AUSTRALIAN
RETAIL
CREDIT
ASSOCIATION

Application for variation of registered CR Code – Hardship changes

Part II – Explanation of proposed changes

In this Part we explain the:

A. Variations being proposed to the CR Code
B. Issues that are not proposed to be covered in CR Code

We have categorised each change as one of:

- Hardship reforms
- Non-hardship related issues – non-participating credit providers
- Non-hardship related issues – access to credit reporting information
- Non-hardship related issues – recognised external dispute resolution scheme

Some of the paragraph references for the proposed changes have changed between the public consultation version and the final changes submitted to the OAIC for approval. Unless otherwise marked, the paragraph numbers in this document refer to the updated paragraphs.

Effective date for changes

We propose that each of the changes listed below as 'hardship reforms' in the 'Category' section would be effective from 1 July 2022.

Other changes would be effective upon approval by the OAIC of the proposed changes, other than subparagraphs 19.7(c) and (d) relating to 'Non-hardship related issues – access to credit reporting information' which would become effective 3 months after code approval.

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A. Variations being proposed to CR Code

CR Code ref	1.1	**CR Code topic:**	Who is bound by CR Code?
Category:	Non-hardship related issues - non-participating credit providers		

Explanation and reasons:

The explanatory memorandum (EM, at paragraph 2.47) to the *National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Act 2021* (the amending Act) describes the introduction of the concept of 'non-participating credit provider' as removing "the unnecessary regulatory burden on businesses that do not, and have not, actively participated in the credit reporting system but are captured by the definition of 'credit provider'". We understand that this would include relieving the regulatory burden from businesses such as trades people, who provide payments terms of at least 7 days but do not access credit reporting information to provide those terms and do not disclose default information if payment is not made.

This confirms that non-participating credit providers are not bound by the CR Code (see Section 26(N)(2)).

We note that paragraph 20.1 addresses a similar issue to that which is being addressed by the "non-participating credit provider" change. While the need for paragraph 20.1 may have largely been eliminated, we are not proposing to remove paragraph 20.1 (partly because the definition of non-participating credit provider does not match the wording of subparagraph 20.1(a) and (b) and, accordingly, it is not clear whether there would be any unintended consequences of removing that paragraph). We consider that this matter could be reviewed as part of the upcoming independent review of the CR Code.

Stakeholder feedback and ARCA response:

This change was either supported or not commented on by all stakeholders.

Consequences of the variation:

This variation (with paragraph 2.3) gives effect to the intention of the amending Act to relieve non-participating credit providers from obligations under Part IIIA.

By including provisions explicitly excluding non-participating CPs from Privacy Act obligations this ensures that those CPs have less of an unnecessary regulatory burden.

For consumers, the impact is immaterial because non-participating CPs don't interact with the credit reporting system – and moreover, it strongly reinforces the consumer protection in place as soon as the non-participating CP elects to participate in the credit reporting system.

<table>
<tr><td>CR Code ref</td><td>1.2</td><td>CR Code topic:</td><td>Definitions used in 8A.2 and 8A.4</td></tr>
<tr><td>Category:</td><td colspan="3">Hardship reforms</td></tr>
<tr><td colspan="4">Explanation and reasons:

The definitions ‘ordinary monthly payments’ and ‘overdue payment arrangement’ support paragraph 8A.2 and 8A.4.

The definition of ‘overdue payment arrangement’ recognises that there may be a variety of arrangements that are ‘put in place’ in relation to payments that are or will become overdue, some of which may be temporary FHAs and some of which may be ‘promises to pay’ (as described in paragraph 2.29 of the explanatory memorandum). This definition is simply a catch all for all those types of arrangements (and paragraph 8A.2 then establishes the principles for deciding how a particular arrangement should be treated).</td></tr>
<tr><td colspan="4">Stakeholder feedback and ARCA response:

N/A - new definitions to support the simplified paragraph 8A.2 and 8A.4. These definitions (and redrafted paragraph 8A.2) were provided to key stakeholders after the public consultation process. Feedback from industry stakeholders was that they were a significant improvement and made the requirements clearer. We did not receive feedback from consumer advocates (although the simplification of the provisions was consistent with their previous feedback).</td></tr>
<tr><td colspan="4">Consequences of the variation:

See our discussion of paragraphs 8A.2 and 8A.4.</td></tr>
</table>

CR Code ref	1.2	CR Code topic:	Definitions of types of FHAs
Category:	Hardship reforms		

Explanation and reasons:

The definitions of ‘temporary FHA’ and ‘variation FHA’ reflect the descriptions in subsection 6QA(1)(d).

See the discussion in relation to proposed paragraph 8A.3 regarding the meaning of “*permanent* variation” as that term is used in subsection 6QA(1)(d)(i).

The ordinary difference between a ‘temporary’ FHA and a ‘variation’ FHA is that, if the arrangement ‘reduces’ the payments to be made by the individual, then under a:

- temporary FHA, terms of the credit contract are not varied and payments that are missed during the arrangement will remain due and payable at the end of the arrangement (unless paid by the individual); and
- variation FHA, the terms of the credit contract are varied so that payments do not fall due or, for payments that are already overdue, are treated as no longer being overdue.

Stakeholder feedback and ARCA response:

ARCA had proposed to use the terms ‘temporary relief or deferral FHA’ and ‘variation FHA’ to refer to two forms of arrangements described in section 6QA(1)(d). The proposed terms reflect the wording in that section, save that we have omitted the word “permanent” from “permanent variation to the terms of the consumer credit”.

Consumer advocates recommended that the terms be replaced with:

- ‘temporary/deferral FHA’
- ‘permanent/ongoing FHA’

Written industry feedback either supported the terms or was silent. Feedback during roundtables with industry was that the terms were supported. A CP suggested that the terms be replaced with “Hardship Variation” and “Temporary Hardship Arrangement”.

Based on feedback, we have simplified the terms to:

- Temporary FHA; and
- Variation FHA.

While section 6QA(1)(d)(i) uses the word ‘permanent’, we consider this (or the term ‘ongoing’, as suggested by the joint consumer advocate submission) would be confusing to consumers and other users of the CR Code as they may mistake ‘permanent’ (or ‘ongoing’) as referring to a change that lasts for the remainder of the loan term. While, in some cases, the ‘permanent variation’ may last for the remainder of the term of the contract credit, it is not always true. For example, an arrangement that changes the repayments to $0 per month for three months will be a ‘permanent variation’ provided it is done by way of a change to the terms of the consumer credit. That is, at the end of the three months there will be no contractually overdue amount as a result of the arrangement.

The joint consumer advocate submission also recommended that the definitions of temporary FHA and variation FHA clearly explain that the former will result in arrears accumulating and the later will not. We have included this in the explanation of the change above. Subparagraph 8A.3(c) also describes the difference between a temporary FHA (i.e. missed payments fall due) and a variation FHA (i.e. missed payments do not fall due).
Consequences of the variation: Providing clear definitions distinguishing the two states of hardship is important for CPs because it enables the creation of processes and systems which give practical effect to this distinction. Without these provisions in the CR Code (and further provisions which reinforce the method by which a CP identifies a temporary FHA vs variation FHA), each CP would be tasked with deciding this on a case-by-case basis, which would increase the cost and complexity of implementation of the hardship reporting regime.

CR Code ref	2.3	CR Code topic:	Who is bound by CR Code?
Category:	Non-hardship related issues - non-participating credit providers		

Explanation and reasons:

See paragraph 1.1. Together paragraph 1.1 and 2.3 give effect to the policy that non-participating credit providers should not be bound by the CR Code.

Stakeholder feedback and ARCA response:

See paragraph 1.1. Following the public consultation process, ARCA identified that there may be an inconsistency between the previous paragraph 1.1 which stated that the entire CR Code did not apply to non-participating credit providers and paragraph 2.4 (which was previously paragraph 2.3) which clarified situations in which a CP would not be a non-participating credit provider. For that reason, we have created the separate paragraph 2.3 which makes it clear that paragraph 2.4 will apply to all CPs.

Consequences of the variation:

See paragraph 1.1.

CR Code ref	2.4	CR Code topic:	When a CP won’t be a non-participating credit provider
Category:	Non-hardship related issues - non-participating credit providers		

Explanation and reasons:

Paragraph 2.3 provides for circumstances in which a CP is not able to rely on the exemption applying to ‘non-participating credit providers’.

Stakeholder feedback and ARCA response:

Consumer advocates supported the intent of this paragraph. Industry stakeholders either supported the paragraph or were silent.

A consumer advocate noted that paragraph 2.3 was overly complex. In response we have simplified the drafting.

Consequences of the variation:

This has the potential to impact some CPs’ practices. For instance, it may require a CP which wants to take advantage of the provision for ‘non-participating credit provider’ and which has previously advised customers that they ‘may’ disclose credit reporting information or credit eligibility information to a CRB to provide a written notice to retract that statement. However, we consider that this is an appropriate step to take to update their customers.

CR Code ref	8.1	CR Code topic:	Reporting RHI if payments are affected by an FHA
Category:	Hardship reforms		

Explanation and reasons:

The changes to existing paragraph 8.1 provide that:

- RHI reported following a variation FHA is subject to the same requirements as 'standard' RHI (i.e. where the monthly payment is not affected by an FHA) as per the existing process in paragraph 8 of the CR Code (which will remain unchanged by these variation); and
- RHI reported while the monthly payments are affected by a temporary FHA are subject to distinct requirements, including that no grace period will apply to those payments (see below).

The grace period on overdue payments for reporting 'standard' RHI is to allow the individual to take action in respect of the missed payment (including by entering an FHA as provided for in the proposed subparagraph 8A.1(a) and (b)).

An individual who has entered a temporary FHA will already have engaged with the credit provider regarding the payments they are likely to miss, and an arrangement will have been put in place to make payment of a lesser amount. On that basis, we consider that it is not necessary to put in place a further grace period on payments due under a temporary FHA. This proposal should also be read in conjunction with our proposal in subparagraph 8.2(d) for RHI that is reported in respect of a temporary FHA to be limited to '0' and '1' (i.e. during a temporary FHA, an individual's credit report will only show '1' regardless of the age of the oldest outstanding payment).

From a practical perspective, our understanding from discussions with industry is that it is likely that a credit provider will promptly contact an individual who misses a payment under a temporary FHA. During that conversation it is possible that the temporary FHA payment obligations (either overall or in respect of the previous month) will again be discussed and may be subject to a further 'arrangement' which may, itself, be considered a temporary FHA.

In that case, there is a high likelihood that the credit provider would (if a grace period applied and based on the requirements in subparagraphs 8A.1(a) – (c)) be required to report the previous month's RHI based on the second arrangement (i.e. so that the RHI for that month would show as RHI=0 even though the individual did not make the payment required under the initial arrangement). If, this is done regularly for individuals who miss a payment under a temporary FHA, the overall effect across the industry is that little 'negative' RHI would ever be recorded in the credit reporting system in respect of temporary FHA payment obligations.

The absence of a grace period for temporary FHA payment obligations emphasises the need for the agreed temporary FHA to be suitable for the individual's situation (i.e. that the individual can reasonably make the payments (if any) that are required under the temporary FHA). We consider that this is already an expectation established under the credit laws (in particularly sections 72 and 76 of the NCC (or sections 177B and 177F in relation to consumer leases), section 47(1)(a) of the National Consumer Credit Protection Act and ASIC's Debt Collection Guidelines) and, as such, the absence of a grace period will simply reflect these broader existing hardship obligations. In that regard, it is unnecessary and – indeed – overreach to suggest the CR Code should import this grace period as a measure of consumer protection. As the credit conduct regulator, ASIC would have ultimate oversight as to whether credit providers are agreeing to appropriate hardship arrangements. The Australian Financial Complaints Authority (AFCA) would be able to consider complaints if an individual considers that the credit provider did not agree to an arrangement appropriate to the individual's circumstances (and may be required to report to ASIC if it considered there was a potential systemic issue in relation to the hardship arrangements the credit provider entered into with its customers more generally).

If there are multiple FHAs effective for a month

Although unlikely, it is possible for more than one FHA to be put in place in an RHI month, and the CP will need to determine which FHA is 'active' for that RHI month. For example, a variation FHA that immediately extends the term of the loan/reduces contractual repayments, and a temporary FHA which provides that the individual is not required to make those reduced payments for 3 months may be both put in place in the RHI month. We do not consider that the legislation permits a credit provider to disclose FHI in respect of more than one FHA in a month (particularly as each of those FHAs would involve different RHI and it is not possible to report more than one RHI record in a month; see subparagraph 8.2(a)).

Our earlier proposal for the CR Code included a requirement for the CP to report RHI and FHI in relation to the FHA that established the 'lowest' payment obligation for that month (i.e. to treat that FHA as being the one that is 'active' for that month under subparagraph 8A.1(b). Based on feedback that the CR Code is too complex, we have removed that provision from the final version of the changes proposals. However, we consider that our earlier proposal simply described the necessary interpretation and requirements of the amending Act, and its removal does not change what is required of a CP. Given the clear intent of the amending Act, we do not consider that a CP can take a rigid approach to deciding how to report RHI and FHI in such circumstances where that approach would result in 'negative' RHI being disclosed to a CRB that was inconsistent with one of the FHAs that are potentially active at the end of the RHI month. For instance, we do not consider it would be appropriate to adopt an approach to always report against the 'latest' FHA agreed in a month (if the earlier FHAs are still potentially active for the month). Given the nature of temporary FHAs (i.e. which relieve the individual of contractual obligations), we expect that, in most cases, a temporary FHA is likely to take precedence over a variation FHA (however, again, the CP would need to consider what was appropriate in the circumstances).

Stakeholder feedback and ARCA response:

RHI reported following variation FHA

Consumer advocates supported the proposal that RHI following a variation FHA should be disclosed on the same basis as 'standard' RHI. Industry stakeholders either supported this paragraph or were silent. Critically, no stakeholders raised issue with this approach, and

we consider that this approach properly reflects the legal effect of variation on payment obligations and is consistent with stakeholder understanding and expectation. *Application of grace period to payments under temporary FHA* Consumer advocates consider that payments due under an FHA should be subject to a grace period and, in particular, note: • It would be confusing for consumers and financial counsellors if grace periods were not applied to payments due under a temporary FHA (when they apply to payments due under the terms of consumer credit); • Administrative problems may still impact a consumer's payment under a temporary FHA (e.g. automated BPAY might not go through as planned); and • While a CP should propose a temporary FHA that is affordable to a consumer, it is not always clear what will be suitable. However, consumer advocates do appreciate that RHI disclosed during a temporary FHA will be limited to '0' and '1'. Written industry feedback either supports the proposal that a grace period would not apply to payment required under a temporary FHA, or was silent. Industry feedback during the roundtables supported this proposal. While we acknowledge the consumer advocates' comments, on balance, and considering the feedback provided by other stakeholders, we consider the approach in the proposed subparagraph 8.1(c) is appropriate. We note that introducing a grace period would introduce significant industry detriment in terms of the need to develop an even more complex reporting system to record and track grace periods during FHAs. It could also significantly decrease the potential of any valuable RHI to be disclosed during FHAs (which is already restricted by the proposal to allow binary (i.e. 0 or 1) reporting of RHI during a temporary FHA). Moreover, the consumer detriment associated with this approach is limited, noting (as discussed above) the consumer protections already embedded as part of the broader hardship framework.
Consequences of the variation: The amending Act imposes an obligation on CPs to undertake substantial work to update their systems and processes to allow for the reporting of FHI and, importantly, a new form of RHI (that is determined by reference to a temporary FHA). The changes made to paragraph 8.1 do not increase the amount of work required and, to the extent that subparagraph 8.1(c) does not require a 'grace period' to be applied, reduces the complexity of that work.

