AUSTRALIAN
RETAIL
CREDIT
ASSOCIATION

Ms Angelene Falk
Information Commission and Privacy Commissioner
GPO Box 5218
SYDNEY NSW 2001

6 September 2021

By email only: [redacted]

Dear Ms Falk,

Hardship regime updates to CR Code – Application for approval

Pursuant to section 26T of the *Privacy Act,* the Australian Retail Credit Association (ARCA) applies to vary the *Privacy (Credit Reporting) Code 2014* (CR Code). The proposed changes are marked-up to the current version of the CR Code (i.e. version 2.1) in Part IVa of this application.

This application is made up of:

- Part I – Introduction, consultation summary and key issues. Also included:
    - Appendix A: Context of CR Code changes to address hardship reporting
    - Appendix B: Discussion of ARCA's proposed framework for considering promises-to-pay vs FHAs
    - Annexures: Non-confidential submissions
- Part II – Explanation of draft changes (including when each proposal would be effective)
- Part III – Examples of the application of the draft changes
- Part IVa – Proposed CR Code – clean copy
- Part IVb – Proposed CR Code changes – marked-up to v2.1
- Part V – Change log from the public consultation changes to final proposed changes
- Part VI – Detailed consultation statement (CONFIDENTIAL)

We have also included the public consultation pack released by ARCA on 5 July 2021.

If you have any questions about this application, please feel free to contact me on [redacted] or at [redacted] or Michael Blyth on [redacted].

Yours sincerely,

Mike Laing
Chief Executive Officer
Australian Retail Credit Association

Application for variation of registered CR Code – Hardship changes

Part I: Introduction, consultation summary and key issues

1. Introduction

On 3 February 2021, the *National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Act 2021* (the amending Act) was passed.

In addition to changes to the *National Consumer Credit Protection Act* that have mandated the supply by 'eligible licensees' (i.e. the major banks) of credit information to credit reporting bodies, the amending Act provides (through changes to the Privacy Act) for:

i. Licensed credit provider to disclose (and receive) 'financial hardship information' (FHI) in relation to 'financial hardship arrangements' (FHA) and a requirement that, during a financial hardship arrangement, the repayment history information that is disclosed is to be determined by reference to that arrangement;

ii. Credit reporting bodies (CRBs) to provide free credit reports every 3 months (instead of every 12 months), plus a requirement to include the individual's 'credit rating' (with an explanation) with the report;

iii. an independent review of Part IIIA of the Privacy Act (Part IIIA) to be conducted before 1 October 2024;

iv. minor amendments, including removing the obligation for a credit provider, which does not participate in credit reporting in any way (i.e. non-participating credit providers), to have a credit reporting policy and comply with the Part IIIA corrections.

Items (i), (ii) and (iv) require changes to be made to the CR Code. ARCA was asked by the OAIC on 18 March 2021 to act as 'Code Developer' to consult on and prepare those changes, and seek approval from the Information Commissioner.

As described in section (2), below, in preparing the proposed changes to the CR Code, ARCA has engaged extensively with key stakeholders, including consumer representatives, credit providers, credit reporting bodies, other industry associations, regulators, and external dispute resolution (EDR) service providers.

Relevantly for paragraph 6.10 of the OAIC's Guidelines for developing codes, this engagement culminated in a public consultation process between 5 July – 11 August 2021 (having been extended from the original date of 4 August).

This application for approval of changes to the CR Code has been approved by ARCA's Board of Directors, which is constituted by directors elected by ARCA's credit provider and CRB Members. Directors have been briefed regularly on the issues being raised by stakeholders and have considered alternative approaches as to how they might be resolved taking into account the views of different stakeholders.

Links to the legislation and related documents are provided below for reference:

- *National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Bill 2021* (amending Act)
- Explanatory Memorandum (EM) to the amending Act

- Supplementary EM to the amending Act covering changes to free credit report frequency, credit ratings, and the disclosure of FHI by CRBs
- Privacy Act prior to changes made by the amending Act
- Privacy (Credit Reporting) Code 2014 (Version 2.1) (CR Code)

In the public consultation pack, ARCA provided a discussion of the context and history to the introduction of hardship reporting under Part IIIA (which informed our approach to this CR Code change process) and a detailed discussion of ARCA's proposed framework for considering promises-to-pay vs FHAs (including how it interacts with the *National Credit Code* (NCC) hardship regime). Updated versions of that material are included, respectively, in Appendix A and Appendix B.

2. Consultation summary

ARCA has undertaken an extensive, multi-stage consultation process to develop the proposed CR Code changes.

Before being asked to act as Code Developer, ARCA played a key role in identifying the need for a hardship reporting regime under Part IIIA and made a detailed submission to the Attorney-General's Department's *Consumer credit reporting and hardship* review (conducted in 2018) which ultimately lead to the decision to create a new hardship reporting regime. Once the government had decided to implement a hardship reporting regime and its policy framework, ARCA was one of the key stakeholders that engaged with the Attorney-General's Department and Treasury throughout the legislative process and when given the opportunity provided feedback on some details of the draft legislation.

As a result, ARCA had a detailed understanding of the history and intent of the amending Act when it was passed in February 2021, which has assisted in our role as Code Developer.

In order to prepare this application, ARCA has followed a multi-staged approach to review the legislation and identify issues, obtain feedback from key stakeholders and to prepare the proposed CR Code changes. This process is summarised below (with further details in Part VI[1]).

In summary our consultation process involved:

February – May 2021	Preliminary workshops with: • ARCA Members (credit providers and CRBs) • Signatories to the Principles of Reciprocity and Data Exchange • Consumer advocates • Regulators (the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulatory Authority (APRA)) • EDR schemes (Australian Financial Complaints Authority (AFCA) and non-financial services EDR schemes), • Industry associations

[1] Part VI – Detailed consultation statement (CONFIDENTIAL) includes written submissions and other feedback for which ARCA does not have consent to make public.

11 May 2021	Initial update given to OAIC describing key issues and proposed approaches
24 May – 16 June 2021	Key stakeholder consultation pack and further workshops conducted with stakeholders (as above).
4 July – 11 August 2021	Public consultation pack released and roundtables (including OAIC representatives) conducted with: • Industry participants, including credit providers, CRBs and related businesses • Consumer advocates • Industry associations, • Regulators (including ASIC, APRA) and EDR (including AFCA and non-financial services EDR)
11 August – 2 September 2021	Further one-on-one engagement with key stakeholders in relation to potential refinements to the proposals. Provision of proposed updated paragraph 8A.2 to key stakeholders.
3 September 2021	Submitted CR Code variation application to the OAIC.

ARCA has held meetings with many dozens of stakeholders. Not counting incidental discussions (or, in the case of industry stakeholders, one-on-one meetings), the breakdown of meetings based on stakeholder group is:

Consumer advocates	7
Regulators and EDR	9
Industry stakeholder workshops	18[2]
Industry associations	5
	39 meetings

ARCA received written submissions to the public consultation pack from 16 stakeholders, which ranged from detailed submissions addressing each question raised in Part B of the public consultation pack to short, emailed responses[3].

[2] This includes separate meetings with ARCA Members and non-ARCA Members, plus two combined roundtables. It also includes meetings specifically with CRBs and LMI providers.
[3] Such short email responses typically provided general support for ARCA proposed CR Code changes.

The breakdown of stakeholders providing submissions was:

Consumer advocates	2
Regulators and EDR	2
Industry stakeholders (credit providers and CRBs)	10
Industry associations	2
	16 stakeholders

Some submissions were provided to ARCA on a confidential basis (and are included with Part VI). Submissions that were provided on a non-confidential basis are annexed to Part I.

Summary of feedback by stakeholder group:

Stakeholder group	Feedback summary

Consumer advocates	ARCA met with consumer advocate groups throughout the process of developing the CR Code changes.
	
	Written submissions received (and annexed to Part I):
	
	• Joint consumer advocate submission
	  ○ Consumer Action Law Centre
	  ○ Consumer Credit Legal Service (WA)
	  ○ Financial Counselling Australia
	  ○ Financial Rights Legal Centre
	  ○ Consumer Action Law Centre
	  ○ Uniting Communities: Consumer Credit Law Centre SA
	• Legal Aid Queensland
	
	Key concerns raised by consumer advocate groups regarding ARCA's earlier proposals for the CR Code have helped shape the final version.
	
	In particular, although the explanatory memorandum suggests that they are not FHAs, consumer advocates considered that 'catch-up' or 'payment test' periods can (and, in many cases, should) be FHAs. In response[4], the final proposed changes create a presumption that catch-up or payment test periods that follow a temporary FHA are also temporary FHAs. Catch-up or payment test periods that don't follow a temporary FHA are not presumed to be temporary FHAs, however that presumption may be displaced.
	
	Overall, while consumer advocates still have reservations regarding how some credit providers may apply the proposed paragraph 8A.2 (which helps differentiate between promises-to-pay and FHAs), they

[4] And also giving effect to the OAIC's instruction that the CR Code cannot dictate which arrangements are or are not FHAs.

	are generally supportive of the proposal. This includes recognition that the proposal may 'raise the bar' across the credit industry in terms of promoting conversations between credit providers and consumers. In relation to the consumer advocates' concern that some credit providers may take advantage of the proposed approach in paragraph 8A.2 to avoid offering appropriate hardship assistance to consumers, we note that all relevant credit providers will hold an Australian Credit Licence and be subject to ASIC's oversight (including in relation to their general conduct obligation to act 'efficiently, honestly and fairly'). Consumer advocates have significant concerns regarding the overall complexity of the CR Code; both the new provisions and the existing provisions. In response, we have sought to simplify as many of the new provisions as possible (although noting that the hardship reporting framework introduced under the amending Act is itself complex). Otherwise, we are unable to address the concerns regarding the overall complexity of the CR Code. Additional key concerns of consumer advocates included ensuring: • consumers were made aware of the impact of an arrangement (whether an FHA or promise-to-pay) on a consumer credit report and ability to obtain credit; and • ensuring the reporting of FHI would not act as a barrier for consumers to request hardship assistance (e.g. by introducing additional restrictions on how FHI can be used by credit providers). While we have not adopted all the consumer advocates' suggestions, we consider that (in respect to consumer awareness) the proposed requirements go beyond the legislative requirements in the amending Act and are consistent with other forms of customer notification already required under the CR Code (i.e. in respect to the reporting of default information). As described in Part II, we will, in our capacity as industry representative, also work with Members on developing industry-level reporting on the 'use' of FHI (although this would be done outside the CR Code). Consumer advocates agreed with ARCA's proposals in relation to joint accounts (although also recommending longer term change to how credit information is disclosed for joint accounts). Other important issues of concerns for consumer advocates included: • grace periods applying under temporary FHAs (see Part II, paragraph 8.1 and subparagraph 8A.1(e)); • the backdating of FHA to the date of the hardship request (see Part II, subparagraph 8A.1(d)); • 'time to sell' arrangements (see Part II, subparagraph 8A.2(c));

	• explanations given with the credit rating by CRBs (see Part II, subparagraphs 19.7(d)(v) – (vi)). Overall, the feedback from consumer advocates has been very helpful to develop these changes. To the extent that we have not adopted some of the recommendations of the consumer advocates, we consider that it is open to industry - with the assistance of stakeholders, including consumer advocates – to undertake additional work outside the CR Code process to improve outcomes for both consumers and industry.
Regulators and EDR	ARCA meet with ASIC and the APRA on several occasions. We also met with external dispute resolution schemes in both financial services (i.e. AFCA) and non-financial services (e.g. Telecommunications Industry Ombudsman (TIO); Energy and Water Ombudsman NSW (EWON)). We also met with the Australian Small Business and Family Enterprise Ombudsman (ABSFEO). Written submissions received (and annexed to Part I): • EWON • ABSFEO We conducted a roundtable with the regulators and EDR schemes on 5 August (not including ASBFEO). Feedback from that meeting: • recognised the need to provide clarity in the CR Code as to when an FHA is formed; • emphasised the need to ensure a consumer was aware of the impact of the arrangement and would have the ability to raise complaints; • supported ARCA's proposals in relation to joint accounts; and • supported the need to ensure that the requirement to provide the credit rating and explanation (under section 20R(1A)) does not result in consumer confusion. We note that the feedback from various regulators and EDR schemes generally reflected their areas of responsibility, i.e. ASIC was focused on credit provider conduct and consumer outcomes, APRA on ensuing the credit reporting system supported appropriate and efficient lending and EDR schemes on having certainty in operation of the law so that complaints are minimised. Overall, however, we consider that the proposals made by ARCA provide an appropriate balance of those requirements. Non-financial services EDR schemes have generally noted that the changes will not have a direct impact on their areas of responsibility because the non-financial services credit providers do not hold Australian Credit Licences and cannot disclose or receive RHI or FHI. However, based on its experience of hardship processes within the utility sector, EWON has agreed with the proposal in paragraph 8A.2(a) to "place an onus on the credit provider to 'disprove' the existence of a hardship requests where the individual is not able to

	meet payments (rather than placing the onus on the individual to make the request)".
Industry stakeholders (Credit providers and CRBs)	In both group and one-on-one sessions, ARCA met with credit providers and CRBs throughout the process to develop the CR Code changes. This included both ARCA Members and, given they are likely to disclose or receive FHI, signatories to the Principles of Reciprocity and Data Exchange (PRDE)[5], the industry rules under which all comprehensive credit reporting data in Australia is exchanged. We also engaged with providers of lenders mortgage insurance. Meetings with industry stakeholders often involved over 100 participants from more than 40 organisations, which demonstrates the level of interest in this issue. Public written submissions received (and annexed to Part I): • NAB • Equifax • illion • Teachers Mutual Bank Other industry stakeholders asked that their submissions remain confidential. In both written and verbal feedback, there was consensus amongst industry stakeholders that the introduction of FHI into the credit reporting system must support the continued usefulness of that system. For example, it must not undermine the value of RHI in the system by resulting in too many collections arrangements being treated as FHAs (so that the RHI reflects the 'arrangement' rather than the credit contract). It was noted that poorer consumer outcomes would likely result if credit providers were not able to distinguish between customers who had experienced a genuine hardship event affecting their ability to repay and those who had experienced a simple mismanagement of funds. There was broad agreement that the CR Code should help to establish the difference between promises-to-pay and FHAs. Further, many credit providers supported the inclusion of the 'guiderails' suggested by ARCA. However, most industry stakeholders thought the drafting in the public consultation pack was too complex. We have redrafted those sections following the public consultation period and several credit providers have provided written support for the redrafted version of paragraph 8A.2 (see Teacher Mutual's submission; other credit providers which provided similar feedback have asked for their submission to be made confidential). Two credit providers (including NAB) submitted that the guiderails

[5] Of the 65 PRDE signatories, 31 are not ARCA Members.

	being proposed were too prescriptive. The other credit provider (which asked for its submission to be made confidential) has subsequently provided feedback that they have further considered paragraph 8A.2 and have recognised that the proposals do not set out 'hard and fast' rules and each presumption can be displaced. We have responded to the concern of those credit providers, and further explained the need for guiderails, in Appendix B to Part I and in Part II. Overall, we consider that there is a clear need for 'guiderails' to be included in the CR Code to help distinguish between 'promises-to-pay' and FHAs. The form of guiderails suggested by ARCA are not overly prescriptive, can be implemented by credit providers 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 credit provider to make inquiries about their financial situation). Further, while not prescriptive, they will help to ensure a higher degree of consistency between credit providers (compared to what is likely without any such guiderails). We believe that other stakeholders are supportive of the need for guiderails. There was also consensus support for ARCA's proposal in relation to joint account holders, with credit providers considering it would be a backward step to require CPs to obtain the consent of all account holders to enter an FHA. There was also agreement with ARCA's proposal to address the risk of domestic abuse by withholding RHI (and therefore FHI) for at-risk customers. Credit providers generally accepted a requirement in the CR Code to explain how an overdue payment arrangement would affect the customer's credit report, provided that the requirement was flexible and would not inappropriately interfere with their engagement with the customer. While credit providers did not support the inclusion of further restrictions on the 'use' of FHI in the CR Code (i.e. which would apply when assessing credit applications), there was support from a number of credit providers for developing industry-level reporting on the 'use' of FHI (although this would be done outside the CR Code). There was broad support for ARCA's proposal in relation to the provision of credit ratings. Otherwise, industry stakeholders provided feedback on many issues throughout the process to develop the CR Code changes, which has helped shaped the proposals in this variation application.
Industry associations	ARCA has engaged with industry associations, both financial services and non-financial services, throughout the process to develop these changes.

	Written submissions received (and annexed to Part I): • Australian Banking Association (ABA) • Australian Institute of Credit Management (AICM) We conducted a roundtable with the following industry associations on the regulators and EDR schemes on 29 July: • ABA • Australian Collectors and Debt Buyers Association • Australian Finance Industry Association • AICM • Finance Brokers Association of Australia • Law Council of Australia • Mortgage and Finance Association of Australia The Communications Alliance had previously advised that they did not identify any impacts for their members in the proposed changes. We also invited representatives from industry associations in the small amount credit contract and consumer lease sectors, however they did not attend. As with industry stakeholders, there was agreement that the CR Code should provide clarity but not prescribe how arrangements should be treated. There was also a concern that almost all arrangements could be considered as FHA (e.g. if the issue was later taken to AFCA). In written submissions, AICM supported ARCA proposals, while the ABA raised concerns that they were too prescriptive (see comments above in relation to industry stakeholder feedback). The feedback from industry associations mirrored that of industry stakeholders in relation to a number of issues, including joint accounts and consumer disclosure. Industry associations shared the concern of other stakeholders regarding the complexity of the CR Code, although AICM noted that the current format does provide technical clarity and aids uniform compliance.

3. Key issues for the CR Code

Part II discusses the issues that have been raised and considered as part of this application.

The following is a summary of what we consider to be the key issues arising from the consultation process.

i. *Promise-to-pay vs Financial hardship arrangement*

This has been the most significant issue for stakeholders. In short, while the explanatory memorandum explicitly recognises that not all arrangements relating to overdue payments

are FHAs, there is lack of detail in the legislation as to how that distinction should be drawn. We understand that this lack of detail was deliberate so that any arrangement could be an FHA. However, this creates significant uncertainty around how to distinguish between arrangements that are treated as 'promises-to-pay' (such that RHI would be reported against the contractual terms and no FHI reported) and those that are treated as a temporary FHA (such that RHI would be reported against the terms of the arrangement and FHI would be reported).

Following a significant amount of consultation with key stakeholders, ARCA has proposed paragraph 8A.2 in the CR Code that would help provide clarity to this issue. This proposal has obtained support from a broad range of stakeholders. However, there has been feedback from the ABA and a small number of credit providers that the proposal is too prescriptive and that the NCC already provides enough clarity.

Part II discusses our proposal, and the feedback received, in further detail. In addition, Appendix B to this Part discusses the proposal in the context of the current NCC hardship regime.

In summary, ARCA's firm view is that our proposal is not prescriptive because the proposal does not seek to detract from the ability of a credit provider and individual to agree that a particular arrangement is or is not an FHA. Moreover – and recognising that the purpose of the CR Code is to give effect to the Part IIIA regime – the suggestion that the separate NCC regime provides sufficient clarity on how to distinguish between promises-to-pay and financial hardship arrangements is misguided. ARCA's view is that the proposals in this CR Code application are both appropriate and necessary in order to give effect to the Part IIIA regime and its policy intent. In particular, the proposal helps to achieve the twin goals of allowing for any arrangement to potentially be reported as a FHA, while at the same time maintaining consistency in the treatment of consumer in similar financial positions across the industry.

ii. *Treatment of joint accounts*

Subparagraph 8A.1(d) provides that an FHA may be formed at the request of one party to a jointly held loan. This is consistent with existing industry practice and has been strongly supported by all stakeholders. However, the OAIC has noted concerns that subparagraph 8A.1(d) may require further legislative amendment in order for the CR Code to give effect to that subparagraph. We look forward to receiving an update from the OAIC as to their consideration of this issue.

Separately, stakeholders have noted concerns regarding the impact of the new hardship reporting regime on victims of domestic abuse. ARCA has suggested an approach to this issue that sits outside the CR Code. Stakeholders have agreed with this approach, however consumer advocates have also recommended a broader long term solution which sits outside the scope of this CR Code change.

iii. *Complexity of the CR Code*

Many stakeholders noted that the proposed changes (particularly in relation to the promise-to-pay vs financial hardship arrangement issue) were complex and difficult to understand. In addition, consumer advocates noted general concerns with the complexity of the CR Code as a whole, and the difficulty for consumers or even consumer representatives to understand the code. They noted that this was particularly problematic as the CR Code is intended to be a 'consumer facing' document.

One suggestion was to extract the more 'technical' provisions (which are of greater relevance to industry users) from the general code. However, we note OAIC's feedback that it would not support an approach of separating the 'consumer facing' CR Code provisions from the 'industry facing' provisions (e.g. by extracting the later provisions to an appendix).

In relation to the specific changes associated with this CR Code application, ARCA has reviewed the proposed changes and where possible has simplified, or removed, a number of paragraphs in response. We also considered moving some of the more 'technical' elements of the CR Code (which are more relevant to industry participants rather than consumers) to an appendix. However, we do not consider that it would be appropriate to separate those requirements from the rest of the CR Code (and note that the OAIC has indicated concerns with such an approach).

In relation to the general concerns that the CR Code is not user-friendly (particularly for consumers), we note that this is beyond the scope of this update to address. However, we recognise that the CR Code is complex and consider that this is an inevitable outcome of the legislative framework applying to credit reporting in Australia. While we would support this being reviewed as part of the upcoming Independent Review of the CR Code, we consider that the issue is unlikely to be resolved without fundamental changes to the legislative framework in Part IIIA.

iv. *Concern with how FHI will be used/additional limits on use*

Consumer advocates are concerned that FHI will be used in a way that would dissuade consumers from seeking hardship assistance, i.e. the consumer will attempt to struggle through their financial hardship, rather than seek assistance, so as to avoid the potential of having FHI recorded on the credit report. They would like to see additional use restrictions included in the code. Separately, they want credit providers to keep adequate records of how FHI is used and to report on that use (including as part of the legislated review of Part IIIA in 2024).

Industry participants have not supported additional restrictions being included in the CR Code as they consider that this would be inconsistent with a credit provider's ability to set its own risk tolerance. However there has been recognition that it may be appropriate to report on how FHI is used in practice.

ARCA has not adopted the recommendation to include additional use restrictions in the CR Code. In particular, we consider that the issue was considered fully as part of the development of the legislation and it was decided not to introduce those additional restrictions. However, we have noted that, in our capacity as industry association, we will

work with Members to explore the potential for developing a reporting regime on the use of FHI across credit providers.

v. *Explaining impact*

A number of stakeholders have considered that it is important that lenders provide consistent and fair communications with customers as to the impact upon their credit report of an overdue payment arrangement (whether that is an FHA or a promise-to-pay). Many credit providers have said that they would intend to give such information to their customer when entering into the arrangement. However, given the broad range of circumstances in which the arrangements may be put in place, they were concerned that a prescriptive obligation may result in poor customer experience and, potentially, result in additional confusion.

Based on the feedback of all stakeholders, we have included paragraph 8A.5 which requires a credit provider to tell an individual about the impact of the arrangement on the RHI and, if relevant, FHI that will be disclosed to a CRB. This must be given at the time the arrangement is put in place or as soon as practicable afterwards. In practice, we expect that this could be done by the credit provider sending an SMS to the customer with a link to further information. To be clear, the link to the further information would need to reference the particular type of arrangement put in place (i.e. promise-to-pay or temporary FHA or variation FHA).

This notification requirement is not required by the amending Act and goes beyond what is required for other forms of credit reporting information (other than for default information for which Part IIIA establishes a contemporaneous notification requirement).

Consumer advocates have acknowledged the benefits of the inclusion of paragraph 8A.5, however, have suggested that the notification requirements go further, including information about options available to the individual and what the consequences of those options will be for their credit report and their future ability to access finance. Overall, we do not consider this level of detail should be included in the CR Code (and is not included in respect of any other type of credit information, including default information).

Appendix A

Context of CR Code changes to address hardship reporting

i. *Introduction*

The issue of how 'hardship assistance' should be reflected in the credit reporting system has a complex history, which has caused significant debate and disagreement amongst stakeholders for at least 5 years (and intensified as more credit providers began reporting repayment history information since 2018). That debate also reflects the broader uncertainty as to the concept of 'financial hardship' itself, i.e. what is 'financial hardship' and how are credit providers expected to help customers experiencing it? That issue has a longer history that goes back to the 1990s with the introduction of the *Uniform Consumer Credit Code* (which was the precursor to the *National Consumer Credit Protection Act* (NCCP) and was subject to a significant legislative change in 2012 when the *Consumer Credit Legislation Amendment (Enhancements) Act 2012* was passed.

That Act introduced the concept of a 'hardship notice' which reflected the increased expectation on credit providers that they take a more proactive approach to identifying, and assisting, customers experiencing financial hardship; although, as discussed in Appendix B to this Part, that regime does not establish a clear 'framework' for when a hardship notice has been given by a consumer (which some stakeholders consider is intentional given the nature of 'financial hardship').

