AUSTRALIAN
RETAIL
CREDIT
ASSOCIATION

Ms Angelene Falk
Acting Information Commissioner and Privacy Commissioner
Office of the Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

BY POST AND BY EMAIL

26 April 2018

Dear Ms Falk,

APPLICATION TO VARY *PRIVACY (CREDIT REPORTING) CODE 2014* (CR CODE)

Pursuant to section 26T of the *Privacy Act 1988* (Cth) (Privacy Act), the Australian Retail Credit Association (ARCA) applies to vary the following paragraphs of the CR Code:

- Paragraph 1.2(i) – 'Month' definition
- Paragraph 6.2(b) – 'Maximum amount of credit available'
- Paragraph 6.2(c) – 'The day credit is terminated or otherwise ceases to be in force'
- Paragraph 8.2(c)(ii) - Repayment history information (RHI) disclosure
- Paragraph 9.3(d) – Individual's last known address for default notices
- Paragraphs 9.3(a), (b), (c), (d) and (f) – Timing for default notices
- Paragraph 18.1 – Scope of prohibition on direct marketing
- Paragraph 20.9 – Corrections notifications

ARCA was initially appointed as Code Developer for the CR Code by the OAIC in 2013.

In March 2018, the OAIC wrote to ARCA noting that it would consider an application from ARCA to vary the CR Code to address the following matters arising from the Pricewaterhouse Coopers' (PWC) independent review of the CR Code:

- clarifying the timing of issuance of section 21D notices and the possibility that there is inconsistency between the relevant provisions in the Privacy Act and the CR Code (PWC recommendation 4)
- clarifying the permitted methods of delivery of section 21D notices and where to deliver those notices (PWC recommendation 5)

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- determining how the 'maximum amount of credit available' is calculated and consistent categorisation of credit contracts in determining the maximum amount of credit available (PWC Issue 15)
- determining 'the day credit is terminated or otherwise ceases to be in force' to ensure accurate disclosures of consumer indebtedness (PWC Issue 16)
- improving and clarifying mechanisms for correction of information (PWC Issue 18)
- clarifying the definition of 'month' for purposes of reporting RHI in respect of whether the time is to be calculated using business and/or non-business days (PWC Issue 29)
- clarifying the impact of the application of a 'grace period' when calculating the first RHI period (PWC recommendation 7)
- clarifying the scope of prohibition for developing a 'tool' to facilitate a CP's direct marketing (PWC recommendation 8).

Following receipt of this correspondence, we consulted with a broad range of stakeholders before drafting the proposed variations to the Code. You will note that these variations predominantly address operational issues experienced by industry members that have arisen in the four years of operation of the CR Code. The PWC review provided useful recommendations and feedback on each of the relevant CR Code provisions now sought to be varied.

To support this application, ARCA provides the following:

- A varied CR Code, both in track change, and 'final' version (Annexure A).
- A detailed analysis of each variation, setting out the wording, explanations and reasons for the variation, consequences of each variation, commentary from the PWC report about the relevant CR Code provision, and feedback obtained by ARCA during the variation consultation process (Annexure B).
- A consultation statement, providing information about the consultation conducted by ARCA between 3 and 17 April 2018 (Annexure C), as well as details of the consultation material provided to stakeholders (Annexure D), feedback from specific stakeholder consultation session (Annexures E and F), and written submissions received from external stakeholders (Annexure G).

In ARCA's view this material indicates that adequate consultation of the proposed variations has occurred, with the relevant entities impacted by the variation afforded an opportunity to provide feedback.

Moreover, as the analysis of this material demonstrates, ARCA has carefully taken into consideration all stakeholder views, and sought to draft each of the variations to appropriately incorporate and manage these views.

Further, throughout the variation consultation, stakeholders have identified a range of additional feedback and issues outside the scope of this variation application. Some of these issues arose through the PWC review process, and are either still outstanding or have already been identified for inclusion in the 'second tranche' of variations to the CR Code (which we note is proposed to occur early in the 2018/2019 financial year). Other issues are entirely new. ARCA has set out the list of new issues in Annexure H – 'Additional Issues' and noted proposed further steps in respect to each item. We would welcome any feedback your office may have about the progression of each of these issues.

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If you have any questions or concerns please contact ARCA's Legal & Regulatory Affairs Manager, Elsa Markula, on [redacted]

Yours sincerely

[redacted]

Mike Laing

Executive Chair

cc. Ms Melanie Drayton, Assistant Commissioner, OAIC

Ms Sophie Higgins, Director, Regulation and Strategy Branch, OAIC

Mr Steven Robertson, Assistant Director, Regulation and Strategy Branch, OAIC

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ANNEXURE A – MARKED UP AND 'FINAL' VARIED CR CODE

[Separate document file]

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ANNEXURE B – DETAILS OF VARIATIONS

1. Paragraph 1.2(d) Month definition

Wording of variation:

(i) "**Month**" has the meaning given to that term in the *Acts Interpretation Act 1901* is a period:

(i) starting at the start of any day of one of the calendar months; and

(ii) ending on either of the following days, as determined by the CP:

1) immediately before the start of the corresponding day of the next calendar month; or
2) 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
3) if there is no such day – at the end of the next calendar month.

Explanation and reasons for variation:

This variation to the 'month' definition will enable the day which is the end of the 'month' to shift to a later day to accommodate non-business days (for instance, where a month would end on a Saturday, enabling the reporting period to end on the following Monday)[1]. This will predominantly impact repayment history information (RHI) reporting. This is largely seen as a technical change to align with current industry practices.

The current 'month' definition takes its meaning from the *Acts Interpretation Act 1901* (Cth). The 'month' in the AIA means either a calendar month, or a period between two corresponding days (for instance, where a month begins on 15 April, it ends on 14 May).

It is also noted that section 36(2) of the AIA provides that 'if an Act requires or allows a thing to be done' on a non-business day, then it is permissible for thing to be done on the next business day. However, this provision does not apply to the 'month' definition in the CR Code because:

- The CR Code is a legislative instrument, not an Act.
- It is arguable the 'month' definition does not require or allow a thing to be done – as the reporting of RHI is allowed by sections 6V and 21D of the Privacy Act. The CR Code provisions for RHI reporting (paragraphs 8.1 and 8.2) simply explain how that reporting will occur.

As such, the varied definition simply extracts the existing AIA 'month' definition wording, but adds a further limb (2), enabling the 'month' period which would have ended on a non-business day, to end on the next business day.

Consequences of variation:

The variation will ensure that existing credit provider (CP) systems (some of which already shift reporting days to allow for non-business days) to continue and be utilised for RHI reporting. Were the month definition to remain in its current form, these CP systems may be non-compliant with the CR Code. The cost to enable CP systems to enable credit reporting body

[1] It is noted the 'month' definition is used elsewhere within the CR Code, including default information (paragraphs 9.2 and 9.3(f)), serious credit infringements (paragraph 12.1), access (paragraphs 19.2 and 19.3), corrections (paragraph 20.9), complaints (paragraphs 21.5 and 21.6), audits (23.3). However, the issues discussed in the context of the variation predominantly concern the disclosure of RHI, which as a ongoing monthly disclosure, is where the issue of non-business days becomes exacerbated.

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(CRB) reporting on non-business days could be significant, given CPs generally do not operate on non-business days.

This problem is compounded where a CP has aligned its CRB reporting with its account payment cycle. In that case, if a consumer sought to make payment on a non-business day, there may be restricted payment methods available – given banks generally do not open on a non-business day.

To be clear, the variation will not require continual changes to subsequent reporting dates. For instance, if a credit account is set to report to the CRB on the 15th day of each month, the definition would operate so that the month would run from the 15th day of the first month, to the 14th day of the corresponding month, except where that 14th day fell on a weekend, or public holiday. Where that occurred, the month would end on 15th (if the 14th were a Sunday), or 16th (if the 14th were a Monday). This would mean that month was an extra one or two days long.

However, for the month following, if the 15th day was again a business day, then the month would end on this day.

PWC report:

PWC's evaluation[2] noted that any change to the 'month' definition was unlikely to require significant implementation costs for CPs, and would bring the CR Code in line with existing internal processes.

PWC further suggested consideration be given to the application of the mechanism in section 36(2) of the *Acts Interpretation Act* (AIA) to deal with non-business days. Alternatively, PWC suggested consideration be given to changing the month definition to deal with non-business days. PWC suggested consultation with CPs to assess the practical impact of the inconsistency between the current definition and CP practice, as well as the applicability and appropriateness of the mechanism under s36(2) of the AIA. As already noted above, ARCA has adopted the approach that such mechanism is not applicable to the CR Code.