CR Code ref	8.2	CR Code topic:	Reporting RHI if payments are affected by an FHA
Category:	Hardship reforms		

Explanation and reasons:

As with the changes to paragraph 8.1, the changes to paragraph 8.2 set out how RHI should be recorded following a variation FHA (which is the same as reporting standard RHI) and temporary FHA (which is subject to distinct requirements).

Subparagraph 8.2(d):

- confirms that the codes used to record RHI in respect of a temporary FHA must be a subset of those used in relation to standard RHI. This gives effect to the policy intent of the shorter retention period for FHI (i.e. 12 months, compared to 24 months for RHI) by ensuring that a CP cannot disclose different codes for RHI in respect of a temporary FHA (which would otherwise act an implied hardship indicator for 24 months); and
- based on existing practice in relation to 8.2(c), provides that the codes will be ‘0’ (meaning all payments due under the temporary FHA have been paid) and ‘1’ (meaning there is an outstanding payment due under the temporary FHA regardless of the age of the oldest outstanding payment).

(To clarify, the existing subparagraph 8.2(c) does not require the use of ‘0’ or ‘1’ as it simply requires codes ‘representing’ the status of the payment. However, industry practice is to use ‘0’ for current and the codes 1 – 6 and X for overdue payments.)

We have included a note to subparagraph 8.2(d) recognising that, while the same codes are to be used, the meaning of those codes differs depending on whether the code is used under subparagraph 8.2(c) or subparagraph 8.2(d); this is a necessary outcome of the amending Act which requires RHI to be reported against the temporary FHA (if one exists), rather than the terms of the consumer credit.

Our proposal to restrict the available codes to ‘0’ and ‘1’ reflects the circumstances that apply to a temporary FHA; in particular, that if a payment is missed under a temporary FHA, a CP is likely to promptly engage with the customer regarding that missed payment and either review the arrangement or terminate the arrangement such that the RHI reporting will revert to that determined by the terms of the consumer credit (i.e. it is less likely that higher RHI relating to temporary FHAs will be needed). The proposal also recognises that the effort required by credit providers to develop systems to calculate and report RHI during a temporary FHA will be significant. Restricting the codes to ‘0’ and ‘1’ (i.e. ‘binary reporting’) will help reduce that effort. Our proposal to provide for binary reporting has received support from many credit providers, however a small number of credit providers have noted a preference to retain the same codes as for standard RHI (i.e. 0 – X). Overall, given the overwhelming feedback in support of the binary reporting approach, we consider that this approach is appropriate.

For consumers, the binary approach will mean that an individual – who is experiencing financial hardship and whose ability to meet the payments required under the temporary FHA will be variable – will not have RHI that records a significantly overdue situation.
Stakeholder feedback and ARCA response: Consumer advocates supported this proposal. Industry stakeholders overwhelmingly supported this proposal in both written feedback and during roundtables (save for some minor reservations by a small number of CPs that it would result in less valuable information being recorded in the credit reporting system).
Consequences of the variation: The amending Act imposes an obligation on CPs to undertake substantial work to update their systems and processes to allow for the reporting of FHI and, importantly, a new form of RHI (that is determined by reference to a temporary FHA). The changes made to paragraph 8.2 do not increase the amount of work required and, to the extent that subparagraph 8.2(d) limits the reporting RHI under a temporary FHA to '0' and '1', reduces the complexity of that work. For consumers, the binary approach will mean that the worst RHI that will be recorded under a temporary FHI is 'RHI=1'. Given these consumers are experiencing financial hardship, it is more likely that their ability to meet the payments required under the temporary FHA will be variable during the period they are experiencing hardship. The binary approach will ensure that their credit report will not have a record of significantly overdue payments (which would last the full two years, even after they have recovered from the hardship event).

CR Code ref	8A.1(a) – (c)	CR Code topic:	Technical issues for reporting FHI
Category:	Hardship reforms		

Explanation and reasons:

The legislation sets out the circumstances in which an FHA (whether a variation FHA or a temporary FHA) is formed and that FHI may be disclosed in relation to the FHA. However, whether FHI should be reported in a particular month[1], will depend on the timing of when the FHA is made and, for temporary FHAs, when it ends (whether expiring as expected or terminated early). Subparagraphs 8A.1(a) – (c) set out the rules that a credit provider must apply. Without those rules, there is a risk that the recording of FHI would be inconsistent, which would undermine the value of the credit reporting system for all users. In summary, FHI may be disclosed for a month if the FHA is active 'for' that month. Whether the FHA is 'active for' a month will depend on whether the FHA is a variation FHA or a temporary relief or deferral FHA.

Part III includes some examples of how subparagraph 8A.1(a) – (c) will work.

The reference to 'assessment day' in subparagraph (b) means that an individual who enters an FHA with the credit provider after a payment falls due but before the CP reports RHI for that month (including during the 'grace period' for a missed payment), will not have negative RHI recorded for the previous month (provided they comply with any relevant conditions of the FHA). Allowing for the recognition of FHAs that are made during the grace period can act as an incentive for overdue customers to contact the credit provider as soon as possible.

A temporary FHA will be 'active' in each month that the individual's payment obligations are affected (i.e. FHI=A reported each month), unless a payment has subsequently fallen due in that month that is not affected by the FHA (i.e. if the temporary FHA ends during the month, the credit provider will not disclose FHI if a payment that is not affected by the FHA subsequently falls due).

The wording relating to payments that have 'subsequently fallen due' in relation to temporary FHAs is necessary as credit providers (which assess RHI on a fixed day of the month, such as the last day of the calendar month, rather than on the monthly payment due date) may otherwise treat the temporary FHA as ending on the date that the last payment impacted by the FHA is due and, based on the rest of subparagraphs (a) – (c), reporting would immediately revert to standard RHI. For example:

- Monthly payment due: 25th each month
- RHI Month end (when RHI assessed): End of calendar month
- Temporary FHA made on 20 April: 3 months of $0 payments (i.e. April, May and June payments):
    - April (reported as at 30 April): FHI=A/RHI=0
    - May (reported as at 31 May): FHI =A/RHI=0
    - June (reported as at 30 June):
        - Without reference to 'subsequent payment': RHI=3

[1] Noting that the 'month' under the CR Code will not always be a calendar month but can be an alternative time period between two corresponding dates)

- With reference to ‘subsequent payment’ (i.e. the proposed approach under 8A.1(c)(ii): FHI=A/RHI=0

A customer who has been told that their June payment is subject to a temporary FHA “for 3 months” would not expect their June RHI record to show the negative RHI.

The consequence of the proposed CR Code drafting is to ensure FHI and RHI reporting which is consistent with consumer expectations.

Application of this to weekly/fortnightly contractual payments: If a temporary FHA ends in an RHI month in which another payment falls due after the FHA ends (e.g. if there are fortnightly payments, where only the first fortnightly payment due in that RHI month is subject to the FHA), the overall effect of subparagraphs 8A.1(a) – (c) is that there will be no FHI recorded for that month. This is appropriate as the customer would be aware that the subsequent payment is not subject to the temporary FHA, and so there is a payment obligation for that month (based on the contractual terms) that must be satisfied to ensure RHI is reported as up to date. In this case, the RHI code that is disclosed is based on the current 8.2(c) in the CR Code – given the RHI value would be based on the standard RHI calculation. If payments have continued to accrue during the temporary FHA, it is likely that the grace period will have already expired when the temporary FHA ends (noting that the grace period will only apply to the first overdue payment as determined by reference to the terms of the consumer credit).

A result of subparagraphs (a) – (c) is that a very short-term temporary relief or deferral FHA (i.e. less than one month) may not be reported by the credit provider at all. For example, a temporary relief or deferral FHA that is made after the previous month’s assessment date (as described in subparagraph (b)) that expires before the RHI month for the same month will not be reported (although, in practice, such an arrangement is unlikely to be a temporary relief or deferral FHA and is more likely to be a promise-to-pay and, on that basis, the non-reporting of this FHA is appropriate).

Temporary FHAs with a different payment frequency: It would be possible for a temporary FHA to have a different payment frequency from the payments determined by reference to the terms of the consumer credit (‘contractual payments’). For example, the contractual payments may involve monthly payments of $1000 due on the 15th of the month, while the temporary FHA requires weekly payments of $100. The difference in frequency under the temporary FHA would not ordinarily change the ‘month’ for which the credit provider reports under paragraph 8. That is, if the credit provider reports based on a ‘payment due date’ basis, they would continue to report the status of the account as at the 15th of the month.

Stakeholder feedback and ARCA response:

Consumer advocates either supported this approach or did not have comments. The support was based on the consistency in reporting that the subparagraphs would achieve and the fact that they are aiming to meet consumer expectations. However, they were concerned with the complexity and questioned whether it could be extracted into an industry-facing section of the CR Code.

Industry stakeholders generally agreed with subparagraph 8A.1(a) – (c).

Based on feedback (and noting our comments in Part I regarding the OAIC's views on whether 'technical' parts of the CR Code could be separated from the remainder of the code), ARCA sought to simplify the wording of subparagraph 8A.1(a) – (c), including by circulating alternative wording to key stakeholders. However, further review (particularly testing of a range of scenarios and outcomes) has shown that the original wording is necessary to give effect to the intended operation of the reporting. While we recognise that subparagraphs 8A.1(a) – (c) are complex, we believe that this is due to the inherent complexity of the FHA/FHI regime. We have, however, included a further 'note' to those subparagraphs which explains a key outcome of the provisions (i.e. that an FHA agreed during the grace period can apply to the payment that was previously missed). ARCA had previously proposed an additional subparagraph 8A.1(d) that would have applied special rules for FHAs made during a grace period. This was in recognition that such an FHA would otherwise result in FHI being disclosed in relation to the payment that already been missed. However, upon further review (and, again, testing of scenarios), we identified that the issue that the proposed subparagraph 8A.1(d) was intended to address happened in many more situations than first identified (see Example 16, which will be a common occurrence for CPs using the Calendar Month reporting methodology, in addition to Examples 17A and 17C which was describes the circumstances that the subparagraph was going to address). To address the issue for all potential permutations would have required additional complex provisions setting out circumstances in which RHI is to be determined by reference to the temporary FHA but no FHI is disclosed (which is inconsistent with the fundamental principle that if the RHI is disclosed on the basis of an FHA, FHI must also be disclosed). For this reason, the proposed varied CR Code does not include this drafting. To be clear, for a temporary FHA applying to the 'next 3 months', the ordinary result in the circumstances described in Examples 16, 17A and 17C is that 4 x FHA=A/RHI=0 records would be reported rather than 1 x RHI=1 and 3 x FHA=A/RHI=0 (unless the CP and individual agree that the arrangement is not to start until the following payment falls due).
Consequences of the variation: The amending Act imposes an obligation on CPs to undertake substantial work to update their systems and processes to allow for the reporting of FHI and, importantly, a new form of RHI (that is determined by reference to a temporary FHA). The requirements of the amending Act are, in some respects, ambiguous. These subparagraphs ensure CPs build their systems to allow for improved consistency of reporting. It is possible that, as a result, the work to build those systems may be more complex for some CPs, however we consider the improved consistency in reporting outweighs the additional work required of CPs to implement the new regime. Further, the clarity provided by these subparagraphs reduces the risk that CPs will have to redo the work at a later stage. This will have consumer benefits as it means individuals will be treated/reported in a similar fashion across CPs, promoting better consumer understanding and confidence in the credit reporting system.

CR Code ref	8A.1(d)	CR Code topic:	Technical issues for reporting FHI – effective date of FHA
Category:	Hardship reforms		

Explanation and reasons:

The legislation provides that an FHA exists when an arrangement is 'made' between the individual and the credit provider, i.e. the mere giving of a hardship request does not impact what can be disclosed by the credit provider prior to the FHA being formed. While we consider that this interpretation is clear from the wording of the legislation, we have included this subparagraph for the avoidance of doubt (that would be subject to the limited exceptions described immediately below).

That is, a CP may continue to disclose RHI to a CRB while a hardship request is being considered and, if an FHA is proposed, any formalities that are reasonably required by the CP (such as receiving the written acceptance of the arrangement from the individual) are completed (even if that RHI would record that a payment has been missed).

'Excessively delayed'

We have proposed in subparagraph 8A.1(d)(i) that the date on which the FHA is considered to have been 'made' can be backdated if the credit provider 'excessively' delayed agreeing to the arrangement. This provision does not require the credit provider to 'rush' the assessment of the hardship request. In practice, the time taken by the credit provider to assess a hardship request will depend on a range of factors, including the nature of the account, the circumstances of the individual and the credit provider's own policies and procedures. The mere possibility that another credit provider may agree to a financial hardship arrangement in a shorter time does not mean the credit provider has excessively delayed. The conduct of the individual would also be relevant, e.g. whether they provided information reasonably required by the credit provider in a timely fashion.

The timelines set out in sections 72 and 177B of the National Credit Code (including as described in the ASIC's Information Sheet 105) would be relevant to assessing whether the credit provider excessively delayed agreeing to the arrangement. It should be noted, however, that:

- without the CR Code containing an allowance for backdating due to an excessive delay on the part of the credit provider, the mere failure to comply with the NCC obligations would not permit the backdating of the effective date of the FHA (as the Part IIIA hardship reporting regime is separate to the NCC hardship regime);
- a CP may, in some instances, be considered to have 'excessively delayed' even if they have complied with the timing requirements under the NCC hardship provisions. For instance, if the CP would ordinarily assess a hardship request within 2 days but, due to a process failing, does not assess a particular request for 20 days, the CP is likely to have 'excessively' delayed (despite still complying with the NCC hardship provisions); and
- conversely, the fact that an FHA is backdated under subparagraph 8A.1(d)(i) does not mean the CP has necessarily breached the NCC hardship provisions.

To be clear, the 'excessive delay' provision in the CR Code is relevant only to the credit reporting treatment of the formation of the FHA and should be considered separate to the

CP's compliance with any NCC assessment obligation (although, we expect that a failure to comply with the NCC hardship provisions is likely to be considered as also involving an excessive delay under the CR Code). Subparagraph 8A.1(d)(i) would be relevant in situations in which the CP has a high volume of hardship requests and takes longer to assess each application (as many CPs experienced at the start of the COVID-19 pandemic) even if the CP ultimately meets the timing requirements under the NCC hardship provisions. This subparagraph is also relevan7t to circumstances in which the credit provider has not agreed to an FHA (or not agreed to an extension of a temporary FHA) and the customer is disputing that decision (either through the credit provider's internal dispute resolution or through AFCA). Unless and until the dispute is resolved in the customer's favour or a mutually agreed settlement reached, no FHA has been 'made' and RHI would be reported based on the contractual terms (and no FHI reported). If the complaint is subsequently resolved in the favour of the customer, it may be appropriate to backdate the FHA and correct the RHI (i.e. on the basis that in the circumstances of the dispute, the CP *ought* to have agreed to the FHA at an earlier stage). *Inability to make a hardship request* We have also proposed to allow for an FHA to be backdated if the individual was unable to make a hardship request at an earlier time because of circumstances beyond their control, such as illness or natural disaster. The individual can request the CP to consider backdating the effective date on this basis and, provided the CP is satisfied that the individual was prevented from making the hardship request due to those circumstances, the CP can backdate the effective date. The CP could ask for supporting information that they require to make that assessment, however obtaining documentation is not a requirement, and should be requested only if reasonably necessary. Earlier versions of our proposals for the CR Code changes included a similar provision relating specifically to natural disasters. That proposed provision has been replaced by this provision which covers a broader range of circumstances (recognising the impact of the circumstances on the individual's ability to contact their CP is the relevant factor – not the actual circumstances themselves). Reliance on this subparagraph to backdate the effective date is expected to be the exception, rather than the rule. It should apply in situations in which the individual's ability was clearly impacted by circumstances outside their control.
Stakeholder feedback and ARCA response: *'Backdating' of the CR Code to hardship request* Subparagraph 8A.1(e) confirms that an FHA will generally not be effective until it is 'made' (i.e. agreed). We consider this subparagraph reflects the correct interpretation of the amending Act, i.e. that the FHA will only be effective once it is 'made'. However, consumer advocates have recommended that there be a general requirement to 'backdate' the effective date of an FHA to the date the hardship request was made.