It was in that context that ARCA was tasked with developing the proposed changes to the CR Code to give effect to the hardship reporting regime introduced by the amending Act. While it has taken considerable effort (from both ARCA and key stakeholders), we consider that we have developed a set of proposals that balances the interests of stakeholders, gives effect to the intent of the amending Act and works 'alongside', but is independent of, the existing hardship regime in the *National Credit Code* (NCC). To the extent that some credit providers are not currently giving full effect to the intent of the NCC hardship regime, our proposals are likely to 'raise the bar' for those industry participants (although, noting that they are separate regimes).

We consider that the feedback to the public consultation process from key stakeholders recognises that ARCA's proposed approach – in particular, in respect of the key issue of 'promises to pay' vs 'financial hardship arrangements' – creates an appropriate balance and is, in fact, likely to 'raise the bar' in relation to hardship practices across the industry.

To provide context of the proposed changes, we make the following comments regarding how we approached our role as Code Developer, and the broader purpose of the CR Code in the credit reporting system.

ii. *CR Code is to give effect to the hardship legislation*

The role of the CR Code is to particularise the hardship reporting elements recently incorporated into Part IIIA of the Privacy Act. Section 26N(2)(a) of the Privacy Act requires the CR Code to set out how provisions of Part IIIA "are to be applied or complied with", while s26N(3) provides that the CR Code may impose additional requirements, so long as the

additional requirements "are not contrary to, or inconsistent with, that Part". Where the drafting of the legislation may suggest alternative interpretations, the Explanatory Memorandum and Supplementary Explanatory Memorandum are useful guides to understanding the legislative intent and hence the preferred approach to how a requirement may be detailed in the CR Code.

As Code Developer, ARCA recognised that the OAIC has initiated the process to undertake an independent review of the CR Code. Hence, for the purposes of this process, we restricted ourselves to those changes necessary to accommodate the hardship reporting legislation, the changes relating to access to free credit reports and credit rating, and the amendments relating to non-participating credit providers[6].

iii. *The role of the credit reporting system*

Credit reporting systems exist worldwide to address the asymmetry of information under which an individual has more information about his or her credit position and behaviours than credit providers. Australia's credit reporting system – even with the introduction of comprehensive credit reporting in 2014 and the enablement of hardship reporting – remains far less "comprehensive" than other equivalent economies.

A credit reporting system creates tensions between access to information and an individual's privacy. For this reason, in Australia rules controlling credit reporting are incorporated into the Privacy Act, limiting both the information available and the purposes to which that information may be disclosed and used (and who may disclose and use it).

Our initial discussions with key stakeholders regarding the changes that would be required to the CR Code in response to the amending Act reflect the tension between the credit reporting system operating as it was designed, and the impacts for individuals e.g. some stakeholders would like the CR Code to protect individuals from having (what may be considered) 'negative' information in their credit report. However, it is important to understand that the balance between how the credit reporting system is designed and the impacts on individuals has been considered and addressed in the design of the legislation itself.

In explaining the need for the 'mandatory CCR regime', the explanatory memorandum to the *National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Bill 2019* (the Bill), notes that "Australia's credit reporting system is characterised by an information asymmetry" (in paragraph 1.10) which can "result in mis-pricing and mis-allocation of credit" (and which justifies introducing the mandatory regime for major banks).[7]

Likewise, in respect of the hardship changes, the explanatory memorandum (in paragraph 2.4) describes the current inability to report information about hardship arrangements in the

[6] Or any necessary changes arising from the mandatory CCR components of the amending Act – however we did not identify any.

[7] The Explanatory Statement (page 1) to the *National Consumer Credit Protection Amendment (Mandatory Credit Reporting) Regulations 2021* also notes that the "mandatory credit reporting regime will give lenders access to a deeper, richer data set so they can better assess a borrower's true credit position, including their ability to repay a loan. This will benefit consumers as the regime will drive more competition in the market by encouraging new entrants and smaller lenders to compete for consumers with positive credit histories".

credit reporting system as a further 'information asymmetry" that "affects the ability of credit providers to meet their responsible lending obligations".

Hence, the clear purpose of the hardship reforms is to enhance the effectiveness of the credit reporting system and the drafting of those reforms specifically considered the consequences for individuals – particularly whether and how hardship is reflected and the impact this has on the reporting and use of repayment history information (RHI). The economy wide benefits of an effective credit reporting system are seen to flow through to both industry and individuals overall, in terms of the efficiency of credit provision.[8]

In amending the CR Code to give effect to the legislation, the extent to which the additional benefits from the credit reporting system are achieved will be significantly impacted by the drafting of the CR Code changes. The explanatory memorandum (at 2.38) notes that in an effective credit reporting system "consumers in similar financial situations will have correspondingly similar information in their credit reports". The converse is also true, different behaviour should result in different disclosures. Hence, to the extent their behaviour is different, the behaviour of two individuals should, to the extent allowed by law, look different in the credit reporting system.

As a result, central to the drafting challenge for the CR Code changes giving effect to the hardship legislation, is ensuring there is a consistent and meaningful way to distinguish between arrangements that should be reported as financial hardship arrangements and those which are not. In the context of the hardship legislation and its accompanying explanatory memorandum, it is clear there is no intention to create an outcome where all and any arrangements are considered hardship arrangements, nor an outcome where all and any arrangements are not considered hardship arrangements. It is clear that the intention was to allow for a variety of outcomes that reflect the differing circumstances applying in each specific case.

The hardship reporting regime established under the legislation is already a product of compromise where a legislative balance has been made between the views of various stakeholders including consumer advocates and industry. For example, the reporting of an individual's behaviour will be "blurred" by the requirement to delete FHI after 12 months, resulting in the meaning of the associated repayment history to be uncertain and unknowable from that point. The explanatory memorandum (at paragraph 2.38) makes it clear that this was seen to balance the interests of consumers in hardship reporting. Nevertheless, as noted above, in other respects there is a clear intention to improve the effectiveness of the credit reporting system by allowing for a greater ability to distinguish between the behaviour of different individuals (and greater consistency in reporting between individuals exhibiting the same behaviour). It is the role of the CR Code to reinforce this legislative balance.

iv. *Credit reporting and consumers' perceptions*

We recognise that, notwithstanding the beneficial role the credit reporting system has for individuals, an individual's *perception* of the system can have real world implications.

Prior to the amending Act being passed, some stakeholders argued that the possibility of having financial hardship reflected in an individual's credit report may impact whether the

[8] Efficiency in the wider sense of credit availability and access, allocation, and pricing.

individual would approach their credit provider to discuss difficulties with repayments. It was suggested that as a result, individuals could struggle for too long with payments, causing personal stress and potentially causing them to fall into deeper financial distress and, possibly, leading them to seek more credit from 'lenders of last resort'.

Alternatively, earlier in our consultation process, some stakeholders suggested it would be better for an individual to have FHI reported in their credit report rather than negative RHI, because that shows the individual has actively engaged with the credit provider. Hence, on the basis that it 'looks' better to have FHI recorded, the argument is that arrangements should be reported as 'hardship' as often as possible.

As Code Developer, ARCA acknowledges these points of view but we do not believe they should determine how the CR Code is drafted. In our view the CR Code should give effect to the legislation and its intent, and in this respect the legislation clearly does not seek to require all arrangements between credit providers and consumers to be reported as reflecting hardship, although in places it sets or suggests some criteria that would determine which arrangements would be reported as 'hardship' as well as those that would not be reported in that way.

As discussed in Part II, ARCA as a representative of industry (not Code Developer) acknowledges the concerns expressed around how FHI might be used and consumer perceptions of that use leading to individuals trying to avoid FHI. While we think the law is clear and the CR Code needs to give effect to the law, we are happy to work with all stakeholders to work out ways to identify whether those concerns are happening in practice and/or work to find other ways to reduce those risks from happening. This would need to be created outside the CR Code, and could range from consumer (and industry) education initiatives through to voluntary industry agreements. We also note that there is a broad review of Part IIIA of the Privacy Act due in 2024, and further legislative changes affecting the entire credit reporting system may occur as a result of that.

Appendix B

ARCA's proposed framework for considering promises-to-pay vs FHAs

Summary

- ARCA has undertaken extensive and detailed discussions with a wide range of stakeholders (before and after the publication of the public consultation pack) to develop and refine its proposals in *Part IV – proposed CR Code changes*, required to give effect to the hardship legislation.
- Those discussions have resulted in significant changes to ARCA's initial proposals, particularly in relation to the issue of delineating between promises-to-pay and FHAs. Earlier draft proposals included a delineation based on the length of the arrangement, including providing for situations in which an arrangement *couldn't* be a FHA. While a "temporal" element still remains in the proposed paragraph 8A.2 it plays a significantly smaller (though still important) role, which we consider is consistent with feedback received from the OAIC that the CR Code could "stipulate further steps" that are relevant to whether an individual is suffering financial hardship.
- In response to feedback to the public consultation pack, ARCA has redrafted and simplified the proposed paragraph 8A.2. However, the substance of the paragraph has not changed.
- Proposed paragraph 8A.2 allows complete flexibility - in that it allows for any arrangement to be (or not to be) an FHA depending on the engagement between the individual and credit provider.
- ARCA's proposal also:
    - Promotes consistency in treatment of consumers, in respect of payment arrangements, across credit providers;
    - "Raises the bar" across the credit industry in terms of promoting conversations between credit providers and consumers that will help identify those in need of hardship assistance; and
    - Provides a framework that will assist credit providers, regulators, and AFCA to assess the performance of credit providers' hardship processes.
- ARCA considers that our proposed framework is consistent with the approach taken for other provisions in the CR Code where it has been considered necessary to add details or place limits (including temporal details/limits) that do not otherwise exist in the underlying legislation.
- In developing our proposal, ARCA has deliberately avoided being prescriptive around the steps a credit provider should undertake to determine if an individual is suffering financial hardship. Aside from the desire to allow for flexibility, ARCA's view is that given all credit providers able to report FHAs are also subject to the *National Credit Code* (NCC), it is not appropriate for the CR Code to introduce NCC obligations into the CR Code, especially where the NCC itself does not provide detail on specific requirements.

A. Background

As code developer, ARCA understands its role is to develop the changes to the CR Code to give effect to the clear intent of *National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Act 2021* (the amending Act). The explanatory memorandum to the amending Act makes it clear that the intent of the hardship reforms is to enhance the effectiveness of the credit reporting system (e.g. addressing information asymmetries, enabling responsible lending obligations to be met) which benefits both individuals and credit providers. The explanatory memorandum also makes it clear that not all payment arrangements are to be treated as a financial hardship arrangement (FHA).

Following extensive discussions with key stakeholders, we have developed a proposal (of which the proposed paragraph 8A.2 is the primary element) in relation to the issue of differentiating between 'promises-to-pay' and FHA.

Our proposed changes recognise that the amending Act allows significant flexibility in what arrangements can be 'financial hardship arrangements'; while also acknowledging that unfettered flexibility without guidelines in how it should be applied is likely to result in the inconsistent treatment of consumers in similar situations. This outcome would not result in "industry practice [that] is consistent and interpretable" (paragraph 2.35 of the explanatory memorandum).

Accordingly, paragraph 8A.2 sets out a framework for when a 'temporary FHA' will be presumed to be formed – while allowing for any specific arrangement to be an FHA (or not be an FHA, if that is what the individual wants) depending on the discussions between the individual and the credit provider.

The framework uses the phrase "an arrangement… that is *put in place*" in the definition of 'overdue payment arrangement', which recognises that, as described in the explanatory memorandum (see paragraph 2.29), not all arrangements reflect a mutual understanding between the individual and credit provider. The proposal then establishes the framework for when that mutual understanding will be presumed to be formed and an FHA is 'made' in relation to arrangements that are 'put in place' (which, again, is ultimately dependent on the discussions between the individual and the credit provider).

Part III includes examples of how the proposal would operate in practice.

In our preliminary discussions with key stakeholders we noted that an 'alternative approach' to address the issue of differentiating between 'promises-to-pay' and FHA would provide that an arrangement 'put in place' is not an FHA if the credit provider states, when taking the arrangement, that there is no FHA agreed. We think this is a sub-optimal outcome as it may result in worse consumer outcomes (as there is no framework that would encourage a credit provider to proactively investigate potential hardship) and it does not allow for industry practice that is 'consistent and interpretable' (as it is completely up to the credit provider to determine when they want to treat an arrangement as an FHA).

B. Framework needed to aid consideration between 'promises-to-pay' and FHAs

How to distinguish between 'promise-to-pay' arrangements and FHAs has been the most important issue for stakeholders during ARCA's initial discussions with key stakeholders on the changes to the CR Code.

A key subset of this issue is whether a 'catch-up' period or a 'payment test' period is an FHA. The case study described in example 2.2 in the explanatory memorandum clearly provides that a 'catch-up' period is not an FHA. As code developer, ARCA is guided by the explanatory memorandum, and we would ordinarily seek to give effect to example 2.2 in the CR Code.

However, feedback from some key stakeholders was that they consider example 2.2 in the explanatory memorandum to be wrong.

We do not necessarily agree with that opinion, however we acknowledge that the difference in opinion evidences the complexity of the amending Act and the apparent disconnect between the wording of the legislation and the explanatory memorandum in respect of several key issues.[9]

This is not the only area of uncertainty in the amending Act. Despite the very clear statement that 'promises-to-pay' are not FHAs in the explanatory memorandum (para 2.29), a very broad – and we consider, incorrect – reading of the amending Act could apply the definition of FHA's to *all* promises-to-pay. That is, if an FHA can be created by an 'understanding'[10] it is arguable that any promise-to-pay *would* involve an understanding. This is because the only reason for an individual to give a promise-to-pay is that they have an expectation that the credit provider will act in a certain way in respect of overdue payments, and the credit provider shares and acts in accordance with that expectation (i.e. a 'nod and wink' understanding[11]).

Accordingly, it is clear that the CR Code needs to provide significant additional clarity to the regime created by the amending Act in order to give effect to the clear intent of Parliament (and to avoid the regime operating in a way that significantly undermines the effectiveness of the credit reporting system including producing adverse outcomes for consumers).

C. Precedents in CR Code

This is not the first time that the CR Code has needed to 'go beyond' the basic provisions in the Part IIIA of the Privacy Act to allow for a workable regime to be implemented. As noted in Part I, the Privacy Act requires the CR Code to set out how provisions of Part IIIA "are to be applied or complied with", while the CR Code may impose additional requirements, so long

[9] While we do not necessarily agree with this opinion, paragraph 8A.2 allows flexibility for such catch-up periods to be a 'temporary FHA'.

[10] As apparently provided for in subsection 6QA(3); although the meaning of that section, and how it interacts with the rest of s6QA, is unclear. We also note the apparent drafting error which provides that the subsection applies to "[t]his subsection", even though subsection 6QA(3) has no substantive effect.

[11] As the ACCC explains in relation to the use of that term in respect of competition law; see https://www.accc.gov.au/business/anti-competitive-behaviour/anti-competitive-conduct

as the additional requirements "are not contrary to, or inconsistent with, that Part". The requirements of the CR Code have often sought to aid the implementation of the requirements of the Privacy Act where it has been considered necessary or appropriate (while continuing to preserve key consumer protections).

For example:

- **Corrections notifications (paragraph 20.9)**

  Under the Privacy Act (sections 20U and 21W), both credit reporting bodies and credit providers have an obligation to notify "each recipient" who has previously received the now corrected information (unless 'impracticable').

  While the Act does not provide for any temporal limitation of that obligation, paragraph 20.9 of the CR Code, restricts the previous recipients of the information to those who have obtained disclosure of that information within the previous 3 months; while providing that an individual may explicitly nominate a previous recipient who has received the information beyond that 3 month period.

  When seeking approval of the CR Code (which was granted), ARCA noted that this provision represented sound policy and balanced the need of the individual to have the correction notified against the protection of the individual's interests in potentially disseminating information too broadly (even though it limited the 'unfettered' approach in the legislation).

- **Credit ID information and capacity information (paragraphs 1.2 (c) & (d), 5.1)**

  The Privacy Act (sections 20C and 20E) does not restrict a CRB's ability to collect or disclose information that pertains to an individual's credit worthiness, and which is not 'credit information'. However, the explanatory memorandum to the *Privacy Amendment (Enhancing Privacy Protection) Bill 2012* provided that the legislative intent was to restrict a CRB's collection and disclosure to categories of 'credit information', despite this not being explicitly allowed for in the legislation.

  Hence, paragraph 5.1 of the CR Code addressed this legislative gap by imposing a restriction on credit reporting bodies and credit providers that permits collection and disclosure of credit related information only, with limited specific exceptions. These exceptions were identified by industry as being necessary to enable adequate identification and matching of individuals to credit reports by credit reporting bodies and credit providers.

- **RHI reporting (paragraph 8)**

  The Privacy Act defines repayment history information as including information about whether or not an individual has met a payment obligation, the day on which the monthly payment is due and payable, and the day on which the individual makes that payment (s6V(1)(a) to (c)).

  However, the CR Code limits the repayment history information disclosure to a status which reflects whether or not the monthly payment has been met and, if not met, how

overdue that payment is. This is a departure from the detail contemplated in the Privacy Act definition.

When seeking approval of the CR Code (which was granted), ARCA noted its view that this approach was more appropriate and did not result in an incomplete or misleading impression of the individual's payment.

- **Default listing procedures (paragraph 9)**

  Before disclosing default information, a credit provider must give a notice under section 6Q and section 21D(3)(d). There is nothing in the legislation that requires those notices to be sent separately (i.e. one notice could theoretically be sent to satisfy both sections). However, it was considered that this was not consistent with the explanatory memorandum's expectation that the section 21D(3)(d) notice was to give the individual "one final opportunity to pay".

  Accordingly, the CR Code (in paragraph 9) provides that those two notices be given separately, so that the section 6Q notice must be given no less than 30 days before the notice under section 21D(3)(d)). In doing so this provides an additional temporal element to the timing of the relevant notices that does not exist in the Act

- **Ban periods (paragraph 17)**

  Where an individual considers they are at risk of identify fraud, they may request a 'ban period' under section 20K of the Act to be applied to their credit file (which places restrictions on a credit provider accessing that information and protects against the fraudster taking out credit in the individual's name). Such ban periods are initiated by the individual making a request to the CRB. However, the Privacy Act does not recognise that due to there being multiple credit reporting bodies in Australia, the individual may need to notify each of those bodies.

  In 2020, the CR Code was varied to include additional requirements obliging the credit reporting bodies to work together to co-ordinate bans across credit reporting bodies.

Accordingly, we consider that paragraph 8A.2 is both appropriate and necessary to implement a hardship reporting regime that gives effect to the clear intent of parliament, and is consistent with how previous issues under the 'raw' legislation have been dealt with in the CR Code.

D. Process to develop the proposal

We engaged extensively with a broad range of key stakeholders to develop the proposal in paragraph 8A.2. Through that process, we have refined and adjusted our proposal in response to stakeholder feedback, including:

- The time frame included in the proposal (now one month) was originally based on the repayment history information value that 'could' have been reported during the arrangement. Feedback from credit providers was that this would be difficult to operationalise as it would require a complex calculation by frontline staff. For that reason, we have changed the timeframe to be based on the simple length of time before the customer can restart payments (i.e. which suggests that customer is no longer experiencing financial hardship).

- In addition, we have reduced the proposed time frame from 45 days to one month. This reflects the view that if the individual cannot recommence minimum payments within one monthly pay cycle, it is appropriate to expect the credit provider to take some action to understand the reasons (and whether the customer requires hardship assistance). From a credit reporting perspective, it means that the most the individual's RHI value could increase during the 'promise-to-pay' was by 1. It should also be noted that an analysis of data provided confidentially by some credit providers relating to the terms of promises-to-pay suggests that a significant proportion of them currently extend beyond one month. In the future under the proposed framework such longer promises to pay taken by some credit providers will likely come under greater scrutiny as potentially relating to hardship.
- We have also listened to the feedback from a variety of stakeholders regarding arrangements relating to catch-up or payment test periods. Subparagraph 8A.2(b)(i) provides that a catch-up or payment test period following an earlier 'temporary FHA' is exempt from the general presumption established under that subparagraph (i.e. they would be presumed to be a temporary FHA unless agreed otherwise). As noted above, we consider that this is contrary to the guidance in Example 2.2. However, some key stakeholders strongly objected to that outcome (and considered the example in the explanatory memorandum was wrong). Overall, we consider that the proposal in 8A.2(b)(i) is appropriate notwithstanding it is somewhat inconsistent with example 2.2. Under paragraph 8A.2(b)(i), an individual who exits a 'temporary FHA' with overdue payments (as determined by the consumer credit) will continue to have RHI reported against an 'arrangement', rather than the contract (i.e. which would otherwise result in missed payments being disclosed). Provided the individual satisfies the catch-up/payment test payments, all trace of the individual payment difficulties will fall off the individual's credit report 12 months after the completion of the catch-up/payment test period.
- Subparagraph 8A.2(b) now provides that a catch-up or payment test period that does not follow an earlier 'temporary FHA' can be a 'temporary FHA' if the individual makes a hardship request and the individual and credit provider explicitly agree to the FHA. As noted in Example 5 in Part III, this could be triggered by the customer saying that, notwithstanding they can restart paying minimum monthly payments, they want to give a hardship notice. Given this would trigger a fuller review of the individual's circumstances by the credit provider, it may be appropriate for the credit provider to then explicitly agree to the FHA (which may or may not be the same as originally proposed by the individual).

E. NCC obligations remain

We note that some stakeholders have expressed concern that unscrupulous credit providers could 'take advantage' of the one-month time frame (e.g. by only ever accepting 'promises-to-pay' that are less than one month so that they avoid having to consider offering more appropriate hardship assistance). In addition, stakeholders have noted the potential for a customer to have multiple/repeating promises-to-pay (which could indicate a broader concern about the individual financial situation). It is important to note that the proposal in paragraph 8A.2 does not in any way displace a credit provider's obligations under section 72 or section 177B of the NCC. In both situations described, the credit provider would still need

to consider whether the individual has provided a hardship notice and, if they fail to recognise that one has been given, would be in breach of section 72 or, for consumer leases, section 177B (which attracts significant financial penalties). We have included a 'note' to paragraph 8A.2 to make this clear.

Importantly, while the proposal does not directly change a credit provider's obligations under section 72 or section 177B of the NCC, several stakeholders have recognised that it would probably result in the 'raising of the bar' for many credit providers (noting our comments below regarding the lack of clarity in the NCC hardship provisions). Other credit providers, who believe they already have strong processes to identify individuals experiencing financial hardship, have considered that the proposal would not require significant additional work.

Finally, our consultation process has highlighted the absence of a clear 'framework' under the NCC provisions for when a 'hardship notice' has been given by an individual, and that stakeholders have very different views on when such a notice has been given. While the NCC provisions do not directly impact on how the Privacy Act hardship reporting regime will operate, this lack of clarity (and potentially, lack of consistency) emphasises the need to create a framework under the CR Code to ensure the consistency of data that is reported in the system (while having, we consider, a secondary effect of improving credit provider practices under the NCC).

Submission by the

Consumer Action Law Centre;

Consumer Credit Legal Service (WA)

Financial Counselling Australia (FCA); and

Financial Rights Legal Centre

Uniting Communities: Consumer Credit Law Centre SA

Australian Retail Credit Association

CR Code Hardship changes - Public Consultation

August 2021

Financial Rights Legal Centre |PO BOX 538, Surry Hills 2010 | Tel (02) 9212 4216 |Fax (02) 9212 4711 |
info@financialrights.org.au | www.financialrights.org.au | @Fin_Rights_CLC | ABN: 40 506 635 273

About the Financial Rights Legal Centre

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters. Financial Rights took close to 21,000 calls for advice or assistance during the 2019/2020 financial year.

Financial Rights also conducts research and collects data from our extensive contact with consumers and the legal consumer protection framework to lobby for changes to law and industry practice for the benefit of consumers. We also provide extensive web-based resources, other education resources, workshops, presentations and media comment.

This submission is an example of how CLCs utilise the expertise gained from their client work and help give voice to their clients' experiences to contribute to improving laws and legal processes and prevent some problems from arising altogether.

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Introduction

Thank you for the opportunity to comment on the draft the changes required to the Privacy (Credit Reporting) Code 2014 as a result of the *National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Act* 2021 **(Amending Act)** being passed.

This joint consumer submission has been prepared by the Financial Rights Legal Centre in consultation with the Consumer Action Law Centre, the Consumer Credit Legal Service (WA), The Consumer Credit Law Centre (SA), the Economic Abuse Reference Group and Financial Counselling Australia. Consumer groups have responded below to the 60 questions set out in Part B of the Consultation Papers.

We have expressed our broad concerns about Comprehensive Credit Reporting (**CCR**) and Financial Hardship Information (**FHI**) in several previous consultations so they are not re-stated here. Nevertheless, we want to emphasise that the inclusion FHI in credit reports will necessitate a major change in the daily work our organisations do assisting consumers in financial stress. We will now be required to explain to consumers what asking for, or accepting, a hardship arrangement will mean for their credit report. We have strong concerns that these changes will lead to fewer consumers proactively talking to credit providers to obtain hardship assistance.