ARCA Consultation feedback:

The early version of the consultation draft proposed also shifting the month end day to a *prior* day. This aspect of the variation raised concern with consumer advocates, because potentially allowing less time for a consumer to pay (where a CP has aligned its CRB reporting with payment dates and has not otherwise providing access to a means for payment to occur on the non-business day) could result in consumer detriment.

Industry members had initially indicated that the shifting of reporting days to allow for non-business days may mean shifting a day forward, as well as back. However, through the consultation process, industry members overwhelmingly indicated the approach was to shift a day back, rather than forward. There was no information provided to support the practice of shifting a reporting day to an earlier day, and its impact on consumers.

While it may be that credit products will continue to exist which include terms and conditions enabling the shifting of days in this manner, for the purpose of RHI reporting, this practice is not supported.

[2] PWC Review of Privacy (Credit Reporting) Code 2014 (V1.2), dated 8 December 2017 ('PWC Report'), page 18

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There has been a further refinement to the wording of (2) in the consultation draft, adding the words “day before…” and “the end of…” to clarify the relevant month end date. This is a minor change to clarify the operation of the month in that particular circumstance.

Otherwise, the consultation raised no additional issues about the proposed variation.

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2. Paragraph 6.2(b) – Maximum amount of credit available

Wording of variation:

(b) "the maximum amount of **credit** available" is:

(i) where no credit limit applies to revolving **credit**, a charge card contract or the sale of goods or supply of services where **credit** is provided – no fixed limit;

(ii) in the case of revolving **credit** with a credit limit - the credit limit that applies at the time the **consumer credit liability information** is disclosed to a CRB;

(iii) in the case of **credit** where the principal amount is not repayable until a fixed date and, until that time, payments of interest only are required to be made - the principal amount of the **credit**;

(iv) in the case of **credit** where payments of the principal amount must be made throughout the term of the **credit** - the amortised maximum principal amount of the **credit**, calculated on the basis that the individual makes the minimum only principal repayments throughout the term of the **credit**;

(v) for **consumer credit liability information** disclosed up to and including 30 June 2019:

(i) in the case of **credit** provided for the purposes of the acquisition of particular goods or services, the applicable credit limit;

(ii) in the case of **credit** provided by a supplier of goods or services where the contract specifies the amount of the **credit** or the credit limit – that amount;

Explanation and reasons for variation:

Industry members had indicated that overlap existed between the six categories of 'maximum amount of credit available', and that it appeared two of the categories were redundant (being 6.2(b)(v) credit provided for the purposes of the acquisition of particular goods or services; and 6.2(b)(vi) credit provided by a supplier of goods and services where the contract specifies).

This may create inconsistency in reporting credit limit across CPs, who could pick and choose the method of disclosing credit limit. For instance, a motor vehicle loan could be disclosed with a fixed limit (under 6.2(b)(v) or (vi)), or with an updated amortising limit (under 6.2(b)(iv)).

The variation will remove 6.2(b)(v) and (vi), requiring a CP to disclose credit limit under one of the earlier four categories.

The variation makes allowance for a 12-month transition timeframe, during which time a CP can continue to disclose under all six categories. This allows sufficient time for those CPs who may currently be utilising the 6.2(b)(v) and (vi) for their credit limit disclosure, to update their reporting systems to one of the earlier four credit limit categories.

Consequences of variation:

The variation will mean that CPs currently disclosing credit limit for goods or services purchases as a fixed amount (under 6.2(b)(v) or (vi)) will instead likely disclose the credit limit based on:

- revolving credit for goods or services with no fixed limit, no fixed limit (6.2(b)(i));
- revolving credit for goods or services with a fixed limit, the limit applying at time of disclosure (6.2(b)(ii)); or

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- the amortised payment schedule, with regular updates of limit based on the amortised schedule (6.2(b)(iv))[3].

This will lead to greater consistency in how 'credit limit' information is disclosed on a credit report. This promotes the accuracy and reliability, as two products, which operate in the same manner but are held with different CPs, will still reflect the same type of credit limit.

There will be a cost for some CPs who currently utilise 6.2(b)(v) and (vi), as their system capability will need to be upgraded. In some instances, if the disclosure is changed to align with the amortised payment schedule for a credit contract, it will mean the CP will need to make more regular disclosures to a CRB. However, given the 12-month transition timeframe, any system upgrade can be combined with any other systems changes, which would occur semi-frequently.

PWC report:

PWC's evaluation[4] was that amendment of the CR Code may be appropriate to avoid possible overlap between the categories in paragraph 6.2(b). However, PWC recommended further consultation to assess the extent of the overlap and any unintended consequences arising from amendment including:

- Re-assessing credit limits for contracts already determined under sub-paragraphs 6.2(b)(v) and (vi).
- Determining whether there may be specialist CPs who will be unable to disclose credit limit under the categories in 6.2(b)(i) – (iv).

Consultation feedback:

Feedback has been sought from goods and services credit providers (Flexi Group, Thorn Rentals, Rent 4 Keeps, and the Consumer Household Equipment Rental Providers Association Inc), but no responses received.

ARCA also sought feedback from industry associations Australian Finance Industry Association, and Australian Institute of Credit Management. Neither association received member feedback raising issue with the variation to 6.2(b).

ARCA has also reviewed the sample terms and conditions documents available online for Flexi Group, and Thorn Rentals, to ascertain what these documents may indicate about how credit limit may be disclosed. It appears that credit limit for these types of products could be disclosed as 'no fixed limit' (6.2(b)(i))[5].

Communications Alliance initially indicated the removal of the two categories may cause an issue for telecommunications providers who provide handset purchase contracts. However, further feedback from its members indicated this will not be an issue, as these contracts do not stipulate a maximum amount of credit (and therefore disclosure of 'credit limit' would be 'no fixed limit' under 6.2(b)(i)).

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[3] It is assumed that the "interest only" payment type credit limit category (paragraph 6.2(b)(iii)) will generally not apply to goods or services finance products, given this credit limit is generally more applicable in the context of home lending.
[4] PWC report, page 27
[5] Flexi Group terms and conditions: http://flexrent.s3.amazonaws.com/flexi/files/inline/FlexiRent_CreditGuide_OCT16.pdf (last accessed 25 April 2018); Thorn Rentals terms and conditions: https://www.radio-rentals.com.au/media/wysiwyg/pdf/Radio-Rentals_T&CsBooklets.pdf (last accessed 25 April 2018)

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Consumer advocates supported this variation, noting that it was largely a technical change but would improve data accuracy, consistency and clarity. It was further noted that this would ensure potential CPs would be able to obtain an accurate picture of the total credit available to an individual, and this information would be vital to conducting a responsible lending assessment.

ARCA Members largely either support, or simply have no issue, with the variation. It is noted that potentially impacted CPs from the ARCA Membership, such as Toyota Finance Australia who provide motor vehicle finance, already disclose 'credit limit' in accordance with an amortised payment schedule (6.2(b)(iv)).

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3. Paragraph 6.2(c) – the day credit is terminated or otherwise ceases to be in force

Wording of variation:

(c) for **consumer credit liability information** disclosed up to and including 30 June 2019, "the day credit is terminated or otherwise ceases to be force" is:

(i) the day that the **credit** contract, arrangement or understanding is terminated; or

(ii) if earlier, the day that the **credit** is no longer available to the individual under the terms of the contract, arrangement or understanding and the CP has irrevocably determined that the **credit** cannot be reinstated on those terms; or

(d) for **consumer credit liability information** disclosed from 1 July 2018, "the day credit is terminated or otherwise ceases to be force" is:

(i) the day that the debt owed under the **credit** is repaid and there is no ability to defer payment of further debt under the **credit**;

(ii) the earlier of:

1) the day that either the CP determines or the individual and the CP agree that all outstanding payment obligations arising under the **credit** has been written off or otherwise discharged ('write off'); or

2) the day that the CP charges off the full balance of the **credit** ('charge off').

(e) For the purposes of 6.2(d)(ii):

(i) write off means that the CP has agreed to permanently forgo recovery or enforcement action in respect to any outstanding debt owed by the individual under the **credit**.

(ii) charge off means the accounting practice where the CP recognises outstanding balance as a loss due to the likelihood that the amount will not be recoverable, although the CP maintains the legal ability to enforce the outstanding debt against the individual.

(iii) where either a write off event or charge off event occurs, the individual is no longer able to incur further debt (other than that arising from interest, fees or other charges in respect to the debt) under the existing **credit**.

Explanation and reasons for variation:

This variation has been drafted to address a practice where it appears CPs are disclosing an account as 'closed' under the existing "where credit is no longer available" limb (paragraph 6.2(c)(ii), also known as the 'second limb of account closed'), and this disclosure occurs where there may be limited arrears for the account (possibly at this stage of RHI of '3', or even less), and default information may not be disclosed for months.