Industry stakeholders did not support a requirement to backdate the effective date of an FHA to the date the hardship request was made. Two CPs and the ABA also challenged the inclusion of the requirement to backdate even if the CP had excessively delayed.

We have carefully considered this issue. In the industry roundtable that followed the release of the public consultation pack, we specifically asked industry participants to consider whether they would agree to a requirement to backdate the effective date of the FHA to the date on which the financial request (i.e. 'hardship notice' under the NCC) was made. This would avoid the potential for a consumer to have 'negative' RHI reported while the FHA was being considered (or would, at least, require that negative RHI be removed once the arrangement was made).

We noted that such a requirement could:

- Reduce pressure on CP's hardship teams to approve FHAs quickly;
- Remove the inconsistency caused by different approaches to hardship approval (i.e. between those CPs which can approve during an initial phone call and those which do not); and
- Reduce the likelihood of complaints.

Nevertheless, no industry stakeholder has supported a general requirement to 'backdate' the effective date of the FHA to the date of the hardship notice. They have noted there would be significant operational and systems complexity to implement such a requirement. They have also noted that, in practice, the processes involved in a CP agreeing to an FHA can be complex. For instance, a customer may give a hardship notice and then delay providing material – and ultimately abandon the request. The customer may then return at a future stage and 'restart' the process. As a result, identifying the date to which the FHA should be backdated could be complicated and the lack of clarity and certainty would represent a detriment for both consumers and industry.

Given the clear approach taken in the amending Act, and the potential complexity and uncertainty around how a requirement for dating would be implemented operationally, we do not consider on balance that the CR Code should require CPs to generally 'backdate' the effective date of the FHA to the date of the hardship notice. Such a general requirement would move beyond 'consumer protection', and risk undermining the operation of the credit reporting system.

We have, however, included limited reasons to backdate the effective date. It is considered that the provisions to enable limited backdating are sufficient to embed important consumer protections, and help to answer concerns raised by consumer advocates (without going so far as to introduce a blanket requirement for backdating).

Excessively delayed

While consumer advocates recommended a general obligation to 'backdate' to the date of the hardship request, two CPs and the ABA recommended that the allowance for backdating based on the CP 'excessively' delaying the approval of a FHA be removed. We understand that those industry stakeholders accept that FHAs may need to be backdated, however the provision in the CR Code was unnecessary (and that the NCC would already require such backdating). As noted in the explanation above, the NCC is a separate regime to the credit reporting system. The fact that the CP has not met their obligations

under the NCC would not automatically allow for the FHA to be backdated. Likewise, under the proposed subparagraph 8A.1(e), the fact that the CP has technically met their NCC obligations does not necessarily mean the CP has not excessively delayed. In the absence of this exception, CPs would not be able to backdate the effective date, regardless of the circumstances. It is important to note that, as part of their responses to the COVID-19 pandemic, many CPs undertook the backdating of COVID-19 'payment deferrals' that were given to their own customers. Under the new hardship reporting regime, those CPs would not be able to do so if the 'excessively delayed' exception was removed. We consider that significant consumer detriment would arise if the proposed allowance for backdating due to the CP excessively delaying is removed from the CR Code. *Inability to make a hardship request* While industry stakeholders did not support a general requirement to 'backdate', a CP recommended the additional allowance for backdating where an individual was prevented from making a hardship request due to circumstances beyond the individual's control. We agree with this recommendation and have included subparagraph 8A.1(d)(ii), which uses similar language to the existing paragraph 20.5. ARCA considers that there is benefit in developing further guidelines on the operation of both the proposed 8A.1(d)(ii) and the existing paragraph 20.5 (which allows for removal of default information where that information was disclosed in circumstances beyond the individual's control). We will engage with our Members and other relevant stakeholders in relation to developing such guidelines. For completeness, we note that the previous subparagraph 8A.1(h) allowed for the backdating of FHAs following natural disasters. This was supported by all stakeholders. As noted in the explanation above, the updated subparagraph 8A.1(d) replaces that provision (and provides for broader circumstances in which the FHA could be backdated).
Consequences of the variation: The clarification that CPs do not need to generally backdate the effective date of the FHA will reduce the complexity of implementing the new regime. CPs will need to have the capability to correct data if they excessively delay agreeing to a FHA and, as a result, they will need to (i) develop processes to identify when they *should* backdate the FHA; and (ii) have the ability to correct the RHI already reported (which is an existing process for all CPs) when they self-identify that the effective date of the FHA should be backdated or are directed by AFCA to do so. Enabling backdating in some situations ensures that consumers' interests are protected if the CP unnecessarily delays their assessment, or if the individual is not able to make a hardship request for reasons beyond their control.

CR Code ref	8A.1(e)	CR Code topic:	Technical issues for reporting FHI - treatment of joint accounts
Category:	Hardship reforms		

Explanation and reasons:

Subparagraph 8A.1(e) provides that a single account holder may agree to an FHA with their CP, without needing to obtain the agreement or consent of other account holders. However, as set out in the note to the subparagraph and as a matter outside the CR Code, a CP would still need to give consideration to notifying the other account holder that a FHA has been put in place.

The credit reporting system is based on the fundamental concept of 'account based' reporting, i.e. that information is reported based on the status of the account, rather than separately for different account holders. This means that, while the FHA may be agreed with one account holder only, FHI will be disclosed by the CP to a CRB in relation to all account holders (and the RHI that is disclosed will reflect the FHA for all account holders).

If a temporary FHA is agreed by one account holder, the other account holder(s) may still avoid having FHI disclosed in relation to the account by paying all amounts that fall due under the account on time (as per section 6QA(5)). That is, the joint account holder would normally be able to avoid having FHI disclosed on their credit report by simply complying with their existing contractual obligations (which would mean neither account holder would have FHI recorded on their credit report and RHI would show that the account was up to date).

Stakeholders have noted that the recording of FHI on the credit report of a perpetrator of domestic abuse may trigger harm to the victim survivor who has agreed to the FHA. Outside the CR Code, ARCA will develop guidelines addressing situations in which the requesting account holder tells the CP that they believe the contribution of FHI in relation to the consumer credit may trigger another account holder to cause harm to the requesting account holder or another person. While ARCA is reviewing the options, this is likely to initially involve 'withholding' the reporting of RHI and FHI during the FHA. We will engage with ASIC to obtain seek relief from the mandatory CCR regime for CPs subject to that regime.

IMPORTANT: the OAIC has noted concerns that the proposed subparagraph 8A.1(e) may require further legislative amendments in order for the CR Code to give effect to our proposal.

Stakeholder feedback and ARCA response:

All stakeholders strongly agreed with ARCA's proposed approach to allow for a single account holder to agree to an FHA with their CP, without the need to obtain the agreement or consent of other account holders. Stakeholders – both consumer advocate and industry – considered it would be a significant retrograde step to require CPs to obtain the consent of all account holders.

Domestic abuse Stakeholders – consumer advocate and industry – agreed with ARCA's suggested approach to address the risk of FHI 'triggering' domestic violence. However, consumer advocates (while recognising the work that would be involved) considered that the credit reporting system should move away from 'account based' reporting, so that an FHA could be reported in respect of one account holder only (while the non-requesting account holder would be reported as against the credit contract). We note that one CP also raised the potential for separate reporting for individuals that may be at risk of domestic abuse. We note that this issue is likely to be raised as part of the upcoming Independent Review of the CR Code and, at this stage, ARCA does not consider any further changes are required to the CR Code. However, it must be recognised that any move away from account-based reporting is a significant and highly complex change to the credit reporting system, that will have far reaching consequences.
Consequences of the variation: The proposal in relation to joint accounts is consistent with existing practice and should not introduce additional complexity into the work already required of CPs and CRBs. If this proposal is not adopted, CPs will need to undertake significant additional work to implement another approach (e.g. that would require the CP to obtain the agreement of all account holders). The ability for one account holder to agree to a financial hardship arrangement provides a significant consumer benefit. Importantly, providing for any other approach (e.g. where all account holders must agree) will create significant consumer detriment.

CR Code ref	8A.1(f)	**CR Code topic:**	Technical issues for reporting FHI – RHI to accompany FHI
Category:	Hardship reforms		

Explanation and reasons:

The legislation (section 21EA) provides that FHI must be disclosed for a month if an FHA affects the monthly payments and the credit provider discloses RHI for that month. However, it does not require RHI to be disclosed for a month in which FHI is disclosed. We have proposed that the CR Code will impose such a requirement (save for a minor transitional exception in subparagraph 8A.6(b)(ii)). However, this does not require a credit provider to report either FHI or RHI in any particular month (even if there is an FHA that is current).

Stakeholder feedback and ARCA response:

Consumer advocates did not provide comments on this issue (although one consumer advocate noted that they did not understand the purpose of this provision).

Industry stakeholders generally supported this provision.

Consequences of the variation:

This proposal is unlikely to result in additional complexity for CPs (as it simply reflects the assumed outcome under the amending Act). It will make it easier for CRBs to apply data supply validation processes.

CR Code ref	8A.1(g)	CR Code topic:	Technical issues for reporting FHI – operation of section 6QA(5)
Category:	Hardship reforms		

Explanation and reasons:

Subsection 6QA(5) of the Privacy Act provides for an exception to the reporting of FHI, even if a temporary FHA is in place, if the individuals meet the conditions in subparagraphs (a) and (b) of that section.

As part of our discussions with stakeholders it was identified that there was some uncertainty as to whether the 'amount' required to be paid under subparagraph 6QA(5)(b) was the full amount 'due' under the contract (i.e. all overdue amounts plus the amount that falls due in the month) or simply the amount that falls due in the month. While we consider that the legislation is reasonably clear that it is the former (i.e. all overdue amounts plus the amount that falls due in the month), we have included subparagraph 8A.1(g) to clarify this issue.

In addition, the subparagraph also clarifies when that payment must be paid. While we consider that the meaning of the legislation is clear, it may be argued that payments made in the 'grace period' (that applies to some payments under the current paragraph 8.1) also applies to payments made under subsection 6QA(5). We do not consider this is case and have included the timing element of subparagraph 8A.1(f) to clarify that subsection 6QA(5) does not apply in the following circumstances (as an example):

- Customer D has a personal loan with contractual repayments of $500 due on the 1st of each month.
- Although currently up to date, Customer D and the lender agree to a temporary FHA under which Customer D is to pay 50% of monthly payment (with the remaining 50% accruing as arrears).
- In the first month of that temporary FHA, Customer D pays $250 on the 1st of the month.
- On 2nd of the month, the CP reports RHI=0; FHI=A (i.e. because the terms of the temporary FHA have been satisfied and the customer has not also satisfied the payments due under the terms of the consumer credit).
- On 12th of the month, Customer A pays a further $250 – which would have satisfied their obligation for that month during the grace period that would have applied under a standard RHI calculation if there was no temporary FHA in place. The report of RHI = 0; FHA = A that was reported on the 2nd of the month will remain in place as correct.

Stakeholder feedback and ARCA response:

Consumer advocates expressed disappointment with the drafting of section 6QA(5) as they consider that a consumer in a 'catch-up period' or 'payment test period' following a temporary FHA should be reported as up to date, without any FHI, if they make those catch-up or payment test payments.

In roundtable discussions, industry stakeholders were generally firmly of the view that s6QA(5) required the individual to pay all amounts due and payable under the credit contract to be triggered (although there was a degree of confusion as to how this provision

sat within the overall operation of the amending Act; which is the reason for the subparagraph 8A.1(g)). Industry stakeholder's written feedback either supported this provision or was silent. Consumer advocates have challenged the timing element provided for in subparagraph 8A.1(g) on the basis that it is not included in the amending Act. We note, however, subparagraph 8A.1(g) merely describes and clarifies the existing operation of the amending Act. It does not provide for any additional 'grace period' into the operation of 8A.1(g). To allow for the payment to be made during a 'grace period' would require additional changes to be made to the CR Code and would involve significant additional complexity for CPs to develop their systems. The circumstances in which this issue is likely to be relevant are very narrow and we do not consider that the detriment to industry is outweighed by the minimal consumer benefit that would apply if the grace period were to be created.
Consequences of the variation: This proposal avoids additional complexity for CPs that would be required if the payment under section 6QA(5) was able to be made in the 'grace period'. Further, it does not remove any existing consumer protection as the grace period under paragraph 8.1 is unaffected.

CR Code ref	8A.2 generally	CR Code topic:	When is a temporary FHA formed
Category:	Hardship reforms		

Explanation and reasons:

The explanatory memorandum recognises that not all arrangements relating to payments that are, or may become, overdue are FHAs. Arrangements commonly known as 'promise to pay' arrangements may also be put in place in relation to such overdue payments (which are not FHAs).

As part of the consultation process, all key stakeholders have acknowledged that there is a difference between a 'promise to pay' and an FHA. However, initially, there was a wide range of views on how that distinction should be described and therefore, what proportion of 'arrangements' should be treated as promises to pay (such that RHI would be reported against the contractual terms and no FHI reported) and temporary FHAs (such that RHI would be reported against the terms of the arrangement and FHI would be reported). How this distinction is drawn will impact the ongoing usefulness and integrity of RHI in the credit reporting system and, importantly, will impact how a CP will respond to FHI in an individual's consumer credit report (including when assessing an application for credit from those individuals).

A subset of this issue is whether arrangements under which the individual is to make their payments as they fall due (without necessarily immediately repaying all overdue amounts) should or can be an FHA; these are referred to as 'catch-up periods' or 'payment test periods' in this application (noting the explanation of subparagraph 8A.1(g), above, also discusses these types of arrangements).

Based on the purpose of the hardship reforms, and taking into account initial key stakeholder feedback, we have developed paragraph 8A.2 to provide clarity on these matters.

The proposed approach in paragraph 8A.2 is based on the principles that:

(a) There should be no prescriptive approach to determining when an FHA has been agreed and, hence, the CR Code cannot and should not dictate the circumstances in which a credit provider and individual *must* agree to a 'financial hardship arrangement'; and
(b) Aside from those individuals who may self-identify and request hardship assistance, there is also an expectation that a credit provider will have processes in place that seek to understand the reasons behind someone experiencing payment difficulty, and whether the borrower should be assessed for 'hardship' assistance. It also seems reasonable to expect that the credit provider's focus on this would increase the longer that the individual will be overdue.

We also recognise that the legislative intent was to allow for flexibility rather than prescription, so that depending on specific circumstances, any particular arrangement could be considered as a financial hardship arrangement.

