

7 May 2024

Manager – CR Code Consultation Team
Office of the Australian Information Commissioner
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Sydney NSW 2001

By email: consultation@oaic.gov.au

Dear Manager

Proposed variations to the Credit Reporting Code Consultation

The OAIC is consulting on the application made by ARCA in December 2023 to vary the Privacy (Credit Reporting) Code 2014 (CR Code). AFCA¹ and its predecessors have contributed extensively to the iterative development of the CR Code and to the currently proposed variations.

The credit reporting regime is complex. This complexity is manifest in terms of the policy settings about who reports and what and how they report, the institutional arrangements for administration and oversight of the CR Code and the processes for the review and update of constituent parts of the framework. This complexity can compromise the introduction of appropriate and timely updates that will benefit firms and consumers.

There are overlaps between this CR Code application process and the current review of the credit reporting framework being conducted by the Attorney-General's Department ([AGD Review](#)). We are concerned that:

¹ For comprehensive information about AFCA, see our website www.afca.org.au.



- issues AFCA considers material to the accuracy and consistency of credit reporting information, the likelihood of subsequent complaints, and consumer outcomes generally, are either not being progressed or are partially or wholly referred to other processes. This leads to uncertainty and a lack of transparency as to if, how and when they will be taken forward.
- narrowly scoped variations may not respond effectively to the issue they are intended to address.

1. AFCA's participation in ARCA's consultation

AFCA participated in ARCA's consultation for the current round of CR Code variations, providing input in meetings, by email and in a [written submission dated July 2023](#).

Our feedback focussed on proposals designed to improve accessibility and clarity for consumers and to enhance consistency of reporting for credit providers (CPs) and credit reporting bodies (CRBs). We also provided specific comments on implementation of proposals made in the 2021 Independent Review of the CR Code – Proposals 17, 19, 24 and 39 to 41.

2. Variations proposed by ARCA

We understand that not all issues may be addressed in a review process as is the case in this review. ARCA's application to the OAIC in December 2023² ([ARCA's Application](#)) indicates that some aspects of AFCA's feedback could be addressed through other reform initiatives. However, it is uncertain as to where and how these issues - some of which are material consumer issues - will be taken forward.

The table below sets out each of the issues AFCA raised and its proposed treatment. The notes highlight our specific concerns.

² ARCA's application to vary the CR Code dated 19 December 2023

Independent Review Proposal	CR Code provision to be varied	Proposed treatment Notes highlight AFCA's concerns and risks (the detail is set out in the Appendix)
Proposal 17 Definition of month	Section 5	Partially dealt with in ARCA's Application. ARCA's Application notes (p.7) that matters raised by AFCA (not addressed in proposed CR Code variations) could be addressed through ARCA's Best Practice Workgroup (BPW) and the AGD Review. Note: It is uncertain if or when these matters will be addressed (timing, comprehensiveness) and whether the BPW is the appropriate forum, particularly as part of the rationale for not progressing relates to implementation costs.
Proposal 19 Statute barred debts	Deferred	To be dealt with in the AGD Review. *AFCA agrees that the AGD Review is the appropriate forum to take this issue forward.
Proposal 24 Notification obligations	Section 4 in Schedule 2	Partially dealt with in ARCA's Application. The Independent Review suggested (in Proposal 25) the AGD Review should include 'a holistic review of the notice framework in Part IIIA'. ARCA's consultation on Proposal 24 proceeded on the basis that this holistic review will occur. Note: Difficulty of ensuring the proposed CR Code variations and AGD Review reforms are fully co-ordinated in both design and implementation to address all notification issues.
Proposals 39-41 Circumstances beyond control of individual	Section 20 in Schedule 2	Partially dealt with in ARCA's Application. Issues relating to vulnerable consumers fall within the scope of the AGD Review's Terms of Reference and its Issues Paper discusses financial abuse and domestic violence. Note: Risk that the proposed CR Code variations and AGD Review reforms may not, together, address all issues raised in ARCA's consultations, resulting in further delay in addressing these issues.