Consistency and data collection

There are a few critical things that must happen if Australia is to avoid undermining a decade of hard work and success in cementing good hardship practices. We recognise that the Credit Reporting Code (CR Code) will not be able to achieve all of these things in isolation. Firstly, lenders must commit to fair and consistent use of FHI information. There are some clear restrictions on the use of FHI in the Amending Act, but they will be very hard to enforce. Lenders can use almost any reason to reject an application for credit, so it will be incumbent on industry to be open and transparent about how they use FHI in lending decisions and how they treat existing customers who have FHI with other financial institutions. Lenders must commit to keeping robust records of how FHI is used in lending decisions, so the independent review of the Amending Act can be done with accurate data. Data should also be collected relevant to consumers' willingness to seek or accept hardship assistance, whether the outcomes of financial hardship reporting are consistent and fair, and whether this data is fuelling unhelpful conduct by credit repair firms.

Secondly, lenders must commit to consistent and fair communications with customers that are considering entering into financial hardship arrangements (**FHA**) after 1 July 2022. Consumers need clear and accessible information in real time about what a FHA will look like on their credit report, and what the alternative might be. They need to be given some information about their options and what the consequences of those options will be for their credit report and their future ability to access finance.

Accessibility

Finally, for the new regime of financial hardship reporting to be implemented in a fair and consistent way, the new rules must be comprehensible. Unfortunately, the new draft provisions of the CR Code are impenetrable. In its current state, there will be no way for consumers (or their advocates) to use the CR Code to hold lenders accountable for their reporting or use of FHI. While we discuss our specific concerns about each new provision below, we find the new section 8A (as well as most of the rest of the CR Code) dense, inaccessible and confusing. Consumer groups recognise that one of the roles of the CR Code is to further particularise the relevant provisions of the *Privacy Act* (and various amending legislation) and so requires a level of detail that might not be accessible to average consumers. Nevertheless, the CR Code is a consumer facing code and at a minimum it needs to be accessible to advocates like financial counsellors, consumer lawyers and case managers at AFCA. Consumer groups strongly submit that the current CR Code including the new draft provisions do not meet this minimum standard.

The organisations that have signed-on to this submission have all expressed frustration at the dense and confusing provisions operationalising FHI reporting. More so, several consumer organisations have said they cannot sign on to this submission because the new provisions are so inaccessible, they cannot understand them enough to even comment. This is an extraordinarily disturbing situation. If trained lawyers and experienced consumer advocates cannot even understand the CR Code, how can we possibly advise consumers on their credit reporting rights or their prospects in making a complaint to AFCA? We submit the new regime of FHI reporting is on the brink of regulatory failure before the provisions in the Amending Act have even commenced.

Recommendations

1. **We recommend that the OAIC breaks up the CR Code between principles-based consumer-facing provisions and the technical industry-facing provisions. It would be critical that the consumer-facing principles take precedence in any conflict with the technical provisions.**

Responses to Specific Questions in Part B

1. **Do you agree that 'nonparticipating credit providers' should, for the purposes of section 26(N)(2) of the Privacy Act, not be bound by the CR Code?**

Consumer groups agree this is reasonable.

2. **Is there any reason for paragraph 20.1 of the CR Code to be removed now?**

Consumer groups agree this can wait until the independent review of the CR Code which is due to take place in the second half of 2021.

3. **Do you agree with the use of the terms 'temporary relief or deferral FHA' and 'variation FHA' (noting that the CR Code will separately provide for how FHAs should be described to consumers – see paragraph 19.8). If not, what terms should be used?**

Consumers suggest instead of the CR Code using the terms 'temporary relief and deferral FHA' and 'variation FHA', that these be referred to as '*temporary/deferral FHA*' and '*permanent/ongoing FHA*'. We believe these terms would more accurately reflect the two types of FHA as laid out in the Amending Act. We also believe their meaning will be better understood by consumers and consumer representatives like financial counsellors who may be using the CR Code. The distinction between temporary and permanent would also align with s6QA of the Privacy Act which distinguishes between a permanent variation and temporary relief. Consistency between the Act and the CR Code may reduce confusion.

For the avoidance of doubt, the distinction between these terms should be more clearly defined. Specifically, it should be specified, both in the definition section at 1.2 as well as at 8A.2 and 8A.4 that *temporary/deferral FHA* will result in arrears accumulating and a *permanent/ongoing FHA* will not. For clarity however, for the rest of the submission we will continue to use the proposed terms 'temporary relief or deferral FHA' and 'variation FHA'.

Recommendations

2. **The CR Code should use the terms '*temporary/deferral FHA*' and '*permanent/ongoing FHA*'.**
3. **The definitions of '*temporary/deferral FHA*' and '*permanent/ongoing FHA*' in provisions 1.2, 8A.2 and 8A.4 should clearly explain that the former will result in arrears accumulating and the latter will not.**

4. **Do you have any comments in relation to paragraph 2.3?**

We are supportive of this inclusion.

5. **Do you agree that RHI disclosed following a variation FHA should be disclosed on the same basis as 'standard' RHI? If not, please explain why.**

Consumer groups agree RHI disclosed following a variation FHA should be disclosed on the same basis as 'standard' RHI.

6. **Do you agree with our proposal that RHI reported in respect of a temporary relief or deferral FHA should not be subject to a grace period? If not, please explain why (including addressing the issues noted in our commentary).**

Consumer groups do not agree with the proposal that RHI reported in respect of a temporary relief or deferral FHA should not be subject to a grace period. While we appreciate that RHI during a deferral period will be limited to '0' and '1' we still believe there should be a grace period before a '1' is reported after a temporary relief or deferral FHA is agreed to.

While the grace period is not something required by the law, but instead a creation of the CR Code, we believe it is now a well understood and relied upon element of the credit reporting system. Consumers and financial counsellors understand the concept of the grace period and expect it to be universally applied across different credit products and different Credit Providers (**CPs**). It would be confusing for consumers if grace periods were not applied during temporary relief or deferral periods.

There are lots of reasons why a consumer might need a grace period, even after just agreeing to a temporary relief or deferral FHA. First, simple administrative mistakes can happen. It is common for people to get confused about the actual due date of a new payment arrangement, or an automated BPAY might not go through as planned. Second, hardship arrangements often take some trial and error before the consumer and CP get the arrangement right. We agree that hardship arrangements should be suitable (consistent with the NCC provisions), but it is not always very clear what will be suitable in the first instance. Consumers are notoriously bad at estimating their own expenses or what level of payment they can actually afford during a period of hardship.

Recommendations

4. **Consumer groups recommend the 14 day grace period apply to payments due under a temporary relief or deferral FHA.**

7. **Do you agree with our 'binary reporting' proposal for RHI disclosed in respect of a temporary relief or deferral FHA? If not, please provide reasons.**

Yes, consumer groups agree with this proposal.

8. Do you agree with the approach in subparagraph (a) – (d), particularly that an FHA made during the grace period will affect the payment from the previous RHI month? If not, please provide reasons and, if relevant, an alternative suggestion.

Consumer groups agree with the consistency of reporting that ARCA is trying to achieve through subparagraphs 8A.1(a) – (d), however we are not convinced these provisions need to be in the consumer-facing provisions of the CR Code. While we believe this approach endeavours to meet consumer expectations (even when it does not always align with the exact technical requirements of the Amending Act) we submit these subparagraphs are so dense and legalistic they will be incomprehensible to consumers (and probably their advocates).

The detail of these provisions is really aimed at CPs who need to design their systems for the various permutations of the timing of hardship arrangements. Consumer groups recommend that this detail should be removed from the consumer-facing CR Code. Perhaps these provisions could go in a separate inter-industry Code or a separate schedule attached to the CR Code. As recommended above in the Introduction, consumer groups believe the provisions which set out consumer rights (including issues of the timing of reporting FHI) should be more principles based and consumer and advocate friendly.

9. Do you agree that the examples in Part C reflect the meaning of subparagraphs (a) – (d)? Is there a need for any further examples to demonstrate the operation of subparagraphs (a) – (d)?

Consumer groups agree the examples in Part C reflect the principles outlined in the new provisions of the CR Code, but they do not necessarily reflect good hardship practice. For example:

Example 1

The individual indicates they cannot pay for 3 weeks. We would argue that this is a hardship notice under the NCC, and should at least a prompt for the CP to ask "why can't you pay"? If the customers discloses a hardship reason then the CP has an obligation to consider it.

Example 2

We do not disagree with the example, but we suggest that it is incumbent on the lender to take one more step and explain that the individual will have negative RHI reported and give the individual one more chance to explain their circumstances. This is because many people are reluctant to disclose their true situation. This may be because of shame of failure, or a strong sense of privacy, or fear that their future opportunities with the lender may be limited in future if they admit their financial problems now. Understanding the impact on their credit report may be the trigger they need to overcome their reluctance to disclose. The communication obligations now included in the draft Code go some way towards achieving this aim but we do not think they require the disclosure to be sufficiently tailored or contemporaneous.

Example 4

As per 1 and 2 above, CP needs to ask why and explain consequences of arrangement.

10. Do you agree with the approach in subparagraph 8A.1(e), particularly that RHI may be reported as usual while an FHA is being assessed? If not, please provide reasons.

Consumer groups **disagree** with the approach taken in 8A.1(e) that RHI may be reported as usual while an FHA is being assessed. We submit that once an FHA is applied for all enforcement should cease including the deterioration of RHI. For example, if RHI is a 1 and then an application is made but the credit provider has not determined the outcome by the time the next payment is due, RHI will remain at a 1 and will not deteriorate to a 2. If this is not possible from a systems point of view, we support RHI being suppressed while a hardship notice is being assessed.

Consumer groups also strongly believe 8A.1(e) should require the commencement of an FHA to always be backdated to the date of the hardship request after the FHA has been agreed to. We can see no reason why backdating should not always take place, regardless of any reasonable or unreasonable delays by the CP in agreeing to an arrangement. We understand this is not required by the Amending Act, but it is good hardship practice and exactly the kind of thing that can be particularised by the CR Code.

Finally, consumer groups also have concerns that the current drafting of 8A.1(e) may lead to CPs creating barriers to FHAs like requiring written acceptance by the customer. If an individual requests a hardship arrangement and the CP responds and agrees then no further acceptance should be required by the individual.

To be clear subparagraph 8A.1(e) should be redrafted as follows:

> *for the avoidance of doubt, a financial hardship arrangement is made when the individual and a CP agree to the arrangement ~~(including the completion of any formalities that are reasonably required by the CP, such as receiving written acceptance of the arrangement from the individual)~~ and not when a hardship request is made. However, the commencement date of a financial hardship arrangement ~~may~~* ***should*** *be backdated* ***to the date of the hardship request****. ~~(to no earlier than the day the hardship request was made by the individual) if the CP has excessively delayed agreeing to the arrangement (having regard to the time that a CP acting reasonably would have taken and any conduct of the individual that contributed to the delay)~~;*

Recommendations

5. **Once a hardship request has been made all enforcement should cease including the deterioration of RHI, or alternatively RHI should be suppressed while a hardship request is being assessed.**
6. **8A.1(e) should require the commencement of an FHA to always be backdated to the date of the hardship request after the FHA has been agreed to.**

11. Do you consider the reference to the 'lowest payment obligation for that month' is clear? If not, please provide reasons and, if possible, suggest alternative drafting that would address the lack of clarity.

Yes, we believe the reference to the 'lowest payment obligation for that month' is clear.

12. Do you have any feedback in relation to proposed subparagraph 8A.1(g)?

Consumer groups are concerned about the drafting of this proposed subparagraph. The use of the word 'arrangement' is confusing and opens the door to some very poor practices by CPs. What is to stop a CP from telling a consumer that their temporary relief or deferral FHA has been refused but if they want the CP to not commence legal proceedings the consumer will need to agree to some other kind of 'arrangement'? This would save the CP the hassle of reporting FHI or reporting RHI in line with the arrangement and the fact that the consumer 'agreed' it was not a temporary or deferral FHA means they are complying with the CR Code. Any kind of 'arrangement' that follows a hardship request should be treated as a FHA.

In other words, CPs should not be able to avoid the NCC requirements by describing an 'arrangement' resulting from a communication of the kind described in s72NCC ie that "he or she will be unable to meet his or her obligations under a credit contract" as something other than a hardship arrangement. FHA reporting should be applied consistently to all such arrangements.

The definitions in the CR Code should match the definition of "financial hardship arrangement" in the *Privacy Act s6QA* which matches the s72 NCC definition and specifically includes informal arrangements.

CPs should not be able to avoid the NCC requirements by describing an arrangement resulting from a communication of the kind described in s72NCC ie that "he or she will be unable to meet his or her obligations under a credit contract" as something other than a hardship arrangement and ideally FHA reporting should be applied consistently to all such arrangements.

The definitions in the Code should match the definition of "financial hardship arrangement" in Privacy Act s6QA which matches the s72 NCC definition and specifically includes informal arrangements.

> ***6QA Meanings of financial hardship arrangement and financial hardship information***
>
> *Financial hardship arrangement*
>
> *(1) If:*
>
> *(a) a credit provider provides consumer credit to an individual; and*
>
> *(b) the National Credit Code applies to the provision of the credit; and*
>
> *(c) the individual is or will be unable to meet the individual's obligations in relation to the consumer credit; and*
>
> *(d) as a result of the inability, an arrangement covered by subsection (3) affecting the monthly payment obligations of the individual is made between the credit provider and the individual which is either:*
>
> *(i) a permanent variation to the terms of the consumer credit; or*

(ii) a temporary relief from or deferral of the individual's obligations in relation to the consumer credit;

*then the arrangement is a **financial hardship arrangement**.*

Note: Financial hardship arrangements affect repayment history information: see subsection 6V(1A).

(2) For the purposes of this section, it does not matter whether the arrangement was initiated by the credit provider or the individual.

(3) This subsection covers any kind of agreement, arrangement or understanding, whether formal or informal, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings.

The way the rejection of a hardship request and subsequent CCR reporting is communicated to the consumer will be very important to ensure fairness and prevent complaints down the track. It is important that the CP tells the consumer (in real time) '*this is not a hardship arrangement and your repayment history on your credit report will continue to show your repayments as overdue even if we are not going to commence legal proceedings'*.

It is also important that CPs comply with the NCC requirements for notice when a hardship request if rejected, and that FHAs can be backdated if a dispute over hardship is resolved in the consumer's favour.

13. In relation to 'time to sell' arrangements:

a. should they be treated as FHAs all the time or some of the time? Please provide reasons.

Consumer groups believe 'time to sell' arrangements should almost always be treated as FHA. The vast majority of our clients that have been given 'time to sell' arrangements are in financial hardship. They may or may not be able to meet partial payments while they are putting their house on the market, and they will often have extensive arrears. In some cases, such as family breakdown, there may be no arrears but one party recognises they cannot meet repayments alone going forward and therefore wishes to sell without penalty. This is also financial hardship.

These clients have agreed to sell their properties in order to prevent any equity they might have from being eaten up by legal fees and other costs through foreclosure. Many of those who have some equity will want to buy another home, either by downsizing or moving to a cheaper area. It would be impossible to get another home loan, even a much smaller one if their credit report is riddled with negative repayment history information while they were trying to sell.

Of course, there may be examples where a customer seeks time to sell a property, without being in financial hardship and while not meeting full repayments in the interim, (tax optimisation, wanting to apply their money to another investment) but it would not be a common occurrence. There are also circumstances where there is financial hardship, but the customer is able to meet full repayments and would not want FHI on their credit report.

For example, one financial counsellor in the NT recently reached out to say:

I have a client who is concerned that if I request a reduction of the interest rate on her car loan while she is pursuing a Property Settlement after separation that this will adversely affect her credit report even though she is able to make the usual repayments to the loan.

In short, a time to sell arrangement will often also be a hardship arrangement, but not always.

b. if so, should this be provided for in the CR Code (noting our comments in relation to the appropriateness of the CR Code restricting the flexibility of the legislation)?

We would be very disappointed if CPs disagree and do not consider 'time to sell' arrangements are able to be recorded as FHA most of the time. As discussed at 13(a) above we think it would be a bad outcome for a consumer if for example, after a family breakdown the person was unable to buy a smaller home because there was a period of time when they could not pay all of the arrears while they were trying to sell the larger family home and accumulated negative RHI. To put the issue beyond doubt the Code should include time to sell arrangements as an example in Clause 8A to make it clear to credit providers that this will often be a hardship arrangement. We note this situation will be a good test of how CPs use FHI going forward. People are going to want to buy a new property as soon as they sell, possibly with a smaller loan. Will they still be able to get finance despite the FHI on their credit reports?

Another less common, but very important related form of arrangement is where the bank provides a borrower with a life interest in a 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). Another option with similar effect is to charge off the loan, stop charging interest and hold the title against the principal debt. These arrangements are most commonly offered when there are compelling compassionate circumstances, such as the customer occupier being very elderly, sick or severely disabled. This should be included in the list of examples of variation FHA in clause 8A.5, along the lines of:

"*reducing the monthly payments to zero for the life of a secured loan, with the intention of collecting the debt from the sale of the asset once the borrower either dies or moves out of the premises*".

Such arrangements are also made as part of the settlement of disputes, for example, in relation to a complaint about responsible lending or unconscionable conduct. In those circumstances, the arrangement is not being made on the basis of hardship and should not be caught by the Act or the Code. Such variations should not appear on a credit report.

This would include arrangements made in response to debts incurred through domestic and family violence (**DFV**). It is very common for CPs to make arrangements with victim survivors to remove listed defaults or waive debts relating to DFV. The definition of variation FHA includes full or partial debt waiver as a result of hardship, which would be represented by a one off V on the credit report. It may be appropriate for a CP to report a V where the person took on the debt eyes wide open but now is unable to pay because current DFV is ruining their lives. However, debts that were incurred by fraud, coercion or undue influence in the context of DFV, should not be treated in the same way. These types of arrangements should not be recorded as FHA or attract an FHI on the victim survivor's credit report.

Recommendations

7. **Life interest arrangements or charged off loans with an interest remaining in the property should be added to the list of examples of variation FHA in clause 8A.5.**
8. **Arrangements made as part of the settlement of disputes (for example, in relation domestic and family violence or to a complaint about responsible lending or unconscionable conduct) are not being made on the basis of hardship and should not be caught by the Act or the CR Code.**

14. Would you support an alternative way to ensure a fair consumer outcome and consistency in approach between credit providers (e.g. an industry 'guideline')?

Consumer groups would support an industry guideline or guidance from ASIC on how 'time to sell' arrangements should be treated under the NCC. 'Time to sell' arrangements could also be included as an example in Clause 8A.

15. Do you agree with the proposal that a 'proactive offer' of assistance does not create an FHA unless the customer indicates their acceptance of that offer? If not, please provide reasons.

Consumer groups agree with this proposal. Customers would be very upset to find they have hardship information on their credit report in these circumstances. Customers who can pay, even with some difficulty, will often choose to pay rather than suffer any impact to their credit report. Customers who cannot pay still need to be told the consequences of accepting a hardship arrangement for their credit report or there will be significant numbers of complaints.

16. Do you agree that it may be appropriate to 'backdate' the start date of the FHA in the circumstances described (where that would require a correction to be made to the credit information, including RHI, previously disclosed)? If not, please provide reasons.

Consumer groups agree with this proposal. People's lives are often in disarray following a disaster and personal administration tasks are highly likely to be secondary to issues of safety, preservation of property, and in many cases, trauma. There may also be practical barriers such as damage to infrastructure and communications.

Consumer groups strongly disagree with the proposition that FHA should not be backdated in other circumstances – see Recommendation 6 above.

17. Subject to your answer to (15), do you consider there is a need to provide specific provision for this 'backdating' process? If so, please provide reasons and describe how you consider this should be described.

There should be a clear mechanism for backdating FHA as a result of the late acceptance of a pro-active offer of assistance, where there are good reasons for the delay. There should also be a clear mechanism for backdating FHA to the date of a hardship notice, where a hardship

arrangement has ultimately been agreed. It is a matter for industry whether such a mechanism needs to be included in the Code to be effective.

18. Noting that the fundamental 'account-based' approach could be considered as part of the Independent Review of the CR Code, do you agree with the proposal in subparagraph (i) that (subject to the terms of the contract and any other laws), an FHA can be made with the agreement of one joint account holder? If not, please provide reasons.

The national Economic Abuse Reference Group was consulted extensively for our responses to Questions 18-21.

The ability to make a FHA with the agreement of one joint account holder is widely recognised as good industry practice in responding to domestic and family violence, and it is crucial that new credit reporting requirements don't remove this protection. While we believe this is used in quite limited circumstances, industry was urged to adopt this approach by the Economic Abuse Reference Group (representing community organisations who work with victim survivors). Based on our various organisations' experience working with DFV victim survivors, victim survivors must be able to negotiate a hardship arrangement on a joint debt (or seek a waiver or other agreement) without the agreement or knowledge of the joint borrower. Physical violence and financial abuse are closely linked (most women who report physical violence also report financial abuse), and the ability for CPs to use their discretion in these cases is important to protect physical safety as well as financial security. In some cases, it is vital for personal safety reasons that the joint borrower is not even told about the arrangement. For this reason, we strongly urged the OAIC to agree that lenders can continue to use their discretion and, where required, enter an FHA without informing the other borrower.

Each situation is different, but examples of where a CP may be asked to vary a loan without notifying a joint borrower (at least initially) include:

- The perpetrator (with a poor credit record) is refusing to pay a joint debt to harm the victim survivor's credit, and the victim survivor doesn't want the perpetrator to know they are seeking assistance, or believes the perpetrator may refuse to agree to a FHA;
- The victim survivor may be seeking a FHA with the bank in relation to a joint debt as part of (secret) planning to leave a violent relationship;
- The victim survivor may have agreed to pay a joint debt (for example if it was for the victim survivor's benefit) and is fearful about retribution if the perpetrator is made aware they are not paying the full amount due to hardship;
- The perpetrator may be delaying a Family Law property settlement, or finalizing the sale of a property to harm the victim survivor. It may be dangerous for the victim survivor if the perpetrator was aware they had explained the circumstances to the CP and sought a FHA.

Our primary position is that account based reporting is inappropriate and that individual based reporting is the optimal way to ensure both privacy and safety objectives can be met. Account-

based reporting necessarily includes weighing up the privacy rights of one joint account holder against the safety and privacy rights of the other. We submit that safety should trump privacy in these circumstances. Action should be taken to move away from account based reporting as soon as practically possible. In the interim the proposed solution in the Draft Code and accompanying materials by ARCA could be accepted as the lesser of two evils.

The difficulty of obtaining financial independence is often the most significant barrier for a victim survivor to leaving a violent relationship, and a lack of financial independence often results in a person returning to that relationship. Joint finances become a tool of control when the perpetrator can no longer reach their victim in the form of physical or psychological abuse. Even though it may not be in the abuser's best interests to stop payment or default on the debt, they may do so knowing that it will cause further pain for their victim.

Further, the trigger risk identified in Part A, 2 (ii) of the consultation pack, is a real danger in some cases, and needs to be taken into account. While it may be impossible to avoid all triggers of violent abusers, it is essential to preserve the discretion of credit providers to take into account the very real safety concerns of their customers in coming to practical solutions in these complex scenarios. Banks and AFCA already consider it to be best practice to allow one joint-account holder to request hardship assistance. The ABA's *Preventing and responding to family and domestic violence* Industry Guideline states:

> *"Banks should accept a financial hardship request from a joint borrower without the consent of the other co-borrower." And only "where possible, subject to customer safety considerations, notify the other borrower."*[1]

AFCA's approach to financial difficulty states:

> *"The financial firm has obligations under the National Consumer Credit Code to consider a financial hardship request from an individual borrower who is in financial difficulty. Industry Guidelines issued by the Australian Banking Association also make it clear that it is acceptable for a bank to vary a contract when requested by a joint borrower, without the consent of the other borrower."*[2]

Depending on the circumstances, in some cases it may be appropriate for the CPs to not obtain the co-borrower's consent, **and** not to alert the co-borrower to the arrangement – at least in the short term. CPs will make this decision based on the customer's circumstances and whether there is a risk to the customer. To require CPs to disclose all variations to a co-borrower, would reduce the banks' ability to protect customers and would place some customers at risk.

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[1] *Preventing and responding to family and domestic violence* Industry Guideline. (Pg 9): https://www.ausbanking.org.au/wp-content/uploads/2021/03/ABA-Family-Domestic-Violence-Industry-Guideline.pdf

[2] AFCA Approach to Joint Facilities and Family Violence, p16: https://www.afca.org.au/media/691/download

Recommendations

9. **The Code must facilitate a way for Financial Hardship Arrangements to be put in place with the agreement of one joint account holder.**
10. **CPs must retain the flexibility to not disclose an FHA to all account holders when that notification would place a customer at risk.**
11. **Credit reporting must move to individual based reporting, not account based reporting as soon as practically possible.**

19. Subject to (17), are any refinements required to subparagraph 8A.1(i)? If so, please describe.

Consumer groups believe the current subparagraph 8A.1(i) is flexible enough to allow CPs to agree to a FHA when only one joint account holder reaches out for assistance. We also believe it does not **require** the notification of all account holders when a FHA is agreed to.