Proposed paragraph 8A.2 sets out a basis upon which a 'promise to pay' arrangement (which is not an FHA) can be differentiated from a temporary FHA. Importantly, paragraph 8A.2 only establishes presumptions, which can be displaced in a particular situation. This

approach gives effect to the principle that the CR Code cannot dictate circumstances in which an arrangement is, or is not, an FHA. The individual provisions of paragraph 8A.2 are discussed below.
Stakeholder feedback and ARCA response: This has been the most significant issue for stakeholders. ARCA's public consultation pack included a detailed discussion of the background to ARCA's proposals in relation to this issue, and the process by which we developed those proposals (which is included in Appendix B of Part I). Our proposal has obtained support from a broad range of stakeholders, as evidenced by the consumer advocates' written submissions and the verbal feedback provided by numerous stakeholders during the roundtables. We note in the joint consumer advocate feedback that: • They recognise the potential for the guiderails 'raise the bar' across the credit industry in terms of promoting conversations between credit providers and consumers[2]; • it would be suboptimal to have a simple definition for an FHA that would allow a CP to avoid reporting arrangements as FHA by simply stating that 'no FHA was agreed'; and • paragraph 8A.2 is flexible enough to allow most financial hardship arrangements to potentially be captured as FHA in the credit reporting system (as consumer advocates note is their understanding of the amending Act). We note that support from CPs has ranged across the spectrum from fully supportive to an acceptance that 'some' guiderails are necessary (and the ones proposed by ARCA are workable within their business), to the guiderails are unnecessary and too prescriptive. Overall though, based on our extensive consultation, the bulk of industry stakeholders accept some guiderails are both necessary and workable. We acknowledge the general concern raised by stakeholders – both consumer advocates and industry - about the complexity of the drafting. We have redrafted the paragraph to take a more 'direct' approach. Importantly, the explicit reference to 'presumptions' in the redrafted paragraph 8A.2 reinforces that the paragraph does, in fact, only establish 'presumptions'. Consumer advocates have noted concern that a CP could place undue pressure on an individual to 'agree' that an overdue payment arrangement is not a temporary FHA (e.g. by promising not to send a default notice or commence additional legal proceedings as long as the customer agrees there is not an FHA in place). We have considered this feedback and have concluded that sufficient consumer protection exists within the existing framework to manage this issue. In particular, we don't consider this is a significant risk in

[2] We note that this is not the primary intent of ARCA's proposals; rather, our proposals are intended to give effect to the amending Act, promote consistency of reporting between CPs and to provide for a reporting regime that is able to work alongside the existing NCC hardship regime. However, we agree that the implementation of this proposal may consequently raise the bar across industry which will require some CPs to improve the hardship processes (and which should result in better consumer outcomes).

practice as, once a CP has built the capacity to report FHI, then there should be no issue with disclosing this data (i.e. no incentive exists which would act to put a 'stop' on the CP making this report). Further, based on our understanding of the overall consumer credit regulatory framework, such conduct is likely to be inconsistent with the CP general conduct obligations as an Australian Credit Licensee (see section 47, NCCP) and an individual would have recourse to complain where a CP engaged in conduct of this nature.

Industry feedback has also uniformly supported the policy intent to ensure the continued relevance of RHI (i.e. to ensure that appropriate situations of non-payment continue to be reflected on the credit report) and avoid a situation in which 'almost all' collections arrangements are treated as FHAs. In roundtable and one-on-one sessions with industry participants, we have received feedback that the approach is appropriate and workable (noting, however, the general concerns with the complexity of the drafting). A number of CPs have confirmed this feedback in their written submissions.

We note that 2 CPs and the ABA have raised concerns that ARCA's proposal in paragraph 8A.2 may be too prescriptive, is unnecessary as the NCC establishes the relevant obligations already, and may interfere with current CP practices in relation to the NCC obligations.

We disagree with these views and believe they reflect a misunderstanding of both the proposed operation of the guiderails and of the NCC. As noted in the explanation above – the paragraph in the CR Code establishes presumptions only, which are based on an assumption that (when determining if the situation is an FHA or not, for the purpose of determining the credit reporting treatment), the longer an individual will take before making their ordinary monthly payments, the more a CP should be expected to enquire about their financial situation. In no way does 8A.2 restrict how a CP must report a particular arrangement put in place with a customer – instead it simply provides a guide or checklist of presumptions to assist classification.

In relation to a CP's existing NCC obligations, based on ARCA's understanding and experience of the NCC, it is incorrect to suggest that the NCC hardship provisions establish a clear basis for treating an arrangement as a financial hardship arrangement. They do not. Instead, the NCC hardship provisions merely require a CP to identify a hardship notice and, following the decision whether to vary or not vary the contract in response, provide a written notice to the consumer. Further, the amending Act does not limit the creation of FHAs only to circumstances in which a NCC hardship notice has been given; although, in order to improve consistency with CPs' existing processes, our proposal allows a CP to implement a process under which a hardship notice is a precondition to an FHA. This is done by setting out the circumstances in which an onus is placed on the CP to proactively prompt the individual to give the notice.

Overall, despite the concerns expressed by some stakeholders, we consider that the better approach to drafting is to ensure that 'guiderails' are included in the CR Code to help distinguish between 'promises-to-pay' and FHAs. The form of guiderails suggested by ARCA are not prescriptive, can be implemented by CPs without significant change to their existing practices and are based on sound logic (i.e. the longer the individual is going to be in arrears, the greater the expectation on a CP to make inquiries about their financial situation). Importantly, as noted above, we consider that the consequence of this approach may be that it will generally raise the bar for industry in terms of managing hardship and deliver better consumer outcomes. Moreover, compared to what is likely to occur to the credit reporting treatment of financial hardship arrangements without any such guiderails, the use of these tools will help to ensure a higher degree of consistency of outcomes for consumers, reflecting greater consistency in approaches taken by credit providers when reporting financial hardship arrangements. As explained in the EM, this was a clear intent of the legislation.

Consequences of the variation:

The amending Act imposes an obligation on CPs to undertake substantial work to update their systems and processes to allow for the creation of 'FHAs' and the reporting of FHI.

Currently, most CPs have a clear delineation between arrangements put in place through the 'collections team' or, at least, under 'collection policies' (which are <u>not</u> financial hardship arrangements) and those agreed through the 'hardship team' or under 'hardship policies'. Under the amending Act, the creation of 'FHAs' are not subject to those distinctions (i.e. an FHA can be agreed through the 'collections team' or under 'collections policies'). This would potentially require almost all CPs to completely redesign their collections/hardship processes and restructure the teams that are responsible for those matters.

While recognising the internal structure of a CP's collections/hardship processes and teams cannot determine the treatment of particular overdue payment arrangement for the purposes of credit reporting, this proposal allows CPs to avoid making those significant changes by allowing a CP to implement a process under which a hardship notice is a precondition to an FHA. This is done by setting out the circumstances in which an onus is placed on the CP to proactively prompt the individual to give the notice (i.e. so that if the customer gives the notice, they are then transferred to the existing hardship team or considered under the existing hardship policy).

CPs that currently have robust processes and procedures to identify customers in need of hardship assistance will need to make minimal changes to their systems and processes (although some CPs have noted that, given the heightened focus on those processes introduced by paragraph 8A.2, they may need to strengthen their record keeping practices).

CPs that currently do not have robust processes and procedures to identify customers in need of hardship assistance will need to undertake additional work.

In the absence of the clarity provided by this proposal, it is likely that without the significant change to business structures and to collections/hardship processes outlined above, CPs (and, ultimately AFCA and financial counsellors) would need to deal with more complaints about how a CP has classified and subsequently reported the credit reporting information for that customer (with those complaints being more complex). This proposal should reduce both the number and complexity of those complaints.

For consumers, this proposal will:

- provide clarity on what factors should determine credit reporting treatment and how arrangements should be treated and, as a result, reduce the risk that they may be convinced to pay for the high-cost services of credit repair firms;

- reinforce proper classification of the individual (in the CR Code for credit reporting treatment) but, as a consequence, helping ensure that individuals who need financial hardship assistance are channelled to the appropriate teams within the CP; and
- give individuals final control over whether FHI or missed payments are recorded on their credit report.

Further discussion of particular elements of paragraph 8A.2:

CR Code ref	8A.2(a)	**CR Code topic:**	Temporary FHA presumed

Explanation and reasons:

Subparagraph 8A.2(a) provides that an overdue payment arrangement under which the individual won't pay their ordinary monthly payments within the next month is presumed to be an FHA (referred to below as an 'extended arrangement').

It is important to note that subparagraph 8A.2(a) does not require a credit provider to treat any specific arrangement as a temporary FHA merely because the individual will not pay their ordinary monthly payments within the next month. Rather, it simply places an onus on the credit provider to understand the reasons for that customer having overdue payments when determining the credit reporting treatment of that customer. If the reasons appear to be consistent with 'financial hardship', it would then be appropriate for the customer to be dealt with under the credit provider's 'financial hardship' processes and therefore, potentially, reported in accordance with a resulting FHA (subject to the customer accepting that referral). This is consistent with the principles described above and, we consider, is consistent with the expectations placed on credit providers under the general conduct obligations in the NCCP and NCC hardship regime.

If the CP is not clear as to the reasons for the individual's inability to meet their obligations, they could ask the customer whether the individual wants to make a hardship request. If the individual declines, the resulting overdue payment arrangement would not be an FHA. See our discussion of subparagraph 8A.2(a)(iii), below.

It is not open to a credit provider to routinely and invariably treat all arrangements otherwise captured by subparagraph 8A.2(a) as temporary FHAs. If it is clear that the extended arrangement *is* subject to one of the exceptions listed (e.g. the result of a mismanagement of funds in the short term), the arrangement should not be classified as an FHA when reporting information about the account. This will ensure the continued effectiveness of RHI (and FHI) in the credit reporting system. That is, a customer who is unable to pay due to a 'reasonable cause' (as described in the notes to subsections 72(3) and subsection 177B(3) of the NCC) should be reported differently to a customer who is unable to pay due to a 'mismanagement of funds in the short term' (as described in paragraph 2.29 of the EM).

This will help ensure that other credit providers are more able to differentiate applicants whose previous payment difficulty was the result of a 'reasonable cause' (as referenced in the NCC) from those whose payment difficulty was the result of a mismanagement of funds in the short term. When assessing applications for new credit, this will enable credit providers to dedicate more resources on understanding the financial situation of the first group of customers, and reduce the potential for FHI to be seen as a 'black mark'.

Set out immediately below is a further assessment of the individual components of subparagraphs 8A.2(a).

See Examples 3 and 6 in Part III.

Stakeholder feedback and ARCA response:

This subparagraph was previously subparagraph 8A.2(c).

The joint consumer advocate submission supported the subparagraph 8A.2(a); although making a suggestion as to the drafting (which we have adopted).

Further feedback to this subparagraph is discussed below in relation to the components on subparagraph 8A.2(a).

CR Code ref	8A.2(a)(i) -(ii)	**CR Code topic:**	Temporary FHA presumed – displacing presumption

Explanation and reasons:

An extended arrangement would not be considered a temporary FHA if the credit provider reasonably believes the individual's inability to meet their obligations is the result of a 'mismanagement of funds in the short term' (or the individual has not provided information to the credit provider that allows the credit provider to make the assessment). This wording is taken from paragraph 2.29 of the EM and reflects a general view that 'financial hardship' relates to payment difficulty that results from "a reasonable cause (such as illness or unemployment)" (see the Notes to subsections 72(3) and 177B(3) of the NCC). We note that while the mismanagement of funds may happen in the 'short term', the effects could be 'extended' (i.e. continue to impact individual's ability to make payments as they fall due for more than a month). For example, a weekend-long splurge of 'buy now pay later' (BNPL) purchases, could have an extended impact on their ability to make repayments on other loans.

The concept of 'mismanagement of funds' has not been defined in the proposed CR Code drafting because of a desire to retain flexibility and avoid a prescriptive approach to the drafting. Having discussed this concept with stakeholders and based on our experience and understanding, we consider that a mismanagement of funds in the short term could include things such as (i) using BNPL services too much which may have a lasting effect for the following few months on the individual's ability to pay their other credit products; (ii) travelling for leisure and, by doing so, incurring additional expenses and disregarding existing expenses already due and loan payments; (iii) spending salary on non-essential items so that commitments cannot be paid; and (iv) for self-employed customers, minor cash flow issues. It could also include (v) unplanned/unbudgeted expenses (e.g. car repairs) that impact short term capacity to meet commitments (however this may be a matter of degree and credit providers would need to be aware of indicators that a 'short term' issue is potentially indicative of longer term financial difficulties). A material case of 'overcommitment', which is likely to have extended impact on the individual's ability to meet their obligations under the credit contract, is unlikely to be a 'mismanagement of funds in the short term'. Of course, although a CP may need to treat this as a hardship request (or ‘hardship notice’ under the NCC), it does not necessarily require the CP to agree to an FHA in response to that overcommitment situation (see also the Note to section 72 NCC). In this way, the credit reporting treatment will flow from the NCC assessment undertaken by the CP.

As we have already noted, we have not proposed a definition of ‘mismanagement of funds in the short term’ in the CR Code.

Recognising the flexibility in the CR Code approach, we would observe that the credit reporting treatment will reflect existing processes. For instance, to understand the individual’s reasons for not meeting their obligations, a credit provider could, for example, ask the individual for their reasons, review the information that the credit provider holds on the individual or do a combination of those and other things. A CP would need to consider how the basis for this assessment is recorded. What are reasonable steps will depend on the circumstances, e.g. less steps may be reasonable if the arrangement is only going slightly beyond a month compared to one that will last a long time. However, as a starting point, subparagraph 8A.2(a)(i) does *not* require the CP to undertake a detailed assessment of the individual’s financial situation (as may be done in response to a hardship request) to form a ‘reasonable’ belief as to the reasons for the individual’s inability to meet their obligations.

Under subparagraph 8A.2(a)(ii), it is open to the CP to treat the overdue payment arrangement as *not* a temporary FHA if the individual has not responded to the CP’s request for information regarding the individual’s reason for their inability to meet their obligations.

Stakeholder feedback and ARCA response:

As noted above, the joint consumer advocate submission supported this subparagraph (although noting that the previous subparagraph (i) should be split into two elements – which we have done). The joint consumer advocate submission does not support the CR Code further defining the meaning of ‘mismanagement of funds in the short term’. They disagreed with some of the examples given as to what could be a mismanagement of funds in the short term (in the explanation, above):

- Unplanned/unbudgeted expenses
- Travelling

In relation to unplanned/unbudgeted expenses we note that the explanation above makes it clear that these could indicate that the issue is not a ‘short term’ issue and that CPs would need to be aware of that possibility. Beyond that, we do not consider it is a matter for the CR Code to provide further comment on that issue. In relation to travelling, we have clarified that the example relates to leisure travel.

Legal Aid Queensland questioned the inclusion of this provision and considered it “seeks to lay blame on individuals for the inability to pay a credit account in the short term”. We note that the term “mismanagement of funds in the short term” is taken from the explanatory memorandum and is consistent with the ‘note’ to section 72 of the NCC (which describes circumstances in which a CP may choose not to agree to a financial hardship variation).

Industry stakeholders have generally supported the principle behind the provision and the use of the term ‘mismanagement of funds in the short term’. There has been a mix of feedback as to whether the CR Code should provide more clarity on the meaning of the term (however we consider that is beyond the scope of the CR Code and is more appropriately a matter for the NCC and ASIC guidance).