3. Narrow approach taken in development of proposed variations

Some reforms suggested by AFCA in earlier consultations were not adopted in the proposed variations developed by ARCA. Where we suggested broad approaches to address ongoing consumer issues that feature in AFCA's complaints handling work, ARCA proposed narrower approaches. We encourage the OAIC to assess whether the proposed variations are sufficiently broad to respond to the issue appropriately and comprehensively.

This is explained briefly in the notes below referring to Proposals 17, 24 and 39 to 41. More detail is provided in the Appendix.

Proposal 17 – definition of month

In ARCA's consultations, AFCA provided feedback about inconsistencies in practices between CPs, such as different Repayment History Information (RHI) month reporting dates and noted that this could result in the same behaviour appearing as different RHI on an individual's credit report.

Given the material impact on the accuracy of credit reports, we queried whether, to address the inconsistencies, more significant changes could be made to the CR Code – potentially to the definition of month or when RHI must be reported.

ARCA did not accept AFCA's suggested approach as to the need for more significant changes. The rationale for ARCA's decision were cost and inconvenience to CPs (see p. 28 of ARCA's Application). The application does not set out how these industry factors were weighed against the benefits of accurate credit reporting information and reduced consumer complaints.

Proposal 24 – notification obligations

To deal with the widely acknowledged problem of consumer confusion, the Consultation Paper released by ARCA in November 2023 proposed a new disclosure obligation – to give consumers a short, prominent statement to explain reporting and enquiries. AFCA supported that proposal in ARCA's consultations. We favoured the approach of requiring a separate, simple disclosure rather than changes to existing statements of notifiable matters.

ARCA decided not to proceed with the new disclosure obligation. ARCA's Application indicates cost to industry was a major reason for this decision. Its discussion of the obligation on pages 33 and 34 repeatedly notes concerns about anticipated compliance costs. While compliance cost is an important and relevant consideration, the ongoing downstream costs resulting from consumer confusion and consumer complaints appear to be a second order consideration.

Proposals 39-41 – circumstances beyond control of individual

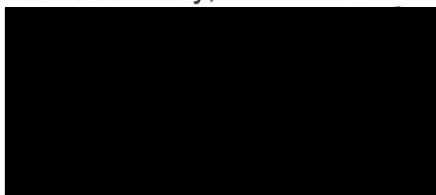
AFCA has consistently supported measures to implement Proposals 39 to 41. In consultation discussions with ARCA in November 2023, AFCA noted that suppression of RHI could be an option and raised the question of when suppression might be appropriate as the outcome of a correction.

ARCA decided the option of suppression of RHI should not be pursued because it considered that option to be inconsistent with the intention of the 2021 hardship reporting reforms (as explained on page 51 of ARCA's Application).

4. Further input or discussions

Please do not hesitate to contact us if you would like AFCA to provide further input or discuss any of the matters addressed above. AFCA will be making a submission to the AGD Review based on our experience in handling consumer complaints about the CR regime and where we think reform should be prioritised to ensure that the regime works effectively for all participants.

Yours faithfully,



Clare McCarthy
Senior Manager – Regulatory, Policy & Research
Australian Financial Complaints Authority



Appendix

1. Proposal 17 – Definition of ‘month’

1.1 AFCA’s input

AFCA provided input verbally in a meeting with ARCA on 13 November 2023, including input relating to the definition of ‘month’ as follows:

- We expressed a slight preference for larger changes to the definition (not a narrow change leaving issues unaddressed).
- We provided feedback about inconsistencies in practices between CPs, based on matters like different RHI month reporting dates, and noted that this could lead to the same behaviour appearing as different RHI on an individual’s credit report.
- We asked whether more significant changes could be made to the CR Code (potentially to the definition of month or when RHI must be reported) than those proposed to address these inconsistencies.

1.2 ARCA’s commentary

ARCA’s application to the OAIC for CR Code variations dated 19 December 2023 ([ARCA’s Application](#)) discusses Proposal 17 on p24 – 28.