The Note however is too long and may be confusing. We suggest shortening it to:

> *Note: This subparagraph provides that a CP is not, for the purposes of reporting financial hardship information, required to obtain the agreement or consent to the financial hardship arrangement of all individuals who jointly hold the consumer credit (although a CP may need to consider whether it would be appropriate to notify those other individuals).*

20. Do you have any comments on the proposal (as set out in Part A) to 'suppress' reporting of RHI (and, therefore, FHI) for customers who self-identify as being subject to domestic violence? (Noting that this is a matter that will be dealt with outside the CR Code.)

Consumer groups support the proposal to 'suppress' reporting of RHI as an interim solution for customers subject to domestic violence. We agree this is probably the best solution that can be put in place before July 2022. We will engage closely with ARCA and industry to ensure this proposal gets enacted in the most effective way.

One issue we foresee is whether victim survivors of economic abuse will need to self-identify, or whether CP's should be expected to reasonably identify victim survivors of abuse in certain situations. Best practice would be for CPs to have a policy in place to help them identify and assist customers that are experiencing or recovering from financial abuse.

However, as noted above, consumer groups do not agree with an account based approach. Any FHA reporting should only apply to individuals who have agreed to the proposal. When it comes to situations of family and domestic violence, the absence of information may also be a trigger. Further, the temporary solution is entirely dependent on customers at risk being successfully identified.

If an individual account approach is adopted it eliminates the need for special treatment for individuals who identify as the victims of domestic violence, and removes the risks associated with them not being identified (although clearly their identification will continue to be important to access other support options). It also narrows the circumstances in which there will be a need to notify all account holders of hardship assistance given to one joint account holder. This approach is likely to help many individuals, not just individuals who are the victims of economic abuse. An individual account approach would better protect the privacy of all individuals, including the person seeking hardship assistance.

We recognise that there may be situations where another other joint account holder will need to be given some information and options in relation to their account – such as where there is a disagreement over the need for the sale of a joint asset. Taking the credit reporting aspect out of this scenario should reduce the circumstances in which such notification is necessary, and provide credit providers with the freedom to delay such notification pending precautions being taken to protect the hardship applicant who is at risk.

21. Do you consider any of the alternative options to be appropriate (given the OAIC's privacy-related concerns in relation to ARCA's proposal)? Please provide any detail that you are able to provide in support of your views.

Consumer groups consider the second option where a financial hardship arrangement is only made if at least one account holder has requested the arrangement and, having been given notice of the proposal, another account holder does not object to the arrangement within a reasonable period of time, as preferable to the first and third options but far from ideal. We do not think it is always appropriate or safe to give notice to a joint account holder when family and domestic violence is involved. There will be times when a victim survivor is seeking assistance from their CP and they clearly disclose that giving notice to the joint account holder is likely to trigger violence or abuse. In that situation we would expect a CP to assist the victim survivor without notifying the joint account holder.

The other two alternative solutions are not acceptable to consumer groups. These alternatives would undo significant progress by industry to help victim survivors. Consumer and family violence advocates have long advocated to industry, ASIC and AFCA that in situations of economic abuse, joint account holders must be able to access financial hardship assistance without the consent of the other account holders. The third alternative solution which only allows one account holder to seek a FHA if the account is not designated as 'all to sign' won't work. It is common for victim survivors that are trying to protect themselves from further economic abuse to seek to designate joint accounts as requiring 'all to sign'. This is the only way for victim survivors of abuse to prevent funds from being drained from joint accounts by the perpetrator (for example from a redraw facility). It would be a perverse outcome if taking one action to protect misuse of joint accounts actively prevents them from seeking hardship assistance on those accounts.

Recommendations

12. **Consumer groups could only support the second alternative solution as long as CPs are not required to always give notice to joint account holders when the risk of violence is known. It is not our preferred option. Consumer groups do not support the first or third alternative solutions. See also Recommendation 11 above (move away from account based reporting).**

22. Do you agree that RHI must, subject to the limited transitional exception in subparagraph 8A.8(b)(ii), be disclosed for a month if FHI is disclosed? If not, please provide reasons.

No comment.

23. Do you have any comments in relation to the proposed subparagraph 8A.1(k)?

Consumer groups are very disappointed that people who are in a catch up or payment test period after a period of reduced repayments, and paying their usual minimum monthly payment (or more), will continue to have FHI included on their credit report in every month until they have fully paid their arrears, or the loan is re-aged (variation FHA). To be clear, consumer groups prefer an FHI and RHI reported against the arrangement to having negative RHI reported during a catch up period. However, whether to re-age a debt immediately or only after a trial period (or not at all) is entirely at the lender's discretion and may have no relationship to the consumer's actual circumstances.

We maintain that it is unfair that the FHI of consumers whose loans are re-aged immediately start the clock on the 12 months retention at the point of the variation, whereas those whose loans are not re-aged might have six months or more of FHIs on their report. These provisions also mean that people who ultimately pay back every cent according to their original contract are potentially disadvantaged compared to people who do not (because they received a variation such a reduction in the interest rate, or partial debt waiver). To the point made in the EM and referenced in Part A of the consultation pack that "consumers in similar financial situations will have correspondingly similar information in their credit reports", this is an example of where a legislative objective has not been achieved. People in substantially similar situations will have different information on their credit reports. However, we appreciate that the drafting is ambiguous at best on this point and this may be a matter for the 2024 review.

We oppose the time limitation introduced by clause 8A.1(k). This is not included in the Act. Where the amount paid within the grace period is sufficient to catch the consumer up entirely, then the credit report should be corrected to show the account as up to date for that month. Otherwise, the borrower is in a worse position than if they had never contacted the lender at all. This creates perverse incentives. First of all, the borrower will be loath to contact the lender in future if they are concerned they may not be able to pay. Secondly, where a borrower finds they

are in a position to pay their arrears sooner than anticipated, they should be rewarded for doing so.

24. Subject to the further questions below regarding the specifics of the proposal, do you generally agree with our proposal set out in paragraph 8A.2? If not, please provide reasons and alternatives.

Consumer groups support that ARCA is trying to "Raises the bar" across the credit industry in terms of promoting conversations between credit providers and consumers that will help identify those in need of hardship assistance. While we agree that it would be sub-optimal to have a simple definition for an FHA which would allow a CP to avoid reporting arrangements as FHA by simply stating that 'no FHA was agreed', 8A.2 is not at all accessible to the average consumer reader as it is very legalistic and dense. In fact it is not even accessible to financial counsellors and consumer lawyers. Many among our ranks are scratching their heads and asking for guidance on what it actually means. This makes it very hard to evaluate as a proposal. It is also a powerful indicator that it is inappropriate for inclusion in a consumer facing code.

Consumer groups believe the definition of temporary relief or deferral FHA in the legislation is purposefully broad. It is designed to catch many arrangements that in the past lenders would internally classify as indulgences or "promises to pay". We believe the parliamentary intent of the new broad legislative definition is to ensure more arrangements are being recorded as FHA and that payments are being reported against the arrangement in the consumer's RHI. We agree that 8A.2 is flexible enough to allow most financial hardship arrangements to be captured as FHA in the credit reporting system.

Consumer groups are happy about the significant changes that have been made to ARCA's initial proposals in relation to the issue of delineating between promises-to-pay and FHAs. While a "temporal" element still remains in the current proposal, it plays a significantly smaller role. Consumer groups agree that ARCA's current proposal allows flexibility - in that it allows for any arrangement to be (or not to be) an FHA depending on the discussions between the individual and credit provider. However, we would prefer:

- The CR Code was clearer and more principles based; and
- ASIC to issue Guidance making it clear when CPs have an obligation to make further enquiries into an individual's reasons for being unable to pay on time.

Consumer groups are particularly concerned that the provisions in 8A.2 might lead to CPs pressuring or manipulating customers into accepting some kind of 'arrangement' which is **not** an FHA because the customer was told they need to agree it is not an FHA in order for the CP to proceed. For example, a CP might tell the customer it will agree not send a default notice or commence additional legal proceedings as long as the customer **agrees** there is no FHA in place. The customer is told if he or she does not agree (and instead contemplates disputing the hardship rejection in AFCA) the CP may proceed with legal action.

Example 7 in Part C raises exactly these concerns.

> ***Example 7:***
>
> i. *CP has accelerated the balance of the credit contract;*
> ii. *Arrangement is put in place under which the individual will make payments that are 2 x MMP that were previously required under the credit contract;*
> iii. *CP will not 're-age' the arrears after 6 months as the balance has been accelerated;*
> iv. *CP explicitly notes as part of the arrangement that this arrangement is not a temporary relief or deferral FHA;*
>
> *Outcome: Not an FHA as the CP and individual have explicitly agreed otherwise (8A.2(d)).*

In this example, it is not clear why the CP has accelerated the balance of the credit contract. Is it because the individual has been missing payments? If so, the individual should be asked why they have been missing payments to determine if it was for a hardship reason. The scenario also appears to suggest there will be negative RHI until the entire balance has been paid off because of the acceleration. Is that correct? If so, why would a customer agree that this is not an FHA if it will instead attract 6 months of arrears reporting?

25. Does our proposal need any further clarification?

Consumer groups would support having the examples included in Consultation Paper C (*Examples of the application of draft changes*) become official guidance from the OAIC. These examples would be very helpful to financial counsellors and community workers who are trying to advise consumers about whether or not their credit reports are accurate and also how to speak to their lenders about hardship assistance. We suggest that in developing such examples, the OAIC should collaborate with ASIC to ensure they also reflect good hardship practices.

Recommendations

13. Examples like those in Consultation Paper Part C should be issued as formal guidance from the OAIC before the new hardship provisions begin in July 2022.

26. Alternatively, should the CR Code follow the approach of clarifying when there is an 'agreement' (as described the 'alternative approach' is described in the Appendix to Part A)? If yes, please provide your reasons.

Consumer groups agree there should be some framework that would encourage a credit provider to proactively investigate potential hardship. We reiterate our comments from above that the framework as currently expressed is dense and difficult to interpret.

Without consistent and interpretable hardship and credit reporting practices it would be impossible for financial counsellors and community workers to assist consumers looking for advice and assistance. It is critical that industry starts collecting data on how FHAs are being

agreed to, and how FHI is being used by other lenders when making responsible lending assessments. Without a consistent approach to determining whether an arrangement is an FHA or a promise to pay, it will be impossible to gather interpretable and reliable data on the meaning and use of FHI.

27. Do you have any comments in respect of subparagraph 8A.2(a)?

The words "catch up period or payment test period" should be included in subparagraph 8A.2(a) in order to make this provision easier to understand.

Consumer groups agree that a catch-up period or payment test period that follows an earlier temporary relief or deferral FHA should be presumed to also be a temporary relief or deferral FHA and so we support 8A.2 (a)(i) & (ii).

We agree with ARCA's commentary that it would be unusual for an individual to not want the catch-up period or payment test period treated as a temporary relief or deferral FHA, as this would result in 'negative' RHI being disclosed in the individual's credit report after nearly every period of hardship. More so, we think the alternative (not presuming a catch-up period to be temporary relief or deferral FHA) would be a terrible outcome for most consumers and would lead to increased complaints. As consumer representatives we would anticipate most borrowers in that situation would be annoyed that despite doing all the right things, and proactively reaching out to their lender about their hardship, their credit reports would have negative RHI.

Nevertheless, consumer groups support the flexibility in ARCA's drafting. If an individual prefers for the arrangement not to be treated as an FHA where they will be paying more than the payment due each month and they would like their credit history to clearly demonstrate that the contractual arrears are being cleared then they should be allowed to do so. That is to say, as long as that individual actually understands his or her options and what their different consequences will be.

It will be very important to collect data over the next few years about how negative but reducing RHI is treated by lenders. Is it treated as positive information or is all negative RHI seen as cumulative and incorporated into an algorithm which makes access to competitive loan rates difficult? It will be impossible for consumer groups to advise people whether they should accept or reject an FHA on their credit report if we don't have any data about how that information is used by industry.

Recommendations

14. **The words "catch up period or payment test period" should be included in subparagraph 8A.2(a) in order to make this provision easier to understand.**

28. Do you have any comments in respect of subparagraph 8A.2(b)? Do you have any comments in respect of subparagraph 8A.2(c)?

Consumer groups have problems with 8A.2(b). It is extremely difficult to understand. We presume that if the individual is not to catch up within 7 months (or have the contract re-aged) then it is hardship but this is not clear. We are also concerned that the entire fate of the arrangement appears to hinge on agreement between the parties, when the CP is likely to be the more powerful party when it comes to striking this bargain. An individual consumer seeking to avoid enforcement is likely to agree to anything proposed by the CP. While we understand this provision is against the backdrop of the individual's NCCP/NCC rights, they are not likely to be aware of those rights, and the Code creates no obligation to tell them.

It seems the crux of the situation is why the consumer is in arrears in first place (is this as a result of financial hardship?) and yet the clause is silent on this point. We think this part of the section requires re-drafting for clarity at the very least. If the intention is to create a presumption in favour of hardship when it will take longer than 7 months to catch up then it should say so.

We also support 8A.2 (c)(i)-(iii). However we submit it would be clearer for this subparagraph to read:

> (c) *the individual is not to pay the payments (as determined by reference to the terms of the **consumer** credit) as they fall due for a period longer than one month unless:*
>
> *(i) the arrangement is a **variation FHA**;*
>
> *(ii) the CP reasonably believes that the individual's inability to meet their obligations in relation to the **consumer credit** is the result of a mismanagement of funds in the short term; or*
>
> *(iii) the individual has not provided the information that the CP reasonably requested to assess a hardship application; or*
>
> *(iv) the individual explicitly states that they do not want to make a **hardship request**.*

Recommendations

15. 8A.2(c) should be redrafted as set out in this submission to be clearer.

29. Should the CR Code provide further clarity around the meaning of 'mismanagement of funds in the short term'? If so, what should that clarity say?

Consumer groups do not believe ARCA should further clarify the meaning of 'mismanagement of funds in the short term' since that would be crossing too far into the purview of the NCC. Consumer groups do not agree with all of ARCA's examples of situations which should be considered 'mismanagement of funds' listed in Part B for Question 29. For example, unplanned/unbudgeted expenses (e.g. car repairs) are something we would generally consider a reasonable cause of financial hardship. If someone does not have enough savings buffer and are living pay check to pay check, unplanned car repairs will absolutely send them into financial hardship and will impact their short term capacity to meet financial commitments.

Another example ARCA gives of 'mismanagement of funds in the short term' is "*travelling and, by doing so, incurring additional expenses and disregarding existing expenses already due and loan payments"*. Sometimes a person needs to undertake unplanned travel because a family member is unwell or has died. In those circumstances it would be common for them to incur additional expenses and be unable to pay existing expenses when they become due, but we would not consider this a 'mismanagement of funds."

Consumer groups submit that if lenders need more guidance about what should or should not be considered a financial hardship arrangement, then that guidance should come from ASIC.

30. Do you have any comments in relation to this proposed subparagraph?

Consumer groups support placing the onus on the credit provider to disprove the existence of hardship 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.

31. Do you have any comments in respect of subparagraph 8A.2(d)?

Subparagraph 8A.2(d) is a catch-all provision. It is another example of technical drafting that might be useful for industry but is very confusing to consumers and consumer advocates. While consumer groups support placing the onus on the credit provider to disprove the existence of a hardship request rather than placing the onus on the individual to make the request, we are concerned that this paragraph gives CPs power to require the consumer to agree that an arrangement is not a temporary/deferral FHA in order to get some other kind of assistance (i.e. agree this is not an FHA or take enforcement action).

Whether the arrangement is treated as a temporary relief or deferral FHA (i.e. so that FHI is reported) or not (so that 'negative' RHI is reported), ARCA says it would "*expect the credit provider would, at least, provide clear disclosure to the individual*." Consumer groups strongly agree that CPs should be required to give clear disclosure in real time over the phone or by SMS. This is discussed more below at Question 32.

32. Do you agree with our proposal in paragraph 8A.3? If not, please provide reasons. If you are a credit provider and do not agree with the proposal due to the operational impacts and/or costs, please provide details of those impacts and costs.

Consumer groups strongly support disclosure requirements being in the CR Code. Consumers need to know if their RHI is going to be reported as in arrears or if there will be a hardship indicator put on their file. These are very new and very sensitive changes being made to people's personal information. Consumers need to understand what they are agreeing to (or what they need to dispute) if they are unhappy with what will happen on their credit report. The required communications do not need to be extensive or strictly codified, but there must be a requirement for CPs to tell consumers in real time what is going to happen to their personal payment information.

Unfortunately, we do not agree with the proposed provision at 8A.3(a) which does not require tailored information to be given to the individual. While we do not believe that detailed information is required (exactly what the RHI will be recorded as on each month), we do submit

that the information must be tailored enough to explain to the individual that the arrangement being entered into is either a 'promise to pay' and will result in negative RHI or is an FHA and will result in a hardship indicator being put on the credit report and RHI being reported against the arrangement rather than the original repayment schedule.

Consumer groups do agree the information can be given to the consumer verbally and in writing (8A.3(b)) but this information needs to be given in real time. Ideally the customer would be told through the same communication channel through which the consumer is making the arrangement and backed up by another form of communication. If the arrangement is made on the phone, then the disclosure should be verbal and followed up with an SMS or e-mail. If the arrangement being made online, then the disclosure can be made using the same process and then followed up through another channel. We support the temporal requirement made at 8A.3(d) but believe the subparagraph should be tweaked to emphasise that contemporaneous disclosure should be made whenever possible.

Consumer groups do not support 8A.3(c) which permits a credit provider to give the information in the form of a hyperlink to the credit provider's website. We know that this is a step the majority of consumers will not take, which makes it a meaningless disclosure requirement. We also (as explained above) believe the information needs to be tailored to the individual.

Consumer groups support subparagraph 8A.3(e). If the payment will be made within the grace period and the credit report is not going to be affected by the arrangement, then there is no need to disclose to the consumer whether they have entered into an FHA or simply made a promise to pay. If the credit report is not going to have a hardship indicator or negative RHI because of the arrangement, then there is no need to confuse the consumer.

Recommendations

16. Consumer groups recommend the following changes to 8A.3:

a) **8A.3(a) should require information that is tailored to the specific circumstances of the individual;**

b) **8A.3(c) should be deleted;**

c) **A new subparagraph should be added which says the information should be given through the same communication channel the consumer is making the arrangement in and backed up by another form of communication;**

d) **8A.3(d) should be tweaked to emphasise that contemporaneous disclosure should be made whenever possible.**

33. Should paragraph 8A.3 be more specific regarding what 'reasonable steps' involves? For example, should it say that the reasonable steps are only required if the credit provider has an electronic address to which they can send the information (or link to information)? If yes, please provide details of the cost and other operational issues of sending the information via nonelectronic means.

Consumer groups do not believe 8A.3 needs to be more specific regarding what 'reasonable steps' involves.

34. Is the exception in subparagraph 8A.3(e) too narrow? Should the exemption be broadened? If so, please provide alternative suggestions. If you are a credit provider, please provide details of the reduced operational impacts and costs of your alternative suggestion.

No comment.

35. Do you agree with the proposed clarification in respect of variation FHAs? If not, please provide your reasons.

Consumer groups agree the proposed clarification in respect of variation FHAs is useful.

36. If you are a credit provider that provides 'upfront' variations, do you agree that the upfront variation should cover both the period of reduced payments and the treatment of the consumer credit following that period (i.e. so that there should generally be only one FHI=V recorded for the whole arrangement)?

No comment.

37. Do you agree with our proposal in paragraph 8A.3?

We presume this question is actually about 8A.6

Consumer groups again believe the information provided to consumers should be tailored to their specific circumstances. As discussed above we do not support CPs simply providing a hyperlink to generic information about FHAs on their website. We also do not support subparagraph (e) which says that CPs do not need to give information about the new variation FHA if the CP has already given information about FHAs in general at an earlier stage of hardship. Consumers need to know that a new type of information is being recorded on their credit report. They also need to know that their RHI will now reflect their contractual payments going forward. These are all basic pieces of information we would expect any lender with good hardship practices to explain to a customer.

Recommendations

17. Consumer groups recommend the following changes to 8A.6:

a) **8A.6(a) should require information that is tailored to the specific circumstances of the individual;**

b) 8A.6(c) should be deleted;

c) A new subparagraph should be added which says the information should be given through the same communication channel the consumer is making the arrangement in and backed up by another form of communication;

d) 8A.6(d) should be tweaked to emphasise that contemporaneous disclosure should be made whenever possible.

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38. Do you agree with our proposal to use the FHI codes of 'V' and 'A'? If not, please provide your reasons and an alternative.

Consumer groups support this proposal.

39. Do you agree with our proposal that the CR Code not provide for further types of FHI (e.g. natural disaster FHI)? If not, please provide your reasons and describe what other forms of FHI should be allowed?

Consumer groups agree with this proposal.

40. Do you agree with our proposed transitional provisions? If not, please provide reasons.

Consumer groups agree with the proposed transitional provisions.

41. Are there any other transitional issues that the CR Code should address? If so, please provide an explanation.

No comment.

42. Do you agree with the proposal to mirror the prohibition on disclosure by CRBs with a prohibition on credit providers and mortgage insurers seeking that disclosure? If not, please provide reasons.

Consumer groups agree with the proposal to mirror the prohibition on disclosure by CRBs with a prohibition on credit providers and mortgage insurers. However, we believe this provision should include the actual prohibited reasons for requesting financial hardship information from the CRBs. Simply referring to PartIIIA of the Act is not very useful for consumers or financial counsellors. The CR Code does not even reference Section 20E(4A) so how would a consumer know whether their information has been disclosed and used for a prohibited reason?

Among other things, the Amending Act prohibits CRBs from disclosing financial hardship information to a CP if the CP (or mortgage insurer) wants the information for collecting overdue payments on personal or commercial credit. We submit that paragraph 8A.9 should specifically reference this prohibition. Consumers that call financial counsellors and consumer advocates are particularly concerned about debt collection across different accounts. They want to know that they can make an arrangement with one lender without all of their other CPs smelling blood in the water and coming after them. The parliamentary intent behind these provisions was to give consumers peace of mind that they could seek assistance without opening themselves up

to increased debt collection. The CR Code is a consumer facing document and should help provide that peace of mind.

Recommendations

18. Paragraph 8A.9 should include specific reference to the prohibition on disclosure of financial hardship information if the CP wants the information for collecting overdue payments on consumer or commercial credit.

43. Other than for 19.8 (which would be effective from 1 July 2022), is a transitional period (from OAIC approval) required in relation to the paragraph 19 changes? If so, what is a reasonable period? Please provide an explanation.

Consumer groups note that most of the provisions in the Amending Act which require changes to paragraph 19 (Access) have already been effective since the day after Royal Assent (Para 1.21 Supplementary EM). We would hope that this means a limited if any transition period would be needed to implement the CR Code changes.

44. Is there any reason to change paragraph 23.11? If so, please explain what that change should involve.

No comment.

45. Are any other consequential changes required?

No comment.

46. Do you agree with our proposal to require the CRB to provide only the one credit rating? Is the description of that credit rating clear? If you answer no to either question, please provide reasons and suggested alternatives.

Consumer groups agree with the proposal to require the CRB to provide only the one credit rating. Providing multiple credit ratings to consumers will be very confusing to most people. We agree the description of that credit rating is sufficiently clear.

47. Do you agree with our proposal to require CRBs to provide other credit ratings for free once every 3 months if the CRB otherwise seeks to charge access seekers for access?

Consumer groups agree with this proposal. For those consumers that are aware that multiple scores might be generated about them depending on the type of credit provider seeking information, being able to access multiple derived scores for free every three months is a good addition to the CR Code. This provision in the Code will help avoid credit reporting bodies seeking to profit by 'upselling' the individual to credit ratings derived using other calculations.

48. Do you agree with this proposal? If not, please provide your reasons.

Consumer groups do not like third party credit score websites. These websites claim to offer consumers their credit score for free but really the price is the consumer's persona data which is then on-sold for marketing purposes. Consumers now have a legal right to free access to their credit rating. They should not have to sell their personal data in order to access their free credit rating from CRBs.

This proposal attempts to replicate Paragraph 19.3(b) which requires CRBs to make free access to credit reporting information "as available and easy to identify and access as its fee-based service." In 2014 a coalition of consumer groups brought a representative complaint against one of the major CRBs because of its systemic breaching of this provision of the CR Code. In 2016 the OAIC determined that the CRB was in breach of the CR Code and required the CRB to refund thousands of consumers who had paid to obtain credit reports.

Consumer groups submit that this new provision will open the door for similar non-compliance. CRBs are for-profit companies and they make money from third party referral websites. CRBs inevitably be motivated to lead access-seekers to these third party sites. We believe they should not be allowed to advertise these referral websites at all in relation to free credit reports or free credit scores. Such a prohibition would improve consumer trust in the credit reporting system because it helps people to know if they seek their credit report for free, this will not open the door to incessant marketing.

Recommendations

19. **Paragraph 19.7 should prohibit the use of third party offers and referral services in relation to free credit reports or free credit ratings.**

49. Do you agree with the proposal to require CRBs to provide an explanatory statement? If not, please provide reasons.

Consumer groups support this proposal.

50. Do you agree with our proposal to not include further clarification on the circumstances in which a CRB may refuse to provide a credit rating under s20R(2)(d)? If not, please provide reasons and suggestions on what the CR Code may say.

No comment.

