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Australian Retail Credit Association
Attn: Mr Richard McMahon
General Manager – Government & Regulatory
PO Box Q170, Queen Victoria Building NSW 1230

Via email: [redacted]

Dear Richard,

The FBAA appreciates the opportunity to consider the proposed changes to the CR Code and to provide a submission to ARCA.

We note that many of the changes appear relatively straightforward or are administrative in nature. Our submission provides our comments on only a small number of the proposals and we support all of the other proposals not specifically referenced in our submission. The FBAA has made a separate submission to the consultation on the soft enquiries framework.

The proposals we wish to comment on are:

A. Proposal 13
B. Proposal 24
C. Proposals 39-41

Proposal 13 - Amend the CR Code to require CRBs to publish their CP audits and submit these to the OAIC

We do not support the proposal to require CRBs to publish CP audits or provide these to OAIC as a matter of course. We further note that many groups in their submissions to the 2021 Independent Review of the Privacy Code ("Review") opposed the notion of any additional disclosure.

The Review found no evidence of serious systemic breaches by CPs involving the quality or security of credit report information[1]. The Review considered there were limited risks with CRBs auditing CP's practice because the audits were being conducted by an independent person.

Against this, we have submissions from elements in the consumer advocacy sector speculating that there COULD be a conflict and the structure COULD give rise to risks with the integrity of the process without adducing any evidence to support this position. Consumer advocates suggested there was an entrenched conflict of interest between CRBs requiring audits of CPs where CPs are the CRBs paying clients. They also claimed that publishing reports would bring a level of transparency and

[1] Page 51, September 2022 Report on the 2021 Independent review of the Privacy (Credit Reporting) Code.

accountability to CP compliance with credit reporting obligations that does not currently exist. There is no evidence to indicate that either concern has any basis beyond speculation.

On the contrary, the assertions are largely negated by the findings of the Review. The best the Review could concede was that some could perceive a conflict and that without transparency, those that perceive a conflict may remain unsatisfied.

In our view this is a very poor justification for Proposal 13.

Publishing information about CP audits will not lead to any greater level of transparency that is practical or which will satisfy those that currently hold unsubstantiated concerns about the integrity of CRB directed audits of CPs or whether enough audits are being ordered.

To protect businesses that are subjected to an audit, most of the information in the reports themselves would need to be redacted. As soon as this happens, those with unsubstantiated concerns about the integrity of the current audit process will again become dissatisfied.

Another risk is that auditors will begin writing reports with the expectation they may be published and will withhold information and opinions that they may otherwise be inclined to express.

Requiring publication of audit reports will not give the sceptics the information they want and will likely diminish the quality of audit reports.

Other regulators and enforcement agencies are not required to prove they are undertaking audits and compliance checks to appease consumer advocacy groups. Such work is undertaken privately until a private investigation reaches a stage where a public announcement can be made. For example, ASIC routinely undertakes regulatory compliance surveillances on licensees. This is not made public. Information only becomes public if ASIC identifies concerns and takes further regulatory action.

We believe the risk of compromising the integrity of the audit process outweighs any argument that "knowing more would be nice to prove that less isn't happening". At the very most, CRBs could provide a list of the entities that were directed to undergo an audit however the contents of those audit reports need not be made public. If an audit identifies concerns that are material enough to warrant further action, then that information will become public at the appropriate time.

We do not believe any case is made out to justify Proposal 13.

Proposal 24 – Amend the CR Code regarding notification obligations

The FBAA strongly supports any approach that seeks to improve existing disclosure to make it more effective. Most critical is that we avoid solutions that include additional disclosure.

Licensees report that they continue to receive a high number of complaints from consumers based on their incomplete understanding of how the credit enquiry process works. Unfortunately a number of these make their way to EDR even where a licensee has acted appropriately.

We agree with the Review finding that most complaints in this area arise from individuals not fully understanding the regime. However, rather than consider how to improve an individual's understanding (for most are not sufficiently engaged with the subject matter and never will be), we need to focus on simplifying the message.

Consent

Consumer understanding of the requirements around privacy consent are very poor. We would wager that if asked, most consumers would say that a business could not make a credit enquiry without the consumer's written consent. Many consumers give written consent and are not even aware they have done it.

Most credit businesses obtain written consent from individuals. This is for a range of reasons including making inquiries with third parties such rental landlords and employers where those parties won't engage with brokers or lenders unless they receive proof of the individual's consent, as an evidentiary record in case of a later dispute and also because it is a requirement of CRBs and becomes a contractual obligation in the agreement between the CRB and the business.

Written consent forms contain too much information and make it extremely difficult for consumers to provide consent that is either specific or informed.

In response to the question posed in the paper about whether individuals are receiving consistent information from all parties about the lack of a need to consent to the disclosure of their information – the answer is that even if the information given to the individuals is consistent, their understanding of the information is not good and businesses do not necessarily conduct themselves in a manner consistent with the rules. Thus we have consumers incorrectly thinking they need to give written consent and businesses seeking written consent where they do not necessarily require it and consumers regularly complaining they did not give consent where they did.