This can potentially cause a 'gap' in the account information, as it will not be readily apparent to other CPs accessing the credit report whether the account has been closed and arrears discharged, or whether the arrears still remain and are subject to recovery action. This makes the credit report less reliable as a source of information on an individual's current liabilities.

In addition, the variation addresses feedback from industry which indicates a level of uncertainty about how account closure is described in the CR Code. For instance, terms like 'termination', and 'credit no longer being available' do not easily correspond to industry practice.

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Instead, ARCA has identified three distinct scenarios which CPs agree correspond to account closure, being:

- Repayment of the account, and further credit no longer being available (so any redraw facilities which may exist with the account are also closed)
- Write off of the account, where 'write off' equates to a settlement of the outstanding balance for the account, and no further debt owed to the CP
- Charge off of the account, where the debt owed is identified as a 'loss' by the CP, and it is transferred from the core banking system to the CP's recoveries system[6]. The CP will seek to recover the charged off account, and there is a likelihood that there may also be a 'write off' applied to that account.

This redraft of the CR Code definition aligns the CR Code with industry practice.

Both the concepts of 'write off' and 'charge off' are consistent with credit 'otherwise ceasing to be in force'. These terms are well understood within industry.

In a 'write off' situation, the CP will forgive the debt owing by the individual, and no credit will then exist.

In a 'charge off' situation, because of the outstanding debt owed by the individual, the CP does not operate the credit through its ordinary core banking systems, but instead limits the operation of the account to the mere recovery of the outstanding debt. Treating the account as 'closed' in this situation is consistent with contract law principle whereby rights to recover outstanding monies owed under a contract will survive termination of that contract.

Subparagraph 6.2(e)(iii) of the varied wording makes it clear that it does not prevent additional interest, fees or other amounts (in respect to the outstanding debt) accruing in respect to the outstanding debt. Moreover, a CP and customer may make a new arrangement as to the terms for repayment of this debt (which will often occur as part of the debt recovery process). However, for all other purposes, the credit will be considered closed and no further funds will be advanced to the individual in respect to the existing credit.

The original consultation draft of the 'account closed' definition had proposed simply removing the second limb of the definition, and reverting to the Privacy Act definition (which would limit the circumstances where an account could be disclosed as 'closed' to where the account was terminated). Two key reasons why this drafting was not retained in the final variation were:

1. As noted above, 'termination' is legal contractual term, and not a term readily used by CPs or which corresponds to existing practices. Part of the purpose of the CR Code is to clarify and guide how Part IIIA obligations may be complied with. It would be inconsistent with this purpose to simply require CPs to adhere to Privacy Act obligations for account closure, particularly where those obligations require clarification and guidance.

2. Keeping an account open until its termination would mean for many CPs continuing the disclosure of RHI for payment obligations arising for that account, even where the account had been transferred to the recoveries system. However, RHI reporting obligations have been designed for a CP's core banking system, but not for its

[6] Some CPs may also refer to a 'recoveries' system as their 'collections' system – although it is noted that this issue won't impact a 'collections' system which still remains part of the CP's core banking system. It only impacts the 'collections' system which operates like a recoveries system. Recoveries systems tend to be independent of the core account systems (and not connected to the core banking system where the account has come from).

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recoveries system. Imposing this credit reporting obligation on recoveries systems would require significant change to credit reporting practices by CPs.

Moreover, given many of the accounts which have been transferred to recoveries systems may be for accelerated debts[7], the value of the ongoing RHI for those accounts may be limited. That is, once a debt is accelerated, full payment of the account balance is required for the customer to have discharged their obligations under the account. For RHI purposes[8], RHI may appear as a repeated '7'.

The variation has also been drafted to allow for a 12-month transition period, which will enable CPs to update their account closure processes.

Consequences of variation:

The variation will provide clarification on the three clear circumstances of account closure.

It will partly address the 'gap' between the account close date and the disclosure of default information as set out above. There is still a prospect that a CP will opt to 'charge off' their account at a point where an individual has only incurred more minor arrears. However, there is less likelihood of this occurring under the 'charge off' definition, rather than the existing 'credit no longer available' definition because the 'charge off' definition requires the CP to only make this disclosure where a CP has identified the outstanding debt as a loss. This sets a much higher threshold for the CP. Further, the alternative would be removal of the second limb entirely, which as discussed above, will lead to significant unintended consequences.

By addressing the potential 'gap', the variation will better support the use of credit reporting to aid responsible lending practices in credit assessments.

There will be a cost for CPs to upgrade their credit reporting processes to align with the new account close definition. However, this cost will be mitigated by the 12-month transition timeframe, allowing the integration of this change with other ongoing changes to credit reporting processes (for instance, changes to the credit reporting data standards).

PWC report:

PWC acknowledged[9] that removing the second limb of paragraph 6.2(c) of the CR Code might be appropriate to address the practical issue of reflecting the account as closed even though payment obligations are still outstanding, providing better clarity on a consumer's payment obligations and a CP's ability to meet responsible lending obligations.

PWC suggested that the manner in which the CR Code is amended to address any inaccurate representation of a consumer's ongoing payment obligations caused by the definition of 'otherwise ceases to be in force', will require further investigation to ensure any unintended consequences are addressed. PWC also recommended investigating alternatives to removing the second limb, such as including a new mechanism for accounting for inactive but not yet terminated accounts.

Consultation feedback:

[7] Noting 'accelerated debts' refers to those debts accelerated in accordance with the requirements of the National Credit Code

[8] Assuming RHI can be disclosed for an accelerated debt, as there is a separate legal issue to be resolved as to whether or not the obligation to pay the full balance of the debt is consistent with the meaning of RHI, being whether or not a monthly payment obligation has been met.

[9] PWC report page 28

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Feedback on this variation has largely come from ARCA Members, who have identified this as one of the more significant variations impacting CP practice. ARCA Members have agreed with the intent of the variation, as described above, and have provided input on means to address the consequences of the variation (particularly the redrafting to identify account close events, rather than proceeding with the variation and requiring RHI disclosure for recoveries systems).

Consumer advocates have strongly supported clarifying the CR Code to address the practice of listing accounts as closed where there is a possibility of a consumer rectifying the accounts and getting back on track. In addition, consumer advocates have submitted that RHI should not continue to record when the account has been accelerated, and is in collections, particularly if the result would be a '7' indefinitely.

ARCA considers the variation addresses both these issues. By ensuring an account can only be closed at 'charge off', this restricts account closure (on this basis) to those accounts which are recoveries accounts, with no prospect of getting back on track. This means that where an individual's account has been 'charged off', the CP will not re-open this account (should the consumer get back on track). Instead the CP will enter into new credit with the individual. This addresses the concern of an individual who has 'got back on track' for a charged-off account not having this positive payment behaviour reflected on their credit report.

The variation also addresses the ongoing disclosure of RHI for collections accounts by providing this will not occur where the account has been charged off and is therefore closed.

Consumer advocates also objected to the initial consultation draft which would have resulted in the 'account closed' definition simply reverting back to the Privacy Act term. This objection is well-founded, for the reasons stated above, and has been addressed in the further variation draft (which has, instead of reverting to the Privacy Act term, redefined account closure).

There has also been specific feedback (raised by Australian Collections and Debt Buyers Association, as well as Equifax) provided about the 'account close' definition and its impact on debt buyer participation in comprehensive credit reporting. Debt buyers who hold an Australian Credit Licence (ACL) are able to access and disclose RHI (as well as CCLI, although it is not necessary to hold an ACL to access and disclose this data set).

The concern is that, where a debt buyer takes assignment of a closed account, the debt buyer may be unable to continue CCR reporting for that account. A debt buyer will, however, be able to engage in CCR reporting for any open accounts which are assigned to it, and further for any new credit which is granted by the debt buyer to the individual.

It appears the view may be that, by removing the second limb of the account closed definition, it increases the ability for debt buyers to engage in CCR reporting by promoting a practice of CPs assigning open accounts.

As already set out above, the broader industry feedback has raised some significant unintended consequences which will occur if the second limb of the account closed definition is removed. For this reason, this approach has not been adopted. In ARCA's view, the issues which remain to be resolved in determining the extent of debt buyer participation in CCR ought to be determined separately, and outside the CR Code variation process. While the variation to the CR Code may be construed as making it more difficult for a practice of assignment of open accounts to occur, it does not prevent this practice being adopted (if it were determined such a practice is necessary and desirable to support debt buyer participation in CCR).

