications and duplication. We recommend that at minimum all definitions in the Exposure Draft should form a reference directory at the end of the provisions.

Additional issues have been identified in the following Clauses:

- 180 - As the definition of *consumer credit* is based on a threshold of 'primarily' - this would mean that up to 50% of the credit in a 'package' product could be consumer, but any difference in the allowability of certain types of information to be used in assessing (and presumably managing and collecting) on such credit would be applied to all of the consumer credit within that package as well. Such a situation could have an impact on packaged products for small business customers.

- 180 - The definition of *identification information* does not include forms of government identification other than a driver's licence. It would seem that other data, for example a Passport Number, or a State-issued identification card which are commonly issued for those who don't or can't drive, have been overlooked. Such a restriction impacts on the ability of CRAs and Credit Providers to meet other regulatory requirements (for example, *Anti-Money Laundering and Counter Terrorism Financing Act 2006* requirements) as well as match records supplied by various sources, thus potentially undermining the goal of providing a credit report that is 'accurate, complete, and up to date'.

- 180 – The definition of *pending correction request* refers specifically to 'credit information' and 'CRA derived information' only. Therefore, this would exclude CP derived information. Clause 157(2) includes the ability to complain about 'credit eligibility information' - which includes CP derived information. This would suggest that due to the limited definition of a pending correction request - there can be no pending complaints that relate to CP derived information. The same issue arises with the definition of *pending dispute*.

- 185 – Within the meaning of *payment information*, it is unclear whether the requirement for updating a previously listed default is only when it is paid in full (or the debt is settled for less than the full amount) or if the requirement is to update when any payment of the previously default amount is made. Further, as the amount of a defaulted debt can increase with the addition of further missed payments or fees or interest, it is not clear whether a previously default amount can be updated (assuming the appropriate notification and collections actions have been undertaken).

- 191 - This Clause states that a debt buyer, upon buying a specified debt, becomes for the purposes of the Act a Credit Provider. If that is the case, then other Clauses with regard to collections agencies, and other assignees, would seem to be inconsistent.

- 193(2) – Within the meaning of *Credit* and *amount of Credit*, it is unclear whether or not interest, fees and charges are to be considered as part of the debt when referring to the

amount. If it were the case that they were not, then this would create substantial issues in relation to the listing of missed repayments and defaults, for example. Unpaid fees and charges are incorporated into the principle for certain products. Separating these, if that were required under this Clause could require substantial systems modification and may have tax and other legal ramifications not contemplated when this Clause was drafted.

ARCA Recommendation: The definitions contained within the Exposure Draft provisions are amended in consultation with industry stakeholders to ensure they reflect the intentions of the government.

Additional issues

Penalties

ARCA supports a strong regulatory environment, supported by a robust compliance framework to ensure consumers receive the full benefits associated with the introduction of more comprehensive credit reporting. However, we note that the provisions contained in Division 6 of the Exposure Draft provisions take no consideration of intent, and thus could impose significant penalties on an otherwise compliant institution based on the activities of a single rogue employee.

Additionally, in regards to Cl 167 specifically, if a breach happens 'en masse' as a result of an unintended act - such as a processing error – we note that the penalty, if equal to the number of penalties for each instance, could be enormous.

We propose that, as in the case of the Corporations Act, activities which are not wilful and deliberate should be approached with a lesser set of penalties, and that actions on the part of a data sharer should be able to mitigate penalties in appropriate circumstances.

Reporting repayment history and treatment of hardship

Consumers will sometimes be impacted by circumstances beyond their control. ARCA is concerned that the provisions at Cl 187 may not provide the flexibility that would enable accommodation of unusual circumstances, such as a natural disaster.

Similarly in Cl 184, ARCA notes that hardship situations are envisaged to only occur if the account has been in default – yet there are a substantial proportion of hardship cases that occur pre-default, for example in the case of dealing with natural disasters such as has recently been experienced in Queensland and Victoria. If the restrictions on credit reporting do not cater for instances of hardship 'pre-default' then these consumers' credit reports would start to show delinquency issues that are undistinguishable from situations where this is not the case, making it very difficult for them to get credit when they may well both need it and it would be 'responsible' to grant it.

In these cases, consumers with immaculate credit history may be thrust into hardship and are rendered unwillingly unable to meet their credit responsibilities. ARCA would argue Exposure Draft provisions should be amended to avoid creating a situation where 'the law' precludes flagging compassionate action in difficult circumstances.

Further, within the meaning of Repayment History Information, the word 'monthly' may be too specific, as there are obligations that fall due weekly, and fortnightly. The determinant of whether the indicator of a missed repayment should be incremental (from 0 to 1, or 1 to 2, and so on) and should be constructed by looking at the account at the same relative time once each month and looking at the degree to which payments were overdue.

