Privacy Act Regulations – credit reporting

Stakeholder Submissions - table of key issues for teleconference discussion

Stakeholders - table of acronyms

AAM	Abacus Australian Mutuals	CCLC	Consumer Credit Legal Centre
ABA	Australian Bankers' Association	EWON	Energy and Water Ombudsman NSW
AFC	Australian Finance Conference	IBA	Indigenous Business Australia
APF	Australian Privacy Foundation	OAIC	Office of the Australian Information Commissioner
ARCA	Australian Retail Credit Association	GE	GE Capital
CALC	Consumer Action Law Centre	TIO	Telecommunications Industry Ombudsman

Regulation making power/topic	Stakeholder views	Issues/possible questions
Terms and conditions Subsection 6(1)—meaning of *consumer credit liability information*	**APF, CALC, CCLC** - Remove/don't use power allowing for collection of terms and conditions of consumer credit as sufficient information will be available for assessing credit worthiness following the introduction of the new data sets; but if regulations made, they should tightly prescribe the specific pieces of information and that it can only be used for assessing credit worthiness and not any other purpose (eg marketing). **AAM** – don't make regulations, sufficient information available and requiring additional reporting disproportionately impacts compliance costs for smaller lenders. **OAIC** – Encourages careful consideration of whether particular terms and conditions are in fact necessary to	Are regulations necessary? Why? Can a consensus view be reached? If regulations are to be made: • What level of detail is required? • What matters should be listed and why? • Can a consensus view be reached on the minimum matters to be included? Should further matters, or further detail on the matters listed in the regulations, be included in the CR Code? Why?

Regulation making power/topic	Stakeholder views	Issues/possible questions
	adequately assess credit risk. **ABA** - Deal with the majority of the terms and conditions issues in the CR Code; regulations and/or CR Code should provide clarity as to what sort of information could be included, and avoid including information that is not beneficial or is irrelevant. **ARCA, TIO, AFC** - Use regulation-making power to prescribe terms and conditions. • Such information is necessary to gain a full understanding of the nature of the individual's consumer credit liabilities, as well as assisting to determine the individual's capacity to repay their debts. Further, the data can be used to verify information that has been supplied by the individual to ensure that data used in decision-making is accurate. • ARCA proposed an indicative list of terms and conditions that should be listed: o industry type; o amortisation type; original/concessional terms; o term type (if fixed, the term); o payment frequency; o security type and nature; o whether individual is the borrower or a guarantor; and o general provision authorising other	

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	matters (if any) to be included in the CR Code.	
Monthly cycles Subsection 6V(2)—meaning of *repayment history information*	**ARCA** – Suggested options are too complicated and not consistent with prudential requirements for dealing with missed payments. Proposes alternative approach: • Once per month assessment of any missed payments relative to all payments due within that month is made and this is reported as repayment history information for that account; • Assessment is based on how the CP treats the requirements of the credit contract, including any leniency relative to the contractual due date; • If any obligations due and payable have not been met the level of missed payments is based on how many days the oldest outstanding payment [is overdue]; • The number of days that the oldest payment has been outstanding will be reported as representing the monthly equivalent to the number of days. **AFC** – support regulation, note ARCA's preference, will consider matter further. **AAM** – option 1, but would prefer an industry developed standard, noting need to comply with existing APRA standards on missed and partial payments. Don't support regulations describing basis for monthly cycle, arrangements should be aligned with contractual	Issues for discussion: a. What do APRA prudential obligations require? How are they inconsistent with options? b. Monthly cycle - reporting based on monthly cycles linked to payment cycle (as proposed in discussion paper) or on calendar months (as proposed by ARCA and others)? What are the differences between these approaches and the implications of each approach? c. What additional matters, if any, should be dealt with by the CR Code, both in relation to these matters and more generally in relation to the reporting of repayment history? See below re issues around disclosure. d. Is the issue of leniency/grace periods to be addressed, either by regulations or the CR code? The AGD discussion paper set out two options (paras 45 and 46): Two options are proposed for stakeholder