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4. Paragraph 8.2(c)(ii) – RHI disclosure

Wording of variation:

(ii) where there is an amount overdue in relation to the **consumer credit**, the age of the oldest outstanding payment:

1) ~~Up to 29 days overdue (after the grace period has been applied)~~ 15 – 29 days overdue (this disclosure may only be made at day 15, as this allows for expiry of the 14-day grace period.)

Explanation and reasons for variation:

The variation to paragraph 8.2(c)(ii) addresses issues that have arisen in the application and interpretation of the grace period. The grace period is intended to 'mask' the disclosure of an overdue payment for a 14-day period, providing individuals extra time and leniency to make an overdue payment without this then being reflected on their credit report. The grace period cannot impact whether or not the payment is overdue – this is a matter for the CP to determine based upon the consumer credit terms and conditions, and any variation to those terms and conditions.

However, the initial wording used in the CR Code to describe how RHI is disclosed in the first month an account is overdue had caused some confusion in practice. Recent external dispute resolution (EDR) decisions had indicated it was possible to interpret the 'up to 29 days overdue (after the grace period has been applied)', in conjunction with paragraph 8.1 (which provides, "the grace period allowed by the CP for an overdue payment must be at least 14 days, beginning on the date that the CP's systems first classified the payment as being in arrears") to require that the grace period only commence after expiry of 14 days. This would mean the first time an RHI of '1' could be disclosed would be at day 29.

This interpretation does not reflect the underlying intent of the provision. However, it did highlight the need to vary the description of what RHI '1' means, to clarify its operation. This is achieved by the variation wording which provides that RHI '1' is a disclosure that the overdue amount is 15 to 29 days overdue, and further that this disclosure may only be allowed at day 15, as this allows for expiry of a 14-day grace period.

In drafting this variation, consideration was also had to adding additional wording to clarify how the grace period may apply where an individual has been in arrears and is making a series of 'catch up' payments to reduce those arrears. It had been proposed in the consultation draft also including the wording "the grace period must only be applied in the first month the payment is overdue" in brackets following the description of RHI '1'.

This proposal drew feedback both from industry and consumer advocates, with competing views about how the grace period operates, and whether it applies to subsequent overdue payments (where the account remained overdue). One view put forward was that a grace period can only be applied to the first overdue payment, and if an individual remains in arrears in respect to subsequent monthly payments, no grace period can apply to those payments. Based on this view, including the extra wording in brackets was necessary, to make it clear that the individual, when making 'catch up payments' for old arrears will not get the benefit of a further grace period (when those arrears reverted to being only one month overdue).

However, ARCA has concluded that this view is not consistent with how RHI is intended to operate. Rather than reflecting whether or not an individual has made each monthly payment,

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RHI is intended to reflect whether the individual is up-to-date in making their payments and, if not, what is the age of the oldest outstanding payment.

The following example illustrates how this RHI reporting will operate in practice:

- Jane is required to make an account payment on the 1st day of each month. The CP reports information for the account on the 2nd day of each month. Jane misses payments due on 1 March, 1 April and 1 May. On 7 May, Jane makes a catch-up payment equivalent to four monthly payments.
  Jane's RHI for March, April, May and June will appear as follows:

March	April	May	June
0*	2**	3***	0****

*March is a '0' because on 2 March the payment is 1 day overdue, which is within the 14-day grace period.
**April is a '2' because the oldest outstanding payment (the March payment) is 33 days overdue at the reporting date (2 April).
***May is a '3', because the oldest outstanding payment (the March payment) is now 63 days overdue at the reporting date (2 May).
****Following payment on 7 May, Jane was current and up-to-date (and a month ahead in payments). As such, on the 2 June reporting date, the RHI is a '0'.

Consequences of variation:

Given this change to the CR Code is intended to add clarity to the existing provision, and not otherwise change the operation of the CR Code, this change will have no cost. Moreover, the benefit will simply be to ensure the CR Code reflects existing practice. Given it was never intended that a grace period be 28 days, there is no detriment to limiting any possible application of this interpretation of the grace period.

PWC report:

PWC recommended (Recommendation 7) that: "Paragraph 8.2(c)(ii) of the Code should be amended to specify that the first RHI code ('1') applies where the age of the oldest outstanding payment is '15 – 29 days overdue' in order to ensure consistency in the application of the 14 day grace period". (page 20).

PWC's evaluation noted that the proposed change will only lead to implementation costs for those CPs who do not account for the grace period in the favoured manner. It noted the benefits of the change were the clarification in interpretation of the grace period timeframe, reduced risk of technical non-compliance with the CR Code, and greater clarity and consistency in RHI reporting for consumers.

Consultation feedback:

The consultation feedback did not raise any issues with the final variation wording, except for the suggestion (which was adopted) to add the additional wording in brackets, to ensure there was no doubt that RHI '1' could be disclosed at day 15 because the 14-day grace period had expired.

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The focus of the consultation feedback instead concerned how the grace period could be applied to subsequent overdue payments. As noted in the discussion above, both industry and consumer advocates raised concerns about the ability to apply a grace period to subsequent overdue payments. Some industry members wanted to ensure that the grace period only applied to the first overdue payment (with subsequent overdue monthly payments not afforded a grace period), other industry members disagreed with this approach.

Consumer advocates recommended that all overdue payments ought to be afforded a 14-day grace period, beginning on the day that the CP's systems first classified the payment as being in arrears.

For the reasons already outlined above, this feedback responds to a mis-understanding of the operation of the grace period and has been addressed in the final variation draft by removing the extra wording in brackets ('the grace period must only be applied in the first month an account is overdue') from the variation draft on the basis that these words are superfluous. To be clear, the correct view is that the grace period will always be applied against the age of the oldest outstanding payment. Wherever the payment arrears are less than 15 days, the grace period will apply and the RHI for the account will appear as current and up-to-date.

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5. Paragraph 9.3(d) – individual's last known address

Wording of variation:

(d) the CP must give ~~issue~~ the **Section 6Q notice** and **Section 21D(3)(d) notice** by sending them to the individual's last known address at the time of despatch. Subject to meeting the requirements of the *Electronic Transactions Act 1999*, the **Section 6Q notice** and **Section 21D(3)(d) notice** may be sent by electronic communication. Where the CP combines the **Section 6Q notice** or a **Section 21D(3)(d) notice** with a section 88 *National Credit Code* notice (the 'combined notice'), it must send the combined notice to a last known address which meets the notice requirements for section 88 *National Credit Code* notices.

Explanation and reasons for variation:

The variation is intended to enable a CP to treat an email address as an individual's last known address when giving that individual a default notice.

An existing fact sheet issued by the Office of the Australian Information Commissioner (OAIC), Privacy Fact Sheet 35, already provides that a CP may treat an email address as an individual's last known address.

However, information from stakeholders indicates a desire for this guidance to be reflected in CR Code drafting, In particular, the Energy and Water Ombudsman NSW (EWON) has indicated that it receives a significant number of default listing disputes which arise where the energy or water retailer has failed to give a default notice to an individual at an email address, and instead given the notice to the individual at a physical address recently vacated by that individual.

As discussed further below, the variation to the CR Code may not necessarily impact the conduct cited by EWON, given that conduct is already a clear breach of the existing law.

Nonetheless, all stakeholders were agreed that it was appropriate for the CR Code to explicitly recognise electronic communication, given the prevalence of this form of communication for CPs communicating with their customers.

The difficulty, however, is that CPs regulated by the *National Credit Code*[10] are currently required to give certain enforcement notices under that Code (section 88 notices) by providing the notice to the individual by posting them to their last known address[11]. Regulated CPs may choose to combine the section 88 notice with a section 6Q or section 21D Privacy Act notice (noting that section 88 requires the CP include a provision in the notice advising the individual that they may have default information disclosed on their credit report – as such, it seems quite logical to combine these notices).

However, in these circumstances, there is a risk that the delivery of these notices (even as a combined notice) may be subject to separate requirements – under the NCC, a postal requirement, whereas under the Privacy Act, a requirement to provide to the 'last known address' which (with the proposed variation) may be a physical address or may be an electronic address (or other form of communication).

[10] *National Consumer Credit Protection Act 2009*, Schedule 1
[11] *ET Regulations*, Schedule 1, item 86

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Requiring the CP to meet different, and partly conflicting requirements, when giving a single combined s88/s6Q or s21D notice is undesirable.

For this reason, the variation has been drafted to 'carve out' combined s88/s6Q or s21D notices from the use of electronic communication (at least until such time as the National Credit Code is amended to allow for use of electronic communication).

However, the variation enables the use of electronic communication for all other Privacy Act notices, provided the communication adheres to the requirements of the *Electronic Transactions Act 1999* (Cth) (ETA) (reference to which also includes the *Electronic Transactions Regulations 2000* (ET Regulations)).

