

Ms Angelene Falk

Information Commission and Privacy Commissioner
GPO Box 5218
SYDNEY NSW 2001

18 February 2022

By email only: Angelene.falk@oaic.gov.au; melanie.drayton@oaic.gov.au;
emi.christensen@oaic.gov.au

Dear Ms Falk,

Hardship regime updates to CR Code – Updated application for approval

We refer to our application of 6 September 2021 to vary the *Privacy (Credit Reporting) Code 2014* (CR Code).

Based on subsequent engagement with stakeholders and feedback from your office, we would like to submit an updated version of the varied CR Code.

In addition, we would like to provide further clarification on some matters discussed in Part III of our original application.

This updated application is made up of:

- This cover letter, which includes:
 - Appendix A – Multiple ‘active’ FHAs for a month
 - Appendix B – Update to Part III: Examples of the application of proposed changes
- CR Code:
 - Marked-up showing all changes to the current version of the CR Code (document: **CR Code A.docx**);

- Marked-up showing changes that will come into effect before 1 July 2022 compared to version 2.1¹ (document: **CR Code B.docx**);
- Marked-up showing changes that will come into effect on 1 July 2022 compared to the version in CR Code B.docx (document: **CR Code C.docx**).

Consultation:

Most of the additional changes are intended to clarify or simplify the wording of the relevant provisions and do not materially change the meaning of the CR Code (as submitted on 6 September). On that basis, we do not consider that further consultation is required.

The proposed addition of subparagraph 19.7(b)(i) may impose an additional (although minor) obligation on credit reporting bodies. We advised the three credit reporting bodies of this change and they have confirmed that they do not object to it.

If you have any questions about this application, please feel free to contact me on 0414 446 240 or at mlaing@arca.asn.au, or Michael Blyth on 0409 435 830 or at mblyth@arca.asn.au.

Yours sincerely,



Mike Laing
Chief Executive Officer
Australian Retail Credit Association

¹ While this version includes the changes relating to the provision of free credit ratings by credit reporting bodies, it does not include the 'note' to paragraph 19.7(a) and paragraphs 19.8 and 19.9 (as they relate to financial hardship information).

APPENDIX A

Multiple 'active' FHAs for a month

The Public Consultation version of the proposed CR Code changes included the following in paragraph 8A.1:

(f) if two or more financial hardship arrangements are active on the assessment day, the financial hardship information and repayment history information that may be disclosed is to be determined by reference to the financial hardship arrangement that requires the lowest payment obligation for that month;

In the final application, we noted (at page 9 of Part II) that:

- while possible, it would be “unlikely” for more than one FHA to be put in place in an RHI month; and
- we considered that the outcome in the proposed paragraph simply reflected the necessary interpretation of the legislation, i.e. the CP should be determining RHI/FHI based on the FHA that would result in the ‘best’ RHI being disclosed to the CRB. For example, if there was a choice between RHI=0/FHI=A under a temporary FHA and RHI=3/FHI=V under a variation FHA (see Example A, below), the CP should apply the temporary FHA, rather than the variation FHA.

Given the above, and feedback of stakeholders to simplify the CR Code, we chose to remove the proposed paragraph from the final version of the proposed CR Code. Importantly, the paragraph was not removed because it was ‘wrong’ or established an inappropriate requirement.

However, since submitting the final application, we have become aware that it is more common for two FHAs to be ‘active’ for a month:

Example A: Some CPs may offer arrangements involving the following:

- the individual starts June already two payments behind (for April and May)
- in June, the individual and credit provider agree to change the contractual repayments to \$0 for three months
- as part of this, the credit provider does not agree to ‘re-age’ the payments already missed from April and May, however agrees not to demand payment for the next three months. After the three months (i.e. in September), the customer will be expected to make those payments (by which time the oldest outstanding payment will be 6 months old) unless a further arrangement is agreed

Under the changes to the Privacy Act, the agreement to change the contractual repayments to \$0 for three months would be a ‘variation FHA’, while the agreement not to demand payment of the overdue payments for three months would be a ‘temporary FHA’. Under the proposed paragraphs 8A.1(a) – (c) in the CR Code, both

of those two FHAs would be 'active' for the month and, in the absence of further guidance, a CP could choose to report against either FHA.