51. Do you agree with our requirement for CRBs to use at least 5 bands? If not, please provide reasons.

Consumer groups support the requirement that CRBs use at least 5 bands.

52. Do you agree with our proposal regarding the explanation a CRB is required to include with the credit rating (i.e. that it must relate to the band in which the individual's credit score sits, but does not need to be further personalised)? If not, please provide reasons and an alternative or additional proposals.

Consumer groups believe the legislative intent behind Subparagraphs 20R(1A)(b)-(d) was to give consumers **particular** information about their score, how it was calculated and its relative weighting. The legislative intent was not for CRBs to provide generic information about credit score bands, what types of information typically are used in score calculations or generic information about how to improve a credit score. All of that information is already readily available to consumers online. These new provisions in the Privacy Act are intended to give consumers personalised information about what bits of credit reporting information were used to calculate their current score, and how certain bits of their personal information were weighed against other bits.

We recognise that ARCA does not believe the legislative intent of these subparagraphs were to have a generic statement about credit scoring algorithms that provides no insight into either the credit reporting body's actual scoring methodology or the specific individual's circumstances. And we agree the CR Code should not include overly detailed and prescriptive requirements.

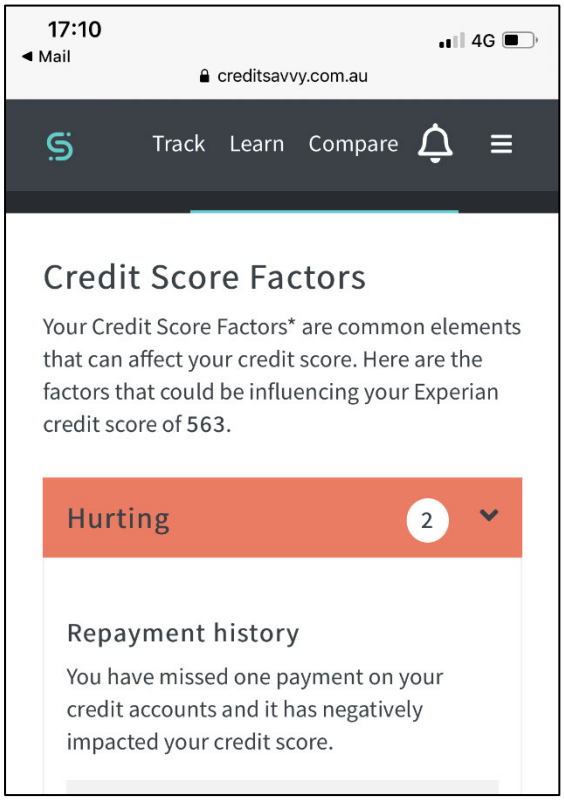
Nevertheless, the legislation clearly states that a credit reporting body must provide a consumer "*the **particular** credit information that is held by the body and from which the credit rating was derived*" and "*information about the relative weighting of*" that particular information (emphasis added). Consumers want to know **particular** information. They want to know which credit enquiries on their credit report carried the most weight. They want to know if the default from 4 years ago is why their score is so low, or is it the 3 months of recent missed credit card payments. This information will positively influence consumer behaviour. Consumers need to understand where they are going wrong if they are going to change.

Consumer groups acknowledge that the EM references the New Zealand Credit Reporting Privacy Code which only requires a statement outlining "the general methodology used to create the score, including the types of information used." Nevertheless, the language of legislation has primacy in statutory construction and the Act uses the word **particular**.

These provisions of the Amending Act have been in effect since the day after Royal Assent and our services have already seen examples of CRBs giving consumers particularised information about their "credit score factors". We see no reason why these results cannot be codified for all CRBs.

Recommendations

20. Paragraph 19.7(d)(v)(1) & (2) should be rewritten to require CRBs to provide particularised information about the types of credit information that is held by the CRB about the individual access seeker and how that particular information was weighted when deriving the score.



53. Do you agree with our proposal that a credit report that includes FHI require a standardised explanation of that information? If not, please provide reasons.

Consumer groups support the requirement that a credit report that includes FHI is accompanied by a standardised explanation of that information.

54. Do you agree with our consumer-facing descriptions of the meaning of 'V' and 'A'? If not, please provide alternatives.

These consumer-facing descriptions seem fine, but consumer groups always support consumer testing when it comes to any communication tools like these.

55. Should subparagraphs 20.3(c) and 21.4(b) be updated to immediately remove the reference to the Commissioner?

No comments.

57. Are there any other issues that the CR Code should address at this time (noting our comments in Part A regarding the upcoming Independent Review of the CR Code)?

No. Any other issues relating to the CR Code can be dealt with in the upcoming Independent Review.

58. Do you agree that the new hardship regime should apply to 'employee loans' (as described in subsection 6(11) of the National Consumer Code)? If not, please provide your reasons (including any potential unforeseen outcomes).

Consumer groups agree that the new hardship regime should apply to 'employee loans'.

59. Do you agree that the CR Code should not impose a reporting regime on how credit providers 'use' FHI in their credit application and management processes? If no, please provide reasons and suggestions as to what that reporting should involve?

While consumer groups believe that a reporting regime on how credit providers 'use' FHI in their credit application and management processes is critical, we agree it does not belong in the CR Code. ASIC should administer a reporting regime using its powers to enforce the NCC.

60. Do you agree that the CR Code should not introduce additional restrictions on the use and disclosure of FHI? If no, please provide reasons and suggestions for what those restrictions should say.

Consumer groups believe financial hardship information should only be visible to CPs that are making a responsible lending assessment on applications for new or extended credit. FHI is important for CPs relying on the RHI to have a more accurate picture of a consumer's repayment obligations and whether they are meeting those obligations, but only in the context of assessing whether additional credit is not unsuitable. CPs and CRBs should not be able to use this new sensitive information for direct marketing, pre-screening or credit management purposes.

Consumer groups advocated for FHI to only be **visible** to CPs while they were making a responsible lending assessment on applications for new or extended credit. Those restrictions were not incorporated into the Amending Act, but similar restrictions could be introduced into the CR Code. If CRBs say they are able to get a clear inference of the CP's intended use of the FHI depending on what 'product' they select, then a restriction should be imposed where CRBs are only able to disclose FHI when a CP is going to use it for assessing a new or extended application for credit. Consumer groups do not believe there is any other legitimate use of FHI.

Recommendations

21. The CR Code should restrict CRBs from disclosing FHI unless a CP intends to use it for responsible lending purposes while assessing a new or extended application for credit.

22. CRBs should be prohibited from allowing CPs to set alerts for FHI.

List of Recommendations

1. We recommend that the OAIC breaks up the CR Code between principles-based consumer-facing provisions and the technical industry-facing provisions. It would be critical that the consumer-facing principles take precedence in any conflict with the technical provisions.
2. The CR Code should use the terms '*temporary/deferral FHA*' and '*permanent/ongoing FHA*'.
3. The definitions of '*temporary/deferral FHA*' and '*permanent/ongoing FHA*' in provisions 1.2, 8A.2 and 8A.4 should clearly explain that the former will result in arrears accumulating and the latter will not.
4. Consumer groups recommend the 14 day grace period apply to payments due under a temporary relief or deferral FHA.
5. Once a hardship request has been made all enforcement should cease including the deterioration of RHI, or alternatively RHI should be suppressed while a hardship request is being assessed.
6. 8A.1(e) should require the commencement of an FHA to always be backdated to the date of the hardship request after the FHA has been agreed to.
7. Life interest arrangements or charged off loans with an interest remaining in the property should be added to the list of examples of variation FHA in clause 8A.5.
8. Arrangements made as part of the settlement of disputes (for example, in relation domestic and family violence or to a complaint about responsible lending or unconscionable conduct) are not being made on the basis of hardship and should not be caught by the Act or the CR Code.
9. The Code must facilitate a way for Financial Hardship Arrangements to be put in place with the agreement of one joint account holder.
10. CPs must retain the flexibility to not disclose an FHA to all account holders when that notification would place a customer at risk.
11. Credit reporting must move to individual based reporting, not account based reporting as soon as practically possible.
12. Consumer groups could only support the second alternative solution as long as CPs are not required to always give notice to joint account holders when the risk of violence is known. It is not our preferred option. Consumer groups do not support the first or third alternative solutions. See also Recommendation 11 above (move away from account based reporting).
13. Examples like those in Consultation Paper Part C should be issued as formal guidance from the OAIC before the new hardship provisions begin in July 2022.
14. The words "catch up period or payment test period" should be included in subparagraph 8A.2(a) in order to make this provision easier to understand.
15. 8A.2(c) should be redrafted as set out in this submission to be clearer.
16. Consumer groups recommend the following changes to 8A.3:

a) 8A.3(a) should require information that is tailored to the specific circumstances of the individual;

b) 8A.3(c) should be deleted;

c) A new subparagraph should be added which says the information should be given through the same communication channel the consumer is making the arrangement in and backed up by another form of communication;

d) 8A.3(d) should be tweaked to emphasise that contemporaneous disclosure should be made whenever possible.

17. Consumer groups recommend the following changes to 8A.6:

a) 8A.6(a) should require information that is tailored to the specific circumstances of the individual;

b) 8A.6(c) should be deleted;

c) A new subparagraph should be added which says the information should be given through the same communication channel the consumer is making the arrangement in and backed up by another form of communication;

d) 8A.6(d) should be tweaked to emphasise that contemporaneous disclosure should be made whenever possible.

18. Paragraph 8A.9 should include specific reference to the prohibition on disclosure of financial hardship information if the CP wants the information for collecting overdue payments on consumer or commercial credit.

19. Paragraph 19.7 should prohibit the use of third party offers and referral services in relation to free credit reports or free credit ratings.

20. Paragraph 19.7(d)(v)(1) & (2) should be rewritten to require CRBs to provide particularised information about the types of credit information that is held by the CRB about the individual access seeker and how that particular information was weighted when deriving the score.

21. The CR Code should restrict CRBs from disclosing FHI unless a CP intends to use it for responsible lending purposes while assessing a new or extended application for credit.

22. CRBs should be prohibited from allowing CPs to set alerts for FHI.

Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please do not hesitate to contact Julia Davis at Financial Rights on Redacted .

Kind Regards,

Karen Cox
Chief Executive Officer
Financial Rights Legal Centre
Direct: Redacted
E-mail: Redacted

ARCA Consultation – Privacy (Credit Reporting) Code (CR Code) Hardship Reforms

Submission by Legal Aid Queensland

ARCA Consultation – Privacy (Credit Reporting) Code (CR Code) Hardship Reforms

Legal Aid Queensland (LAQ) welcomes the opportunity to provide a submission in response to the Australian Retail Credit Association's Consultation concerning variations to the Privacy (Credit Reporting) Code (CR Code). Arising out of the *National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Act* 2021 ("the hardship reforms")

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and is required to give this "legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ's Civil Justice Services Unit lawyers provide have advice and representation to clients in banking and finance, credit and debt, farm debt mediations credit reporting and default listings, insurance and consumer law.

General Comments about the CR Code and the Reforms

The Role of ARCA in CR Code development

LAQ did not oppose the Australian Retail Credit Association ("ARCA") taking a leading role in the development of the CR Code when it was proposed in 2011. However, at the time, LAQ was concerned that the body responsible for RC Code development should be independent. This independence could only be achieved if the governing body was comprised of equal representation by industry and consumers advocates with an independent chair.

In LAQ's view, unless the body tasked with developing the Credit Reporting Code (the "CR Code") was independent of industry, it was likely that the CR Code would not seek to protect and balance the legitimate interests of all participants and in particular individuals whose information is being collected and disclosed. That submission was rejected on the grounds that the Office of the Australian Information Commissioner OAIC would retain ultimate authority to approve the CR Code and the role of ARCA was limited to the role of co-developer with the OAIC.

LAQ's experience has been that what ARCA proposes is rarely questioned by the OAIC to any significant degree.

The entire CR Code is being reviewed later this year. Individuals and consumer groups have not had input into the tender, the terms of reference or the appointment of the reviewer. It's unclear whether ARCA have been consulted about the review process. We understand that ARCA has been provided with a copy of the tender. It would appear likely that ARCA have had at least some input into the process.

In 2017, when the CR Code was last reviewed by Price Waterhouse Cooper PWC, many issues were raised by consumers. For example, the complexity of the CR Code was deemed out of scope by the reviewer. Once the independent report written by PWC was received by the OAIC, ARCA was tasked with implementing the recommendations in the report.

In LAQ's view the recommendations implemented in the PWC report were largely actioned through the lens of industry interests and there was not a balanced approach to recognise and protect the privacy of individuals.

This process of the CR Code development and review could be taken to lack a balanced approach with the view that individual's interests are not being given the same weight as those interests of industry by ARCA.

Additionally, we have seen very little evidence of the OAIC taking ARCA to task about the issues raised by consumer advocates in any review process. For example, LAQ is not aware of any occasion where the OAIC has made any significant changes to the CR Code once ARCA has sent the CR Code to the OAIC for approval.

LAQ's apprehension about the composition of the body charged with developing the CR Code is justified and is becoming more apparent as time goes by. Several examples are set out below:

- ***Failure of ARCA to provide independent advice to parliament and the government about the impact of proposed changes to credit reporting legislation.***

In LAQ's view, ARCA in its role as CR Code developer has not provided accurate advice to the government or parliament in relation to the impact of the proposed changes to the legislation affecting credit reporting.

When enacting the hardship reforms to credit reporting, it was clear that parliament intended that the Financial Hardship Information (FHI) should not be provided to other credit providers for the purposes of collecting debt[1].

The amendments also enhance the credit reporting framework in Schedule 2 to the Bill and the Privacy Act 1988 to provide greater protections for consumers and access to their information. These amendments would limit disclosure of financial hardship information by credit reporting bodies to situations where the consumer is attempting to obtain another credit facility.

Specific changes to the Privacy Act 1988 (Cth) were made to ensure that this was not a permitted disclosure and FHI should not be disclosed except when a creditor was assessing a new application for credit.

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[1] National Consumer Credit Protection Amendment (Mandatory Credit Reporting And Other Measures) Bill 2019 Supplementary Explanatory Memorandum
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ARCA failed to point out to the parliament that the proposed amendments to the legislation would not prevent creditors from being informed of Financial Hardship Information FHI if the creditor received "alerts" as set out in Item 5 of Section 21H of the *Privacy Act*, for *"the purpose of assisting the individual to avoid defaulting on his or her obligations in relation to consumer credit"* thus circumventing the restriction that intention of parliament to impose that FHI should not be disclosed except when a creditor was assessing a new application for credit.

- ***Failure of ARCA to consider implementing the legislation in ways that has the least intrusive impact on the privacy of individuals***

ARCA is also arguing that the hardship reforms require lenders to report Repayment History Information (RHI) if they hold an Australian Credit Licence ACL even where the products are not regulated by the *National Consumer Credit Protection Act* 2009 (Cth) (NCCP).For example, some ACL lenders are or are considering releasing or have released[2] "Buy Now Pay Later" products that are not be regulated by the NCCP.

Despite parliament clearly expressing an intention that RHI should only be available or collected in respect of regulated credit where there was a legislative obligation to lend responsibly, ARCA is seeking to extend the reporting of RHI to these products rather than ensuring that the reporting of RHI is limited to only those products where the provider has responsible lending obligations.[3]

LAQ's recommendation

Consideration ought to be given to whether ARCA is the most appropriate body to be developing the Credit Reporting Code that seeks to balance the rights of individuals to privacy and access of credit providers to information to allow them to make good decisions in relation to the enforcement and extension of credit. Serious consideration ought to be given to ensuring the CR Code development body is independent and comprised of equal representation by industry and consumers advocates with an independent chair.

The CR Code is unduly complicated and at times incomprehensible

A Code of this nature and which can have significant financial impact for individuals should be clear, easy to understand and accessible to Industry and individuals. The CR Code in its current form is complex, complicated and difficult to navigate. In LAQ's view the structure and design of the CR Code make it difficult for individuals and consumer advocates, to use, advise on and identify where proposed legislative changes may detrimentally effect individuals.

For this review there are 60 questions. The questions are complex and not easy for individuals or their advocates to understand or comment on and appear to be designed to overwhelm the limited resources of consumer organisations responding to these proposed amendments.

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[2] Buy Now Pay Later - CommBank
[3] National Consumer Credit Protection Amendment (Mandatory Credit Reporting And Other Measures) Bill 2019 Explanatory Memorandum

Issue with structure, design and drafting of the CR Code

The CR Code was intended to aid the understanding of the *Privacy Act 1988* and regulations as it relates to credit reporting. It was not intended to be legislation or circumvent the intention of parliament. The CR Code was also not intended to enable "scope creep".

The CR Code's current structure and drafting style result in a level of complexity that is a major risk for individuals.

The CR Code:

- is not drafted in plain English,
- has a structure that is convoluted, complex and confusing,
- has poorly drafted definitions,
- fails to include aids to understanding such as diagrams, case examples or flowcharts,

The CR Code's complexity inhibits and prevents clear and accurate interpretation of its provisions. This complexity leaves open to industry the ability to interpret the CR Code to advance its interests to the detriment of individuals.

Whilst it is acknowledged that the ARCA, in accordance with the OAIC's Guidelines for developing codes, is undertaking public consultation, ARCA needs to also comply with the Guidelines in relation to drafting style. The OAIC Guidelines for developing codes provides:

*"As registered codes are legally binding, it is important that entities bound by the code, the Information Commissioner, other stakeholders and the **general public** are able to easily understand and interpret the code."*

Examples of some of the specific issues in relation to the proposed amendments are set out below

- Plain English

The CR Code must be clear and the language used must promote understanding. The amendments proposed and the CR Code itself needs to be reviewed for comprehension.

One example of the need for a plain English and comprehension review is found in clause 2.3 of the CR Code which reads as follows:

> *2.3 For the purposes of the definition of **non-participating credit provider** in Subsection 6(1) of the Privacy Act:*
>
> *(a) a CP is deemed to be likely to disclose **credit reporting information** or **credit eligibility information** about an individual to a CRB if the CP has represented to an individual who has taken out, or who is likely to take out, **consumer credit** with the CP that the CP may make such disclosures (unless the CP has subsequently advised the individual in writing that the CP will not make the disclosures); and*
>
> *(b) a CP that acquires the rights of another CP, which was not a **non-participating credit provider**, in relation to the repayment of an amount of **consumer credit** is not a **non-participating credit provider**.*

- **Structure**

The structure of the CR Code should reflect the life cycle of the credit reporting relationship between the individual and the credit provider.

An example of where the proposed amendments do not reflect that life cycle is the references to temporary and variation FHA in Clauses 8.A1 (c) and 8A.7.

In clauses 8A.1 (c) and 8A.7 reference should first be made to Temporary FHA rather than the variation FHA. Temporary FHA arrangements are commonly and usually the first suggestion made by credit provider. The proposed amendments make reference to Variation FHA first. The proposal does not reflect the natural life cycle of the credit reporting relationship and sequencing that occurs between the individual and the credit provider.

- **Definitions**

The CR Code needs to ensure that all relevant terms are defined within the CR Code and the definitions included must be clear and easy to understand. The amendments proposed to definitions within the CR Code itself need to be reviewed for clarity and comprehension.

For example, the definitions of a "V" and "A" arrangement are hard to follow. It's difficult to work out what the fundamental difference is, on a contractual basis, between the two terms. It appears with an "A" arrangement you can accumulate up to 7 months of delayed payments. This is a deferral in the traditional sense of the three options provided for in the old consumer credit code[4]. Then there are V arrangements which encompass every other arrangement except what is considered to be an A arrangement.

The definitions are not inherently clear. The definitions are also misleading as to how the law works. For example, all arrangements under the National Credit Code are Financial Hardship Arrangements (FHA). Under the NCCP there are no "A" arrangements or " V" arrangements. The impact of the proposed definition is to carve out an "A" arrangement from the definitions for financial hardship under the NCCP, and reframe it as a deferral for 7 months and possible catchup and test periods.

The definition needs to be clear and upfront about the intention of the proposed changes.

- **Aids to understanding**

The use of diagrams, case examples and flowcharts assist and would promote understanding the Code. For example, ASIC regulatory guides have good examples to support and promote understanding.

[4] Consumer Credit Code (Qld) 1994

Other general issues with the proposed amendments to the CR Code

- **Definition of financial hardship arrangement**

A FHA needs to be defined in the CR Code and mirror the law. ARCA insist that they are unable to define FHA because the explanatory memorandum specifically says that FHA is not defined.[5]

ARCA then seeks to say that a "time to sell" arrangement is not an FHA in certain circumstances and neither is an arrangement that is a "mismanagement of funds".

In our view a flexible definition of a FHA, as is defined in s72 National Credit Code, would be useful for individuals and credit providers alike and make it clear that a FHA does not have to be in writing.

- **Ability to pay but seeking a deferral**

An FHA is an arrangement based on an inability to make the contractual payment. However, many individuals may request deferral or changes to the contract based on a variety of reasons, maternity leave, study, travel etc. They may also seek to vary the contract from Principal and Interest to Interest only, to reduce contractual payments because of payments made in advance etc.

It would be a perverse outcome if these arrangements were flagged as FHA's and the only option for the borrower was to refinance the contract to avoid the inclusion of Financial Hardship information on their credit reports.

- **Disputes**

It appears from the way the CR Code is drafted that there is no ability to remove a "V" arrangement or and an "A" arrangement from an individual's credit report. It needs to be clear that this is an option and that individuals can complain to AFCA if the "V" arrangement or "A" arrangement are not removed after a successful complaint has been made to the Credit Reporting Bureaus and/or the credit provider.

- **Choosing between a temporary FHA "A" or a variation FHA "V"**

As we have already observed, the proposed amendments to the CR Code are attempting to create an artificial delineation between one type of FHA arrangement and another. Under the NNCCP there are no "A" arrangements or " V" arrangements.

Under the proposed amendments a lender will presumably want a customer to enter an "A" arrangement first and then will consider a "V" arrangement if the borrower successfully completes an "A" arrangement

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[5] Explanatory Memorandum to the National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Bill 2021, while the terms "Hardship Supplementary Explanatory Memorandum" or "Hardship Supp Ex Mem" refers to the Supplementary Explanatory Memorandum to that Bill

and any catchup or testing period. There is an obvious benefit from the individual's perspective in proceeding with a "V" arrangement from the beginning, no matter what the circumstances, as this is likely to have a less significant effect on a person's credit rating.

A potential issue is that the credit reporting system will make it more difficult to obtain a "V" arrangement as opposed to an "A" arrangement initially and the default position will be that borrowers will be given an "A" followed by a "V" arrangement which can be to their detriment.

A solution to this issue may involve improved disclosure about the meaning and implication each arrangement will have on any future applications for credit.

Consultation Questions

1. *Do you agree that 'nonparticipating credit providers' should, for the purposes of section 26(N)(2) of the Privacy Act, not be bound by the CR Code*?

   LAQ supports the view that a non-participating credit provider should, for the purposes of section 26(N)(2) of the *Privacy Act*, not be bound by the CR Code

2. *Is there any reason for paragraph 20.1 of the CR Code to be removed now?*

   LAQ supports leaving paragraph 20.1 until the Statutory Review.

3. *Do you agree with the use of the terms 'temporary relief or deferral FHA' and 'variation FHA' (noting that the CR Code will separately provide for how FHAs should be described to consumers – see paragraph 19.8). If not, what terms should be used?*

   LAQ is of the view that these terms are better than what was previously proposed, however the legislation refers to" temporary hardship arrangement" and "contractual variation". In our view it is preferable to use the same language as that provided for in the legislation rather than use new terms.

   Alternatively, FHA's could be referred to as 'temporary/deferral 'FHA' and 'permanent/ongoing FHA' as both categories involve contractual variation, even the temporary category.

4. *Do you have any comments in relation to paragraph 2.3?*

   LAQ has no comments to make in response to paragraph 2.3, other than as stated above.

5. *Do you agree that RHI disclosed following a variation FHA should be disclosed on the same basis as 'standard' RHI? If not, please explain why.*

   LAQ agrees that RHI disclosed following a variation FHA should be disclosed on the same basis as 'standard' RHI.

6. *Do you agree with our proposal that RHI reported in respect of a temporary relief or deferral FHA should not be subject to a grace period? If not, please explain why (including addressing the issues noted in our commentary).*

   No. Our experience is, is that credit providers and individuals are generally poor at implementing new and effective arrangements under existing contracts. There are many reasons for this including:

   - Miscommunication between the parties as to what are the terms of the arrangement;
   - Difficulty in setting up payment plans because credit providers fail to align direct debits with wage or other payment dates for the individual;
   - individuals underestimating living expenses when entering into arrangements; and or
   - Delay in implementing agreed hardship variations by a credit provider.

   In a recent example, aa individual and credit provider came to an agreement in April 2021 where the individual was to pay weekly amounts for a period of 52 weeks. Despite repeated requests by the individual to provide payment details, the credit provider has only recently implemented the agreement.

7. *Do you agree with our 'binary reporting' proposal for RHI disclosed in respect of a temporary relief or deferral FHA? If not, please provide reasons.*

   LAQ supports the binary reporting proposal for RHI disclosed in respect of a temporary relief or deferral FHA.