The ETA has broad application to electronic communications (which notably is not defined to restrict the mode of communication to 'email' but is a technology-neutral term[12]). Importantly it also requires:

- when an electronic communication is provided, the information is 'readily accessible so as to be useable for subsequent reference'; and
- the person has consented to being given the information by way of electronic communication. (ETA, section 9).

The ET Regulations applies specifically to notices under the National Credit Code (other than the section 88 notices), and similarly mirror the accessibility and consent requirements in the ETA[13].

Consequences of variation:

Given the existing OAIC fact sheet, the variation is likely to 'formalise' existing practice rather than change that practice. Importantly, the wording of the variation provides clarification and certainty for CPs combining s88/s6Q or s21D notices.

PWC report:

PWC recommended (Recommendation 5) that, "Paragraph 9.3(d) of the Code should be amended to permit, but not prescribe, delivery of a section 21D notice to an individual's 'last known address at the time of despatch' by electronic means. Consideration should be given to any formal consent requirements that may need to be adhered to as part of this process".

PWC noted[14] this recommended change would formalise existing OAIC guidance, and be consistent with section 11 of the Electronic Transactions Act 1999. PWC further recommended reference to a technologically neutral term, such as 'electronic communication' to provide additional flexibility for CPs to utilise any future means by which they might usually communicate with customers. PWC further noted the cost of change would be managed by CPs – although noting that the suggested change does not impose a mandatory obligation on CPs to use electronic communication.

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[12] ETA section 5 defines 'electronic communication' as meaning: (a) a communication of information in the form of data, text or images by means of guided and/or unguided electromagnetic energy; or (b) a communication of information in the form of speech by means of guided and/or unguided electromagnetic energy, where the speech is processed at its destination by an automated voice recognition system.
[13] Electronic Transactions Regulations, reg 10
[14] PWC Report, page 13

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PWC did note in its summary of consultation views that concerns had been raised about interaction with section 88 of the National Credit Code, and whether electronic delivery of statutory notices is available to CPs, and in what circumstances, should be clarified.

Consultation feedback:

This variation attracted significant feedback from external stakeholders. While all stakeholders supported the intent of the variation, there was a high degree of interest in the content of the varied wording. ARCA provided interested stakeholders with two versions of the consultation drafting, in an effort to better understand and streamline the stakeholder requirements.

The Australian Securities and Investments Commission (ASIC) provided feedback highlighting the interaction of the Privacy Act, Electronic Transactions Act, the National Consumer Credit Protection Act (including the National Credit Code), and the complexity this caused. ASIC suggested the draft simply provide an ability for a CP to issue a notice 'subject to the ETA', and changing the requirements of 9.3(d) from 'must', to 'may', or alternatively including a note below the provision referring to the ETA.

This feedback was partly adopted, with the reference included to the ETA in the variation draft. ASIC did not consider it necessary for reference to be made to the National Credit Code (NCC), as the NCC only applies indirectly to a notice issued under section 6Q or section 21D. It is agreed the NCC requirements cannot be directly applied to a Privacy Act notice, and it wouldn't be appropriate to simply provide (as the original consultation draft did), that because it is not possible to send a notice via email under s88 of the NCC, it is not possible to send a Privacy Act notice via email.

However, as noted under 'reasons for the variation' above, the issue for CPs who do combine s88 NCC/Privacy Act notices will be the difficulty in complying with separate notice delivery requirements. For this reason, the updated variation wording has explicitly made provision for these 'combined notices', and clearly stated that meeting the NCC delivery requirements (in these circumstances) will be sufficient to meet the Privacy Act delivery requirements.

Communications Alliance provided suggested wording for the variation which would have made the provision 'subject to the provisions of the NCCP'. Again, ASIC's feedback here is pertinent, as the NCC does not apply directly to a Privacy Act notice, which would mean that making an electronic communication under the Privacy Act subject to the NCC would be ineffectual. For this reason, this feedback was not adopted.

EWON provided feedback suggesting the variation reflect more closely the OAIC Privacy Fact Sheet 35, imposing a positive obligation on CPs to send electronic communication by notices. As noted under 'reasons for variation' above, EWON highlighted the practice of energy retailers and water providers of sending physical notices to an address which the customer has left before incurring the bill (and where the customer has had power or water services disconnected from those premises, and the bill is for the final provision of services). EWON considers that having a positive obligation to send notices via email in the CR Code would prevent this practice from occurring.

ARCA's view is that this practice is already a clear breach of the existing CR Code provisions – even without variation. Where a customer has advised their energy or water retailer that they are having services disconnected, because they are leaving the premises to which these services are supplied that premises is not the individual's last known address. The onus is firmly on the retailer to obtain a forwarding address for the customer. Moreover, if an email address is available for that individual (which EWON suggests is often the case), and the retailer is aware the individual no longer resides at the physical address, then the individual's last known

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address is their email address. The term 'address' in the current CR Code does not necessarily mean a physical address, and this is confirmed by OAIC Privacy Fact Sheet 35.

It is appreciated, however, that clear reference to electronic communication within the CR Code may more effectively sign post the requirements for these energy or water retailers (and, with this reinforcement, result in fewer disputes being lodged with EWON).

Regarding EWON's suggestion that a CP 'should' treat an individual's email address as their last known address (where that individual has nominated an electronic address), there are a few issues with this approach. As already outlined above, there are the issues faced by regulated CPs sending combined s88 NCC/s6Q or s21D notices.

Further, as consumer advocates have highlighted in their submission, it cannot always be assumed that electronic communication is the best option for consumers.

Merely nominating an electronic address (perhaps when setting up an account with a CP, or even to receive account statements), may not mean that the individual has consented to the use of that electronic address to receive default notices from their CP. The drafting of the variation has reflected the need to meet consent requirements, by ensuring any electronic communication is subject to either of the ETA or the ET Regulations (as noted above, both include consent requirements).

Consumer advocates have also highlighted the need to ensure that notices are available for a reasonable period and provided in a format which can be saved and printed. Again, the ETA and ET Regulations address this by requiring the information to be 'readily accessible so as to be useable for subsequent reference' (ETA, s9) or (for NCCP Act notices), 'in a format that allows it to be saved to an electronic file and to be printed' (ET Regulation 10).

Consumer advocates have also suggested that the variation include a statement on best practice for delivery of section 6Q and section 21D notices where a communication bounces back (which would be a requirement imposed on the CP to contact the customer to update his or her contact details). Consumer advocates consider the CR Code is the right vehicle for this type of best practice guidance.

In responding to this feedback, it is noted that OAIC Fact Sheet 35 already provides the following guidance:

> "If a CP has evidence that suggests that your last known address details are no longer current, the CP should take reasonable steps to ascertain new contact details before issuing a notice".

It is understood this guidance is consistent with how EDR schemes may approach a dispute where a CP relies on a notice issued to a physical or electronic address and that notice has 'bounced back'.

ARCA has not included the suggested best practice guidance in the variation to 9.3(d). While this guidance is both useful and instructive, the role of the CR Code differs from other industry codes, as a breach of an obligation in the CR Code, is a treated as a breach of the Privacy Act. This restricts the ability for the CR Code to include matters of best practice guidance. In the case of 'bounce backs', constructing an obligation around how to address and deal with these occurrences is problematic, as the circumstances (both of the 'bounce back', and also the 'reasonable steps' available to a CP) will differ on a case-by-case basis.

Moreover, the existing CR Code obligation (to issue the notice to the individual's last known address) also reflects that the individual will likely have an obligation under the terms and conditions of their credit contract to advise their CP of any change of address. As such, any assessment of a 'bounce back' and 'reasonable steps taken by CP' will also need to consider

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the steps taken by the individual to update their address details (particularly if the individual may have contacted the CP for other reasons, but failed to provide a new address).

ARCA Members supported the intent of the variation, although concern was raised about ensuring that the drafting would not result in a regulated CP being required to issue a combined s88/s6Q and s21D notice by both email and post.

The initial consultation draft of the variation raised some concerns with specific wording, including:

- The nomination of 'an electronic address for that consumer credit'. The feedback was that CPs will often hold contact information for a customer as part of a customer profile, rather than as part of the credit account information. To address this feedback, this wording was removed from the final variation draft.
- The need to ensure the individual has consented to electronic communication. As already outlined, this feedback was addressed in the final variation draft by ensuring the electronic communication is subject to the ETA.

One Member also raised whether paragraph 9.3(d) could be varied to provide clarity for a CP sending a notice to an Authorised Representative for an individual. This proposal is outside the scope of the current variation process, but will be considered further and discussed with the OAIC.