The ABA and one CP were concerned that subparagraph 8A.2(a) would prevent a CP from treating an arrangement made in response to ‘overcommitment’ as an FHA. We consider that this is a misreading of the provision. ‘Overcommitment’ of the type referred to by the ABA (i.e. “where a customer is struggling to repay multiple debts, potentially across a number of credit providers”) is likely to involve a financial problem in the extended term (not the short term) and an arrangement in response to the overcommitment is *likely* to involve an FHA (although a CP would need to consider whether a temporary FHA was appropriate, or whether it could exacerbate the customer’s financial problems). We have clarified this in the explanation above.

The same CP was also concerned that they would need to undertake a detailed assessment of an individual’s financial situation (as may be done in response to a hardship request) in order to understand whether the payment difficulty was the result of a ‘mismanagement of funds in the short term’. We note that this is not the intended meaning of the subparagraph. We have clarified this in the explanation above.

A CP raised the example of a customer who, while not able to pay their ordinary monthly payments within the next month, was confident that they would be able to pay all arrears, and be up to date, within a slightly longer period (e.g. 45 days). The CP was concerned that the proposed subparagraph 8A.2(a) would force that CP to treat the arrangement as a temporary FHA (so that FHI would be reported on the customer’s credit report). They considered this would be a poor consumer outcome. That is, however, not the effect of subparagraph 8A.2(a).

The presumption in subparagraph 8A.2(a) would be displaced if the CP reasonably believed that the reason for the overdue payments was a ‘mismanagement of funds in the short term’ and the steps the CP would take to understand whether that was the case can be minimal and straightforward. Given the customer was confident they would be fully up to date within 45 days, the steps required to form that reasonable belief would be very simple, e.g. a question of the customer as to what gave them confidence regarding their future ability to pay or whether there was an ongoing issue behind the current payment difficulty. Again, as noted in the explanation above, 8A.2(a)(i) does not require the CP to undertake a detailed assessment of the individual’s financial situation (as may be otherwise done in response to a hardship request) to form the ‘reasonable’ belief.

Alternatively, to displace the presumption, the CP could simply ask the customer whether they thought a referral to the CP’s hardship team was necessary. That is, where it is unclear whether the customer has made a hardship request, the CP could simply ask the customer if they would like to make such a request (see discussion below). If the customer said no, the presumption would be displaced. We consider that this is consistent with the expectations created under the NCC hardship regime and, for those banks which are signatories to the Banking Code of Practice, consistent with the requirements in paragraph 173 of that code.

CR Code ref	8A.2(a)(iii)	CR Code topic:	Temporary FHA presumed – displacing presumption

Explanation and reasons:

We have proposed that an individual may explicitly state that they do not want to make a hardship request, such that, regardless of the individual's circumstances and reasons for being overdue, no FHI is disclosed by the CP and RHI is determined by reference to the consumer credit. This is based on the principle that an individual should have the ultimate say whether they have agreed to an FHA. We consider that this is consistent with the requirements in sections 72 and 177B of the NCC, under which it is ultimately up to the individual to choose to provide a 'hardship notice'.

Nevertheless, by framing the subparagraph to require the individual to 'reject' giving a hardship request, the onus is placed on the credit provider to disprove the existence of a hardship request where the individual is not able to meet their payments as they fall due within the next month (rather than placing the onus on the individual to make the request).

Stakeholder feedback and ARCA response:

The joint consumer advocate submission supported the approach of putting the onus on the CP in these circumstances. Legal Aid Queensland noted that an individual who states that they do not want to make a hardship request should be referred to a relevant community legal centre, legal aid commission or the National Debt Helpline. However, we consider inclusion of this provision would be outside the scope of the CR Code (and would be more appropriately dealt with under the NCC and ASIC guidance).

CR Code ref	8A.2(b)	CR Code topic:	Temporary FHA not presumed (incl displacing presumption)

Explanation and reasons:

Subparagraph 8A.2(b) provides that an overdue payment arrangement that involves an individual paying their ordinary monthly payments within the next month is presumed *not* to be a FHA.

The presumption in subparagraph 8A.2(b) may be displaced in a number of ways.

See Examples 1, 2, 4 and 5 in Part III.

Following an earlier temporary FHA

Under subparagraph 8A.2(b)(i), if the overdue payment arrangement directly follows, and is in response to, an earlier temporary FHA, the presumption in 8A.2(b) would be displaced (i.e. the presumption would then be that the arrangement *is* a temporary FHA).

This reflects an approach to the provision of hardship assistance followed by many CPs, where the CP will agree to temporary FHAs under which an individual is to pay less than their ordinary monthly payments for a specified period (often three months). During the temporary FHA, the ordinary monthly payments will still fall due and will, contractually, become outstanding. At the end of that period – provided the individual is now able to recommence at least ordinary monthly payments – the individual may be put into a further arrangement under which the individual:

- will pay their ordinary monthly payments, without paying the outstanding payments (i.e. a 'payment test period'). Once the individual has made 6 ordinary monthly payments on time under the payment test period, the CP will be confident that the individual has recovered from their financial hardship and will add the outstanding payments back into the loan (so that those payments are no longer overdue); or

- will start paying more than their ordinary monthly payments to pay down those outstanding payments (i.e. 'catch-up period').

Subparagraph 8A.2(b)(i) provides that, in the circumstances above, the 'further arrangement' (i.e. the payment test period or catch-up period) is likely to be a temporary FHA (however, as with any overdue payment arrangement, this can be changed by clear agreement between the individual and the CP).

If the individual won't be up to date within 7 months

The condition in subparagraph 8A.2(b) (i.e. that the individual is to pay their ordinary monthly payments within a month) means that an individual's RHI record will not significantly 'deteriorate' during the arrangement and, in many cases, will improve if catch-up payments are made. However, if the individual is to only make their ordinary monthly payments and no more, it could mean the individual would never return to being up to date (i.e. with RHI=0). This could lead to a credit reporting treatment which does not accurately reflect the individual's circumstances, and recovery from their financial hardship. Subparagraph 8A.2(b)(ii) reduces that risk by providing that the presumption in 8A.2(b) is displaced if the individual is "likely to still be overdue after 7 months".

Subparagraph 8A.2(b)(ii) will *not* apply (i.e. the presumption in 8A.2(b) will *not* be displaced) if:

- the payments to be made under the overdue payment arrangement should be enough to clear the overdue payments in that period; or

- the CP has a policy (i.e. a 're-age policy') that would generally allow the CP to add the outstanding payments back into the loan (so that those payments are no longer overdue) within 7 months if the payments are made.

Whether this is the case is determined at the time the overdue payment arrangement is put in place, rather than in hindsight based on the actual outcome.

If subparagraph 8A.2(b)(ii) applies, the presumption in subparagraph 8A.2(b) is displaced and the overdue payment arrangement is likely to be a temporary FHA (however, again, this can be changed by clear agreement between the individual and the CP).

Overdue accounts already accelerated

An accelerated account is one where, due to the delinquent status of the account, the credit provider has taken action to call-up the debt and the full balance is now due and payable. As the full balance is due and payable, such accounts will no longer have an 'ordinary monthly payment'. Under paragraph 8.1 of the CR Code, the repayment history information status should continue to increase as long as the full balance is not paid (i.e. so that it ultimately is reported as RHI=X)

We are, however, aware that some CPs may allow an individual to continue paying off the balance provided the individual is able to pay an amount equal to what the ordinary month payment *would* have been if the account was not accelerated (so that the repayment history status will not increase if those payments are made). However, as the balance has been accelerated, the CP's re-age policy may not apply to the account (i.e. the account will remain permanently delinquent unless the individual pays everything that is owing). If so, the presumption in subparagraph 8A.2(b) will not apply.

Accordingly, unless otherwise displaced and provided the arrangement is done with the express or implied agreement of the CP, the arrangement is likely to be a temporary FHA.

However, CPs must be aware that in this situation (and without further intervention), the account could 'permanently' (i.e. until it is paid out) be disclosed as:

- if the presumption is not displaced, subject to a temporary FHA; or
- if the presumption is displaced, in arrears.[3]

CPs will need to consider whether either result is appropriate in the long term, or whether further intervention is appropriate.

See Example 7 in Part III (which deals with a situation in which the individual is likely to remain overdue for more than 7 months due to the account being accelerated).

Stakeholder feedback and ARCA response:

While the joint consumer advocate submission supports the overall paragraph 8A.2, they are concerned that a consumer may not understand their rights under the NCC (i.e. to give a hardship notice which could potentially result in the presumption in 8A.2(b) being displaced). We note that the notification requirements of paragraph 8A.4 will help to reduce that risk insofar as the consumer's understanding of the credit reporting treatment of their hardship situation is concerned (and that, as noted by the consumer advocates, the CP will still need to ensure they are complying with their NCC obligations).

Industry stakeholder feedback mirrors the overall feedback on paragraph 8A.2. However, we note that one of the CPs who has raised concerns with paragraph 8A.2 has also provided strong support to the principle that a CP should "not be required to pry into the specific cause(s) of infrequent and short-term missed payments", and that "requiring a customer – who has not expressed any concern about beginning to (at least) resume making MMP within a month – to provide specific reasons that led to them missing one or more payments is unnecessarily invasive and administratively burdensome". This supports the approach proposed by ARCA in subparagraph 8A.2(b).

Following an earlier temporary FHA in subparagraph 8A.2(b)(i)

This subparagraph was previously subparagraph 8A.2(a).

[3] We note also, if reporting RHI under paragraph 8.1(a) (i.e. as determined by reference to the terms of the consumer credit), the CP will need to ensure that the RHI being recorded accurately reflects the contractual status of account.

The joint consumer advocate submission supports the approach that such arrangements should ordinarily be treated as temporary FHAs. They have also suggested that these arrangements be labelled as 'catch up period or payment test period' – however, we note that would introduce additional complexity as any such label would then need to distinguish between such periods that happen after a temporary FHA and those that don't. We consider that the redrafted paragraph 8A.2 makes the operation of this provision clearer.

Legal Aid Queensland has questioned why a CP cannot re-age the account immediately following the temporary FHA. We note that this is an issue that is beyond the scope of the CR Code to address (given it concerns prudential and accounting treatment, as well as broader issues of hardship responses). Again, while they otherwise agree with the overall paragraph 8A.2, they do not agree with this subparagraph and have not provided any reasons.

This proposal has been broadly supported by industry stakeholders. One CP has noted that the hardship approach of 'temporary FHA' followed by 'catch-up period or payment test', before a 'variation FHA' is not followed by all CPs (in particular those which are not authorised deposit-taking institutions (ADI)). In that CP's view, the amending Act is designed to reflect the hardship approach ordinarily adopted by ADIs and the amending Act risks forcing non-ADIs to adopt the ADI approach, which would require non-ADIs to completely overhaul the way the provide financial hardship assistance and result in poorer consumer outcomes. That CP considers the 'guiderails' would reduce that risk because they allow for differences in hardship approach to be easily reflected in the credit reporting treatment.

CR Code ref	8A.2(c)	**CR Code topic:**	Arrangements following rejection of hardship request

Explanation and reasons:

This proposal is consistent with the principle that the CR Code cannot and should not dictate the circumstances in which a credit provider and an individual must agree to a 'financial hardship arrangement'. The other subparagraphs in paragraph 8A.2 are based on the idea that the longer an individual will be unable to make their monthly payments the higher the expectation is that the credit provider will proactively refer the individual for consideration of hardship assistance.

Subparagraph 8A.2(c) recognises that following such a referral or the receipt of an unprompted hardship request from the customer, the credit provider may nevertheless not agree to a hardship arrangement (whether a variation FHA or a temporary FHA). This may be, for example, because with further information and consideration the credit provider considers the payment difficulty is the result of a mismanagement of funds in the short-term, or because the credit provider believes the individual would not be able to meet his or her obligations under the contract even if an FHA was agreed (see 'time to sell' discussion, below).

A credit provider that does not agree to a hardship variation following a hardship request (i.e. a hardship notice under the NCC) is, under the NCC, required to give a notice to the customer.

'Time to sell' arrangements

After assessing an individual's financial situation in response to a hardship request, the credit provider may "reasonably" believe that the individual "would not be able to meet his or her obligations under the contract even if it were changed" (see Note to section 72 or s177B of the *National Credit Code*). In such cases, the credit provider may choose not to agree to change the credit contract. However, in relation to secured credit (i.e., generally home loans), the individual may advise the credit provider that they will sell the secured property to pay down their debt (either completely or partly). An arrangement may then be put in place to allow time for the individual to sell the property.

Such arrangements may, during the 'time to sell' involve:

- Paying monthly payments as they fall due (without paying overdue amounts)
- No payments; or
- Reduced payments.

Subject to the relevant circumstances, such arrangements could be treated as:

- a temporary FHA, so that while the individual sells the property, FHI would be recorded and the RHI would reflect the terms of the arrangement; or
- not an FHA, so that RHI would reflect the contractual payments during that time and arrears would likely be reported.

We note that the proposal in paragraph 8A – particularly this subparagraph 8A.2(c) – allow for either approach to be adopted based on the discussions between the individual and the credit provider. This is consistent with the view that the legislation allows for flexibility in how an arrangement is classified and reported and that the CR Code should not restrict that flexibility.

While the CR Code cannot dictate when a 'time to sell' arrangement must or must not be treated as a temporary FHA, ARCA considers that CPs should, as far as practicable, seek to apply a consistent approach. In its capacity as industry association, ARCA will work with its Members and other relevant stakeholders to develop guiding principles for how time to sell arrangements should be treated (recognising this may differ depending on the circumstances of the individual consumer).

See Examples 8, 9A and 9B in Part III.

Stakeholder feedback and ARCA response:

Arrangements following a 'rejected' hardship request

Consumer advocates have raised two concerns with the subparagraph 8A.2(c):

- this provision being used by CPs to avoid the burden of reporting FHI or reporting RHI in line with an FHA by having the individual 'agree' that the arrangement is not a FHA. They note that any 'arrangement' that follows a hardship request should be treated as an FHA; and
- as a subset of that issue, 'time to sell' arrangements should almost always be treated as a FHA, and that paragraph 8A should make it clear that this form of arrangement will often be a hardship arrangement.

Industry stakeholders (in both written feedback and during roundtables) supported this provision. CPs have also noted that whether 'time to sell' arrangements should be treated as a temporary FHA will depend on the circumstances.

Subparagraph 8A.2(c) recognises the OAIC's instruction that the CR Code cannot dictate what arrangements are or are not FHAs, i.e. the CR Code cannot dictate that any arrangement that follows a hardship request should be treated as a FHA. Accordingly, the provision simply establishes the basis for determining how the post-rejection arrangement is classified. Given the fact that the customer has made a hardship request, the provision sets a 'high-bar' for determining that the arrangement isn't an FHA. That is, it requires the CP to explicitly state that it isn't an FHA (rather than relying on an inference).

Again, the CR Code cannot dictate whether a 'time to sell' arrangement is or is not an FHA. Feedback from a number of CPs is that they would be open to treating time to sell arrangements as temporary FHAs. However, this would depend on the circumstances. For example, they would likely treat a time to sell arrangement as a temporary FHA if they consider the individual's intent to sell is genuine and the individual is doing everything reasonably necessary to sell. If this is not the case, the CPs would be less likely to treat the arrangement as a temporary FHA.

ARCA agrees that there should be a consistent approach taken by CPs in relation to the treatment of time to sell arrangements (see explanation, above). However, the issue is too complex to address in the CR Code by way of example (also noting that the OAIC has previously stated that the CR Code should not include 'examples). We have included two additional examples in Part III (Examples 9A and 9B) regarding the operation of subparagraph 8A.2(c) in the context of time to sell arrangements (although noting these describe the outcome, rather than the principles that sit behind the CP's approach).