8. *Do you agree with the approach in subparagraph (a) – (d), particularly that an FHA made during the grace period will affect the payment from the previous RHI month? If not, please provide reasons and, if relevant, an alternative suggestion.*

   LAQ has no submission to make in response to this question.

8. *Do you agree that the examples in Part C reflect the meaning of subparagraphs (a) – (d)? Is there a need for any further examples to demonstrate the operation of subparagraphs (a) – (d)?*

   LAQ has no submission to make in response to this question.

9. *Do you agree with the approach in subparagraph 8A.1(e), particularly that RHI may be reported as usual while an FHA is being assessed? If not, please provide reasons.*

   LAQ's view is that once an FHA is applied for, all enforcement should cease including the deterioration of RHI.

For example, if RHI is a 1 and then an application is made but the credit provider has not determined the outcome by the time the next payment is due, RHI will remain at a 1 and will not deteriorate to a 2. If the application is refused, then the credit provider should advise the individual of the option to make a complaint to AFCA. The credit provider should also advise the individual that, if the complaint is not made, within a specified time period, the RHI on the account will continue to deteriorate. If the person makes a complaint to AFCA in the time specified, the RHI will remain at the same level at the time of the application for hardship until the matter is determined by AFCA.

10. *Do you consider the reference to the 'lowest payment obligation for that month' is clear? If not, please provide reasons and, if possible, suggest alternative drafting that would address the lack of clarity*

LAQ supports in principle that FHI should only be reported in relation to one obligation and that obligation ought to be the lowest payment obligation for that month'. It is unclear whether the proposed amendment to the CR Code achieves this outcome.

11. *Do you have any feedback in relation to proposed subparagraph 8A.1(g)?*

There should be a guideline in relation to how the information is communicated to individuals.

12. *In relation to 'time to sell' arrangements*:
    a. *should they be treated as FHAs all the time or some of the time? Please provide reasons.*
    b. *if so, should this be provided for in the CR Code (noting our comments in relation to the appropriateness of the CR Code restricting the flexibility of the legislation)?*

13. *Would you support an alternative way to ensure a fair consumer outcome and consistency in approach between credit providers (e.g. an industry 'guideline')?*

In relation to questions 13 and 14 where there is an agreement entered to allow an individual "time to sell" that includes a reduction in contractual payments, the agreement is either a "temporary hardship arrangement" or a "contractual variation and the rules in relation to FHA should apply.

LAQ agrees that" time to sell" arrangements can involve any of the following:

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

The fact that an FHA with a credit provider also involves an agreement about the sale of a secured asset does not change the character of an FHA. It remains an FHA.

A "time to sell" term of a FHA does not relate to payment information and therefore whether the individual has complied with that term as part of a FHA is irrelevant as to how FHI should be reported.

There are a variety of terms and conditions that an individual may breach in relation to a credit contract which do not relate to payment obligations under a contract and therefore allow a credit provider to issue a default notice.

A relevant and common example is the failure by an individual to maintain insurance in respect of a secured property. If there is no payment default, then neither default information nor negative RHI could be reported against the individual. If an agreement was entered by the credit provider in relation to how to deal with the failure to pay insurance that could not be the subject of an FHA for the purposes of the CR Code unless the individual fell behind with contractual repayments.

This is another example of scope creep by ARCA.

14. *Do you agree with the proposal that a 'proactive offer' of assistance does not create an FHA unless the customer indicates their acceptance of that offer? If not, please provide reasons.*

    LAQ agrees with the proposal that a 'proactive offer' of assistance does not create an FHA unless the customer indicates their acceptance of that offer.

15. *Do you agree that it may be appropriate to 'backdate' the start date of the FHA in the circumstances described (where that would require a correction to be made to the credit information, including RHI, previously disclosed)? If not, please provide reasons.*

    LAQ agrees that it may be appropriate to 'backdate' the start date of the FHA in the circumstances described (where that would require a correction to be made to the credit information, including RHI, previously disclosed)

16. *Subject to your answer to (15), do you consider there is a need to provide specific provision for this 'backdating' process? If so, please provide reasons and describe how you consider this should be described.*

    No.

17. *Noting that the fundamental 'account-based' approach could be considered as part of the Independent Review of the CR Code, do you agree with the proposal in subparagraph (i) that (subject to the terms of the contract and any other laws), an FHA can be made with the agreement of one joint account holder? If not, please provide reasons.*

18. *Subject to (17), are any refinements required to subparagraph 8A.1(i)? If so, please describe.*

19. *Do you have any comments on the proposal (as set out in Part A) to 'suppress' reporting of RHI (and, therefore, FHI) for customers who self-identify as being subject to domestic violence? (Noting that this is a matter that will be dealt with outside the CR Code.)*

20. *Do you consider any of the alternative options to be appropriate (given the OAIC's privacy-related concerns in relation to ARCA's proposal)? Please provide any detail that you are able to provide in support of your views*

The following is in answer to Questions 17, 18 19, 20 and 21.

LAQ does not agree with an account-based approach to joint accounts.

Joint loans are joint and severable. The lender can choose to pursue:

- both borrowers equally, or for different amounts,
- one borrower, or
- seek to initially enforce against mortgaged property before proceeding against any individual.

Any FHA reporting should only apply to individuals who have agreed to the proposal.

LAQ agrees that a FHA can be made with the agreement of one joint account holder, however if both account holders do not agree to a negotiated FHA, only the individual who has made the particular FHA will have FHI in accordance with the FHA reported on their credit file. The other individual will continue to have RHI reported against them in accordance with the terms and conditions of the contract.

A FHA may be different between joint account holders for a variety of reasons, several examples are set out below:

- A credit provider could enter into different FHAs with individual account holders, requiring repayments of different amounts depending on who is working and or living in the property; and
- A credit provider may release one individual from all obligations under the contract but continue to hold the other joint account holder liable for the contractual repayments.

  For example, Joint Account holder "A" seeks a reduction in the amount owed based on irresponsible lending. Joint Account holder "B" seeks a release once the mortgaged goods are returned by them on the basis that they received no benefit from the loan. The credit provider agrees to the resolution. In LAQ's view Joint Account holder" A" ought to have a "V" arrangement from the beginning given the permanent nature of the variation. Joint Account holder "B" should have their account closed and no RHI recorded. It is difficult to see how an account-based approach to credit reporting would accurately reflect each party's obligations.

If an individual approach is adopted, it obviates the need for special treatment for individuals who identify as the victims of domestic violence. It also obviates the need to make a disclosure about domestic violence to obtain special treatment. This approach is likely to assist many individuals not just individuals who are the victims of domestic violence. This approach will more importantly protect an individual's privacy.

It also aligns with universal design principles where systems are designed for use by all and systems do not need retrograde changes to accommodate the different requirements of vulnerable individuals.

21. *Do you agree that RHI must, subject to the limited transitional exception in subparagraph 8A.8(b)(ii), be disclosed for a month if FHI is disclosed? If not, please provide reasons.*

    It is unclear what is being sought with this question. It is also not clear to LAQ, what is the meaning and intent of subparagraph 8A.8(b)(i). This is an example of the drafting used in the proposed amendments being in breach of the OAIC Guidelines for developing codes.

22. Do you have any comments in relation to the proposed subparagraph 8A.1(k)?

    LAQ has no comment.

23. Subject to the further questions below regarding the specifics of the proposal, do you generally agree with our proposal set out in paragraph 8A.2? If not, please provide reasons and alternatives.

    LAQ generally supports the proposal in relation to how "promises to pay" and FHA are to be created

24. Does our proposal need any further clarification?

    The proposal is relatively clear, "promises to pay" will see RHI continue to be listed against the contractual terms, whereas a FHA will have FHI in respect of the missed payment or agreement.

25. Alternatively, should the CR Code follow the approach of clarifying when there is an 'agreement' (as described the 'alternative approach' is described in the Appendix to Part A)? If yes, please provide your reasons.

    The approach of clarifying when there is an agreement might be closer to legislative intent but it is less certain. The rebuttable presumption that ARCA is proposing that anything more than 45 days is presumed an FHA and lender needs to take active steps to determine if it is FHA or reject the FHA.

26. Do you have any comments in respect of subparagraph 8A.2(a)?

    Subparagraph 8A.2(a) provides that a catch-up period or payment test period that follows, and is in response to, an earlier temporary relief or deferral FHA, is presumed to also be a temporary relief or deferral FHA unless explicitly agreed otherwise. It appears that the decision to "re-age arrears" and when that is to occur is arbitrary and entirely at the discretion of the credit provider. From a legal perspective there is nothing in the proposed amendment that prevents the credit provider from immediately re-aging arrears once the period of the FHA ends.

    There does not appear to be any requirement in the proposed amendment for the credit provider to advise the individual of the consequences to their credit report or their rights of appeal in respect of a decision by the lender not to re-age arrears at an earlier date. It needs to be clear that there is an option for the individual to complain to AFCA.

    LAQ does not support what is outlined in this sub-paragraph.

27. Do you have any comments in respect of subparagraph 8A.2(b)?

In LAQ's view, If a person is in arrears and approaches their credit provider and there is an arrangement/agreement that the person will make Minimum Monthly Payments (MMP) and if they then do so the credit provider will re-age the arrears at the end of that period, this is an FHA. It does not matter if it explicitly agreed to or not as long as the approach has been made by the individual.

The examples at 1,2,4 and 5 do not assist to explain the above or change LAQ's views as to when an FHA is made.

28. Should the CR Code provide further clarity around the meaning of 'mismanagement of funds in the short term'? If so, what should that clarity say

The concept is unnecessary and should be removed from any explanation provided. It is a regressive step as it seeks to lay blame on individuals for the inability to pay a credit account in the short term. The examples provided in the explanation of the changes to the CR Code, as to what could be a mismanagement of funds, demonstrates the subjectivity of this term.

The examples include unexpected expenses such as car repairs, travel expenses (implying that these will always be frivolous) and purchasing BNPL without any recognition to the sales pressure placed on individuals by the marketing of those products, by members of ARCA, or by family and peers to purchase unaffordable products.

The examples are framed solely through an industry lens and lack the balance that a CR Code representing and protecting the interests of all parties (industry and individuals) should have.

29. *Do you have any comments in relation to this proposed subparagraph?*

ARCA 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 credit provider and RHI is determined by reference to the consumer credit.

LAQ supports that proposal, as long as the individual understands the consequences of a decision not to access hardship will have for their credit report. In LAQ's view if an individual requests this, there should also be a documented referral for legal advice, either to a community legal centre, legal aid commission or the National Debt Helpline.

30. *Do you have any comments in respect of subparagraph 8A.2(d)?*

It is difficult to understand what ARCA is proposing and why the examples were used. Sub paragraphs that are confusing and cannot be understood should not be included in the CR Code. This is an example of the drafting used in the proposed amendments being in breach of the OAIC Guidelines for developing codes.

31. *Do you agree with our proposal in paragraph 8A.3? If not, please provide reasons. If you are a credit provider and do not agree with the proposal due to the operational impacts and/or costs, please provide details of those impacts and costs.*

    LAQ supports the proposal that individuals should be given information about how a FHA will affect their credit report. That information should be given before or at the time the arrangement is made. LAQ supports information being tailored to the specific circumstances of the individual. A referral to a generic link will not be sufficient to meet this obligation.

32. *Should paragraph 8A.3 be more specific regarding what 'reasonable steps' involves? For example, should it say that the reasonable steps are only required if the credit provider has an electronic address to which they can send the information (or link to information)? If yes, please provide details of the cost and other operational issues of sending the information via non-electronic means.*

    Reasonable steps include more than just communication by electronic means. It should also be provided contemporaneously and allow individuals time to consider whether the arrangement is suitable given the creditor provider's advice. It might be reasonable to provide a link via a mobile number or, in other circumstances, to provide information by post.

    Verbal advice to an individual maybe sufficient but the advice provided should be well documented and detailed records should be kept.

33. *Is the exception in subparagraph 8A.3(e) too narrow? Should the exemption be broadened? If so, please provide alternative suggestions. If you are a credit provider, please provide details of the reduced operational impacts and costs of your alternative suggestion.*

    LAQ believes that exemption in 8A.3 (e) does not require further broadening.

34. Do you agree with the *proposed clarification in respect of variation FHAs? If not, please provide your reasons.*

    LAQ prefers the term "permanent variation" as that is a term that would be more easily understand by the general public. It is again noted that the OAIC's Guideline for developing codes expressly states that registered codes should be easily understood and capable of being interpreted by the general public.

35. *If you are a credit provider that provides 'upfront' variations, do you agree that the upfront variation should cover both the period of reduced payments and the treatment of the consumer credit following that* period (i.e. so that there should generally be only one FHI=V recorded for the whole arrangement)?

    LAQ supports the proposal that permanent variations are treated as such from the inception of the varied contract.

36. *Do you agree that if information is provided at the time a FHA is made it is not required to provide it again when the VHA is made?*

    LAQ supports this proposal.

37. *Do you agree with our proposal to use the FHI codes of 'V' and 'A'? If not, please provide your reasons and an alternative.*

38. *Do you agree with our proposal that the CR Code not provide for further types of FHI (e.g. natural disaster FHI)? If not, please provide your reasons and describe what other forms of FHI should be allowed?*

LAQ supports the proposals in Question 38 and 39.

Energy & Water Ombudsman NSW
Free, fair and independent

10 August 2021

Ms Ilana Madjar
Senior Legal Counsel
Australian Retail Credit Association
GPO Box 526,
Melbourne VIC 3001

Email: [redacted]

Dear Ms Madjar

ARCA Credit Reporting Code hardship reform changes

Thank you for the opportunity to comment on this consultation paper.

The Energy & Water Ombudsman NSW (EWON) investigates and resolves complaints from customers of electricity and gas providers in NSW, and some water providers. EWON receives and responds to complaints from customers on metering work and electricity supply interruption issues relating to retailer and distributor activities. Our comments are informed by our investigations into these complaints, and through our community outreach and stakeholder engagement activities.

We have only responded to those questions in the consultation paper that align with issues customers raise with EWON, or with our organisation's operations as they relate to these reform changes.

If you would like to discuss this matter further, please contact me or Rory Campbell, Manager Policy and Research, on [redacted]

Yours sincerely

[redacted]

Janine Young
Ombudsman
Energy & Water Ombudsman NSW

Energy & Water Ombudsman NSW
Phone (02) 8218 5250 Web ewon.com.au PO Box A2436, Sydney South NSW 1235
Fax (02) 8218 5233 Email omb@ewon.com.au Level 11, 133 Castlereagh Street, Sydney 2000

Energy & Water Ombudsman NSW
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Policy Submission

ARCA Credit Reporting Code hardship reform changes

The Energy & Water Ombudsman NSW (EWON) investigates and resolves complaints from customers of electricity and gas providers in NSW, and some water providers. EWON receives and responds to complaints from customers on credit issues relating to their energy or water bills. Our comments are informed by our investigations into these complaints, and through our community outreach and stakeholder engagement activities.

We have only responded to those questions in the consultation paper that align with issues customers raise with EWON, or with our organisation's operations as they relate to this rule change.

The proposed amendments to the *Privacy (Credit Reporting) Code 2014 (Version 2.1)* (CR Code), including those relating to 'financial hardship information' (FHI) and 'financial hardship arrangements' (FHA), are not directly relevant to issues customers raise with EWON or our organisation's operations for the following reasons:

- Energy and water retailers do not hold Australian Credit Licences and do not access or disclose 'repayment history information' or consumer liability information.
- Energy and water retailers will not access or disclose 'financial hardship information' about 'financial hardship arrangements' under the new provisions.
- A payment plan or hardship arrangement with an energy or water retailer for an energy or water account does not fit the definition of 'repayment history information' as defined in the the *Privacy Act 1988* (Privacy Act).
- A payment plan or hardship arrangement with an energy or water retailer for an energy or water account does not fit the definition of a 'financial hardship arrangement' as defined in the *National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Act 2021* (amending Act).

We have provided comments on questions relating to two issues that ARCA is exploring, being:

- the treatment of joint accounts; and
- when a 'financial hardship arrangement' is considered to be 'made'.

Our comments are informed by our investigation of complaints about joint accounts and financial hardships arrangements in relation to energy accounts, with acknowledgement that the operation of energy accounts does not directly align with repayment history information (RHI), FHI and FHA as defined in the CR Code and Privacy Act.

We have also provided information about emerging energy retailer business models.

The issues raised by these emerging business models are beyond the scope of the amendments currently under consultation. We have raised these issues as they should be considered in the the Office of the Australian Information Commissioner's (OAIC) Independent Review of the CR Code and Part IIIA of the Privacy Act, which is due to be completed by October 2024.

Energy & Water Ombudsman NSW
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Treatment of joint accounts

8A.1(i) – Hardship reforms – treatment of joint accounts
Question 18. Noting that the fundamental 'account-based' approach could be considered as part of the Independent Review of the CR Code, do you agree with the proposal in subparagraph (i) that (subject to the terms of the contract and any other laws), an FHA can be made with the agreement of one joint account holder? If not, please provide reasons.

EWON agrees with the proposal that an FHA can be made with the agreement of one joint account holder. This approach aligns with the treatment of joint energy accounts, where requiring the agreement of all joint account holders to form a hardship arrangement can create a barrier to hardship assistance access. See Case Study 1 in **Attachment 1** for a complaint to EWON that illustrates this.

Formation of a 'financial hardship arrangement'

8A.1(h) – Hardship reforms – when is a temporary relief or deferral FHA formed
Question 15? Do you agree with the proposal that a 'proactive offer' of assistance does not create an FHA unless the customer indicates their acceptance of that offer? If not, please provide reasons.

EWON agrees with the proposal that a 'proactive offer' of assistance by a credit provider does not create a FHA unless the customer indicates their acceptance of that offer. This aligns with EWON's position in relation to energy accounts where retailers make proactive offers including:

- sending individual correspondence to customers with specific payment plan or hardship arrangement offers for their energy accounts; and
- sending general correspondence to groups of customers it has identified as potentially vulnerable (such as those living in bushfire-affected Local Government Areas) encouraging them to contact the retailer to discuss hardship assistance if required.

Our view is that a 'proactive offer' does not create a payment plan or hardship arrangement unless the customer explicitly accepts the offer, due to the potential negative impact for a customer who is not aware they have a payment plan or hardship arrangement in place and has not agreed to that plan or arrangement. Case Study 1 in **Attachment 1** illustrates this point.

8A.2 Generally – Hardship reforms – when is a temporary relief or deferral FHA Formed
Question 24. Subject to the further questions below regarding the specifics of the proposal, do you generally agree with our proposal set out in paragraph 8A.2? If not, please provide reasons and alternatives.

EWON agrees with the proposal to allow for flexibility rather than prescription so that, depending on specific circumstances, any particular arrangement (such as a 'promise-to-pay') could be considered as a FHA with mutual agreement. This aligns with the approach to hardship arrangements for energy accounts. Hardship arrangements for energy accounts must take into account factors including the customer's capacity to pay, the customer's arrears and the expected energy consumption over the next twelve months[1]. Specifics such as duration and frequency are not prescribed. A short-term 'promise-to-pay' style arrangement is not precluded from being considered a hardship arrangement

[1] Rule 72 of the *National Energy Retail Rules*

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if it takes into account the required factors, has been mutually agreed upon and the retailer has informed the customer of:

- the duration of the plan;
- the amount of each instalment payable under the plan, the frequency of instalments, and the date by which each instalment must be paid;
- if the customer is in arrears, the number of instalments to pay the arrears; and
- if the customer is to pay in advance, the basis on which instalments are calculated.

EWON also agrees with the proposal that, aside from individuals who may request hardship assistance, there is an expectation that a credit provider will have processes in place that seek to understand the reasons behind someone experiencing payment difficulty. This aligns with the approach to hardship arrangements for energy accounts. All energy retailers are required to have a hardship policy which contains processes to identify customers experiencing affordability issues, including self-identification by the customer and identification by the retailer.[2]

8A.2(c)(iii) – Hardship reforms – when is a temporary relief or deferral FHA Formed
Question 30. Do you have any comments in relation to this proposed subparagraph?

EWON agrees with the framing of the subparagraph to place the onus on the credit provider to 'disprove' the existence of a hardship request where the individual is not able to meet payments (rather than placing the onus on the individual to make the request). This position is informed by complaints we have received about default listings that centre on whether the energy retailer made reasonable attempts to assess the customer's financial circumstances in line with its obligation to consider hardship requests. See Case Study 2 in **Attachment 1** for an example.

New energy retail business models

ARCA has invited feedback about other relevant matters.

Energy retailers do not hold Australian Credit Licences. However, new energy retailer business models have recently been emerging, including an energy retailer that is a wholly owned subsidiary of a credit provider that holds an Australian Credit Licence and offers personal loans and 'buy now pay later' loans. This energy retailer has yet to commence retailing, but information about its business model indicates its intention is to have integration between the two entities whereby customers will have personal loans or 'buy now pay later' loans with the credit provider and energy accounts with the energy retailer.

At face value, the fact that the credit provider holds an Australian Credit Licence and the energy retailer does not, indicates that the credit provider alone is able to access or disclose RHI and FHI. Meanwhile, the energy retailer is in the same position as existing energy retailers in not accessing or reporting this information. However, it is unclear at this early stage exactly how the business model will work or what customer relationships with the two entities will look like. New energy retailer business models raise questions such as the following:

- Would it be possible for an energy retailer to access or disclose credit reporting information it would otherwise be unable to access or disclose by way of a business relationship with a credit provider that does hold an Australian Credit Licence?

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[2] Section 44 of the *National Energy Retail Law*

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- Will new payment arrangement models emerge for integrated personal loan products and energy plans that fit the definitions of RHI and FHI?
- How will related entities maintain data integrity where they have differing credit reporting obligations?

These issues have implications to consider, including:

- the potential for increased barriers to a customer's access to an energy account based on a credit check (and thereby electricity as an essential service); and
- ensuring hardship protections specific to energy are not diluted or lost.

The issues raised by the emergence of new energy business models are beyond the scope of the amendments currently under consultation. We have raised these issues as they should be considered in the OAIC's Independent Review of the CR Code and Part IIIA of the Privacy Act which is due to be completed by October 2024.

Enquiries

Enquiries about this submission should be directed to Janine Young, Ombudsman on (02) 8218 5256 or Rory Campbell, Manager Policy and Research, on (02) 8218 5266.

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Attachment 1

Case studies

Case Study 1

After over two years of unsuccessful attempts to contact the joint account holders for an electricity account, an energy retailer received a call from one of the account holders and was able to place them on a hardship arrangement during the call.

A customer had a joint electricity account with his partner. The customer called his retailer in March 2021 in response to a text message and was told that no payments had been received since December 2018. The customer said he was unaware of the accumulated debt of $8,491 as he had not been receiving bills. The customer's bills and correspondence were being sent to a work email address, including multiple emails with payment arrangement offers. The customer said that he had changed jobs in December 2018 and no longer had access to the old work email address. The home number and mobile number recorded were correct but the customer had not responded to missed calls or voicemails until March 2021.

During that call, the retailer updated the customer's email address and identified that the customer was experiencing financial vulnerability. The customer agreed to a customer assistance arrangement of $150 per fortnight with payment matching for every sixth payment, which took into account the customer's capacity to pay, the ongoing usage and the arrears. The joint account holder's agreement was not required to put the customer assistance arrangement in place. Given the retailer's difficulty in making contact with the customer over an extended period, it may have created a barrier to assisting the customer if the agreement of the joint holder had been required.

Under energy rules, a retailer is not obligated to offer hardship assistance if a customer has had two payment plans cancelled for non-payment in the last twelve months. The emails the retailer had sent offering payment plans were not considered to be payment arrangements as the customer had not contacted the retailer to accept them. The retailer was therefore obligated to offer the customer an opportunity on their customer assistance program as he did not have any previous broken arrangements.

EWON's review indicated that the retailer had made reasonable attempts to contact the customer using the contact details recorded, and there was no indication the customer had attempted to provide updated contact details prior to the call in March 2021. In recognition of the customer's difficult circumstances, the retailer applied all of the customer's missed pay on time discounts and a $400 goodwill credit. This reduced the debt to $6,300. The customer accepted this outcome as resolution of the complaint and continued to make payments in accordance with the hardship arrangement.

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Case Study 2

A customer had a default placed on his credit file by an energy retailer, but had been making regular payments at the time of the default listing.

A customer had a default placed on his credit file on 7 January 2020 for $3,266 relating to a solar purchase agreement with an energy retailer. The customer discovered the default when he applied for personal finance. The retailer advised the customer that the default listing complied with the requirements of the Credit Reporting Code and would not be removed. The customer considered the default listing was not reasonable as he had been making regular payments toward the debt at the time the default was listed.

EWON's review identified that the customer had agreed to a payment arrangement of $247 per month commencing 30 August 2019. The customer made payments of $60 per week, and was therefore falling short of the required monthly amount by less than $10. This led to the payment arrangement being cancelled in November 2019. The customer had continued to pay $60 per week after the payment arrangement was cancelled, through to the time the default was listed on 7 January 2020 and beyond. It was not clear whether the retailer had made reasonable contact attempts to discuss the shortfall with the customer and understand the reasons why he was not meeting the payment amount, such as whether he had simply miscalculated or whether he may be experiencing financial vulnerability. Based on this and other issues raised by EWON, the energy retailer agreed to remove the default listing. The customer accepted this outcome as resolution of the complaint.