Finally, the provisions do not give certainty surrounding a CRA's ability to give Credit Providers 24 months of repayment history, nor do they provide certainty surrounding the right of Credit Providers to provide CRAs an initial download of repayment history. Without a capacity to make this initial

input into the credit reporting system, the benefits of allowing for the reporting of repayment history will not accrue for many months or years.

Meaning of default information

182 – The meaning of *Default information* in the current *Privacy Act* and the current Credit Reporting Code of Conduct has been the source of much discussion and difficulty in interpretation. In particular, the amount for which a default can be listed is the amount reported to the consumer 60 days ago (less any payments but not any further charges or interest. This 60 day 'lag' results in the amount of the listing being NOT equal to the actual amount owed on the day of the listing. Of further issue is that the criteria for listing is 'open ended' meaning that defaults can be listed when the criteria is met, later or never at all. Finally, it was expected that the government would leave the detail of the definition of default to be addressed in the new Code of Conduct, as per their response to the ALRC's recommendations.

183 – Within the meaning of *Default information* (relative to guarantors) there are additional requirements placed on Credit Providers prior to listing defaults against guarantors. As read the new restrictions would see an additional 60 days have to elapse - on the basis of having to wait until 60 days since the day on which the notice (to the primary debtor) was provided before listing a default against the guarantor.

Implementation and consumer awareness

The introduction of more comprehensive credit reporting will benefit both consumers and industry. However, it will also be a significant technological, training, and administrative task. The introduction of new categories of participation by industry (negative, full and partial comprehensive) could have a significant impact on the consumer experience.

The regulations will be critical to understanding the operation of the regime, and ARCA notes that the draft provisions rely heavily on the yet-to-be-released regulations to provide important substance to the regime.

The introduction of repayment history as a reportable field necessitates a significant communications exercise on the part of industry and government – to allow consumers to take steps to ensure they are in the best position possible well before the commencement of repayment history reporting.

How the implementation of more comprehensive credit reporting is managed by government and industry will have a significant impact on the consumer experience. Yet, significant work remains to be done. ARCA has taken a lead in working towards the review of the current Code, and further work remains to be done to ensure the Code has the full support of all users of the credit reporting system.

Drafting clarity

ARCA has identified a number of drafting errors and concerns which we believe may require redrafting of the Exposure Draft provisions for clarity or additional consultation with industry to achieve the desired outcome. These issues are outlined below.

- Cl. 105(4) - This appears to have the effect of allowing each CRA to have their own data standard - this would add enormous additional cost and complexity to the credit reporting system.

- 111(3) and 112 – This requires keeping a record of pre-screening determinations, but 112 notes that the determinations need to be destroyed. To avoid contradiction and in order to facilitate auditing of the pre-screening process, the records should be kept for at least some period of time - even if they are legally deemed no longer useable for any other purpose.

- 113 - It is unclear if the presence of a ban is part of Credit Reporting Information. If so, the CRA can disclose the presence of the ban on the file. If a consumer who has a ban in place applies for credit (but does not disclose that they have a ban in place to the Credit Provider directly), what is expected to happen when the Credit Provider seeks a credit report as part of their assessment? A Credit Provider must be able access Credit Reporting Information which includes presence of a ban. This will act as an indicator to other Credit Providers not to offer credit to the individual during this period.

- 116(2) and 143(1) - Because credit reporting is not mandatory and there a different levels of information that can be supplied by certain Credit Providers (licensed Credit Providers can exchange repayment data, whilst other can't), a credit report is unlikely to contain a total complete record of all of a consumer's debts. As a result it is unclear what 'complete' means with respect to credit eligibility information. ARCA recommends that all Credit Providers be allowed to access repayment history, or alternatively to clarify that the each record within a credit report is required to be 'complete'.

- 124 – By having retention periods commence when the CRA collects it, this could present 'unfair' treatment of consumers and a lack of consistency in the underlying meaning of an item of data. For example, a consumer has two accounts on with CP1 and another with CP2. The consumer "defaults" on both Credit Providers on the same day, all of the criteria required to list a default is met. If CP1 reports the default at the earliest possible time (that day) but CP2 reports the default 12 months later, the default from CP2 will be on the consumer's file 6 years after it happened (because that is 5 years from when the CRA collected it) whereas the default from CP1 will be off the file 5 years after it happened. We recommend then that retention periods commence within a specified period of the default actually occurring.

- 125 - There appear to be items of information in the retention criteria that are not data that is allowed within the definition of Credit Reporting Information. For example, certificates signed under Section 232 of the *Bankruptcy Act 1966* are not something for which provision has been made for CRAs to be able to score this data.

- 125(2)(3)(4) - The timing of bankruptcy notifications (the lag between when these items actually occur) and when the CRAs could first know about them is likely to be more than "on

the day" - making the deletion of the data in accordance with the provisions not possible. We recommend the requirement be amended to a 'reasonable period'.