Complaints

Most complaints arise when a consumer discovers an enquiry has been made on their credit file – usually from a credit provider they did not ultimately accept credit from. The objective of the complaint is to have the enquiry removed – even where it has been validly made. Complaints relating to credit inquiries can come a long time after an enquiry was made.

Complaints often occur where an individual has inquired to more than one credit provider or has used a broker and had their application submitted to multiple credit providers. Each credit provider makes a (valid) enquiry against the credit file. The individual however, only expects to see an enquiry on their file from the credit provider they obtained credit from.

Many complaints are encouraged by advisory parties seeking to improve an individual's credit file by removing inquiries – often with complete disregard as to whether the enquiry was valid or not. The approach taken by credit repair and advocacy bodies is to complain and have the business prove the enquiry was validly made. Even internal complaints (IDR) consume time and resources of businesses having to justify an enquiry. As a second line of attack, advocates threaten EDR knowing the time and financial cost of EDR can cause a business to withdraw an enquiry as the fastest and cheapest way to resolve the complaint.

CR Code 4.2 Statement of Notifiable Matters
It is questionable that the statement of notifiable matters has any positive impact on improving an individual's understanding of, or access to, information about credit reporting. It is often buried within an entity's larger privacy statement. The statement of notifiable matters is an example of a where a disclosure-based solution was introduced to try to address a problem caused by consumers not understanding the existing disclosure. Between the 4 major banks, the approach taken to make the statement of notifiable matters available is very different and not all make it possible to locate.

Privacy disclosure is delivered to individuals in a wide range of ways. The information is conveyed through documents titled privacy consent, privacy statement, privacy policy and statement of notifiable matters. An average privacy consent document is 4 to 5 pages in length and contains thousands of words. Some institutions present their privacy documentation in a brochure style with fewer words per page but these documents then run to more than 20 pages in length.

Solutions and Awareness Raising

Effective Disclosure
Current privacy disclosure and consent is failing consumers because we are trying to tell them too much. As the Review identified, "individuals are not appropriately informed…". We are telling consumers plenty, but we are not communicating effectively.

For disclosure to be effective, for it to achieve maximum cut-through (which is its main purpose), it needs to reduced to a few simple words. If the important meaning cannot be conveyed in one or two sentences then it will usually fail most of its intended market.

A significant rethink might consider an approach where we reduce the key messages into one or two sentences that focus on the impact to the consumer/from the consumer's perspective. A consumer wants to know *what* will happen to them. *Why* or *how* are less important, although that information can be made available to those who wish to take the time to read and understand it.

Category 1 is **what** a person must know. This needs to be concise.
e.g. "This application will mark your credit file". "This application will impact your credit score".

In the above examples we would need to avoid technical terms such as "credit enquiry" and "credit reporting bureau" and we need to avoid giving explanations.

Category 2 is **why** they need to know it. This is usually all of the information that could be relevant and is made available to those who want to read and learn.

The legislation imposes so many disclosure obligations on licensees that when the lawyers draft disclosure documents they include everything to ensure nothing is omitted. The objective of drafting is not to improve consumer understanding but to ensure a business cannot be accused of omitting something or misleading someone by inaccurately or incompletely summarising something. Disclosure becomes so focussed on being comprehensive that it loses its effectiveness.

Another factor with Privacy Act consent is that it is often obtained at or around the same time as consumers are exchanging a lot of other information with brokers and credit providers. Consumers

are not only receiving Privacy Act disclosure but also NCCP Act disclosure and product information. Consumers are focused on the purpose of their transaction (i.e. buying a car or a house or borrowing money for a holiday etc) and have little interest for "the fine print".

Proposals 39-41 – Amend CR Code mechanism for corrections due to circumstances beyond the individual's control to:
- **include domestic abuse as an example**
- **extend correction requests to include CPs**
- **expand the correctable categories of information**

The FBAA supports parts of these proposals. We caution against making the provision too open such that it can be taken advantage of. We completely support an ability to amend a credit file in situations involving domestic violence. The difficulty at a practical level is how much information a licensee can / should seek in relation to a claim of domestic violence given that it is such a delicate subject. Any guidance that can be offered on this would be useful for industry.

Proposal 40 - Requesting CPs to make changes
We do not support this proposal. We believe correction requests coming in under Paragraph 20 of the CR code should be made to the CRB.

Instead of consulting with a relevant CP, and in turn expecting the CP to initiate further action, a CRB could consult with other CRBs in relation to information specific to an individual in circumstances where the CRB is minded to take action.

Our concern with Proposal 40 is that it will create yet another obligation on licensees that can be exploited through EDR. The recent measures introduced into the AFCA scheme are not enough to protect licensees from EDR being exploited and AFCA continues to demonstrate a willingness to accept and hear disputes relating to credit inquiries and corrections to credit files.

A CRB is in the best position to take action to correct a credit file if they receive information that is strong enough to support the change.

We thank ARCA for the opportunity to provide a submission as part of this ongoing review and reform of the CR Code.

Yours faithfully

[redacted]

Peter J White AM MAICD
Managing Director

Life Member – FBAA
Life Member – Order of Australia Association

Advisory Board Member – Small Business Association of Australia (SBAA)
Chairman of the Global Board of Governors – International Mortgage Brokers Federation (IMBF)