Arrangements on compassionate grounds

The joint consumer advocate submission also notes other related arrangements:

- life interests in property with the intention of collecting the loan upon sale of the home after the person dies or moves to another living arrangement (for example aged care); and
- loan charge off, stop charging interest and hold the title against the principal debt.

They note that these are most commonly offered when there are compelling compassionate circumstances. The consumer advocates consider these should be listed in the examples of variation FHAs in the paragraph 8A.3.

We agree that these would be examples of variation FHAs, such that FHI=V would be disclosed in the month the arrangement was made and no further FHI would be made. Separately, the CP would need to consider whether the loan was closed at that stage (so that CCLI is updated and RHI is no longer reported).

However, we consider that the existing list of variations in subparagraphs 8A.3(c) – (g) cover those situations.

We have added Examples 12 and 13 in Part III to illustrate this issue (see paragraph 8A.3).

'Variations' in settlement of disputes

The joint consumer advocate submission also notes that the settlement of disputes may involve 'variations' of the kinds listed in subparagraphs 8A.3(c) – (g) and that such variations should not appear on a credit report (i.e. by way of FHI) because they do not relate to 'financial hardship'.

This would include matters relating to:

- claims of responsible lending or unconscionable conduct; and
- debts waived due to domestic and family violence.

We agree with the consumer advocates' comment that variations made in response to claims of responsible lending or unconscionable conduct should not be treated as an FHA (and no FHI should be reported).

However, the CP would need to carefully consider whether the variation was the result of a failure of responsible lending or unconscionable conduct, or due to the individual's subsequent financial hardship. We would expect CPs to take the approach that, provided the claim of responsible lending or unconscionable conduct was plausible, a legitimate settlement outcome should include no FHI being reported. However, this same outcome should not be available as a proposed settlement outcome for a clearly baseless responsible lending or unconscionable conduct dispute (where the request to vary the contract clearly related to individual's subsequent financial hardship).

We have added Example 14 in Part III in relation to variation made in response to disputes.

We agree with the consumer advocates' comment that it may be appropriate for a CP to disclose FHI=V where an individual took a debt voluntarily but is now unable to pay due to domestic and family violence. We are less clear on the consumer advocates' assertion that FHI should not be recorded in situations where the debt was incurred by coercion or undue influence. However, in respect of both situations, we note that additional work needs to be done on understanding the implications of the credit reporting system to victim survivors of domestic and family violence. ARCA will be undertaking work on this issue in the coming months, and we will continue to engage with consumer advocates and other key stakeholders.

CR Code ref	8A.3	CR Code topic:	When is a variation FHA formed
Category:	Hardship reforms		

Explanation and reasons:

Proposed paragraph 8A.3 establishes the circumstances in which a ‘contract variation’ will result in reporting a variation FHA and the type of contractual variations that may result in reporting a variation FHA.

Our understanding is that credit providers broadly adopt two approaches to providing ‘assistance’ to individual’s experiencing financial hardship:

- agreeing to a temporary relief or deferral of the individual’s obligations in relation to the consumer credit and, subject to the individual meeting qualifying criteria, later varying the consumer credit via a contractual variation (including to remove ‘arrears’ that have accrued during the period of the temporary relief or deferral); and
- varying the consumer credit upfront to address the payment difficulties being experienced by the individual (whether those changes apply for a short time or an extended time/remaining term of the contract).

Paragraph 8A.3 (a) and (b) provide for the ‘variations’ made in both cases to be classified as a variation FHA. Importantly, where there has not been an initial temporary FHA, subparagraph 8A.3(b) provides that a variation FHA will only be formed if the variation is made in response to a hardship request. This ensures that contract variations done in the ordinary course of the credit provider’s business are not treated as FHAs, e.g. an individual who asks for their loan term to be extended but is not experiencing financial hardship/does not make a hardship request will not have FHI recorded in their credit report.

We note that an agreement for a credit provider to accept a lower lump sum to pay out the loan due to the individual’s financial situation will generally be ‘in response’ to a hardship request (even if the agreement does not go through the credit provider’s formal ‘hardship’ processes or follows an earlier ‘declined’ hardship request).

There are some circumstances where a credit provider may need to more carefully consider whether a ‘variation’ is ‘in response’ to a hardship request (such that, if not, the reporting of FHI could be misleading). For example, a credit provider may agree to a minor fee or interest waiver when an overdue payment arrangement is put in place (including as a simple goodwill gesture from the credit provider). In such circumstances, subparagraph 8A.3(g) provides that the fee or interest waiver would not involve a variation FHA. Likewise, we understand that credit providers may sometimes make minor ‘changes’ to the consumer credit operational reasons. For example, unsecured credit will often be ‘charged-off’ once it becomes 180 days past due. Where an overdue payment arrangement straddles that point, the credit provider may capitalise a small amount of arrears to ensure that the account does not automatically charge-off during the arrangement (which helps both the individual and the credit provider). It may be appropriate for the credit provider to treat this operational step as not being a variation under paragraph 8A.3.

We note that the reference to a 'permanent' variation to the terms of the consumer credit in subparagraph 6QA(1)(d)(i) of the Privacy Act does not, in our view, require the variation to result in changes applying for the remaining term of the credit contract. Rather, it requires the variation FHA to provide a permanent intervention in relation to the individual's inability to pay (where, in contrast, a temporary FHA involves the accrual of overdue payments during the temporary FHA which must be later cleared). For example, a credit provider may agree to a variation FHA in relation to a credit card under which the individual's repayments are reduced to $0 for three months. While this change only applies for a limited time it is still 'permanent' for the purposes of subparagraph 6QA(1)(d)(i) as there are no overdue payments at the end of that 3-month period. If a credit provider agrees to an 'upfront' variation of the customer's repayments to a lower amount for a few months, it is likely that a further change may be required to either increase repayments for the remaining term or extend the term of the loan (where the later of those changes can, under paragraph 8A.3 result in a variation FHA). However, that two-step process should ordinarily be considered as part of the one 'variation', so that FHI is disclosed only in the month in which the payments are first reduced and not again when the loan term is extended (even if this is processed in a subsequent month). This does not, however, prevent a further variation FHA being formed and reported if the credit provider and the individual subsequently agree to a new variation to the terms of consumer credit (for example, because the individual's circumstances have not improved as initially expected based on the information the credit provider had at the time of agreeing to the initial variation FHA). See Examples 6, 10, 11, 12, 13 and 14 in Part III.
Stakeholder feedback and ARCA response: Consumer advocates support the proposal to clarify when a variation FHA is formed. Also, we consider the joint consumer advocate feedback in relation to variations made on compassionate grounds and in settlement of disputes (discussed in relation to response to subparagraph 8A.2(c), *Arrangements following rejection of hardship request*) supports the need for this clarity. There was a mix of views from industry stakeholders. There was general support for subparagraphs 8A.3(a) – (b)), however a CP suggested that subparagraphs 8A.4 were too prescriptive and "arguably incentives blanket hardship decisioning and may impact the accuracy and reliability of financial hardship information reporting". However, we do not see why it would do so and we note that the CP has not provided any examples of variations that the paragraph improperly excludes or includes. As such, we consider it is an appropriate list of variations and does not promote a blanket approach to hardship reporting. Further, we consider that the list provides necessary clarity as to when a variation is, and isn't, to be treated as a variation FHA. For example, paragraph 8A.3(a) provides clarity that only a contractual effective change to payments is a variation FHA. We note that feedback from Legal Aid Queensland shows that there is still a lack of clarity on this issue, despite the confirmation provided by the amending Act. Likewise, subparagraph 8A.3(g) clarifies when a change to the interest rate, fees or other charges is not a variation FHA. In the absence of such clarification there would be continued uncertainty and, potentially, inconsistent approaches taken by CPs.

Consequences of the variation:

The amending Act imposes an obligation on CPs to undertake substantial work to update their systems and processes to allow for the creation of ‘FHAs’ and the reporting of FHI.

Subparagraphs 8A.3(a) – (b) minimise the complexity of the work required by CPs by limiting the circumstances in which a variation FHA is formed. For example, the paragraph means that a CP is not required to review or change contract variation processes that sit outside their collections/hardship teams.

Paragraph 8A.3(c) – (g) will ensure that customers who ask for a contract variation, but are not experiencing financial hardship, will not be reported as being in hardship. This will provide assurance to those individuals that their credit report will not be impacted by routine loan variations.

CR Code ref	8A.4	CR Code topic:	Explaining the impact of arrangements to individuals
Category:	Hardship reforms		

Explanation and reasons:

Privacy Act (section 21C) and the CR Code (paragraph 4.1) require a credit provider to notify an individual about the credit information that it may disclose to a credit reporting body. This must be given at or before the time the credit provider collects personal information that is likely to be disclosed to a CRB. In practice, this notification is typically provided to new customers at the time of application. There is generally no further expectation under the Privacy Act that the credit provider should give further notice to the individual before disclosing credit information to a credit reporting body. There is an exception in relation to default information for which the Act provides specific notification requirements that are proximate to the disclosure (i.e. s21D(3) notice).

The amending Act did not set out any specific notification processes in relation to the disclosure of FHI by CPs to CRBs. Nevertheless, we have proposed that CPs be required to notify an individual of the impact of an overdue payment arrangement (whether a temporary FHA or not) or a variation FHA on the RHI and, if relevant, FHI that will be disclosed to the CRB.

Credit providers would face difficulties in trying to explain the concepts of 'repayment history information' and 'financial hardship information' over the phone to customers, who often have limited understanding of the credit reporting system. For that reason, we have allowed for the information to be given 'at the time the arrangement is put in place or as soon as practicable afterwards'.

Proposed paragraph 8A.4 applies to 'promises-to-pay', temporary FHAs or variation FHAs.

That is, the credit provider would need to tell the customer what repayment history information and/or financial hardship information is likely to be disclosed to a credit reporting body as a result of an arrangement of that type (i.e. 'negative' RHI or FHI). To be clear, this information should relate to the type of arrangement put in place (i.e. temporary FHA, variation FHA or promise-to-pay) but does not need to be otherwise tailored to the individual's circumstances. In short, this will be a specific statement as to whether the arrangement will result in RHI being disclosed as 'missed' (for a promise-to-pay) or FHI being disclosed and RHI being based on the arrangement (for an FHA). While a credit provider may choose to provide additional information, we have not required any additional information to be supplied as part of the CR Code obligation.

An exception is provided in subparagraph 8A.4(f) for promises-to-pay where the arrangement should not result in any 'negative' RHI being recorded in the individual's credit report (i.e. the payment would be made within the 'grace period').

We note that for many credit providers the variation FHA will be the final step in a process that has lasted many months and involve an earlier temporary FHA (e.g. the variation FHA may involve re-aging payments that have fallen due or remain overdue during the earlier temporary FHA). Subparagraph 8A.4(g) confirms that this information may be given as part of that earlier process, which would allow the CP to describe the overall hardship process to the individual (i.e. temporary FHA followed by variation FHA, if the conditions are satisfied).

The requirement is limited to using ‘reasonable steps’. If the credit provider cannot provide that information (e.g. if there is no appropriate address), the credit provider is not required to give the information.

We anticipate that, unless given over the phone, the information would normally be given by a link to a website in a text message, email or other electronic communication (although in simple cases, it could even by sent by a simple text message). This will ensure that the individual receives the information quickly and will reduce the operational costs to credit providers. The link could not be to a generic website that described the CP’s overall approach to reporting RHI and FHI that, i.e. the information must be tailored to the type of arrangement put in place.

ARCA, as operator of the industry-funded CreditSmart website (creditsmart.org.au) that provides consumer education material, will develop content that credit providers may choose to use for this purpose.

Stakeholder feedback and ARCA response:

The previous paragraphs 8A.3 and 8A.6 have been combined into paragraph 8A.4.

Consumer advocates support the provision of information to an individual in relation to the impact of an arrangement – whether a FHA or promise-to-pay – on the RHI disclosed in relation to the consumer credit. While they appreciate the introduction of the requirements set out in 8A.4, they generally consider that the CR Code should set out more stringent obligations, including to give ‘real time’ notice. Overall, we consider that the proposed paragraph 8A.4 sets an appropriate minimum requirement for CPs and is sufficiently flexible to cover a wide range of circumstances. We note also that the clarification described below also addresses the consumer advocates concern that the information should be more specific to the individual’s circumstances.

In response to specific feedback of consumer advocates, we have clarified:

- that the information has to be specific to the type of arrangement put in place (in subparagraph 8A.4(a)); and
- the intended operation of subparagraph 8A.4(g).

Industry stakeholders are generally supportive of the requirements in paragraph 8A.4 on the basis they provide a sufficient degree of flexibility. Some CPs have noted that they would generally look to give the information to the individual during the phone call, rather than as soon as practicable afterwards. While we note that a CP may choose to do this in some cases, as noted in the explanation above, we think it is appropriate to leave this up to the CP to decide.

Consequences of the variation:

Paragraph 8A.4 will require CPs to develop the capability of giving the required information to customers.

If a CP chooses to give the information during the conversation with the customer, this will require the CP to review scripting and staff training. However, this is something that all CPs will need to do in any case in response to the amending Act, and paragraph 8A.4 is unlikely to require significant additional work.

If a CP chooses to give the information immediately after the conversation with the customer, this will require the CP to have the capacity to send the information (or a link to the information) to the customer. This is likely to involve the sending of a SMS, which, for most CPs, will be an existing process.

CPs will need to develop the messaging required by this paragraph (although they may also utilise the messaging that is being developed by ARCA through its CreditSmart consumer education campaign).

This paragraph will ensure individuals are given information about how the arrangement will impact their credit report in a timely fashion (which may also better support the ability of the individual to change their mind). The flexibility to provide the information immediately after the conversation will help to ensure the individual is not bombarded by information during a telephone call.

CR Code ref	8A.5	CR Code topic:	Types of FHA and codes
Category:	Hardship reforms		

Explanation and reasons:

The amending Act contemplates two circumstances in which an FHA is formed in subparagraph 6QA(1)(d). Those two circumstances have been reflected in the definitions of ‘variation FHA’ and ‘temporary FHA’.

The hardship explanatory memorandum goes on to describe two codes representing FHI relating to those different types of FHA.

The proposed paragraph 8A.5 provides for the FHI to be recorded using the following codes:

- V – representing financial hardship information relating to a variation FHA; or
- A – representing financial hardship information relating to a temporary FHA.

We have proposed the code of ‘A’ referring to ‘arrangement’, rather than ‘H’ as used in the hardship explanatory memorandum, as ‘H’ is likely to be taken as referring to ‘hardship’ by consumers. This may result in a perception that a ‘V’ is ‘better’ than ‘H’ as it does not come with the ‘hardship’ inference, despite (i) both forms of FHA being ‘hardship arrangements’; and (ii) the difference between a variation FHA and temporary FHA is a combination of credit provider practice that does not relate to the individual (i.e. whether the credit provider offers upfront variations) and timing (i.e. a variation FHA is likely to follow a temporary FHA).

We have not proposed a specific ‘natural disaster flag’ (which would record whether the individual’s financial hardship was the result of a natural disaster). While there was limited support for the additional information that this would provide, overall stakeholders did not support the inclusion of this form of FHI. Reasons included (i) not wanting to create the impression of ‘good’ FHI (e.g. natural disaster) and ‘bad’ FHI (e.g. ordinary hardship); (ii) the additional complexity of having another form of FHI in the credit reporting system; and (iii) the obligation that would be placed on credit providers to determine whether the individual’s financial hardship was the result of a ‘natural disaster’.