- 126(1)(c) – Fundamentally, this Clause imposes impractical notification requirements based on the assumption that one CRA will be involved. Consumers may not remember which CRA(s) a Credit Provider shares data with, even if they have been told when they applied for the credit. When a CRA is advised by a consumer that they have been a victim of fraud and this proves out, if the consumer can't recall (and the CRA would not know) how would the requirement to notify all or any of the recipients of the required elements work? ARCA recommends that an alternative would be to allow the CRA to 'assign' responsibility to the Credit Provider who provided the credit to the fraudster to have to notify all of the CRAs they have shared the data with, and then the CRAs to have to report back to the Credit Provider that they have done so - within some time frame - and then the Credit Provider confirm to the consumer that this has been done.

- 137(2)(b) – The intent of this Clause is unclear, particularly in relation to whom the 'recipient' is. ARCA recommends that this Clause be removed from the Exposure Draft provisions.

- 137(3) – Clauses 137(1) and 137(2) require the consent to allow for the transfer of data, yet 137(3) to an external agent does not. ARCA questions whether this lower standard of data security was intentional. ARCA recommends that an outcome may be to include references to sub-Clauses 1 and 2 to provide clarity.

- 137(5) – The requirement contained in this Clause of having to wait 30 days for the exchange of data over a commonly held security, for example a second mortgage, is problematic. If a consumer wishes to substitute one security for another, they may not be able to do so without first going 60 days into arrears.

- 140 - It is unclear what information can and can't be provided to or obtained by debt collectors. The lack of clarity here with regard to the 'collection of debts' is also carried over to what 'credit managers' - an undefined term - can or can't do in other Clauses. The use of information for account management and debt collections purpose, should be made clearer and simpler.

- 144 - The penalties for 'misleading' information are severe - as they should be. However, for clarity an 'incomplete' credit report within the context of differing levels of reporting, as noted above, should not result in it being deemed misleading, and this should be reflected in the drafting of the provisions.

- 145(2)(b) – This Clause may increase the danger of deleting information that is still legally required to be held. The strong interrelationships of the Act suggest that the limiting wording of 'under this Division' may be problematic if the data is needed to meet requirements of another Division. For example, an allowable use would be research sanctioned by the Information Commissioner but because that capacity to sanction research is not within this Clause, the data could arguably not be retained for that purpose. ARCA recommends that the words 'under this Division' are deleted from the provisions.

- 146 and 149 - ARCA has specific concerns where these provisions apply to commercially sensitive information - for example credit policies and credit scoring details. Having to provide access to such information not only could severely compromise the intellectual property of the organisation, it could enable fraud if the perpetrators use knowledge of this information to refine their attempts to circumvent credit assessment and management processes. Therefore, ARCA recommends the introduction of a restriction on access where that information could compromise commercially sensitive information.

- 147(1)(b) - Clarification is required regarding "out-of-date". It is unclear where in the Act there is provision for holding data for use in scorecard development, which may require holding data for several years which for other purposes could be deemed to be out of date.

- 148 – This Clause seems to duplicate 147. It should be removed.

- 154 – The term 'credit manager' is materially significant in the context of this Clause, yet it is undefined in the provisions. It needs to be defined.

- 154(2)(a) - Managing credit used in this Clause is defined (in Clause 180) as excluding acts relating to the collection of overdue payments in relation to credit - but does not say what is does include. This term is used in Clause 154(2)(a) to create an exception to the general prohibition on use of credit eligibility information by a "person" - another undefined term - would suggest that this information can't be used by a person in activities that relate to the collection of overdue accounts. Given the breadth of the definition of credit eligibility information, this could make it very difficult to collect on an overdue account. ARCA recommends definitions are included for these terms.

- 155 - If this Clause applies to a debt buyer, or someone who was assigned debts and interested in on-selling them, the credit eligibility information that they were allowed to receive from the Credit Provider could not be passed along to the next assignee or buyer. This would seem to be an unintended consequence.

- 164(1) - The 6 year period is one year longer than the majority of allowable retention periods for information, and 4 years longer than the retention period for a substantial number of elements. This could cause issues with information to which a complaint relates routinely (and mandated by the Act) being destroyed. ARCA recommends the provisions are amended to provide certainty of retention periods.

Appendix A: List of ARCA Members

As at 16 March 2011

Abacus – Australian Mutuals
American Express
ANZ Group
Bank of Queensland
Bendigo & Adelaide Bank
Citibank
Commonwealth Bank
Dun & Bradstreet
GE Capital
HSBC Bank
Lloyds International
ME Bank
NAB Group
Suncorp
Toyota Finance
VedaAdvantage
Westpac Group