ARCA’s Application discusses AFCA’s input – eg:

- on p 27 –
‘In verbal discussions, AFCA indicated a degree of support for a broad variation, but also queried whether, instead of the variations proposed, ARCA could or should consider more significant change to the definition which made RHI reporting practices of CPs more consistent.’
- On p7 -
‘AFCA expressed a slight preference for an expansive definition of ‘month’ – we consider the drafting we have adopted to be expansive in nature. They also raised concerns about differences in practices/RHI reporting dates between CPs, and that this can lead to the same consumer behaviour being treated differently in terms of RHI reporting. ARCA is taking steps through its Best Practice Workgroup to address inconsistency. Those steps, along with consideration through the Part IIIA Review, is likely to be a better approach than wholesale change to the definition beyond that envisaged by the Review.’

ARCA says (on p 28) it decided not to adopt AFCA’s suggested approach to make a significant change because:

- The intention of the Review was to provide CPs with additional flexibility, whereas what was proposed implicitly requires less flexibility (i.e. achieving consistency by having CPs move to reporting RHI at more similar times).
- Based on the other feedback received, a mandatory change to RHI reporting times would involve significant costs for many CPs.
- ARCA already has work underway to promote consistency of data supply through our Best Practice Working Group, which is attended by both CRBs and CPs.
- Issues of data supply and consistency are likely to be considered by the Part IIIA Review, which would be a more appropriate forum for addressing change of that magnitude.

1.3 Current draft of proposed code variation

The current proposal is to make additions to the definition of month in section 5 of the CR Code as shown in **green** below.

month means a period:

- (a) starting at the start of any day (the start day) of one of the calendar months; and
- (b) ending on any of the following days, as determined by the credit provider:
 - (i) immediately before the start of the corresponding day of the next calendar month; or
 - (ii) where the day before the corresponding day of the next calendar month is a non-business day, the end of the next business day following that day; or
 - (iii) if there is no such day – at the end of the next calendar month; or
 - (iv) the end of a day that is between 27 and 30 days after the start day; or
 - (v) where the day before the start day is a non-business day, the end of a day that is 25 or 26 days after the start day.

The definition of month and proposed changes to it are addressed in the CR Code's [Explanatory Statement](#) in paragraphs 17 to 19.

2. Proposal 24 – Notification obligations

2.1 AFCA's input

Submission, July 2023

[AFCA's submission](#) said we support proposals to help CPs clearly inform customers about when and what information may be disclosed to a CRB and appear on their credit file.

Verbal input, November 2023

Late in 2023, ARCA altered its suggested approach to address Proposal 24 and consulted on the new approach. We provided input verbally in a meeting with ARCA on 13 November 2023 as follows:

- We commented that simple disclosure provided up front (as proposed in the consultation) sounded sensible.
- We noted that additional disclosure as part of a statement of notifiable matters on a CP's website would be less effective and beneficial than other simple communications made more directly with a consumer.
- With respect to the draft requirement ARCA consulted on, AFCA queried what 'prominent' meant, and whether that was sufficiently clear.
- AFCA provided more general feedback that notifications and disclosures from CPs could be unduly complex, and that simpler communications would be more aligned with the purpose of the overarching obligations.

2.2 ARCA's commentary

[ARCA's Application](#) discusses Proposal 24 on p 32 – 35. The discussion explains how the reform proposals developed and changed during 2023.

ARCA's Application referred to AFCA's input in this paragraph on p 33:

'EWON's submission broadly supported the proposed new obligation, and comments from AFCA indicated that there could be some benefit, particularly if there was a new disclosure rather than changes to the existing statements of notifiable matters made available under Paragraph 4.2 of the Code. More generally AFCA provided feedback that CP disclosures can be complex and legalistic, and there was scope to improve CP disclosures so that they were simpler and more likely to achieve their overarching policy objectives.'

2.3 Current draft of proposed code variation

The current proposal is to alter section 4 in Schedule 2 to the CR Code so that it reads as shown below. Altered text is shown in **green**. Some of the proposed alterations to section 4 are required to provide for the introduction of a soft enquiries framework.