Stakeholder feedback and ARCA response:

There has been support across stakeholders for this proposal. In particular, there was agreement with the proposal to use the ‘A’ code for temporary FHAs (rather than ‘H’ as suggested in the explanatory memorandum).

Consequences of the variation:

The use of two types of FHA (rather than more types for different situations) will reduce the complexity of the work required by CPs and, on an ongoing basis, will avoid the need for CPs to make complex decisions as to which type of FHA is appropriate based on the individual’s circumstances.

For consumers, this proposal will avoid the risk of being ‘good’ and ‘bad’ types of FHA being disclosed to CRBs, and will help simplify the system and improve consumer understanding.

CR Code ref	8A.6	CR Code topic:	Transitional issues for FHI reporting
Category:	Hardship reforms		

Explanation and reasons:

The hardship regime introduced under the amending Act will only apply to arrangements made on or after 1 July 2022, i.e. a 'hardship arrangement' that exists prior to that date does not 'become' an FHA after 1 July 2022, and FHI cannot be reported in relation to the arrangement. This may create some transitional issues, including how the following hardship arrangements should be treated:

- hardship arrangements that were negotiated pre-1 July 2022 but finally 'made' after that date (i.e. because the customer signed and returned the formal acceptance after that date);
- extensions of pre-1 July 2022 hardship moratoriums after that date; and
- hardship arrangements that started pre-1 July 2022 but where the arrears were capitalised after that date (i.e. so that the initial period was not an temporary FHA but the capitalisation may be a variation FHA).

Proposed paragraph 8A.6 addresses those concerns. Importantly, how a credit provider addresses those transitional issues will depend on the processes adopted by each credit provider and the proposal allows for a flexible approach.

Stakeholder feedback and ARCA response:

There has been support across stakeholders for this proposal.

Consequences of the variation:

A CP will already need to have the transitional capacity to report information to CRBs for customers on pre- and post-1 July 2022 arrangements (where only those post-1 July arrangements can be FHAs).

However, this paragraph will remove some of the complexity in building those systems (e.g. the CP will have confidence that an offer to enter into an arrangement pre-1 July 2022 will not become a FHA if it happens to be accepted after 1 July 2022).

For CPs and consumers, the paragraph will ensure that the treatment of pre-1 July 2022 arrangements will remain consistent even if they are varied or extended after 1 July 2022 (i.e. the CP will not be forced to report FHI after 1 July 2022).

<table>
<tr><td>CR Code ref</td><td>8A.7</td><td>CR Code topic:</td><td>When CP must not request FHI from CRB</td></tr>
<tr><td>Category:</td><td colspan="3">Hardship reforms</td></tr>
<tr><td colspan="4">Explanation and reasons:

Subsection 20E(4A) prohibits the disclosure of FHI to credit providers and mortgage insurers in certain circumstances (based upon the ‘purpose’ for the disclosure). Credit reporting and mortgage insurers are not currently required to disclose the purpose of a request for credit reporting information. However, we have been advised that credit reporting bodies are able to manage this restriction through the different ‘products’ that they offer to clients (where selection of the ‘product’ provides a sufficiently clear inference of the purpose for the request).

Importantly, we note that, unlike the restriction that prohibits disclosure of RHI or FHI to credit providers that don’t hold an Australian Credit Licence (which a credit reporting body could validate by search ASIC’s register), a credit reporting body has no way of knowing the credit provider’s internal purpose (other than through the use of the correct ‘product’ by the credit provider).

We have proposed paragraph 8A.7 to mirror the disclosure prohibition on credit reporting bodies with a prohibition on credit providers and mortgage insurers seeking FHI in prohibited circumstances. This will help to ensure that the credit providers and mortgage insurers do not request the disclosure of FHI in circumstances in which the CRB is prohibited to make that disclosure. Again, the ‘reasonable steps’ should involve the CP simply using the appropriate ‘product’ offered by the CRB.</td></tr>
<tr><td colspan="4">Stakeholder feedback and ARCA response:

There has been support across stakeholders for this proposal.

The joint consumer advocate submission has suggested that a ‘note’ be included to describe the nature of the restrictions that apply to CRB. We have adopted this suggestion (although noting the complexity of the relevant Privacy Act provision, we have kept the description high level and focussed on the ‘collections’ restrictions, rather than those applying to mortgage insurers and guarantees).</td></tr>
<tr><td colspan="4">Consequences of the variation:

This paragraph will not require any additional work from CPs (beyond that required by the amending Act).

For consumers, this will ensure that appropriate protections exist to prevent disclosure of FHI in prohibited circumstances.</td></tr>
</table>

<table>
<tr><td>CR Code ref</td><td>19</td><td>CR Code topic:</td><td>Frequency and credit ratings</td></tr>
<tr><td>Category:</td><td colspan="3">Non-hardship related issues – access to credit reporting information</td></tr>
<tr><td colspan="4">Explanation and reasons:

We have proposed changes to paragraphs 19.3 that reflect the change to section 20R of the Privacy Act under which the credit reporting body must give free access to the individual (either directly or through an agent) to the credit reporting information held by the credit reporting body every 3 months (instead of every 12 months). We have also proposed changes to paragraph 19.3 and 19.4 that reflect the requirement to also give the access seeker the credit rating.

Paragraph 23.11 requires credit reporting bodies to report on the proportion of individual’s accessing their credit reporting information for free (compared to those who are charged). We do not propose to change this reporting requirements.</td></tr>
<tr><td colspan="4">Stakeholder feedback and ARCA response:

See feedback to paragraph 19.7, below.</td></tr>
<tr><td colspan="4">Consequences of the variation:

The amending Act imposes significant new obligations on CRBs.

However, there is no additional impact from these changes as they simply reflect the amending Act. The overall changes to paragraph 19 set out a clear framework and set of requirements, which will make overall implementation more straightforward.</td></tr>
</table>

CR Code ref	19.7(a)	CR Code topic:	What credit ratings
Category:	Non-hardship related issues – access to credit reporting information		

Explanation and reasons:

The amended s20R(1) requires credit reporting bodies to give an individual their 'credit rating' with the individual's credit report (when accessed under s20R(1)). The legislation and supplementary explanatory memorandum suggest that an individual would have one 'credit rating' from each credit reporting body.

However, we understand that a credit reporting body may create multiple credit ratings for an individual, including ratings calculated using an algorithm that differs based on:

- positive vs negative information (e.g. if the receiving credit provider is not able to receive RHI, or information derived from RHI); and
- industry, e.g. a credit reporting body may use a different algorithm for the telecommunications industry compared to the financial services industry.

Stakeholders have generally agreed that the provision of multiple scores would result in consumer confusion.

On that basis, we have proposed subparagraph 19.7(a) which clarifies that the credit rating that must be provided should be the one that includes the broadest range of information available to the credit reporting body (i.e. the calculation that incorporates comprehensive credit reporting information from those credit providers which disclose such information). If there is more than one such credit rating, the CRB is to provide the rating that is the most accurate, relevant and up to date. The CRB should ensure that the credit rating is one that can actually be given to a CP, i.e. it will not include FHI (as per subsection 20E(7) of the Privacy Act).

Some stakeholders also expressed a concern that, if the requirement to provide a credit rating was limited to the rating derived using one calculation only, this may result in credit reporting bodies seeking to profit by 'upselling' the individual to credit ratings derived using other calculations. Proposed subparagraph 19.7(a)(ii) provides that, if the credit reporting body charges for credit ratings derived using other calculations, it must also give individuals the ability to get those credit ratings for free every 3 months.

Stakeholder feedback and ARCA response:

There has been general support for this proposal. Both consumer and industry stakeholders (particularly CRBs) have noted that the provision of multiple credit ratings is likely to result in consumer confusion.

One CRB made suggestions as to the drafting of subparagraph 19.7(a) which would focus on the provision of the most accurate, relevant and up-to-date credit rating (if there was otherwise more than one credit rating that meet the conditions in 19.7(a). We have adopted that suggestion.

Consequences of the variation:

This subparagraph will simplify the obligations for a CRB to provide a credit rating by ensuring that the CRB has to provide only one rating.

For consumer, this subparagraph will ensure that they are not overwhelmed and confused by multiple forms of credit ratings.

CR Code ref	19.7(b)	CR Code topic:	Referrals to credit score websites
Category:	Non-hardship related issues – access to credit reporting information		

Explanation and reasons:

Credit reporting bodies often have commercial relationships with third parties under which the third party will obtain the individual's credit reporting information as an access seeker and then provide consumers with access to their credit score (and, sometimes, credit report) for free ('credit score websites'). The credit score websites generate revenue by using that information for marketing purposes. This subparagraph does not prevent a credit reporting body from referring consumers to such websites, however such referrals must not be more prominent than the service that gives free access to the individual's credit rating (under s20R of the Privacy Act).

Stakeholder feedback and ARCA response:

Consumer advocates have recommended that this provision be changed so as to prohibit CRBs from advertising credit score websites when giving consumers access to their free credit ratings. They have noted that the new law gives consumers a free right to their credit rating and that consumers should not have to "sell their personal data in order to access their free credit rating from CRBs".

We do not propose to change this provision. We note that subparagraph 19.7(b) relates to the advertisement of credit score websites, and does not involve a consumer having to use that service. Further, we note that the law only requires a CRB to provide access to the credit rating; not the score that can be obtained from the credit score websites. Also, as noted by the consumer advocates, this provision mirrors an existing provision. If that existing provision is of concern, our view is it would be more appropriate to raise this as part of the upcoming Independent Review of the CR Code.

Industry stakeholders have not objected to this restriction, and one CRB has specifically agreed with it. The other CRBs have not commented on this provision.

Consequences of the variation:

This provision mirrors a similar provision applying to CRBs and does not create additional work for CRBs.

For consumers, this will ensure that access seekers are not inappropriately directed to the commercial services while still allowing CRB to advise the access seeker of the availability of those services which provide credit scores (rather than merely credit ratings as required under section 20R).

CR Code ref	19.7(c)	CR Code topic:	If credit rating not available
Category:	Non-hardship related issues – access to credit reporting information		

Explanation and reasons:

Subparagraph 20R(2)(d) of the Privacy Act provides an exception from the obligation to provide access to the credit rating if the credit reporting body does not hold enough credit information about the individual to derive the rating. Proposed subparagraph 19.7(b) would require the credit reporting body to explain why it is not able to provide the credit rating and include an explanation of the information that the credit reporting body must hold to be able to derive the rating.

This explanation would be generic (i.e. not tailored to the specific individual) and we have proposed that it may be given by reference to another document that is reasonably accessible (e.g. a website). We have not proposed any further clarification on the circumstances of when a credit reporting body may determine that it does not have sufficient information as this will depend on the particular calculation used by the credit reporting body.

Stakeholder feedback and ARCA response:

Consumer advocates have supported this provision.

There has been limited industry stakeholder feedback, although one CRB noted that they would generally be able to provide a credit rating and would, therefore, not need to rely on subparagraph 20R(2)(d).

Consequences of the variation:

This will require a CRB to develop the ability to provide the explanation. Although, as the explanation may be generic, this should not be an onerous task.

While it is unlikely that subparagraph 20R(2)(d) will apply to many consumers, the obligation to provide explanatory material will help improve consumers understanding of the credit reporting system.

CR Code ref	19.7(d)(i) – (iv)	CR Code topic:	Form of credit rating
Category:	Non-hardship related issues – access to credit reporting information		

Explanation and reasons:

The credit rating must be given in the form of a rating of the individual on a “credit score or scale or range” (subsection 20R(1) of the Privacy Act). The proposed subparagraph (d)(i) will require the credit reporting body to provide a basic explanation of the purpose of credit scores and how the credit rating given to the individual relates to those credit scores.

Subparagraph (d)(ii) requires the credit reporting body to use at least 5 bands when giving the individual their credit rating (using the descriptors required by subparagraph (d)(iii). This will ensure that a credit reporting body cannot use an overly basic categorisation (e.g. it would prevent the credit reporting body using two bands, such as ‘high’ and ‘low’, for the entire credit rating scale). This reflects the example used in paragraph 1.29 of the hardship supplementary explanatory memorandum.

Subparagraph (d)(iv) requires the CRB to state which band the credit score for the individual sits within (and confirms that the CRB is not required to provide the actual credit score).

Stakeholder feedback and ARCA response:

This proposal has received broad support of stakeholders. CRBs recognised that the requirement to use 5 bands is appropriate.

Consequences of the variation:

The amending Act imposes the obligation on the CRB to provide the credit rating. Subparagraphs 19.7(a) – (iv) do not increase the complexity of this requirement for CRBs and will provide a clear framework for implementation.

Subparagraph 19.7(a) – (iv) will ensure the access seeker is given a credit rating that provides an adequate indication of the individual’s credit standing (rather than allowing CRBs to use a more limited banding that provides little information).

CR Code ref	19.7(d)(v) – (vi)	CR Code topic:	Credit rating explanation
Category:	Non-hardship related issues – access to credit reporting information		

Explanation and reasons:

Section 20R(1A) requires the CRB to give:

a) the credit rating of the individual, as derived by the body after the request is made; and
b) information that identifies the particular credit information that is held by the body and from which the credit rating was derived; and
c) information about the relative weighting of the credit information described in paragraph (b) in deriving the credit rating; and
d) information about what the other ratings on the scale or range are, and how the individual's credit rating relates to those other ratings.

It is not entirely clear how subparagraphs (b) – (d) should be interpreted. For instance, they could require a detailed and personalised explanation for each individual. For example:

Mr Smith's credit rating of Above Average was derived from the following information:
RHI – 15%
CCLI – 10%
etc

Further, it could require an explanation of the impact of precise elements of 'credit information' held by the credit reporting body (i.e. "the record of RHI=2 disclosed by CP1 on 1 April 2021 impacted the credit rating by 45 points").

Alternatively, the reference to "particular credit information that is held by the body and from which the credit rating was derived" could be read as referring to *all* the credit information held by a CRB (i.e. as the CRB is likely to use all that information in the calculation of the credit rating). The subparagraphs (b) and (c) could then simply require a generic (and basic) description of the operation of its algorithm.

Importantly, we note that the Supplementary EM states that the requirement to provide the credit rating is "consistent with similar requirements in other jurisdictions, such as New Zealand". The equivalent New Zealand model requires only a statement outlining "the general methodology used to create the score, including the types of information used" (see Rule 6(4)(b) of the Credit Reporting Privacy Code 2020).

We note, also, that the extent to which the explanation should be particularised is influenced by the fact that the amending Act requires only a 'credit rating', rather than a specific credit score. For example, even though the proposed changes to the CR Code will require credit reporting bodies to categorise credit scores into no less than five bands, it is still likely that there may still be significant movements of an individual's credit score that will not result in a move between those bands; so that providing overly particularised explanations would be confusing to consumers.

For that reason, we consider additional clarity is required in the CR Code. It is proposed that the CR Code will, therefore, set out the minimum requirements that are required in a way that gives effect to the intent of the legislation, while avoiding overly detailed and prescriptive requirements. A credit reporting body would be free to go beyond those minimum requirements.

Importantly, in accordance with s26N(3), we have proposed an additional requirement for the explanatory statement to include information in relation to common things that people in similar situations can do to improve their credit score (see paragraph 19.7(d)(v)(3)). This goes beyond the requirements of the amending Act and we consider is an important addition to the obligations to improve consumer understanding of the credit reporting system.

We consider that it would be appropriate to review the operation of the proposed CR Code requirements after they have been in operation for a sufficient period of time. That review should consider both the form and content of the explanatory statements being provided by credit reporting bodies and how consumers have responded to those statements.

