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Digital Transformation Agency  
PO Box 457  
Canberra City  
ACT 2601

By upload at: <https://www.digitalidentity.gov.au/have-your-say/phase-2-digital-identity-legislation>

### **Digital Identity Legislation Position Paper**

Thank you for the opportunity to provide a submission on the Digital Identity Legislation Position Paper, the content of which will help guide the development of the legislation likely to be named the Trusted Digital Identity Bill (**the Proposed Legislation**).

ARCA is the peak industry association for businesses using consumer information for risk and credit management. Our Members include banks, mutual ADIs, finance companies and fintech credit providers, as well as credit reporting bodies and, through our Associate Members, many other types of related businesses providing services to the industry. Collectively, ARCA's Members account for well over 95% of all consumer lending in Australia.

#### **ARCA's submission**

ARCA welcomes the proposal to expand the availability of the Digital Identity System (**the System**) to the private sector (including companies such as banks and utility providers) and state, territory and local governments. ARCA's submission relates to the following aspects of the Proposed Legislation which are canvassed within the Position Paper;

1. The creation of new privacy laws and regulation within the Proposed Legislation;
2. The scope of the Oversight Authority;
3. The potential interoperability of the System with other systems or services;
4. Security of personal information.

## 1. The potential for the creation of new privacy laws & regulation

ARCA notes the statement in the Position Paper that;

*“The Legislation is not intended to duplicate or conflict with established principles in existing legislation, for example, the Privacy Act.”*

And that;

*“It will aim to leverage existing laws, definitions and concepts, where possible, instead of creating a unique set of arrangements that may duplicate and complicate existing obligations of TDIF Providers and Participants.”* [our emphasis]

ARCA acknowledges and supports the stated intention for the Proposed Legislation to not duplicate or conflict with existing legal obligations.

In respect of any instances where it may not be ‘possible’ to leverage existing laws, we consider that the creation of new ‘privacy safeguards’ within the Proposed Legislation itself has to be considered against the potential risk of adding to the legal and regulatory complexity and costs already encountered by businesses in the course of providing online services.

For example, a credit provider considering taking part in the System would need to ensure compliance with the ‘privacy safeguards’ contained within the Proposed Legislation whilst simultaneously ensuring compliance with other various laws and regulations such as the Australian Privacy Principles (**APPs**), the Consumer Data Rules, the Privacy Act (including both APPs and Part IIIA relating to credit reporting), AML/CTF obligations, etc.

We therefore consider that the Proposed Legislation should not inadvertently add to the complexity or compliance burden under the current privacy legal and regulatory framework in Australia, as a result of creating new legal privacy related obligations.

The potential consequences of creating new privacy laws or regulation within the Proposed Legislation, also needs to be considered in circumstances where the existing privacy laws and regulation are unclear or ambiguous. In these instances, by creating new privacy laws within the Proposed Legislation there is risk that the application and enforceability of the ‘new’ laws could potentially extend beyond that anticipated by the legislator or potentially create further legal uncertainty.

By way of example, ARCA notes that in relation to the disclosure of ‘financial hardship information’ for joint accounts<sup>1</sup>, there is currently legal uncertainty surrounding the precise legal requirements placed upon credit providers and credit reporting bureaus when dealing with the joint account holders. In this context, the creation of new obligations and/or requirements in relation to the verification of joint account holders within a separate legal instrument such as the Proposed Legislation, could potentially have an impact upon the legal and regulatory framework beyond that of the System.

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<sup>1</sup> Which is a form of ‘credit information’ that is to be introduced under Part IIIA of the Privacy Act on 1 July 2022.

As such, ARCA considers that it is appropriate for the Proposed Legislation to avoid duplicating current legal privacy rights and obligations and that any ‘privacy safeguards’ should confirm (where applicable) the application of existing privacy laws and regulation, such as those contained in the Privacy Act.

## **2. The scope of the Oversight Authority**

ARCA notes that one of the stated aims of the Proposed Legislation is to;

*“...support the Oversight Authority to effectively monitor and enforce compliance with the Legislation.”*

We consider that any monitoring and/or enforcement activity by the Oversight Authority should be limited to breaches, or potential breaches, of obligations or requirements contained within the Proposed Legislation and which are specific to the operation of the System. The Proposed Legislation should contain an explicit exclusion from the jurisdiction of the Oversight Authority, any breaches or suspected breaches, of privacy related laws or regulations which are referred to, or contained within, external legislation or regulation.

In the absence of such an exclusion, there is risk that monitoring and/or enforcement activity undertaken by the Oversight Authority could:

- relate to areas of law or regulation which extend beyond those applicable to the participant(s) activities within the Digital Identity System; and,
- extend to the monitoring and/or enforcement of laws or regulations more appropriately dealt with by a Court or alternative statutory or regulatory body.

The form, content and outcome of any enforcement activity by the Oversight Authority should therefore be considered against any potential unintended consequences which it may have on a participant’s compliance (or perceived compliance) with privacy legal and/ or regulatory requirements.

## **3. The potential interoperability of the System with other systems or services**

ARCA considers that the Proposed Legislation should contain sufficient flexibility so that the System and an individual’s Digital Identity can interface with, and potentially look to be utilised in conjunction with, other identity systems and services.

In addition, consideration should be given to incorporating within the Proposed Legislation mechanisms (and appropriate safeguards and protections) which would allow for a broader use of the information supplied by an individual in connection with their Digital Identity, than that contemplated within the Position Paper. Such mechanisms should be sufficiently ‘forward facing’ so as to enable the sharing and use of information supplied in connection with an individual’s Digital Identity, with systems or for purposes not yet developed or contemplated.

As an example, we consider that the Proposed Legislation should enable the interplay between an individuals' Digital Identity created within the System and the system utilised by participants within Open Banking when seeking to verify the individual's identity and not contain any restrictions which could potentially limit the ability to utilise both systems simultaneously.

We also note that in instances where a potential participant within the System is a financial services provider, the ability to utilise or rely upon a single identity system when providing various online services may be a relevant consideration in respect of participating in the System.

#### **4. Security of personal information**

Given the potential for individuals participating in the System to disclose, and for participants to access, personal and/or highly sensitive information, we consider it is of vital importance that the Proposed Legislation contain robust and clear security requirements in relation to the collection, storage and handling of personal and/or sensitive information.

Whilst we note and support the proposal to include 'privacy safeguards' as well an enforceable set of rules for TDIF Providers and participants in the System, it is unclear from the Position Paper precisely what the security requirements and obligations placed upon participants with access to personal and/or sensitive information, will be.

We therefore urge the Government to ensure that the Proposed Legislation contains security requirements and obligations which are of sufficient clarity and specificity, so as to meaningfully and appropriately ensure the protection and security of the information provided by individuals in connection with their Digital Identity.

If you have any questions about this submission, please feel free to contact me on 0414 446 240 or at [mlaing@arca.asn.au](mailto:mlaing@arca.asn.au), or Mary Vancea on 0403 137 435 or at [mvancea@arca.asn.au](mailto:mvancea@arca.asn.au).

Yours sincerely,



**Mike Laing**  
Chief Executive Officer  
Australian Retail Credit Association