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	arrangements as far as possible. **CCLC** - Prefer option 1. **APF –** regulations necessary, defer to expert NGO on options. **TIO** - Prefer option 2. **OAIC** - Support regulation on monthly payments but no preference as to options 1 or 2. **ABA –** support regulations, based on calendar months **CCLC** - Repayment history information should not be collected.	consideration: 1) An individual will be taken not to have met an obligation to make a monthly repayment if he or she has failed to make **at least one** repayment due that month. 2) An individual will be taken not to have met an obligation to make a monthly repayment if he or she has failed to make **all** the repayments due that month. In either case, repayment information would be measured in monthly cycles commencing from the day after the first payment is due. The first monthly cycle would cover the period from 1 to 29 days after the due date of the first payment. Where a payment is not made and remains overdue, the second monthly cycle would run from 30 to 59 days after the first payment was due, the third monthly cycle from 60 to 89 days, and so on.
Partial payments Subsection 6V(2)—meaning of *repayment history information*	**CALC, CCLC** - Partial repayments within a certain margin of error (say 10%) should be considered repayments unless there are other factors to indicate that the partial payment is other than an innocent error. **ARCA, AAM** - Partial repayments should not be	Initial position in Discussion Paper is that partial payments should not be addressed. What do APRA prudential obligations require? Do these obligations provide

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	considered repayments.	guidance on this issue? Should partial payments be addressed? If so, how should a partial payment be described? If they are to be dealt with, options are to: a. Make regulation regarding partial payments. b. Do not make regulation and deal with partial payments in the CR Code.
Repayment history – disclosure Subparagraph 21D(3)(c)(iii)— disclosure of repayment history information to a credit reporting body	**ARCA** - No requirements should be prescribed by regulations so long as the definition of *repayment history information* is addressed effectively. **AAM** - Regulations should not prescribe any requirements at this time. **TIO** - There should be regulations governing the disclosure of repayment history information. They could include: • prescribed time limits on how far back repayment history will be included • a requirement for irrelevant repayment history information to not be included • how disputes are to be resolved by the credit provider.	The AGD discussion paper noted that the initial view not to make regulations was subject to views received in submissions. If additional matters are dealt with (such as those proposed by the TIO), they could be considered in the CR Code.

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Classes of organisations or operators—landlords and mortgage insurers Subsection 6G(6)—meaning of *credit provider*	**CALC, APF** - Make regulation making clear that landlords and mortgage insurers are <u>not</u> credit providers. **ARCA** - Do not prescribe any class of organisations or operators. Suggests the definition of *credit provider* should be limited with a dominant purpose test.	a. It is proposed that the regulations would not prescribe any class of organisations or operators at this time (DP). b. Keep regulation-making power and do not make regulation. c. Make regulation providing landlords and/or mortgage insurers are not credit providers.
Additional uses or disclosures Paragraphs 20E(2)(e) and 20E(3)(f)—use or disclosure of credit reporting information	**ARCA** – regulations should ensure that the ban period (section 20K) only prevent disclosure of CRI for those purposes that would involve assessment of an application for more credit. **APF, AAM** – none necessary	The AGD discussion paper noted that it was not proposed to make regulations on this matter. Section 20K (ban period) prohibits any use or disclosure – regulations cannot limit the operation of this provision.

Other credit reporting issues raised by submissions

Issue	Suggested regulation	Comments
Credit fixers	**CCLC** - Organisations that charge consumers to 'fix' credit reports should be banned. Action needs to be taken in the definitions section of the regulations to ban these organisations. **ARCA** - also critical of credit repairers.	Options to deal with credit repairers are being considered by ASIC and Treasury. However, any specific recommendations for regulations can be considered.
Time period for a debt to be credit default listed	**EWON** - concerned that Schedule 2 of the Bill and the CR Code do not specify a timeframe for listing a debt. Some customers are credit default listed but there is a delay in the listing, sometimes up to several years after the subject debt arose. This means that the negative impact on a customer's credit report will continue well beyond the usual five year period of a credit default listing. It may also run over the standard period of time a provider has to take legal action to recover a debt. It seems unreasonable and unfair for the effects of a debt to be prolonged in this way. Would support further consideration of provisions on the time period for when a debt can be listed.	AGD's initial view is that this is a matter of industry practice. If it is to be addressed, the CR code would be the best location for these requirements, which can be negotiated by stakeholders.
Schemes of arrangement	**ARCA** - there appears to be conflicts between the expectations described in the DP and the requirements of the Australian Prudential Regulatory Authority (APRA) relating to the re-ageing of accounts (resetting the delinquency to zero, even when the consumer has not met their obligations). Suggests that schemes of arrangement should be treated in credit reporting regulations the way they are by APRA. **CALC** - Agree with intent at para 58A of DP that care should be	Further advice on the nature of the APRA obligations and how the credit reporting provisions conflict with these obligations would be appreciated.