Based on the wording of section 20R(1A) and the explanatory memorandum we have proposed an approach that requires:

- a general description of each 'type' of credit information that may go into the score and a high level statement of the importance of that 'type'. Given this would probably include a description of the 12 types of 'credit information' allowed under the Privacy Act (excluding FHI), this could be a long explanation. For that reason, we have allowed for the explanation to be given by reference to another document, such as a link to a webpage. We envisage this to be something like:

  > *Repayment history information which is a record of whether you've made your minimum payments on time. A good history of making your repayments on time will help improve your credit score. A consistent history of not making your repayments on time will drop your credit score. This can have a strong impact on your credit score.*

  i.e. the relative weighting would be given by high level terms such as 'strong', 'limited' etc. Alternatively, the credit reporting body could choose to rank the types of credit information in level of importance in their algorithm.

- a description of the types of information that are usually displayed (or not displayed) for people within the credit rating band in which the individual sits. This is tailored to the band but not the individual. The expectation is limited to 3 – 5 types of credit information. We envisage this to include things like:

  > *People in the 'Good' band typically have a strong RHI history (possibly with some minor missed payments that are not recent). They typically do not have any default information." Or "People in the 'Average' band often have a good but not detailed credit history."*

- a statement as to the things that an individual within a particular band could do to improve their credit rating. Again, this is tailored to the band but not the individual (and would flow on from the previous description).

- an explanation of the role credit ratings/scores play in CP's processes. Again, this may be given by reference to another document, such as a link to a webpage.

Subparagraph 19.7(d)(vi) would require the credit reporting body to review the assumptions that sit behind the explanations at no less than once every 12 months, or otherwise when the credit reporting body makes a significant change to the calculations used to derive the credit rating. We consider that this appropriately balances the effort required to update the assumptions, with the need to ensure the explanations are up to date and accurate.

The following table provides a comparison of the requirements in subsection 20R(1A) and those in the proposed paragraph 19.7.

Section 20R(1A)	New paragraph 19.7
(a) the credit rating of the individual, as derived by the body after the request is made; and	Subparagraphs (d)(i) – (iv).
(b) information that identifies the particular credit information that is held by the body and from which the credit rating was derived; and	Subparagraph (d)(v)(1) provides an explanation of the types of credit information a CRB holds about individuals.
(c) information about the relative weighting of the credit information described in paragraph (b) in deriving the credit rating; and	Subparagraph (d)(v)(2) provides an indication of the types of credit information that are usually most important for people in *that* band.
(d) information about what the other ratings on the scale or range are, and how the individual's credit rating relates to those other ratings.	Subparagraphs: • (d)(iii) requires the CRB to list all the relevant bands (with the score ranges) and use appropriate descriptors which should indicate the relationship between those bands. • (d)(v)(3) requires a brief statement of how an individual could improve their rating (i.e. what behaviours does an individual in a particular band need to change to move to a higher band).
	In addition, subparagraphs: • (d)(v)(4) requires an explanation of the role played by credit scores/rating in the assessment and management of credit. • (d)(vi) sets out how often the assumptions used to provide the explanation subparagraph (v).

Overall, we consider this approach is consistent with the aim of:

…allow{ing} consumers to understand the factors that contribute to their credit worthiness and how their behaviours affect their rating, allowing them to adjust their financial habits accordingly and work towards improving their loan accessibility. (supplementary EM, para 1.32).

Stakeholder feedback and ARCA response:

Industry stakeholders have supported the policy behind ARCA's proposal. In one industry roundtable, a CP summarised the situation well by saying that the provision of the credit rating and explanation should promote a consumer to review their credit behaviours to improve their score, rather than focussing on 'manipulating' the data that is already there (i.e. through the use of 'credit repair' services). CRB have provided feedback that the requirements are appropriate and allow sufficient flexibility.

Consumer advocates have suggested that the required explanatory statement should be more personalised to the individual. In particular, they consider that the requirement in section 20R(1A) to give 'particular' information about the credit rating requires more particularised information to be given. As noted in the explanation above, we do not agree that this is necessarily the correct interpretation of subsection 20R(1A).

Overall, we consider that the approach proposed in the public consultation pack is appropriate and provides a beneficial level of information to access seekers, without focusing too much on specific elements of credit information. The requirement in subparagraph 19.7(d)(v)(3) goes beyond the requirements in the amending Act and will assist individuals to understand what they can do to improve their credit history (without placing on inappropriate focus on 'manipulating' information that is already in their credit reports).

Consequences of the variation:

The amending Act requires a CRB to provide an explanation with the credit rating. Subparagraphs 19.7(v) – (vi) simply sets out the criteria that the CRB must follow when building the capacity to provide the explanation. Allowing that information to be based on the band in which the individual sits, rather than the individual consumer's information, will reduce the complexity of providing that explanation.

For consumers, the proposal balances the need to give the access seeker information that will genuinely help the access seeker to understand the reasons for the credit rating and what the individual can do to improve that rating, while reducing the risk that this will result in consumers trying to 'manipulate' that information (potentially with the help of high-cost credit repair firms).

CR Code ref	19.8	CR Code topic:	CRB giving RHI/FHI to access seeker
Category:	Hardship reforms		

Explanation and reasons:

The changes to introduce financial hardship information into the credit reporting system have been subject to significant discussion and delay, which arguably relates to the sensitive nature of ‘financial hardship’ experienced by consumers. The significant attention paid by the media to the impact of COVID-19 payment deferrals on credit reports in 2020 demonstrated how sensitive this issue can be.

Based on these experiences and ARCA’s ongoing involvement with consumer education through the CreditSmart website, we consider that a consistent and accurate message regarding ‘financial hardship information’ is given to Australian consumers. This will help to ensure that consumers are comfortable with the way that financial hardship information is recorded in their credit reports and used by other lenders. If done well, this should encourage consumers who are experiencing financial hardship to engage with their credit provider as soon as possible. It will also reduce the risk that unscrupulous credit repair firms can take advantage of consumer misunderstanding to sell their services inappropriately (noting also the recent changes to the *National Consumer Credit Protections Regulations* which will require such firms to hold an Australian Credit Licence).

For that reason, we have proposed paragraph 19.8(b) which would require credit reporting bodies to include a consistent explanation of FHI with credit reporting information given to access seekers (if the relevant individual’s credit reporting information included FHI).

This paragraph will also require CRBs to:

- 19.8(a): disclose the FHI and RHI to access seekers using the codes as provided by the credit provider, subject to limited exceptions. We note that the use of other codes (in particular to described ‘blanks’ in the individual’s RHI) can potentially cause consumer confusion if those blanks are not explained properly or are different between CRBs.
- 19.8(c): as FHI should not be used in a credit score or credit rating, an individual may be surprised if their score or rating is ‘high’ but they are not approved for credit because FHI is separately disclosed to the CP. This will help to explain that the score or rating does not incorporate the FHI.

Stakeholder feedback and ARCA response:

The joint consumer group submission supported a requirement that FHI on consumer reports given to access seekers should include a standardised explanation of that information. However, they noted that they would support consumer testing of communication tools to consumers. In response to this feedback, we note that the wording in subparagraph 17.8(b) is a small part of the overall communication to consumers. ARCA will be producing additional material to explain the introduction of FHI to consumers (as will other industry participants). We will continue to engage with consumer advocates as part of that process.

Industry stakeholders generally agreed with the proposed approach. Feedback during roundtable sessions was that a consistent approach to describing FHIs would help consumer understanding. A CRB, while agreeing with a standard consumer facing definition, noted that, "while a credit report given to an access seeker may have very generic information about "hardship" it would be inappropriate for this to become a query to the CRB when the information is established by the Credit Provider" (i.e. the credit provider will be in a better position to answer questions about their own hardship arrangements). We agree with this observation and note that CPs could have broader information available on their websites that discusses their approach to hardship arrangements (that goes beyond paragraph 8A.4). The CreditSmart website operated by ARCA will also have information that provides an industry-level view of how hardship arrangements will impact a consumer's credit report. In relation to ARCA's proposal to restrict the RHI 'codes' that may be displayed in a credit report given to an access seeker, a CRB commented that additional codes may be useful in some circumstances to assist the access seeker to understand the information in the credit report. We have updated the proposed subparagraph 19.8(a) to allow for additional codes or other information to be included provided the CRB reasonably believe they will assist the access seeker to better understand the individual's credit history.
Consequences of the variation: This paragraph should not require additional work for CRBs and, through the inclusion of standard wording to describe FHAs, should reduce queries and complaints from consumers. A CRB that wishes to include codes or other information to assist an access seeker to better understand the individual repayment history will need to ensure that it is able to demonstrate that the information does help. However, this should already be done by a CRB. For consumers, this paragraph will help to ensure that they are able to better understand the information on a credit report. The standardisation of the descriptions of the types of FHA will help to reduce the risk of consumer confusion.

<table>
<tr><td>CR Code ref</td><td>20.1; 20.3; 21.2; 21.4</td><td>CR Code topic:</td><td>EDR</td></tr>
<tr><td>Category:</td><td colspan="3">Non-hardship related issues – recognised external dispute resolution scheme</td></tr>
<tr><td colspan="4">Explanation and reasons:

These changes recognise that a credit provider may be “subject to” a recognised external dispute resolution scheme.

We note that subparagraphs 20.3(c) and 21.4(b) provide that a credit provider or credit reporting body that is not a member of, or subject to, a recognised external dispute resolution scheme, the business must advise a complainant that they may complain to the Commissioner. It appears that this provision may now be redundant, however we have not proposed its removal as we are unsure whether there may be unintended consequences.</td></tr>
<tr><td colspan="4">Stakeholder feedback and ARCA response:

None.</td></tr>
<tr><td colspan="4">Consequences of the variation:

There is no additional impact from these changes as they simply reflect the amending Act.</td></tr>
</table>

B. Issues that are not proposed to be covered in CR Code

CR Code ref	N/A	CR Code topic:	Application of hardship reforms to NCC exempt products
Category:	Hardship reforms		

Explanation and reasons:

A condition of an FHA being formed is that the National Credit Code (NCC) 'applies' to the provision of the credit (subsection 6QA(1)(b) of the Privacy Act). This means that credit exempt under the NCC cannot have FHI disclosed even if a 'hardship arrangement' is agreed and any RHI must reflect the terms of the consumer credit. Where an 'eligible licensee' agrees to a non-contractual financial hardship arrangement in respect of exempt credit (such as an exempt BNPL product), the licensee would be:

- required to disclose RHI against the terms of the credit contract (i.e. with RHI showing missed payment); and
- prohibited from disclosing FHI in respect of that arrangement.

This is an issue that the CR Code is largely unable to address because the NCC credit restriction is clear in the amending Act.

However, 'employee loans' (as described in subsection 6(11) of the NCC) are partially regulated by the NCC (including giving the individual access to the hardship protections in section 72 of the NCC). We had initially proposed that it may be appropriate for the CR Code to clarify that 'partial' regulation meant that the "National Consumer Code applies to" the credit (so that employee loans would be regulated in the same way under the hardship reforms as all other consumer credit). This proposal received support from all stakeholders. From a credit provider perspective, they recognise that (i) their own employees should receive the same protections as other employees; and (ii) the requirement to treat employees loans separately from other loans for the purpose of credit reporting would cause operational problems (as they are treated the same for other purposes).

The OAIC, however, has advised that they do consider the CR Code is able to appropriately address the applicability of the NCC to employee loans.

Stakeholder feedback and ARCA response:

Stakeholders – both consumer advocates and industry – agree that the hardship reporting reforms should apply to employee loans. General feedback from CPs is that 'employee loans' are treated no differently than ordinary consumer loans, and that excluding employee loans from the hardship reporting regime would be both a poor consumer outcome and introducing additional complexity to their processes.

We will continue to engage with the OAIC and ASIC (as regulator of the NCC) in relation to this issue.

CR Code ref	N/A	CR Code topic:	Reporting on use of FHI by CPs
Category:	Hardship reforms		

Explanation and reasons:

Paragraph 23 of the CR Code imposes regular reporting requirements on credit reporting bodies to support the integrity of the credit reporting system. We have considered whether the CR Code should impose reporting requirements in relation to the disclosure and use of FHI (i.e. to evidence how that information is being used to lend responsibly to consumers). However, we note that such reporting goes to credit provider 'conduct' (rather than whether the information is being used in accordance with the Privacy Act).

As such, we do not consider that such reporting should sit within the CR Code. However, ARCA would be happy to work with industry to develop a reporting program on how FHI is used in practice to lend responsibly (and engage with consumer advocates and ASIC on that work).

Stakeholder feedback and ARCA response:

The joint consumer advocate submission notes that how CPs 'use' FHI in their credit application and management processes is critical. However, they recognise that this does not belong in the CR Code. They also consider that it is vital that industry is open and transparent about how they use FHI in lending decisions and how they treat existing customers who have FHI with other institutions. This would include keeping robust records of how FHI is used in lending decisions, so the review of Part IIIA (mandated for 2024) can be undertaken with access to accurate data.

Industry stakeholders – both in written and verbal feedback – have not supported additional restrictions in the CR Code. However, through verbal feedback there has been in-principle recognition that it would be appropriate for industry to report how FHI is used in practice.

ARCA will work with its Members (in the first instance) to explore the potential for developing a reporting regime on the use of FHI across credit providers (noting that such reporting would be done on an industry-wide basis).

CR Code ref	N/A	CR Code topic:	Additional restrictions on disclosure and use
Category:	Hardship reforms		

Explanation and reasons:

In ARCA's initial engagement with key stakeholders, some stakeholders have suggested that the CR Code should limit the use of FHI to trigger 'alerts' established under paragraph 16.2 of the CR Code, which are set up so that the credit provider will be proactively told by the credit reporting body if certain information is recorded in an individual's credit file. However, we note that the amending Act has established several use and disclosure restrictions already, including the restrictions introduced into section 67 of the NCC which provide rules for how FHI may be used in the management of existing continuing credit contracts. We consider this shows a clear intention that there was no intent to restrict the use of FHI in the alerts process (as part of the Privacy Act/CR Code regime).

Those stakeholders also noted general concerns regarding the use of alerts which, as set out in Item 5 of Section 21H of the Privacy Act, are for "the purpose of assisting the individual to avoid defaulting on his or her obligations in relation to consumer credit provided by the provider to the individual".

The concern was raised that the information received through such alerts may not be used by some credit providers in a way this is consistent with that permitted purpose. We note that this issue is not solely related to the introduction of FHI into the credit reporting system and, if this is considered a concern, it could be raised as part of the upcoming independent review of the CR Code.

Stakeholder feedback and ARCA response:

Consumer advocates believe that FHI should only be visible to CPs that are making a responsible lending assessment on applications for new or extended credit, which would preclude the use of FHI in the 'alerts' process. While they recognise that these restrictions were not incorporated into the amending Act, they consider that the CR Code could provide for further restrictions.

Industry stakeholders did not support further restrictions, including that matters of risk appetite should always be within the CP's discretion and to provide for this in the CR Code would be outside of the scope of the CR Code's remit.

While we appreciate the concerns of consumer advocates, as noted in the explanation above, we consider that this issue has been clearly addressed in the drafting and passing of the legislation, particularly as (i) the restrictions introduced into 67 of the NCC demonstrates that the drafters were aware that FHI could be included in 'alerts'; and (ii) section 20E(4A) already provides for restrictions on the disclosure of FHI by CRB to CPs (which does not extend to the disclosure for the purposes of 'alerts').