Australian Government

Australian Small Business and Family Enterprise Ombudsman

20 August 2021

Australian Retail Credit Association
Credit Reporting Code
GPO Box 526,
MELBOURNE VIC 3001

via email: [redacted]

Dear Mr Blyth

Credit Reporting (CR) Code – Hardship changes

The Australian Small Business and Family Enterprise Ombudsman welcomes the opportunity to provide feedback on the draft changes to the Credit Reporting Code (the Code) proposed by the Australian Retail Credit Association (ARCA).

Small businesses often have intertwined personal and business finances. Consequently, when cash flow is disrupted for a small business owner this may create pressure on their personal finances impacting their overall financial position, such as in the event of a natural disaster.

We suggest the Code considers encouraging credit providers to better understand the context around financial hardship information (FHI) from a small business customer applying for a credit product if this is on their credit report. This will ensure that where a FHI is present, additional due diligence is conducted to determine the circumstances in which the arrangement was entered into for greater clarity around the risk profile of the applicant.

The Code should include guidance for credit providers to communicate to small business customers, prior to recording this information in the system, the indicators that contribute to the customer's credit score. Further detailed guidance should address the interaction between FHI and the adverse Repayment History Indicator (RHI) on their credit report. Many small businesses are unaware how this information is interpreted by credit providers and this can lead to confusion and frustration if they choose to apply for a future loan.

Thank you for the opportunity to comment. If you would like to discuss this matter further, please contact Miss Kit O'George on [redacted] or at [redacted].

Yours sincerely

[redacted]

The Hon. Bruce Billson
Australian Small Business and Family Enterprise Ombudsman

T 1300 650 460 **E** info@asbfeo.gov.au
www.asbfeo.gov.au

Office of the Australian Small Business and Family Enterprise Ombudsman
GPO Box 1791, Canberra City ACT 2601

National Australia Bank Limited
800 Bourke St
Docklands VIC 3008

11 August 2021

Mr Michael Blyth
Head of Government, Regulatory & Industry Affairs
Australian Retail Credit Association

Via email: [redacted]

Dear Mr Blyth,

2021 CREDIT REPORTING CODE CONSULTATION

The NAB Group (**NAB**) acknowledges the substantial efforts of, and appreciates the collaborative approach adopted by, the Australian Retail Credit Association (**ARCA**) in developing the proposed amendments to the Privacy (Credit Reporting) Code 2014 (**CR Code**) on behalf of the Office of the Australian Information Commissioner (**OAIC**). NAB welcomes the opportunity to provide formal feedback on the proposed amendments to the CR Code.

NAB generally agrees with the primary positions advanced and rationale set out in the supplementary materials of ARCA's consultation pack but considers that some of the actual amendments proposed to the CR Code are overly prescriptive, unnecessarily complex and/or do not actually reflect the policy positions advanced in the supplementary materials. NAB has already provided this high-level feedback to ARCA and understands that ARCA intends to address this general concern in the next version of the draft CR Code produced after the expiration of the public consultation period.

As a member of the Australian Banking Association (**ABA**), NAB has discussed the draft CR Code amendments with the ABA and has now had the opportunity to review the final draft of the ABA's intended submission. NAB is generally supportive of each of the recommendations set out in the ABA submission noting that NAB's support of an ABA position should be read subject to our specific comments below.

1. Financial Hardship Arrangements (FHAs)

NAB supports the principles espoused by ARCA regarding FHAs namely that:

a) in circumstances where an individual does not specifically request hardship assistance, credit providers should nonetheless have processes embedded that seek to understand the reason(s) for a particular customer's payment difficulty and to identify those customers who should be assessed for hardship assistance eligibility (with their prior agreement); and

b) given the clear legislative intent to maintain flexibility regarding FHAs, the CR Code should not dictate the circumstances under which a credit provider is deemed (or presumed) to have agreed to an FHA.

a) Identifying customers in hardship

NAB does not agree with the introduction of hardship 'presumptions' into the CR Code but does agree with ARCA that a credit provider's focus on whether a particular customer should be assessed for financial hardship assistance eligibility should increase the longer that the customer is unable to (at least) make minimum monthly payments (**MMP**). NAB ultimately supports the view set out in the ABA submission regarding financial hardship, namely that the CR Code should not introduce *presumptions* as to when a hardship arrangement has been formed over and above what is prescribed under the NCCP and section 6QA of the Privacy Act.

We note that no other credit reporting elements are built on presumptions. On the contrary, reportable credit events are statements of fact based on an actual event or series of events. NAB proposes that the reporting of an FHA to a CRB should simply be a statement of the fact on the occurrence of:

- a customer requesting hardship assistance and the credit provider agreeing to provide it as such; or
- the credit provider offering hardship assistance and the customer agreeing to accept it as such.

NAB notes that the period of time before a customer is able to recommence meeting (at least) MMP obligations will be relevant to the assessment of whether any agreement between the credit provider and the customer is a 'promise to pay' or a hardship arrangement. NAB does not however agree that a customer should be presumed under the CR Code to be in financial hardship (or not) based solely on whether the anticipated days until the customer will be able to start making (at least) their MMP exceeds one month.

It is proposed by ARCA that, if a customer actively agrees that they will be able to recommence meeting their MMP obligations within a month, any arrangement agreed to between the customer and the credit provider to pay off the overdue amounts should be presumed to be a 'promise to pay' rather than an FHA (in the absence of any direct evidence to the contrary). As noted above, NAB does not support the introduction of hardship presumptions in the CR Code but agrees that the above scenario is more likely to give rise to a 'promise to pay' arrangement than an FHA.

There must be an appropriate balance between the maintenance of a customer's right to privacy and the effective identification of genuine financial hardship. In circumstances where there are no outward signs that the customer is experiencing financial hardship and the customer has indicated that they will be able to recommence making (at least) MMP within one month, a credit provider should not be required to pry into the specific cause(s) of infrequent and short-term missed payments. In NAB's view, requiring a customer - who has not expressed any concern about beginning to (at least) resume making MMP within a month - to provide the specific reasons that led to them missing one or more payments is unnecessarily invasive and administratively burdensome.

If, on the other hand, a customer indicates that they will not be able to (at least) start making MMP within one month – or if it is otherwise readily apparent to the credit provider that this is the case – NAB agrees that the customer's eligibility for hardship assistance should be more actively assessed by the credit provider. NAB considers that, where a customer will not be able to (at least) recommence meeting their MMP obligations within one month, the credit provider should raise the issue of financial hardship with the customer and/or actively seek more information directly from the customer as to the reasons that they will not be able to make MMPs within that period but does not agree that the customer should be presumed to be in hardship unless agreed otherwise by the customer and the credit provider.

b) Flexibility

NAB's view is that the CR Code should not seek to cover or define the numerous and specific circumstances that may give rise to a genuine financial hardship arrangement. We note that the clear legislative intent is that a financial hardship arrangement reflects a *mutual* understanding between the consumer and their credit provider reflecting the nature of the credit relationship.

The current drafting of section 8A.2 is complex and difficult for credit reporting professionals to follow. This would seem not to align with ARCA's stated goal of the CR Code being readily understandable by the average consumer. NAB proposes that section 8A.2 be simplified in the manner described below.

In NAB's view, a **temporary relief or deferral FHA** should be simply defined as a **temporary FHA** and it should be said to have been put in place in relation to payments that are or will become overdue if, following discussion between the individual and the credit provider, each party explicitly agrees that that the agreed repayment arrangement is a **temporary FHA**. That is, entering a hardship arrangement should remain an 'opt-in' in all instances for the consumer rather than an 'opt out'.

To ensure that the individual is in the best position to decide whether to agree to put a **temporary FHA** in place, an obligation could be introduced in the CR Code requiring the credit provider to take reasonable steps to provide the individual with all information that is reasonably required by the individual to make the decision including information that describes the Repayment History Information **(RHI)** or Financial Hardship Information **(FHI)** that may be provided to a Credit Reporting Body **(CRB)** as a result of the decision.

If it was deemed necessary or useful by ARCA or the OAIC, the CR Code (or related guidance issued by the OAIC) could set out the scenarios currently reflected in section 8A.2(a), (b) & (c) of the CR Code as examples of arrangements that may generally give rise to a temporary FHA in circumstances where the individual – after being made aware of all relevant information by the credit provider - agrees to put such an arrangement in place.

2. Variation Financial Hardship Arrangements

As currently drafted, section 8A.5 of the CR Code prescribes variations of consumer credit contract terms that will qualify as hardship arrangements when hardship is present. NAB considers that this approach is unnecessarily prescriptive, arguably incentivises blanket hardship decisioning and may impact the accuracy and reliability of financial hardship information reporting.

NAB proposes that section 8A.5 be amended to state that Paragraph 8A.4 applies to any permanent variation that is made to the terms of the consumer credit as a direct result of the consumer's hardship. That is, a variation FHA occurs when the variation to the terms of the consumer credit contract is made because of (and immediately following) a period of hardship or as a direct result of a hardship request received by the credit provider (that it agrees to).

NAB proposes that the categories of variation set out in paragraphs (a) – (f) of section 8A.5 be (if anything) expressed as non-exhaustive examples of variation FHAs that may be implemented as a direct result of the hardship.

3. Treatment of joint accounts where abuse is suspected

As noted in the ABA submission, consumer representatives have raised concerns that the introduction of FHI into the credit reporting system may lead to domestic abuse. Namely:

- *Economic coercion*: an economically controlling person may seek to interfere with another person's ability to obtain hardship assistance. For example, an ex-partner may seek to block an FHA so that the other person's credit report will show missed payments and, as a result, make it more difficult to obtain finance to buy out the jointly owned home; and
- '*Triggering*': a request for financial hardship assistance by Account Holder A could act as a 'trigger' to Account Holder B. That is, an economically, and potentially violently, abusive person may become upset if their credit report shows FHI because of the other person seeking assistance.

To prevent the above scenarios from occurring, ARCA has proposed the CR Code would specify that:

- *an FHA may be formed at the request of one borrower to the joint account,*
- *any other joint account holders may avoid having any FHI reported in their credit report in respect of a temporary relief or deferral by meeting their contractual obligations, and*

in addition, as an interim measure:

- *an individual who self-identifies as being potentially subject to domestic abuse can request that RHI and FHI be suppressed during an FHA.*

This interim measure has been proposed by ARCA as an additional consumer protection whilst an appropriate longer-term solution is determined as part of the Independent Review of the CR Code. As ARCA has noted, the temporary interim proposal would continue an existing industry practice of hardship suppression that has been in place for many years.

NAB is generally supportive of ARCA's proposal but notes that the suppression of RHI and FHI – because this occurs at an account level and not at individual customer level – may also be a trigger for domestic abuse. NAB has discussed this issue with several CRBs and proposes that, as an interim measure, the victim of the domestic abuse could be disassociated from the joint account (for credit reporting purposes only) such that RHI is suppressed on their credit report but it is not suppressed on the alleged perpetrator's credit report. NAB acknowledges that a more robust reporting solution that will preserve the completeness and integrity of a victim's credit report requires resolution beyond the CR Code and, amongst other things, may involve a substantial revision to the Australian Credit Reporting Data Standard.

As noted in the ABA submission, this interim measure (if accepted) would need to be explicitly approved by the Government and ASIC must provide written assurance that it will not consider such measures to be in breach of mandatory credit reporting obligations.

4. Back dating FHA commencement

NAB does not agree that the CR Code should introduce a requirement to back date the commencement of an FHA if the credit provider has 'excessively delayed' agreeing to the arrangement. As noted in the ABA submission, the CR Code should not include provisions that support a situation where it is contemplated that a credit provider '*may excessively delay agreeing to such an arrangement*'. It is likely that an unjustified delay on the part of a credit provider would amount to a breach of section 72 of the *National Consumer Credit Protection Act 2009*.

We also note that, because an FHA is intended by the legislature to be an arrangement that reflects a mutual understanding between the consumer and their credit provider, the general position should remain that the date that the FHA commences will be the date upon which both parties have agreed to the FHA. Given the flexible way in which an FHA is defined under section 6QA, the parties could of course mutually agree to back-date the commencement of the agreed arrangement where appropriate.

5. Treatment of multiple FHAs

At section 8.A.1(f), ARCA has proposed that:

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

NAB does not support this approach for the reasons set out in the ABA submission namely:

- it would likely be difficult for the credit provider to assess and keep track of which arrangement yields the lowest payment obligation each month when there are two or more financial hardship arrangements in place, and
- it may lead to greater customer confusion if the indicator is moving back and forth between the FHIs each month on the customer's credit file.

We suggest that, where multiple FHAs are (or were) active during a given reporting period, credit providers should report against the then current/active FHA or against the most recently agreed FHA (if more than one FHA remain active).

Credit Reporting Code consultation

Mandatory credit reporting & other measures

11 August 2021

Matt Strassberg, General Manager, External Relations AU/NZ

SUMMARY

In the lending process, a credit report provides a ledger of truth.

Australian credit reports include repayment history information (RHI), enabling insight into a person's current ability to repay additional credit. Its introduction, as part of comprehensive credit reporting, has been supported by the Australian Law Reform Commission, the Australian Prudential Regulatory Authority, the Productivity Commission and in the 2014 Financial System Inquiry.

Twice the Australian parliament has considered legislation on credit reporting.

- The first (2012) enabled credit providers to report RHI;
- The second (2021) required large banks to supply RHI to credit reporting bodies.

Both times, after exhaustive consultation, the final Bills passed parliament with unanimous support.

The second tranche of law also allowed RHI to be augmented by financial hardship information (FHI). Also known as hardship flags, their introduction will add greater integrity to credit reporting and better protect consumers at risk of becoming over-indebted.

Because FHI is a significant adverse element on a credit report, it also has particular restrictions; credit providers cannot refuse additional credit or reduce a credit limit solely because FHI exists and credit reporting bodies cannot include it in a credit score.

We are concerned at calls for a financial hardship arrangement (FHA) to be readily triggered in almost any circumstances where a consumer contacts their credit provider.

Consumer confidence and responsible lending will not be helped if massive numbers of Australians now find a hardship flag on their credit report. It would also significantly undermine the insights RHI brings to the lending process.

We therefore support ARCA's proposed framework for promises-to-pay vs FHA.

Two other provisions are of concern:

1. Clause 19.7 (a) (i) requiring a credit rating that is the "the one most often given to CPs" creates an uncertain metric. A better consumer outcome would be a credit rating that, in addition to using the broadest range of information, is "the one most accurate, relevant and up to date".
2. Clause 19.8(i) would, as drafted, effectively reduce the information a credit reporting body may choose to disclose to an access seeker. We recommend additional provisions to modify its impact.

BACKGROUND

Nearly a decade ago, the then Attorney General, Nicola Roxon. introduced into parliament a Bill for the introduction of comprehensive credit reporting, its detailed provisions the end result of an exhaustive process that had spanned an exposure draft bill, three parliamentary inquiries and a two-year investigative process by the Australian Law Reform Commission.

No member of parliament spoke or voted against the introduction of additional data elements, including repayment history information (RHI).

Most recently, parliament passed the National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Act 2021. Once again, parliament focused on credit reporting, this time on the question of requiring the Big 4 banks to contribute RHI.

Despite consistent and widespread support for the introduction of RHI, the flow of the new data element proved slow and just eight months after the start of comprehensive credit reporting, the Financial Systems Inquiry recommended the Government consider legislating to force the supply of comprehensive credit reporting information:

> *Support industry efforts to expand credit data sharing under the new voluntary comprehensive credit reporting regime. If, over time, participation is inadequate, Government should consider legislating mandatory participation*[1].

The Financial System Inquiry also found that additional credit reporting information was beneficial to consumers, reducing information imbalances between borrowers and lenders; facilitating competition among lenders and improving credit conditions for borrowers, including SME[2].

However, a practical obstacle began impacting the ability of credit providers to supply RHI, namely borrowers who reduced their payments during a period of hardship and how this was to be reported to a credit reporting body.

In 2016 this issue was raised by the Productivity Commission's draft report on Data Availability and Use[3] which noted that:

> *Greater clarity on how the hardship provisions should interact with CCR could help pave the way for greater industry participation in the scheme*

[1] Recommendation 20, Pg 190 https://treasury.gov.au/sites/default/files/2019-03/p2014-FSI-01Final-Report.pdf
[2] Pg 191 https://treasury.gov.au/sites/default/files/2019-03/p2014-FSI-01Final-Report.pdf
[3] Pg 143 https://www.pc.gov.au/inquiries/completed/data-access/thedraft/data-access-draft.pdf

The Productivity Commission further explored the issue of slow contribution in its final report[4], to which the Government immediately responded, using the 2017 Budget to announce it would mandate contribution of comprehensive credit reporting if supply did not meet a threshold of 40 per cent by the end of 2017.

By November 2017, the Government's patience ran out.

A mandatory credit reporting regime was to be introduced and the Attorney Generals Department subsequently tasked to advise on hardship flags.

The subsequent development of the legislation picked up additional concerns regarding security of information.

Once in parliament, further amendments were made by the Government that included strengthening the ability of a consumer to access their credit report and a new right, based on practices in New Zealand, for consumers to access their credit rating/score band. Equifax was supportive of these changes, having already been providing Australian consumers with multiple credit reports per year when requested and, in the instance of credit score band, comfortable with the concept based on our experience in New Zealand.

While there were other changes we did not support, the overall outcome of the legislation was to add greater accuracy and insight to credit risk assessment.

CREDIT REPORTING CODE CONSULTATION

"Promise to pay" Vs financial hardship arrangements

In the context of the Credit Reporting Code consultation, Equifax is aware of a push for financial hardship information to be triggered in lieu of "promises to pay" or indulgences.

The outcome would result in a massive number of Australian consumers having credit reports flagged with financial hardship information. This would not be a healthy outcome for Australia's credit risk assessment framework.

Financial hardship information should represent a significant data element on a credit report, one that according to the explanatory memorandum triggers a "*prospective lenders to make further inquiries in order to assess a consumer's situation holistically and potentially offer them a more suitable product*".

[4] https://www.pc.gov.au/inquiries/completed/data-access/report/data-access.pdf

The legislation already has significant restrictions on FHI. It can only be retained on a credit report for 12 months – half the time period for repayment history information. In addition, FHI cannot be disclosed in credit reporting derived information (e.g. scoring).

Support for an unreasonably low barrier for listing would also be at odds with the multiple requirements other data elements have before they can be reported to a CRB e.g. RHI has a 14 day grace period for late payments and when listing defaults there are time based requirements and provisions for notice to consumers prior to listing.

It is critical for any final provisions to reflect the importance successive Governments have placed on RHI. Financial hardship information should augment insights into a consumer's credit worthiness and not become a backdoor means of eroding or distorting the recording of repayment history information.

PROVISION OF CREDIT RATING (19.7)

The legislation introduced a new requirement for credit reporting bodies to provide consumers with their credit rating; while the term is not defined in the Act, the relevant provisions and explanatory memorandum are sufficiently clear.

It is proposed the Credit Reporting Code adds further definition to what is required:

> *19.7 For the purposes of Paragraph 19.4 and Section 20R of the Privacy Act and the meaning of 'credit rating' used in that section:*
>
> > *(a) if the business of a CRB involves deriving more than one form of credit rating or credit score for individuals (for example, where different credit ratings or scores are derived using calculations based on different sets of credit information):*
> >
> > > *(i) the credit rating required to be given under Section 20R is the rating that is derived from the calculation that is used to provide credit ratings or credit scores to CPs for new credit using the broadest range of information available to the CRB and, if there is more than one such calculation, the one most often given to CPs;*

The highlighted words have the potential to create confusion. Confining a credit rating to one based on calculations for "new credit" and "the one most often given to CPs" will create uncertainty e.g. the one most often given to CPs (by volume of enquiry? By absolute number of credit providers?). Additionally, the rollout of new score models invariably has varying lag in uptake by credit providers.

Greater certainty can be achieved by requiring credit ratings "***that use the broadest range of information available to the CRB and if there is more than one such calculation, the one most accurate, relevant and up to date***"

REPRESENTATION OF INFORMATION REPORTED TO A CRB (19.8)

The draft Code proposes to introduce a new provision not directly related to the new legislation.

At 19.8 (i) it is proposed the Credit Reporting Code extends its remit to cover how a credit reporting body discloses information to access seekers:

> *19.8 Where a CRB provides access to credit reporting information to an access seeker and that information includes repayment history information or financial hardship information:*
>
> > *(i) the information must not be given to the individual using codes other than those disclosed to the CRB by the relevant CP, other than repayment history information disclosed under subparagraphs 8.2(c)(i) and 8.2(d)(i) which may be represented in a graphical form (such as a tick);*

Equifax has been providing access seekers with reports that contain greater granularity than was originally reported by a credit provider, specifically where no RHI has been reported ("blanks"). Because Equifax is able to interpret the provision or non-provision of data, the report is able to give consumer's greater clarity, looking like this:

Period	Aug-19	Sep-19	Oct-19	Nov-19	Dec-19	Jan-20	Feb-20	Mar-20	Apr-20	May-20	Jun-20	Jul-20	Aug-20	Sep-20	Oct-20	Nov-20	Dec-20	Jan-21	Feb-21	Mar-21	Apr-21	May-21	Jun-21	Jul-21
Status	C	C	C	C	C	C	C	C	0	0	0	0	A	A	0	1	2	R	R	R	0	0	0	P

C - closed
A - not Associated
R - not Received
P - Pending - not yet received (applicable to last 2 months only)
T - Transferred

If the provision was introduced, an access seeker would now see this:

Period	Aug-19	Sep-19	Oct-19	Nov-19	Dec-19	Jan-20	Feb-20	Mar-20	Apr-20	May-20	Jun-20	Jul-20	Aug-20	Sep-20	Oct-20	Nov-20	Dec-20	Jan-21	Feb-21	Mar-21	Apr-21	May-21	Jun-21	Jul-21
Status									0	0	0	0			0	1	2				0	0	0	

We do not believe this is a desirable outcome. While we note the introduction of FHI will reduce the incidence of credit providers reporting blanks, should the view be taken there is a strong rationale to have a provision in the Code, we suggest the following:

> *19.8 Where a CRB provides access to credit reporting information to an access seeker and that information includes repayment history information or financial hardship information:*
>
> > *(i) The information must not be given to the individual using codes other than those disclosed to the CRB by the relevant CP, other than:*
> >
> > > *(a) repayment history information disclosed under subparagraphs 8.2(c)(i) and 8.2(d)(i) which may be represented in a graphical form (such as a tick); and*
> > >
> > > *(b) the addition of further codes and information for the purposes of clarity;*

3 August 2021

Australian Retail Credit Association (ARCA)

Via Email: [redacted]

CR Code Hardship changes - Public Consultation

Dear Sir/Madam,

As a major Credit Reporting Body in the Australian credit landscape, illion (formerly Dun & Bradstreet Australia and New Zealand) welcomes the opportunity to provide this submission to ARCA, regarding the Hardship regime and changes to be made to the Privacy (Credit Reporting) Code 2014 (Version 2.1) ('CR Code').

In the remainder of the document we have provided responses to the specific questions where illion wish to provide a specific comment.

Comments on the Changes to the CR Code:

8A.3. Hardship reforms – explaining the impact of arrangements to individuals

Question 33: "Should paragraph 8A.3 be more specific regarding what 'reasonable steps' involves? For example, should it say that the reasonable steps are only required if the credit provider has an electronic address to which they can send the information (or link to information)? If yes, please provide details of the cost and other operational issues of sending the information via non-electronic means".

illion believe that 'reasonable steps' should include some additional explanation, this could include details being made available on a credit provider's credit reporting policy as well as point in time notifications on a hardship letter is sent confirming a hardship arrangement.

8A.7. Hardship reforms – structure of financial hardship information

Question 39: "Do you agree with our proposal that the CR Code not provide for further types of FHI (e.g. natural disaster FHI)? If not, please provide your reasons and describe what other forms of FHI should be allowed?"

illion agree with the proposal on the basis that it would otherwise be too complex and may cause disputes as to the nature of the hardship when the reality is this has no bearing on an individual's credit worthiness.

19 Non-hardship related issues – access to credit reporting information

Question 44: Is there any reason to change paragraph 23.11? If so, please explain what that change should involve.

illion do not see any reason to change the reporting requirements.

19.7(a) Non-hardship related issues – access to credit reporting information

Question 46: Do you agree with our proposal to require the CRB to provide only the one credit rating? Is the description of that credit rating clear? If you answer no to either question, please provide reasons and suggested alternatives.

illion agree with the proposal, we believe there should be only one credit score available directly to consumers and that this should be the score that uses the most data available.

Question 47: Do you agree with our proposal to require CRBs to provide other credit ratings for free once every 3 months if the CRB otherwise seeks to charge access seekers for access?

illion do not believe that multiple scores should be available to consumers as this is only likely to create confusion.

19.7(b) Non-hardship related issues – access to credit reporting information

Question 48: Do you agree with this proposal? If not, please provide your reasons.

illion agree with the proposal.

19.7(c) Non-hardship related issues – access to credit reporting information

Question 49: Do you agree with the proposal to require CRBs to provide an explanatory statement? If not, please provide reasons.

illion will provide a score based on the information it holds.