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6. Paragraph 9.3 – timing for default notices

Wording of variation:

9.3 The following requirements must be met if a CP discloses **default information** about an individual to a CRB:

(a) the CP must ~~issue~~ give the **Section 6Q notice** and the **Section 21D(3)(d) notice** separately;

(b) the CP must ~~issue~~ give the Section 6Q notice before the Section 21D(3)(d) notice;

(c) the CP must not ~~issue~~ give the **Section 21D(3)(d) notice** less than 30 days after the ~~issue~~ giving of the **Section 6Q notice**;

(d) the CP must ~~issue~~ give the **Section 6Q notice** and **Section 21D(3)(d) notice** by sending them to the individual's last known address at the time of despatch. Subject to meeting the requirements of the *Electronic Transactions Act 1999*, the **Section 6Q notice** and **Section 21D(3)(d) notice** may be sent by electronic communication. Where the CP combines the **Section 6Q notice** or a **Section 21D(3)(d) notice** with a section 88 *National Credit Code* notice (the 'combined notice'), it must send the combined notice to a last known address which meets the notice requirements for section 88 *National Credit Code* notices.

(e) the amount that is disclosed by the CP to the CRB as the amount that is overdue:

(i) must not be more than the amount specified in the **Section 21D(3)(d) notice**,

1) plus an additional amount to reflect interest, fees and other amounts that are owing as a result of the overdue payment, other than the acceleration of the entire liability for the **consumer credit**, which have accrued by the time of the disclosure,

2) less any part payments received in cleared funds prior to the date of disclosure by the CP to the CRB; and

(ii) all components of that amount, other than the interest, fees and other amounts mentioned in sub-paragraph 1), must have been overdue for at least 60 days.

(f) the **default information** must ~~not~~ only be disclosed by the CP to the CRB:

(i) ~~earlier than~~ at least 14 days after the date on which the **Section 21D(3)(d) notice** is ~~issued~~ given by the CP to the individual; and ~~or~~

(ii) no later than 3 **months** after that date; and

(g) the CP must meet the other requirements relating to **default information** that are set out in Part IIIA, the Regulations and this CR code.

Explanation and reasons for variation:

This variation will address current mis-alignment between the CR Code and sections 6Q and 21D of the Privacy Act default notice timing requirements. There are two inconsistencies identified between the CR Code and Act:

- The Privacy Act provides that section 6Q and section 21D notices are 'given', whereas the CR Code provides that these notices are 'issued'. The *Acts Interpretation Act*[15] provides that where a document is 'given' by post, it is deemed to be served where the letter would be delivered in the ordinary course of post. By contrast, "issue" by its

[15] Acts Interpretation Act, sections 28A, 29

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ordinary meaning requires the "sending out" of the notice (without allowance for delivery to the individual).

- There is a minor difference between the date when the Section 21D notice can be given to the individual. Section 21D(d) of the Privacy Act requires that a written notice (known as a section 21D notice) be provided to an individual, and disclosure of default information only occur "at least 14 days have passed since the giving of the notice" (emphasis added).
  In comparison, paragraph 9.3(f) of the CR Code provides that default information must not be disclosed by the CP to the CRB "earlier than 14 days after the date on which the Section 21D(3) notice is issued by the CP to the individual" (emphasis added).
  The difference in wording between "at least 14 days" and "earlier than 14 days" appears minor. However, it has resulted in an inconsistency in requirements between the CR Code (which allows for disclosure at 14 days), and the Privacy Act (which arguably only allows for disclosure at 15 days).

The CR Code cannot be inconsistent with the Privacy Act and, where there is an inconsistency, the Privacy Act requirements will apply. For this reason, retaining language in the CR Code which leads to inconsistency with the Privacy Act is undesirable. It places a CP at risk of non-compliance with the Privacy Act requirements, simply by relying on the CR Code provisions.

This variation has included replacing the term 'issue' with 'give' in subparagraphs (a) to (d) of paragraph 9.3, as well as the changes subparagraph 9.3(f) (which was the paragraph initially identified for change by PWC). These additional changes are appropriate to resolve the underlying issue identified by PWC, which is the inconsistency between the Privacy Act and CR Code provisions.

Consequences of variation:

For CPs who have built their default notice processes in reliance solely on the CR Code provisions, there will be a requirement to update those processes to allow for postal service (where these notices are being sent by postal methods). This will add at least three to five business days to each notice timeframe, depending on the 'ordinary course of post' applicable to the notice.

However, as ARCA understands it, most CPs already include allowance for additional time when delivering default notices. As a result, this change to practice is likely to be minor.

Ensuring consistency between the Privacy Act and the CR Code will reduce the likelihood of EDR scheme disputes being decided against the CP, where the CP has relied on the CR Code rather than the Act. This inconsistency has already led to an adverse Financial Ombudsman Service (FOS) determination for one CP[16].

PWC report:

PWC recommended (Recommendation 4) that, "Paragraph 9.3(f)(i) of the Code should be amended to conform to the language of section 21D(3) of the Act, in order to avoid ambiguity in the timing for disclosure of default information by a CP to a CRB following the issue of a section 21D notice".

[16] FOS determination for Case Number 440247, dated 18 November 2016, available here: https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/440247.pdf

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PWC's report[17] focussed on the inconsistency between the wording of the Act ('at least 14 days') and CR Code ('earlier than 14 days after the date'). PWC noted there is an intrinsic benefit in avoiding conflict between the CR Code and Act. It noted there may be a cost of updating systems for CPs who do not include a 'buffer' period in their processes. It suggested that transitional arrangements may be required to be implemented to address any disproportionately onerous impact on certain CPs.

Consultation feedback:

The consultation feedback consistently supported this variation, given the desirability of removing the inconsistency between the Privacy Act and CR Code.

While the consultation variation draft only proposed a change to paragraph 9.3(f) (consistent with PWC's recommendation), views expressed during the consultation, particularly from industry, were clear that *any* inconsistency ought to be addressed through the variation. As such, while ARCA did not specifically consult on the changes to 9.3(a) to (d), these changes appear entirely consistent with the expectations of industry, and consumer advocates.

Finally, it is noted that consumer advocates stated in their submission that this is a technical industry issue, with limited consumer impact. This view is mirrored by the ARCA Member feedback, reflecting that currently the default listing processes of most CPs already comply with the Privacy Act (rather than the CR Code).

[17] PWC Report, page 12

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7. Paragraph 18.1 – scope of prohibition on direct marketing

Wording of variation:

18.1 Notwithstanding Section 20E(2), a CRB must not:

(a) use **credit reporting information** for the purpose of developing any tool or service for provision to a CP or **affected information recipient** for the purposes of assisting them:

(i) to assess the likelihood that an individual may accept:

1) an invitation to apply for, or an offer of, **credit** or insurance in relation to **mortgage credit** or **commercial credit**; or

2) an invitation to apply for a variation of, or an offer to vary, the amount of or terms on which **credit** or insurance in relation to **mortgage credit** or **commercial credit** is provided; or

(ii) to target or invite an individual to apply, or accept an offer, for:

1) **credit** or insurance in relation to **mortgage credit** or **commercial credit**; or

2) variation of the amount of, or terms on which, **credit** or insurance in relation to **mortgage credit** or **commercial credit** is provided; or

3) provide any such tool or service that uses **credit reporting information** to a CP or **affected information recipient**.

Explanation and reasons for variation:

The variation extends the prohibition on direct marketing activity by a CRB extends to the use of credit reporting information in both tools, and relevantly, services provided by a CRB to a CP (where the tools or services involve direct marketing activity).

Concern had been raised that the term 'tools' in the existing provision may have been ambiguous, particularly whether the meaning of 'tools' is sufficiently clear and whether or not it would include the provision of services as well as tools.

Consequences of variation:

The consequences of the variation will be to restrict the future conduct of CRBs, rather than change existing practice. As such, the consequences of this variation will be limited.

Any restrictions on CRB conduct which do occur in the future will be appropriate, and in line with the underlying intent of this provision.

PWC report:

PWC recommended (Recommendation 9) that, "Paragraph 18.1 of the Code should be amended to include a reference to 'services' in addition to 'tool' in order to remove any uncertainty as to whether the prohibition on CRBs to develop tools for provision to CPs to enable direct marketing activities extends to 'services' provided by CRBs.

PWC noted[18] that the key benefit of clarifying paragraph 18.1 was to confirm the intended application of the provision and address the technical gap which may currently exist. It further

[18] PWC Report, page 46

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noted this will reduce confusion for consumers and industry participants and come at a minimal costs, given it is acknowledged most CRBs are not currently providing such 'services'.