Reporting against the variation FHA would result in RHI reflecting the overdue payments, e.g. RHI=3/FHI=V in June. This is the case even though the customer is not expected to make any payments during the hardship period. Further, the RHI value would increase each month of the hardship arrangement (assuming the customer relied on the deferral and did not pay the payments that were already overdue). In the individual's credit report, this would appear as:

	MAR	APR	MAY	JUN	JUL	AUG	SEP ²
FHI				V			
RHI	0	1	2	3	4	5	

Reporting against the temporary FHA would result in RHI reflecting compliance with the arrangement, e.g. RHI=0/FHI=A (which, in this case, requires no payments during the hardship period). In the individual's credit report, this would appear as:

	MAR	APR	MAY	JUN	JUL	AUG	SEP
FHI				A	A	A	
RHI	0	1	2	0	0	0	

In this case, it would be appropriate for the CP to report against the temporary FHA.

Example B: At the end of a 'payment test' period, the CP will re-age any remaining arrears (which would constitute a 'variation FHA'). However, until the re-age happens in that month, the individual's obligations to immediately pay all the contractual arrears have been deferred (which would constitute a 'temporary FHA'). Again, both arrangements would, under the Privacy Act, be financial hardship arrangements and, under paragraph 8A.1(a) – (c), be 'active' for the month.

Importantly, this situation may arise whenever a payment is 're-aged' following an earlier temporary FHA and will be common across industry.

Reporting against the variation FHA would result in RHI=0/FHI=V; indicating to other credit providers that the individual was completely up to date with their contractual obligations.

Reporting against the temporary FHA would result in RHI=0/FHI=A; indicating to other credit providers that, while the individual was meeting their temporary FHA obligations, they were actually overdue on their contractual obligations.³

² What is disclosed for September will depend on what is agreed with the customer at the end of the initial 3-month period.

³ The record of RHI=0/FHI=A necessarily tells other CPs the customer is contractually overdue given the impact of section 6QA(5) as no FHI=A would be disclosed if the customer was up-to-date.

In this case, it would be appropriate for the CP to report against the variation FHA.

We have proposed to reintroduce the paragraph that was consulted upon as it (i) draws attention to the potential for multiple FHA's to be active for a month; and (ii) provides a basis for determining which FHA the RHI and FHI should be disclosed against. This is included as the new subparagraph 8A.1(d), which is accompanied by an additional 'note' to provide context (given this issue is complex and would benefit from that additional explanation).

We have also updated paragraph 8.1 and 8.2 to reflect that the mere existence of a temporary FHA doesn't determine how RHI is to be calculated. Rather, RHI will be calculated against the temporary FHA if one exists for the month and the individual's payment obligations are being "determined by reference to a temporary FHA" (as set out in the new paragraph 8A.1(d)).

We consider this is necessary as discussions with CPs indicate that:

- in relation to Example A, some CPs hadn't recognised that there was a temporary FHA and that they were initially planning to disclose against the variation FHA; and
- some CPs may take a simplistic approach to determining which FHA to report against, such as "last in month" or "always against the variation FHA". This may result in poor consumer outcomes.

APPENDIX B

Update to Part III: Examples of the application of proposed changes

Part III to ARCA's [application to vary the CR Code](#) submitted on 6 September 2021 included numerous examples of how the proposed changes to the CR Code would apply to different factual scenarios.

Based on feedback received after the application was submitted, we would like to:

- correct one example in Part III; and
- clarify two further examples.

1. Correction of Example 25

Example 25 in Part III describes the reporting of FHI at the end of a 'payment test/serviceability period' where the overdue payments on the account are 're-aged'. As discussed in Appendix A, the payment test/serviceability period is a temporary FHA, and the re-age of the overdue payments is a variation FHA.