The independent review of the CR Code suggested (in Proposal 25) the AGD Review should include 'a holistic review of the notice framework in Part IIIA'. All of the work done in connection with Proposal 24 proceeded on the basis that this holistic review will occur.

4 Credit providers' information collection procedures

- (1) This section is made for the purposes of subsection 21C(1) of the Act.

Note: Subsection 21C(1) of the Act requires credit providers, at or before they collect personal information about an individual that they likely to disclose to a credit reporting body, to

- (a) notify the individual of the name and contact details of the credit reporting body, as well as any other matters specified in the registered CR code, or
- (b) otherwise ensure that the individual is aware of those matters.

Notification does not require consent

- (2) For the avoidance of doubt, a credit provider's obligation under subsection 21C(1) of the Act to notify an individual of certain matters does not require the provider to obtain the individual's consent to the disclosure of information to a credit reporting body.

Matters that credit providers must notify or otherwise make individuals aware of – soft enquiries

- (3) At or before the time a credit provider collects personal information about an individual that the provider is likely to disclose to a credit reporting body by making a soft enquiry, the provider must notify or otherwise ensure that the individual is made aware of the following matters:
 - (a) the nature and effect of the soft enquiry, including:
 - (i) the types of information the credit provider will disclose to, and request from, the credit reporting body;
 - (ii) how the information disclosed in response to the soft enquiry may be used by the provider;
 - (iii) that information relating to the soft enquiry cannot be disclosed to a credit provider, including in a credit score or credit rating calculated by a credit reporting body; and
 - (iv) in general terms, the effect of a statement (if any) about financial hardship information on the provider's ability to give the relevant indicative assessment or assessments that are the purpose of the soft enquiry;
 - (b) how the individual may obtain:
 - (i) the credit provider's policy about the management of credit-related personal information required by section 21B of the Act; and
 - (ii) the credit reporting body's policy about the management of credit-related personal information required by section 20B of the Act; and
 - (c) the individual's rights to:
 - (i) access the information from the credit provider; and
 - (ii) request the credit provider to correct the information; and
 - (iii) make a complaint to the credit provider.

Matters that credit providers must notify or otherwise make individuals aware of – other disclosures

- (4) At or before the time a credit provider collects personal information about an individual that the provider is likely to disclose to a credit reporting body for any purpose other

than making a soft enquiry, the provider must notify or otherwise ensure that the individual is made aware of the following matters:

- (a) if the likely disclosure is a hard enquiry:
 - (i) that the individual's consent to the disclosure being made is not required;
 - (ii) that a record of the hard enquiry may be used and, as relevant, disclosed for the purposes of the credit reporting body or a credit provider assessing the individual's credit worthiness, including calculation of a credit score or credit rating (subject to any other use or disclosure limitations under the Act, the Regulations or this CR Code); and
 - (iii) in general terms, how the hard enquiry may affect a credit score or credit rating calculated by a credit reporting body in relation to the individual;
- (b) the credit reporting body may include the information in reports provided to credit providers to assist them to assess the individual's credit worthiness;
- (c) that if the individual fails to meet their payment obligations in relation to consumer credit or commits a serious credit infringement, the credit provider may be entitled to disclose this to the credit reporting body;
- (d) how the individual may obtain:
 - (i) the credit provider's policy about the management of credit-related personal information required by section 21B of the Act; and
 - (ii) the credit reporting body's policy about the management of credit-related personal information required by section 20B of the Act; and
- (e) the individual's rights to:
 - (i) access the information from the credit provider; and
 - (ii) request the credit provider to correct the information; and
 - (iii) make a complaint to the credit provider.
- (f) the individual's rights to request the credit reporting body:
 - (i) not to use their credit reporting information for the purposes of pre-screening of direct marketing by a provider; and
 - (ii) not to use or disclose credit reporting information about the individual, if the individual believes on reasonable grounds that the individual has been, or is likely to be, a victim of fraud.