Consultation feedback:

There has been very limited feedback on this variation. It has been supported by consumer advocates noting it is a straightforward technical change, which may serve to avoid a potential loophole being exploited.

ARCA Members broadly support the variation. While it is noted that some Members raised concern with the operation of 18.1 more broadly through the CR Code review process[19], these concerns were not repeated through the CR Code variation process.

The ACDBA proposed that the variation go further, adding the words 'or other methodology'. This feedback was not adopted on the basis that 'or other methodology' may be unnecessary. 'Tools or services' should be interpreted broadly, and will cover any programs or software, and similar type of technology that could be used to facilitate a CP's direct marketing.

The Law Council of Australia raised some concern (both as part of the CR Code review, and also in the variation consultation process) with the legal basis for the provision, being whether the CR Code can include such a prohibition. ARCA's view is that there is clear legal basis for paragraph 18.1:

- Paragraph 18.1 expands the obligations imposed on CPs under s21H (permitted CP uses in relation to individuals), clarifying that a permitted use for 'internal management purposes' (under s21H(a) Item 1 and 4) cannot extend to facilitating the use of credit reporting information for direct marketing.
- Including this provision in the CR Code is consistent with s26N(3), because the imposition of additional requirements in the CR Code is appropriate and not otherwise inconsistent with Part IIIA.

[19] CBA submitted to the PWC review that the CR Code ought to be amended so that a CRB was only entitled to conduct pre-screening for individuals nominated by the CP, and whom the CP certifies that it would be entitled under APP7 to undertake direct marketing to itself. Equifax submitted to the PWC review that paragraph 18.1 is unnecessary, because the provisions in sections 20G, 20H and 20J of the Privacy Act are sufficiently clear and prescriptive. Further, Equifax submitted that adding the words 'or services' would only increase uncertainty as to the ambit of paragraph 18.1, and may result in inconsistency between the Act and CR Code.

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8. Paragraph 20.9 – corrections notification

Wording of variation:

(b) if notice is given (in accordance with paragraph 20.9(a)) to a CP or **affected information recipient** that previously received **CRB derived information** or **CP derived information** that is no longer correct by reason of the correction, the notice includes revised **CRB derived information** or **CP derived information** (as applicable) that has been derived using the corrected information and such identification information or credit ID information necessary to identify the individual and their consumer credit to the CP; and

Explanation and reasons for variation:

This variation addresses a practical issue raised by ARCA CPs about correction notifications being received from CRBs which contained the corrected information only, and no additional information which enabled that CP to match the corrected information to its customer or that customer's account.

Possible additional variations to paragraph 20 of the CR Code identified in the PWC report were not included as part of this first tranche of CR Code variations. This is because these additional variations will require extensive consultation, as the propose significant change to the corrections process. ARCA considers that it is more appropriate that this extensive consultation occur to coincide with the second tranche of CR Code variations, scheduled to occur in or around September 2018.

Consequences of variation:

The variation will enable a CP to match a correction notification with the relevant customer, and that customer's account. This will mean that correction can be actioned in the CP's system.

The practical effects of this may be limited, given it is unclear from either the CR Code or the Privacy Act provisions (sections 20U(2)(c) and 21W(2)(c)) precisely what obligations, if any, attach to the recipients of this corrected information. Nonetheless, enabling a corrections notification to be properly actioned is consistent with the underlying intent of the corrections process.

PWC report:

PWC identified[20] five areas concerning corrections obligations which may require further consideration to better understand and evaluate the specific costs and benefits of pursuing a change. These areas were:

- Review of correction timeframe – whether the 30 day response time needs review. It was noted this may be appropriate where a CRB does not need to consult with third parties, and would result in timelier resolution of requests for consumers. It was noted a lesser timeframe may be impractical given frequency with which CRBs need to consult with third parties.
- Separating obligations of CPs and CRBs – whether the obligations of CPs and CRBs under paragraph 20.3 of the CR Code be separated, to ensure that necessary communications do, in fact, occur. It is noted this would represent a fundamental

[20] PWC Report, page 36

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change to operation of the Code, and would require further consultation to confirm its practicality.

- Including identification information in paragraph 20.9 notices – whether 20.9 of the Code should be amended to require the correction notice to incorporate sufficient identification information about the debtor so that notified parties can record the correction. It was noted this should facilitate swifter resolution of correction requests, however further understanding of consumer views would be required prior to implementing the change.
- Imposing responsibility for correction on the original CP – whether the original CP, rather than any subsequent acquiring CP following transfer of a debt, should continue to hold responsibility for correction of information even after the transfer event. It was noted this would resolve difficulties experienced by acquiring CPs not having the information required to address the correction request, however would cause CPs to continue incurring costs to correct. It recommended further consultation to better assess the costs and benefits of this suggestion.
- Requiring better internal dispute resolution (IDR) procedures for CRBs – it was noted this suggestion would result in greater resolution of complaints and reduce consumer complaints made to EDR schemes and the OAIC, however would impose additional costs on CRBs in the development and implementation of new IDR procedures. It was further noted there was a risk CRBs might not implement consistent procedures. This would require a policy change and could not be operationalised via the Code.

Consultation feedback:

There has been limited feedback on this variation, and notably, no objection has been raised to the change being made to paragraph 20.9. It appears well-recognised that this is a technical change to industry practice, that seems quite obvious in its intent and straightforward in its execution.

The feedback that has been raised by consumer advocates points to a broader concern about the corrections provisions in paragraph 20, and the failure to consider the four additional areas raised by PWC as part of any CR Code variation.

As set out above, it is acknowledged these issues warrant further consideration and consultation with impacted stakeholders (although it is noted that PWC did raise some practical issues with these additional areas, and these will need to be thoroughly explored and understood through the consultation process). ARCA will undertake this consultation and provide any further variations to the Information Commissioner for consideration and registration as part of the second tranche of variations, in or about September 2018.

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ANNEXURE C – CONSULTATION STATEMENT

The consultation for the proposed variations occurred between 3 and 17 April 2018. ARCA placed a prominent link on its public website (www.arca.asn.au) to the CR Code Variation.

This link included consultation copies of the CR Code, both in track change, and without mark up, and a brief statement to accompany the consultation version of the CR Code. This material is annexed to this Variation Application as *Annexure D – Consultation Material*.

External Stakeholder Engagement

Industry Association Stakeholders			
Stakeholder	**Date**	**Nature of Engagement**	**Outcome/Feedback provided**
Australian Bankers' Association (ABA)*	3 April 2018	Email to ABA providing consultation information and request to attend industry association consultation on 10 April 2018	No significant feedback provided
	10 April 2018	Email from ABA confirming apology for consultation session, and that happy for its Members to confer directly with ARCA	
Australian Collectors and Debt Buyers' Association (ACBDA)*	3 April 2018	Email to ACDBA providing consultation information and request to attend industry association consultation on 10 April 2018	Specific feedback provided by ACDBA regarding variations to paragraphs 1.2(i), 6.2(b), 6.2(c), 8.2(c)(ii), 9.3(d), 9.3(f), 18.1.
	10 April 2018	Attendance at industry association consultation (see *Annexure E - Industry Association Consultation Outcomes* note)	
	13 April 2018	Email to ACDBA providing further drafting for variation to 9.3(d) for comment	
Australian Finance Industry Association (AFIA)*	3 April 2018	Email to ABA providing consultation information and request to attend industry	No significant feedback provided

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		association consultation on 10 April 2018	
	10 April 2018	Telephone discussion with AFIA confirming its members were happy with the changes proposed, and had not identified any real concerns.	
Australian Institute of Credit Management (AICM)	29 March 2018	ARCA published a short note in AICM newsletter seeking specific feedback on variation to paragraph 6.2(b) of the CR Code, and other CR Code variations	Specific feedback provided by AICM regarding variations to paragraphs 1.2(i), 6.2(b), 6.2(c), 9.3(d).
	3 April 2018	Email to ABA providing consultation information and request to attend industry association consultation on 10 April 2018	
	10 April 2018	Attendance at industry association consultation (see *Annexure E - Industry Association Consultation Outcomes* note)	
	13 April 2018	Email to AICM providing further drafting for variation to 9.3(d) for comment	
Communications Alliance	3 April 2018	Email to Communications Alliance providing consultation information and request to attend industry association consultation on 10 April 2018	Specific feedback provided by Communications Alliance regarding variations to paragraphs 6.2(b) and 9.3(d)
	10 April 2018	Attendance at industry association consultation (see *Annexure E - Industry Association Consultation Outcomes* note)	

