

13 October 2021

Melanie Drayton
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Office of Australian Information Commissioner
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Dear Ms Drayton

Re: Additional Consultation on proposed CR Code changes

Thank you for the opportunity to make some additional comments regarding the application to vary the CR Code by ARCA.

Overall we have been satisfied with the consultation conducted by ARCA with the consumer advocacy sector. ARCA hosted numerous roundtables with consumer stakeholders while they were drafting the proposed changes and also followed up with us regarding the most recent redrafting of Section 8A.2. We also note that ARCA completely redrafted its treatment of 'catch-up' or 'payment test' periods after consumer groups raised significant concerns with the original drafted provisions, although this took considerable engagement from consumer advocates.

Changes made by ARCA after the public consultation in July 2021

ARCA have redrafted several sections of the proposed changes to the CR Code since its public consultation in July. Most of these revisions have simplified the original drafting put forward by ARCA, which promotes improved understanding and accessibility.

Before it was submitted to the OAIC, we had the opportunity to review a proposed redraft of Section 8A.2. It is now much shorter, simpler and more accessible for a consumer audience. We are still opposed to the reference to 'mismanagement of funds', which mis-describes what is often a reasonable cause of financial hardship, but the section as a whole is much easier to understand and seems to support a broader definition of temporary FHA. We also support the simplified Note which falls after 8A.1(e) regarding joint accounts.

The redrafting of Sections 8A.3-8A.5 have also simplified the provisions, which is good. Some small changes have been made in accordance with our recommendations. For example, while we still consider that the CR Code should require explanations about FHA to be tailored to each customer, we note that ARCA now states that the information must relate to the specific type of arrangement, which is better than the original drafting. It is also positive that this CR Code provision now requires that explanations are given to consumers contemporaneously when FHA are made.

Consumer groups are also pleased to see the new Note after 8A.7 sets out the circumstances in which CRB prohibited from disclosing FHI.

Remaining consumer concerns

Complexity of the CR Code

Consumer groups hold significant concerns regarding the overall complexity of the CR Code; both the new provisions and the existing provisions. While we note that ARCA has taken steps to simplify 8A.2 we still consider most of the new draft provisions of the CR Code are impenetrable to the average reader. It will be difficult for consumers (or their advocates) to use the CR Code to hold lenders accountable for their reporting or use of FHI. Consumer groups recognise that one of the roles of the CR Code is to further particularise the relevant provisions of the *Privacy Act* (and various amending legislation) and so requires a level of detail that might not be accessible to average consumers. Nevertheless, the CR Code is a consumer facing code and, at a minimum, it needs to be accessible to advocates like financial counsellors, consumer lawyers and case managers at AFCA. Consumer groups strongly submit that the current CR Code including the new draft provisions do not meet this minimum standard.

Our Submission to ARCA recommends that the OAIC break up the CR Code between principles-based consumer-facing provisions and the technical industry-facing provisions. We stand by that recommendation. Consumers need accessible principles-based provisions to enable them to make complaints to External Dispute Resolution schemes.

Treatment of joint accounts

Subparagraph 8A.1(d) provides that an FHA may be formed at the request of one party to a jointly held loan. This is consistent with existing industry practice and has been strongly supported by consumer groups. We urge the OAIC to support this provision as drafted. If the OAIC continues to suggest that a legislative amendment may be required in order for the CR Code to give effect to that subparagraph then law reform will become an urgent priority for consumer groups.

Consumer groups also strongly support giving credit providers the flexibility to **not** notify co-borrowers about an FHA in all circumstances. In some cases, it may be appropriate for the CPs to not obtain the co-borrower's consent, **and** not to alert the co-borrower to the arrangement – at least in the short term. CPs will make this decision based on the customer's circumstances and whether there is a risk to the customer. To require CPs to disclose all variations to a co-borrower, would reduce the banks' ability to protect customers and would place some customers at risk.

Finally, consumer groups have raised concerns in our Joint Submission to ARCA that account-based reporting is inappropriate, and that individual based reporting is the optimal way to ensure both privacy and safety objectives for at risk borrowers can be met. Account-based reporting necessarily includes weighing up the privacy rights of one joint account holder against the safety and privacy rights of the other. We submit that safety should trump privacy in these circumstances. Action should be taken to move away from account-based reporting as soon as practically possible.

Conclusion

There are many other recommendations made in our Joint Submission to ARCA which have not been addressed in this letter. I have attached our original Submission for your convenience. Please do not hesitate to contact Julia Davis, the Senior Policy & Communications Officer at Financial Rights (M: 0478 504 634; julia.davis@financialrights.org.au) if you have any more questions about this letter or our original submission to ARCA.

Yours faithfully,



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