The example suggests that a re-age completed after a monthly payment falls due but before the RHI is assessed for the month does not 'affect' the monthly payment due for that month. That is not correct; if the credit provider is not using the Payment Due Date Reporting approach, the re-aging of the overdue payments will affect the monthly payment due for that month as it changes the status of the overdue payments (as determined by reference to the terms of the credit contract) that have previously been missed and that would otherwise be due on the day the RHI is assessed.⁴

This principle is correctly reflected in the note to Example 20A in Part III.

In the circumstances set out in Example 25, it is (based on the reporting method adopted) possible to have both a temporary FHA *and* a variation FHA 'active' in the month RHI month, and the credit provider will need to determine which FHA it should report against for that month (see Appendix A).

This correction means that there may be a difference in what is disclosed by the credit provider for the calendar month in which the re-age is completed depending on whether the credit provider uses Calendar Month Reporting or Payment Due Date Reporting.

The corrected Example 25 is set out below, which demonstrates how the reporting will differ based on the RHI reporting method adopted (and also reflects the matters discussed in Appendix A, above).

⁴ The references in paragraph 8A.1(c) to "a payment due" and, in subparagraph 8A.1(c)(ii), to payments that ... have subsequently fallen due" both refer to payments as determined by the terms of the credit contract (not by reference to a temporary FHA). We have proposed changes to the OAIC that will clarify this in the CR Code.

Example 25 – after monthly payment due (corrected):

- i. Monthly payments (and payment test payments) due 10th of each month;
- ii. During the payment test period, customer must make ordinary monthly payments in each of Jan – June ('payment test temporary FHA');
- iii. Customer satisfies requirements of payment test period by making their 6th payment test payment on 10 June and CP re-ages account on 15 June (variation FHA);

Payment Due Date Reporting	Calendar Month Reporting
<ul style="list-style-type: none"> iv. For June (RHI assessed as at 10 June), CP would report RHI=0 and FHI=A as the only payment due in June (which, for this CP, ends on 10 June) is subject to the payment test temporary FHA; 	<ul style="list-style-type: none"> iv. For June (RHI assessed as at 30 June), CP would report FHI=V as the re-age occurred in the June month (i.e. 1 – 30 June). That is, a 'payment due' in the June month – being the payments that were previously contractually overdue – was affected by the variation FHA (i.e. re-age) in the June month. RHI would be reported against the contract; and
<ul style="list-style-type: none"> v. For July (RHI assessed as at 10 July), CP would report FHI=V as the re-age occurred in the July RHI month (i.e. 11 June – 10 July). That is, a 'payment due' in the July RHI month – being the payments that were previously contractually overdue - was affected by the variation FHA (i.e. re-age) in the July month. RHI would be reported against the contract; and 	<ul style="list-style-type: none"> v. No further FHI would be reported in July onwards and RHI would be reported against contract.
<ul style="list-style-type: none"> vi. No further FHI would be reported August onwards and RHI would be reported against the contract. 	

Note: For completeness, we note that, in the case of Calendar Month Reporting, there would be two 'active' financial hardship arrangements for the June RHI month; (i) the variation FHA as described above; and (ii) a temporary FHA that relates to the last payment test payment due on 10 June (i.e. as no contractual payment falls due between 10 June (when the temporary FHA 'ends') and the 30 June (when RHI is assessed)). We consider that it is appropriate to report against the active variation FHA in this case as that will show other credit providers that the customer is 'completely' up to date (as per the contract), rather than merely up to date with their obligations under the temporary FHA. The RHI would then be determined based on subparagraph 8.1(a). We have proposed a further change to the CR Code that would require credit providers to report against the FHA that represents "the lowest payment obligation for that month".

2. Minor clarification

We note that in:

- Example 20D, the description should say “variation FHA during grace period (RHI reported *before* grace period expires)”. This example is otherwise correct.
- Example 28, the description of “As per Example 27” for the ‘Alternative December’ is not entirely correct. Although what would be disclosed by the credit provider is the same as for Example 27, the basis for that disclosure is different. In the case of the Example 28, the result of “FHI=A and RHI=1 (as determined by the terms of the temporary FHA)” is due to the fact that no payment fell due between the date the FHA is terminated and the end of the calendar month.