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	13 April 2018	Email to Communications Alliance providing further drafting for variation to 9.3(d) for comment	
	16 April 2018	Written submission provided (see *Annexure G – CR Code Variation Written Submissions*)	
Data Governance Australia (DGA)*	3 April 2018	Email to DGA providing consultation information and request to attend industry association consultation on 10 April 2018	No response received, no feedback provided
Insurance Council Australia (ICA)*	3 April 2018	Email to ICA providing consultation information and request to attend industry association consultation on 10 April 2018	No significant feedback provided
	5 April 2018	Email to ARCA confirming variations have been discussed with ICA members and no issues identified	
	16 April 2018	Email to ARCA confirming variations have been discussed with members that provide Lenders' Mortgage Insurance (LMI) and have been advised no issues. Re-emphasise members' appreciation for access to credit reporting information which LMI providers have under CR Code.	
Mortgage Finance Association Australia (MFAA)*	3 April 2018	Email to MFAA providing consultation information and request to attend industry association consultation on 10 April 2018	No response received, no feedback provided
National Credit Providers Association (NCPA)*	3 April 2018	Email to NCPA providing consultation information and	No response received, no feedback provided

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		request to attend industry association consultation on 10 April 2018	
External Dispute Resolution Schemes			
Stakeholder	**Date**	**Nature of Engagement**	**Outcome/Feedback provided**
Credit and Investments Ombudsman	3 April 2018	Email to CIO providing consultation information and request to attend EDR consultation on 10 April 2018	No response received, no feedback provided
Energy and Water Ombudsman NSW*	3 April 2018	Email to EWON providing consultation information and request to attend EDR consultation on 10 April 2018	Specific feedback provided by EWON regarding variation to paragraph 9.3(d), and the $150 threshold for disclosing default information.
	10 April 2018	Attendance at EDR consultation	
	13 April 2018	Email to EWON providing further drafting for variation to 9.3(d) for comment	
	17 April 2018	Written submission provided (see *Annexure G – CR Code Variation Written Submissions*)	
Energy and Water Ombudsman Victoria*	3 April 2018	Email to EWOV providing consultation information and request to attend EDR consultation on 10 April 2018	No response received, no feedback provided
Financial Ombudsman Service*	3 April 2018	Email to FOS providing consultation information and request to attend EDR consultation on 10 April 2018	No significant feedback provided [Written comments to be provided direct to OAIC following ARCA's submission of variation application]
	3 April 2018	FOS confirmed Lead Ombudsman on leave in April and FOS will be unable to provide written comments until early May 2018	
	10 April 2018	FOS delegate attendance at EDR consultation	

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	13 April 2018	Email to FOS providing further drafting for variation to 9.3(d) for comment	
	16 April 2018	FOS request to remove comments from EDR consultation document[21]. FOS to provide written comments only in early May 2018	
Telecommunications Industry Ombudsman	3 April 2018	Email to TIO providing consultation information and request to attend EDR consultation on 10 April 2018	No significant feedback provided
	6 April 2018	Telephone discussion with TIO confirming will not attend consultation session, or otherwise provide comment. Request to be kept abreast of future variations.	
Government or Regulators			
Stakeholder	**Date**	**Nature of Engagement**	**Outcome/Feedback provided**
Attorney-General's Department	3 April 2018	Email to AGD providing consultation information and request for feedback	No response received, no feedback provided
Australian Securities and Investments Commission (ASIC)	3 April 2018	Email to ASIC providing consultation information and request for feedback	Specific feedback provided by ASIC regarding variation to paragraph 9.3(d)
	12 April 2018	Written response provided (in confidence)	
	13 April 2018	Email to ASIC providing further drafting for variation to 9.3(d) for comment	
	17 April 2018	Further written response provided (in confidence)	
Consumer advocates			
Stakeholder	**Date**	**Nature of Engagement**	**Outcome/Feedback provided**

[21] Due to the FOS request, the EDR Consultation Outcomes document has not been included with the application materials. However, the views of the other attendee at the EDR Consultation (EWON) are reflected in their written submission.

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Consumer Action Law Centre (CALC)*	3 April 2018	Email to CALC providing consultation information and request to attend consumer advocate consultation on 11 April 2018	
	10 and 11 April 2018	CALC confirmed will not be attending consumer advocate consultation, but endorse joint consumer advocate submission	
Financial Rights Legal Centre (FRLC)*	3 April 2018	Email to FRLC providing consultation information and request to attend consumer advocate consultation on 11 April 2018	Specific feedback provided by consumer advocates regarding variations to paragraphs 1.2(i), 6.2(b), 6.2(c), 8.2(c)(ii), 9.3(d), 9.3(f), 18.1 and 20.9. In addition feedback provided regarding: - 2017 Independent Review concerns - Unresolved issues: RHI and hardship; access to credit scores in free reports; reporting writs and summons as credit information; direct marketing to consumers asking for their free report; audit trail.
	4 April 2018	Telephone discussion confirming details of consumer advocate consultation	
	11 April 2018	Attendance at consumer advocate consultation (see *Annexure F – Consumer Advocate Consultation Outcomes* note)	
	16 April 2018	Written submission provided (see *Annexure G – CR Code Variation Written Submissions*)	
	17 April 2018	Email to FRLC providing further drafting for variations to 6.2(c) and 9.3(d) for comment	
	18 April 2018	Email to FRLC providing Consumer Advocate Consultation Outcomes note for comment	
	23 April 2018	Email from FRLC requesting small change to Consumer Advocate Consultation note, and advising any further feedback regarding	

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		variations to 6.2(c) and 9.3(d) will be provided direct to OAIC.	
Legal Aid Queensland*	3 April 2018	Email to Legal Aid Queensland providing consultation information and request to attend consumer advocate consultation on 11 April 2018	No response received, no feedback provided
Rent to buy Credit Providers			
Stakeholder	**Date**	**Nature of Engagement**	**Outcome/Feedback provided**
Consumer Household Equipment Rental Providers Association Inc (CHERPA)	5 April 2018	Email to CHERPA seeking specific feedback on variation to paragraph 6.2(b)	No response received, no feedback provided
Rent 4 Keeps Australia	5 April 2018	Email to Rent 4 Keeps seeking specific feedback on variation to paragraph 6.2(b)	No response received, no feedback provided
Thorn Australia (Radio Rentals)	5 April 2018	Email to Thorn seeking specific feedback on variation to paragraph 6.2(b)	No response received, no feedback provided
Flexigroup Limited	5 April 2018	Email to Flexigroup seeking specific feedback on variation to paragraph 6.2(b)	No response received, no feedback provided
Other stakeholders			
Stakeholder	**Date**	**Nature of Engagement**	**Outcome/Feedback provided**
CreditWise*	3 April 2018	Email to CreditWise providing consultation information and request for feedback	No response received, no feedback provided
Law Council of Australia*	3 April 2018	Email to Law Council of Australia providing consultation information and request for feedback	Specific feedback provided by the Law Council of Australia regarding paragraph 18.1.
	9 April 2018	Attendance at meeting of the Privacy Law Committee of the Business Law Section, briefing provided on CR Code variations	

MyCRA Lawyers*	3 April 2018	Email to MyCRA Lawyers providing consultation information and request for feedback	No response received, no feedback provided

*** Stakeholders who participated in the CR Code Review (either by providing a written submission, or attendance at a consultation session, or both)**

ARCA Member Engagement

- ARCA has provided its Members (full list of current Members is available at https://www.arca.asn.au/members/our-members.html) information about the CR Code variation through its monthly Member update newsletter (the CReditorial).
- ARCA has also formed a 'CR Code Review Member Workgroup' to provide feedback on both the CR Code Review, and the now the CR Code variations. This workgroup includes attendees from the following Member organisations: American Express, ANZ, BCU, Bendigo and Adelaide Bank, Commonwealth Bank of Australia, Compuscan, Credit Union Australia, Equifax, Experian Australia, Good Shepherd Microfinance, HSBC Bank Australia Limited, illion, ING Direct, Latitude Financial Services, Macquarie Group, ME Bank, MoneyMe, National Australia Bank Limited, Suncorp, Teachers Mutual Bank, Toyota Finance Australia Limited, Westpac Banking Corporation.
- ARCA held Workgroup meetings on 27 March 2018 and 12 April 2018 to seek Member feedback on the CR Code variations. In addition, ARCA received one-on-one feedback from a number of Members, particularly concerning the variations to paragraphs 1.2(i), 6.2(c), 8.2(c)(ii) and 9.3(d).

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Annexure D – Consultation Material [Separate document file]

Annexure E – Industry Association Consultation Outcomes [Separate document file]

Annexure F – Consumer advocate Consultation Outcomes [Separate document file]

Annexure G – CR Code Variation Written Submissions [Separate document file]

Annexure H – Additional Issues [Separate document file]

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