Question 50: Do you agree with our proposal to not include further clarification on the circumstances in which a CRB may refuse to provide a credit rating under s20R(2)(d)? If not, please provide reasons and suggestions on what the CR Code may say.

As noted above, illion will always provide a score where it holds information in relation to the individual.

19.7(d)(i) – (v) Non-hardship related issues – access to credit reporting information

Question 51: Do you agree with our requirement for CRBs to use at least 5 bands? If not, please provide reasons.

Illion are in favour of the requirement to use at least 5 bands.

19.7(c)(iv) – (v) Non-hardship related issues – access to credit reporting information

Question 52: Do you agree with our proposal regarding the explanation a CRB is required to include with the credit rating (i.e. that it must relate to the band in which the individual's credit score sits, but does not need to be further personalised)? If not, please provide reasons and an alternative or additional proposals.

Yes, we agree with the proposal as we believe the explanation cannot be too detailed and should not be personalised and overcomplicate the supply of this information.

19.8 Hardship reforms – general

Question 53: Do you agree with our proposal that a credit report that includes FHI require a standardised explanation of that information? If not, please provide reasons.

The issue of hardship is best explained by CP's who own the relationship with their customers and are responsible for making the decision as to whether an individual is accepted as being in hardship or not.

While a credit report or CRB website 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. This is likely to become a point of frustration to consumers if they query differing interpretations and assessments from multiple credit providers with a CRB who will be unable to explain the CP's assessments.

Question 54: Do you agree with our consumer-facing descriptions of the meaning of 'V' and 'A'? If not, please provide alternatives.

illion supports there being a standard consumer facing definition and notes the critical requirement is that CP's interpret this consistently to avoid consumer frustration.

Comments on the Changes that are NOT being proposed:

Hardship reforms – application of hardship reforms to NCC exempt products

Question 58: Do you agree that the new hardship regime should apply to 'employee loans' (as described in subsection 6(11) of the National Consumer Code)? If not, please provide your reasons (including any potential unforeseen outcomes).

illion do not understand why this would be excluded in terms of responsible lending where a benefit is the avoidance of consumer hardship, the fact that a loan is to an employee would not appear to prevent this risk.

Hardship reforms – reporting on FHI

Question 59: Do you agree that the CR Code should not impose a reporting regime on how credit providers 'use' FHI in their credit application and management processes? If no, please provide reasons and suggestions as to what that reporting should involve?

illion agree with the proposal.

Hardship reforms – additional restrictions on disclosure and use

Question 60: Do you agree that the CR Code should not introduce additional restrictions on the use and disclosure of FHI? If no, please provide reasons and suggestions for what those restrictions should say.

illion agree with the proposal.

Should you have any questions or concerns arising from this submission, please feel free to contact me at any time via [redacted].

Yours sincerely,

[redacted]

[redacted]
General Manager, Consumer Bureau and AML

TMBL Feedback on CR Code Hardship Changes

Steven Kennewell <[redacted]>

Mon 9/08/2021 4:57 PM

To: **CR Code** <[redacted]>
Cc: Michael Blacker <[redacted]>

1 attachments (481 KB)

Teachers Mutual Bank Ltd Response – CR Code Hardship Changes Part B.pdf;

Apologies for late reply on feedback to CR Code changes

Whilst TMBL is generally supportive of the changes, we note the significant impact the code changes will have on the Bank's Collections team, particularly the revision of team roles with the expected increase in FHA, and the review of all processes and procedures.

Attached is feedback on specific questions asked in Part B of the consultation document.

Please contact me with any questions.

Regards

Steven Kennewell Senior Credit Risk Advisor

D: [redacted] **W:** tmbank.com.au
PO Box 7501, Silverwater NSW 2128

TEACHERS MUTUAL BANK LIMITED

Firefighters Mutual Bank | Health Professionals Bank | Teachers Mutual Bank | UniBank

Teachers Mutual Bank Ltd Response – CR Code Hardship Changes Part B

Question

1. Agree
2. No reason for 20.1 to be removed
3. Agree with use of terms described
4. No additional commentary
5. Agree
6. Agree
7. Agree
8. Agree with approach in subparagraph a-d
9. Agree. Number of examples sufficient to provide general guidance
10. Agree. RHI should be reported as usual whilst FHA is assessed
11. Reference is clear
12. Subparagraph is clear, and reflects current process when hardship request is denied
13. 'Time to sell' arrangements should not be treated as FHAs all the time. Decision on whether borrower enters into a FHA will result from discussion with CP and borrower, and not automatically based on the fact of a 'time to sell' arrangement
14. Not required as current practice already gives CP and borrowers option to determine if FHA is required or not
15. Agree
16. Agree
17. Specific provision is not required, any 'backdating' process will depend on case by case circumstances
18. Agree. Any change to require agreement from more than one borrower makes process onerous and delays borrower entering into a FHA
19. No refinements required
20. No additional comments
21. Do not consider any of the alternative options appropriate. Alternative options may potentially put borrowers off from making a hardship request by adding additional onerous requiements. Current practices of notifying all borrowers once a FHA has been agreed upon should suffice.
22. Agree
23. No additional comments
24. Generally agree with proposal
25. No further clarification required
26. Clarification of when there is an 'agreement' is too prescriptive, current general wording provides some flexibility
27. No additional comments
28. No additional comments
29. Further clarity on 'mismanagement of funds' is not required. CP can always make further enquires with borrower for reason for arrears and determine it meets definition of mismanagement of funds
30. No additional comments

31. No additional comments
32. Agree
33. No paragraph 8A.3 should not be more specific. ‘reasonable steps’ should remain as a general term to allow CP to cater to individual circumstances
34. Wording for exception in paragraph 8A.3€ is satisfactory
35. Agree
36. 36. Agree, generally only one FHI-V recorded
37. Agree, would advise borrower earlier in the process
38. Agree
39. Agree
40. Agree
41. No other transitional issues
42. Agree
43. No comment – no impact on CP
44. No change required
45. No
46. Agree
47. Agree
48. Agree
49. Agree
50. Agree
51. Agree
52. Agree
53. Agree
54. Agree
55. No comment
56. No comment
57. NA
58. Agree
59. Agree
60. Agree

Michael Blyth

From: Steven Kennewell <[redacted]>
Sent: Monday, 23 August 2021 3:57 PM
To: Michael Blyth
Cc: Policy; Michael Blacker
Subject: RE: CR Code update - redrafted paragraph 8A.2

Hi Michael

TMBL have no issue with the proposed changes. The proposed simplified provisions are less complex and easier to understand, and are an improvement over the original wording

Regards

Steven Kennewell Senior Credit Risk Advisor

D:[redacted] **W:** tmbank.com.au
PO Box 7501, Silverwater NSW 2128

TEACHERS MUTUAL BANK LIMITED

Firefighters Mutual Bank | Health Professionals Bank | Teachers Mutual Bank | UniBank

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From: Michael Blyth <[redacted]>
Sent: Wednesday, 18 August 2021 1:18 PM
To: Michael Blyth <[redacted]>
Cc: Policy <[redacted]>
Subject: CR Code update - redrafted paragraph 8A.2

Hi All

Thanks to everyone who has provided feedback on the CR Code variation public consultation. We're reviewing that feedback and, at this stage, are looking to submit the application by the end of August.

'Promise-to-pay vs FHA' (paragraph 8A.2)

We have had broad support for the policy intent behind the 'Promise-to-pay vs FHA' provisions in 8A.2. However, there has been feedback that the paragraph was overly technical/complex.

On that basis, we have sought to redraft and simplify paragraph 8A.2 (attached). To confirm, this redraft is not intended to change the substantive effect of the paragraph.

However, the redraft emphasises that

- the provisions create a *presumption* only (and establish ways for those presumptions to be displaced);
- the starting point for 'catch-up arrangements' is that they are *not* a FHA (but, again, this presumption can be displaced).

FHI technical provisions (paragraph 8A.1(a) – (e))

We also sought to simplify these provisions.

Note that:

- We are considering removing subparagraph 8A.1(d) which will change the approach to FHAs agreed during the grace period (but only for CPs who hold reporting of RHI until after the grace period)
- We have removed 8A.1(e) which set out what should be reported if there are multiple FHAs in one month. Please note, we do not consider that this changes the legal impact (i.e. paragraph 8A.1(e) simply confirmed the effect of the law). We do not consider that it is possible for a CP to simply take a "latest agreed" approach.

NEXT STEPS: Please let me know if you have any comments or concerns. If you consider that the redrafted provisions are an improvement, we would appreciate receiving that feedback (as it will assist the application process to the OAIC).

Kind regards

AUSTRALIAN RETAIL CREDIT ASSOCIATION

MICHAEL BLYTH
Head of Government, Regulatory & Industry Affairs
[redacted]
GPO Box 526, Melbourne VIC 3001
www.arca.asn.au | www.creditsmart.org.au
CREDITSMART CLEARER CREDIT HISTORY

Australian Banking Association

11 August 2021

Mr Michael Blyth
Head of Government, Regulatory & Industry Affairs
Australian Retail Credit Association

Via email: [redacted]u

Dear Mr Blyth

2021 Credit Reporting Code consultation

The Australian Banking Association (**ABA**) welcomes the opportunity to provide feedback on the draft changes to the Credit Reporting Code (**the Code**) proposed by the Australian Retail Credit Association (**ARCA**).

Our position

The ABA acknowledges the significant undertaking that ARCA has assumed in its role as Code Developer to consult upon the changes required by the *National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Act 2021* (**the Amending Act**).

Central to the consultation process are tensions around the disclosure of financial hardship information, as well as the scope of what constitutes a financial hardship arrangement. The results of this debate are likely to have important implications for customer's perception of the credit reporting system, including whether individuals feel comfortable coming forward to discuss repayment difficulties with their bank.

Recent polling conducted by YouGov found that 70 per cent of Australians wanted their bank to tell them how to avoid adverse information on their credit report.[1] ABA members are cognisant of the need for banks to play an important role in making sure the credit reporting system is fair, that it does what it is intended to do, and that it is easily understandable to customers. It is in this context that we have reviewed the consultation materials and provided recommendations to improve the design and operation of the credit reporting framework.

Key recommendations

The ABA provides the following recommendations and observations:

1. **Promises to pay vs. financial hardship arrangements**: We are concerned that ARCA's proposal to define financial hardship arrangements (FHAs) is overly prescriptive and conflicts with elements of the *National Consumer Credit Protection Act 2009* (NCCP). We suggest that, instead, credit providers should seek to rely upon the existing provisions under the NCCP and the definition of FHA under the *Privacy Act 1988* (Privacy Act) to guide their behaviour.
2. **Backdating the start of a financial hardship arrangement:** The ABA does not support the approach allowing backdating of a financial hardship arrangement. In our view, the CR Code should not include provisions that support a situation where a credit provider "may excessively delay agreeing to such an arrangement". It is likely that such a delay would be in breach of section 72 of the NCCP and reportable as such.

Australian Banking Association

3. **Payment test & catch-up periods:** The ABA is supportive of the proposal for a payment test period or catch-up period to be treated as a financial hardship arrangement where the arrangement immediately follows, and is in response to, an earlier financial hardship arrangement.
4. **Treatment of joint accounts where abuse is present:** We are supportive of the interim proposal that ARCA has proposed to take extra care of customers experiencing family and domestic violence (FDV). The ABA looks forward to participating in the broader industry conversation about the longer-term consumer protections that could be enacted to protect these customers.

Further commentary on the above issues and others are outlined in Appendix A to this letter. We look forward to remaining involved in the Code consultation as it progresses.

Kind regards

[redacted]

Jessica Boddington
Policy Director, ABA
[redacted]

About the ABA

The Australian Banking Association advocates for a strong, competitive and innovative banking industry that delivers excellent and equitable outcomes for customers.

We promote and encourage policies that improve banking services for all Australians, through advocacy, research, policy expertise and thought leadership.

Australian Banking Association

Appendix A: Commentary on consultation paper

The ABA provides the following commentary on several key issues outlined in the consultation paper.

Promises to pay vs. financial hardship arrangements

The most important issue identified in the consultation process so far has been the distinction between what constitutes a *promise to pay* versus what constitutes a financial hardship arrangement. There has been a wide range of views on how that distinction should be described and, therefore, what proportion of 'arrangements' should fall into either category.

The ABA understands that some consumer representatives have advocated that the CR Code should err on the side of characterising all alternative payment arrangements as financial hardship arrangements (with the effect that *promises to pay* would no longer exist). The ABA is opposed to this notion. It is important to recognise that missed payments can occur for a large variety of reasons not related to hardship. It would be potentially confusing and distressing for customers to be placed by default on a financial hardship arrangement each time they agree to make up a missed payment with their bank. It is therefore vital that there is some flexibility for banks and customers to agree to alternative payment terms in cases where hardship is not present.

ARCA proposal:

It is ARCA's view that a financial hardship arrangement must reflect a mutual understanding between the individual and the credit provider. In practice, 'arrangements' may be put in place between an individual and its credit provider in relation to the individual's overdue payments that do not involve a mutual understanding (and are, therefore, not a financial hardship arrangement). These are sometimes called *promise-to-pay* arrangements.

ARCA has set out several presumptions for when an arrangement that is put in place involves a 'mutual understanding' based on the individual's circumstances. In each case, it has made clear that the presumptions can be displaced based on the discussions between the individual and its credit provider.

An example of the presumptions proposed include the following:

8A.2 … a temporary relief or deferral FHA is made if, following a discussion between the individual and the CP, an arrangement is put in place in relation to payments owed by the individual that are or will become overdue in the following circumstances: …

b) the individual is to pay at least the payments (as determined by reference to the terms of the consumer credit) as they fall due (without immediately paying all amounts that are currently overdue) and:

i) the individual is to start making those payments within the next month…

c) the the individual is not to pay the payments (as determined by reference to the terms of the consumer credit) as they fall due for a period longer than one month and none of the following applies:

i) the arrangement is a variation FHA.

ii) the CP reasonably believes that the individual's inability to meet their obligations in relation to the consumer credit is the result of a mismanagement of funds in the short term…

In addition, ARCA has sought to prescribe in paragraph 8A.5 the types of credit variations that might qualify as financial hardship arrangements. These include, amongst others:

- *reducing the monthly payment obligations that are to fall due under the consumer credit … so that if the individual satisfies those obligations (and not the previous obligations) the CP would treat the consumer credit as not being overdue …*
- *treating payments that are already overdue in relation to the consumer credit as being no longer overdue (without the individual paying those overdue amounts)*
- *extending the term of the consumer credit ….*

The ABA understands that ARCA was motivated to propose new presumptions regarding when a financial hardship arrangement has been formed due a view that there is "the absence of a clear 'framework' under the [*National Consumer Credit Protection Act 2009* (**NCCP**)] for when a 'hardship notice' has been given by an individual". While ARCA acknowledges that the NCCP provisions do not directly impact on how the Privacy Act hardship reporting regime will operate, it is concerned that this lack of clarity and consistency would jeopardise the reliability of hardship data reported under CCR.

The ABA is strongly opposed to the view that the CR Code must introduce new presumptions as to when a hardship arrangement has been formed over and above what is prescribed under the NCCP and section 6QA of the Privacy Act. In our view, rather than "raising the bar" across the credit industry, it stands to create a parallel regime for hardship that may result in some smaller credit providers becoming non-compliant with the NCCP. This is because, despite the intention that these rules create a presumption only, there is a risk that certain providers may create systems that 'automatically' allocate customers into treatment as FHAs or non-FHAs depending on their expected timeline for resuming repayments.

Whilst ARCA's intent to clarify the hardship definitions are well-intentioned, at a practical level the proposal to prescribe the types of assistance that can be offered and when they can be offered is inconsistent with the pre-existing and well-established approaches enshrined in the NCCP. This legislated approach dictates that credit providers must assess whether the customer has experienced an "unexpected event" that has affected their ability to pay. The ABA suggests that, if it is a concern that the current approach to hardship differs substantially across the industry, it is a matter for ASIC and credit providers to ensure that the current NCCP requirements are clarified and enforced rather than creating new presumptions through the CR Code. We offer our assistance to ARCA in facilitating these discussions between industry, the Government and relevant regulators.

Another example of what ABA members believe is unnecessary prescription going beyond the legislative definitions is the proposed position under 8A.2(c)(ii) that 'mismanagement of funds in the short term' is presumed to not be a situation of financial hardship. In the view of the ABA, the 'mismanagement of funds' can involve overcommitment, including where a customer is struggling to repay multiple debts, potentially across a number of credit providers. That situation would often justify treatment and reporting as that customer being in hardship. The term 'mismanagement of funds in the short term' is therefore open to varying interpretations. It also illustrates again why undue prescription in the CR Code on what is or is not an FHA should be avoided.

Backdating the start of a financial hardship arrangement

ARCA proposal:

8.A.1(e) … the commencement date of a financial hardship arrangement may be backdated (to no earlier than the day the hardship request was made by the individual) if the CP has excessively delayed agreeing to the arrangement (having regard to the time that a CP acting reasonably would have taken and any conduct of the individual that contributed to the delay)…

The ABA does not support the inclusion of the above wording in the CR code, on the basis that it is unclear where and why 'backdating' may be required. In our view, the CR Code should not include provisions that support a situation where a credit provider "may excessively delay agreeing to such an arrangement". It is likely that such a delay would be in breach of section 72 of the NCCP and reportable as such.

Payment test and catch-up periods

A key issue for all stakeholders is whether an FHA is formed when an arrangement is made for the individual to pay at least their minimum monthly payments on an ongoing basis, without immediately paying accrued arrears.

Broadly, the arrangements in question can occur in two situations:

- ‘Catch-up period’: the individual is in arrears and agrees to make payments that are greater than their minimum monthly payment in order to make up the missed payments.
- ‘Payment test period’: the individual is in arrears and has agreed to make payments that are equal to their minimum monthly payments on an ongoing basis. The credit provider has agreed to capitalise any arrears that remain after the individual has maintained those payments long enough to demonstrate they are back on track (usually 6 months).

ARCA proposal:

A payment test period or catch-up period can be treated as a financial hardship arrangement where the arrangement immediately follows, and is in response to, an earlier financial hardship arrangement.

The ABA is supportive of ARCA’s proposal. This scenario is a common one for many consumers being managed by many credit providers’ hardship teams. For example, banks may offer payment test periods to customers after a non-contractual FHA to assess whether the customer is able to get ‘back on track’ with their payments before a formal contract variation is agreed to.

The ABA considers that it is important that consumers remain incentivised to come forward to speak to their bank when they are in financial hardship. It is for this reason that, notwithstanding the legal interpretation of the Amending Act, we put forward that it is preferable for credit providers to treat customers as being in an FHA in the circumstances outlined above. This is so that customer can avoid having negative RHI recorded on their account if they speak to the bank early and comply with the terms of any payment agreement reached.

Treatment of joint accounts where abuse is present

Consumer representatives have raised concerns that the introduction of FHI into the credit reporting system may lead to domestic abuse. Namely:

- **Economic coercion:** an economically controlling person may seek to interfere with another person’s ability to obtain hardship assistance. For example, an ex-partner may seek to block an FHA so that the other person’s credit report will show missed payments and, as a result, make it more difficult to obtain finance to buy out the jointly owned home.
- **‘Triggering’:** a request for financial hardship assistance by Account Holder A could act as a ‘trigger’ to Account Holder B. That is, an economically, and potentially violently, abusive person may become upset if their credit report shows FHI because of the other person seeking assistance.

ARCA proposal:

To prevent the above scenarios from occurring, ARCA has proposed the CR would specify that:[1]

- an FHA may be formed at the request of one borrower to the joint account, and
- any other joint account holders may avoid having any FHI reported in their credit report in respect of a temporary relief or deferral by meeting their contractual obligations.

In addition, as an interim measure:

- an individual who self-identifies as being potentially subject to domestic abuse can request that RHI and FHI be suppressed during an FHA.

The interim measure has been proposed as an additional consumer protection whilst an appropriate longer-term solution is determined as part of the Independent Review of the CR Code. As ARCA has noted, the temporary interim proposal would continue an existing industry practice of hardship suppression that has been in place for many years.

The ABA is supportive of ARCA’s proposal on the basis that:

[1] ARCA, 5 July 2021, *CR Code Hardship Changes – Key Stakeholder Consultation, Part A,* pp. 6-7.

- it conforms to the views expressed by AFCA that a credit provider should not refuse to agree to a financial hardship arrangement requested by one borrower simply because the other borrower(s) have not agreed or consented to the form of assistance
- the measures should be sufficient to avoid new incentives for FDV abusers to perpetrate violence, and
- the interim approach is a simple solution that can be implemented to protect customers whilst suitable longer-term arrangements are consulted upon.

We note, however, that explicit approval would need to be granted by the Government for the interim approach to be adopted by the largest banks (given the mandatory legislated nature of comprehensive credit reporting). The ABA offers its assistance to participate in these discussions, as needed.

Other comments

Treatment of multiple FHAs

ARCA proposal:

8.A.1(f) … if two or more financial hardship arrangements are active on the assessment day, the financial hardship information and repayment history information that may be disclosed is to be determined by reference to the financial hardship arrangement that requires the lowest payment obligation for that month…

The ABA is not supportive of this approach on the basis that:

- it would likely be difficult for the credit provider to assess and keep track of which arrangement yields the lowest payment obligation each month when there are two or more financial hardship arrangements in place, and
- it may lead to greater customer confusion if the indicator is moving back and forth between the FHIs each month on the customer's credit file.

Clarity is required over status of technical standards

The Amending Act outlines the mandatory credit information that an eligible licensee must supply to credit reporting bodies. These supply requirements are defined under s133SQ as containing any information required by the CR Code, legislative instrument or technical standards approved by ASIC.[2] The ABA seeks to confirm whether ARCA seeks to gain ASIC's approval through the release of a technical standard for any data exemptions contained in the current Principles of Reciprocity and Data Exchange (**PRDE**).

Need for further examples

The ABA respectfully requests that ARCA provide further illustrations and explanations of the integration of proposed reporting changes into the various iterations in payment cycles and reporting periods. These examples are required for industry-wide calibration and consensus – particularly from a customer fairness perspective.

As a specific example, a customer may either benefit from, or be impacted by, the timing of their regular payment due date based on proposed expectations of the reporting process. This is because the customer may be reported as being in an FHA if the arrangement was approved prior to the repayment due date for that month. However, if the approval came after the payment due date, the customer would be reported as having adverse repayment history information (RHI).

[2] 133CQ - Meaning of supply requirements 31 (1) Information is supplied in accordance with the supply 32 requirements if the supply is in accordance with: 33 (a) the registered CR code (within the meaning of the Privacy 34 Act 1988); and (b) any determination under subsection (2); and 2 (c) any technical standards approved under subsection (4).

Australian Institute of
CREDIT MANAGEMENT

PO Box 64
St Leonards NSW 1590

16 August 2021

Michael Blyth
Australian Retail Credit Association
By email: [redacted]

Dear Michael

Credit Reporting Code - Hardship changes

The Australian Institute of Credit Management (AICM) appreciates the opportunity to participate in the consultation on changes to the Credit Reporting Code (CR Code).

AICM represents over 2,600 credit professionals who contribute to a resilient economy and drive successful business outcomes through

- mitigating risk;
- maximising growth; and
- applying sound credit principles and practices.

Without our members, businesses are exposed to reputational damage, poor cash flow management and inefficient processes. Their employers are at risk of breaching regulatory requirements and not getting paid for hard won sales and services delivered.

Our members are the custodians of cash flow. They assess credit risk in all sectors and manage credit terms for the supply of goods, services and finance.

AICM welcomes the changes to the code which address inconsistencies with reporting requirements and believes the approach taken will improve the accuracy of information available in the credit reporting system and appropriately balances the needs of credit providers and impacts on individuals.

Below we provide comment on key elements of the code.

Promise-to-pay vs Financial hardship arrangement (FHA)

AICM supports the intention of legislation to not prescribe what a hardship arrangement is and what a promise to pay is. Therefore, it is appropriate that the CR code does not prescribe a differentiation.

The difference between a promise-to-pay and a FHA is best determined based on communication between creditor and consumer and the known circumstances at the time.

Treatment of joint accounts

AICM supports the proposal that an FHA may be formed at the request of, and with the agreement of, one borrower only.

This allows credit providers to effectively meet reporting obligations and support individuals in need of timely hardship support.

AICM confirms that while a credit provider will not be required to obtain the consent of other borrowers, credit providers are likely to make reasonable attempts to obtain this and choose to inform the other borrowers of the financial hardship agreement.

Detailed code vs understandability

AICM notes that while the code is not structured for easy interpretation by consumers, it is an appropriate format for use by signatories to the code as it provides technical clarity, aids uniform compliance with the code and ensures the code achieves its intended goals.

We understand ARCA and others intend to provide supporting documents explaining the code for consumers. AICM welcomes the opportunity to support this work by contributing experience of its members who have daily hardship conversations with their customers.

Finally, on behalf of AICM members I thank the team at ARCA for its work developing this code and for the extensive efforts to consider and balance all relevant views.

We welcome the opportunity to further contribute to the development and implementation of the code.

Yours sincerely

Nick Pilavidis
Chief Executive Officer
Australian Institute of Credit Management
[redacted]