Issue	Suggested regulation	Comments
	taken to ensure credit reporting processes do not discourage consumers from seeking hardship variations. If a default is listed on the credit report, it should be immediately removed if parties to the contract agree to a variation which means the consumer is no longer in default. Any regulations regarding schemes of arrangement or hardship applications should reflect these principles. **CCLC** - Strongly support ensuring consumers are encouraged to apply for financial hardship. Consumers will not apply for a financial hardship agreement if they believe there will be negative consequences on their credit report if they do so. Disagree with the reasoning in relation to a scheme of arrangement. Contract law is clear about the variation of contracts by agreement. Once the parties agree to the varied agreement then the contract is varied. Accordingly, a default cannot be listed until there is a default on the agreed variation. Recommend that the reference to schemes of arrangement be deleted as it is a term that is no longer relevant. If the Government decides to keep the term it should be limited to situations where there is a reduction in the debt and repayments amongst more than one creditor.	

Additional matters raised by ARCA for consideration

Meaning of *repayment history information – regulations*

Proposal for text of regulation under 6V(2)(a):

If an individual has not met their obligation to make 'a monthly payment', the amount of time that the oldest payment has been outstanding may be reported, expressed in months.

Proposal for text of regulation under 6V(2)(b):

A 'monthly payment' represents all of the due but yet unpaid repayment obligations that have fallen due in or prior to the month to which the assessment relates.

Administrative fields

There are a variety of fields that are required to be included in the provision of credit information which have no bearing on credit worthiness, but which are necessary for administrative purposes.

Account number - default:

When listing a 'default' the account number is included along with the person's details and the specifics of the default. When the default is updated, to make clear that the credit provider has changed – as happens in a debt sale, or the default is paid off – the account number is needed to enable matching of the updated information to the original listing.

However, the definitions relating to the new types of data (such as Consumer credit Liability Information – CCLI and Repayment History Information – RHI) are written in such a way that it could be use of such information may need to be specifically enabled.

If that is the case then potentially this can be done via the provision for regulations under the definition of CCLI at 6(1)(e)(ii) and there include the account number. The terms and conditions of consumer credit generally do refer to the consumer credit in terms of an account and often refer to an 'account number' so there is a 'natural link'.

Identifying field names:

It is normal when sending a file of information to identify each record and the field names within that record to facilitate administration of the information. There might be 2 date fields that are being reported and if there was no field identifier it would not be possible for the CRB to know what the reported date relates to.

As the technical protocols for supplying data are being developed, it is clear that there are a number of such instances where data that has no bearing on the credit worthiness of the individual are needed to enable information that does have such implications to properly matched to various records and managed so that the data about the individual can be accurate, complete, and up-to-date.

It would be difficult at this juncture, given the evolving nature of the new credit reporting framework, to create a definitive list of such fields. Further, doing so would likely result in a need to update regulations should the actual fields reported under the permitted types of data change over time. This could happen if, say, a new type of credit product was introduced into the market and the current values (within the allowed data categories) needed to be updated so that the new credit was properly classified.

Whilst ARCA is currently seeking legal opinion whether or not such fields could be considered Personal Information and as such not subject to Part 3A of the Privacy Act, we suggest a general regulation be made that would allow for administrative fields which cannot be used in determining the credit worthiness of an individual as a 'type of information' which can be exchanged to support complete, accurate and up-to-date information.

Default Listing - amount

There has been a historic issue and confusion with regard to the 'amount' included in the listing of a default. There is a requirement for 60 days to pass between when the warning advice is sent and the default listing. The banking ombudsman (FOS) has taken the view that the amount listed must be the specific amount advised to the individual in the notice of the intention to default list. However, the interpretation further specifies that the listed amount must incorporate any part payments of the advised amount made between the time of notice and the time of listing; but cannot include any further payments that have fallen due or any further charges (interest, fees etc.) in that period.

The consequence of this interpretation is confusion – as the communication between the credit consumer about the debt has moved on. This interpretation results in two amounts that need to be administered – the amount of the default listing and the amount overdue on the account that must be paid to bring the account into order with the terms of the contract.

Suggestion for addressing this situation: allow via regulations for the amount listed to be the amount owing on the date of the listing if the requirements of the prior notice warning of a default listing are not addressed within the timeframe specified.

This would see the amount of the default and the amount required to address the terms of the contract able to be aligned…and result in a simpler situation for both the consumer and credit provider to manage.