How credit providers may notify individuals

- (5) A credit provider may comply with its obligations under subsection 21C(1) of the Act and this section to notify or ensure an individual is aware of specified matters (the notifiable matters) by:
 - (b) publishing a clearly expressed statement of the notifiable matters on its website; and
 - (c) at or before the time of collection of the personal information from the individual, notifying the individual or otherwise making the individual aware of the following:
 - (i) that the credit provider's website includes information about credit reporting, including the credit reporting bodies to which the provider is likely to disclose the individual's credit information; and

- (ii) a brief description of the key issues contained in the statement of notifiable matters; and
- (d) providing details of the credit provider's website and ensuring that the notifiable matters are prominently displayed on the website; and
- (e) making it clear to the individual that they can request to have the statement of notifiable matters provided in an alternative form – such as a hard copy.

This version of section 4 in Schedule 2 to the CR Code is explained in paragraphs 35 to 42 of the CR Code's [Explanatory Statement](#).

3. Proposals 39-41 – Circumstances beyond individual's control

3.1 AFCA's input

Submission, July 2023

[AFCA's submission](#) confirmed our support for measures to implement Proposals 39-41.

Email, October 2023

In an email sent to ARCA on 30 October 2023, we outlined AFCA's expectations of financial firms in family violence situations.

Verbal input, November 2023

We provided input verbally in a meeting with ARCA on 13 November 2023 as follows:

- We noted that clear delineations of what's 'in' and 'out' of a correction mechanism can be difficult because issues can run together (for instance, there can be responsible lending issues plus other issues together).
- We queried when suppression of RHI might be appropriate as the outcome of a correction, and noted that this could be an option.

3.2 ARCA's commentary

[ARCA's Application](#) discusses Proposals 39-41 on p 49 – 52. The discussion explains how the reform proposals changed in late 2023.

ARCA's Application responded to feedback about suppression of RHI (which AFCA's input covered) in this paragraph on p51:

'Although we acknowledge the feedback about suppression of RHI as a correction option, this is generally a sub-optimal approach to credit reporting. The 2021 hardship reporting reforms allow for more meaningful approaches to reporting RHI, with suppression strictly limited to certain domestic abuse situations. We consider that encouraging or facilitating wider use of the suppression of RHI would be out of step with the intention of the 2021 hardship reforms. We note that

paragraph 8A.1(e) of the CR Code / subsection 8A(9) of the Proposed CR Code allows CPs some flexibility to back-date the commencement of financial hardship agreements (FHAs); this kind of option could provide CPs with an option they can consider in the context of certain circumstances beyond the individual's control.'

3.3 Current draft of proposed code variation

The current proposal is to set out in subsections 20(12) and (13) in Schedule 2 a re-written mechanism for correcting information that exists due to unavoidable consequences of circumstances beyond the individual's control. This is shown below in green.

Correcting credit information – information that exists due to circumstances beyond the individual's control

(12) If an individual makes a correction request on the basis that credit information of the kind specified in subsection (13) only exists because of unavoidable consequences of circumstances beyond the individual's control, such as natural disaster, domestic abuse, or bank error in processing a direct debit or fraud, the credit provider or credit reporting body that receives that request must:

- (a) consider whether the relevant information is inaccurate, out-of-date, incomplete, irrelevant or misleading, having regard to the purpose for which the information is held; and
- (b) if the correction request is made to a credit reporting body or a credit provider other than the provider that disclosed the information to a body, consult with the provider that disclosed the information for the purposes of the considerations in paragraph (a); and
- (c) if the body or provider is satisfied that the information is inaccurate, out-of-date, incomplete, irrelevant or misleading, having regard to the purpose for which the information is held, agree to correct the information.

(13) For the purposes of subsection (12), individuals may request correction of the following kinds of information on the basis that the information only exists due to unavoidable consequences of circumstances beyond the individual's control:

- (a) default information;
- (b) payment information;
- (c) new arrangement information of the kind described in subsection 6S(1) of the Act;
- (d) repayment history information, where the monthly payment obligations that gave rise to the repayment history information have been complied with or varied; and
- (e) financial hardship information.

The rewritten mechanisms for corrections are explained in the CR Code's [Explanatory Statement](#) in paragraphs 190 to 193.