Joint Consumer Submission by the

- **Australian Communications Consumer Action Network**
- **Australian Privacy Foundation**
- **Consumer Action Law Centre**
- **Consumer Credit Law Centre SA**
- **Consumer Credit Legal Service WA**
- **Financial Counselling Australia**
- **Financial Rights Legal Centre**

to the Attorney-General's Department Review of financial hardship arrangements, 28 March 2018

Non-confidential submission

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Introduction

Thank you for the opportunity to comment on the Review of financial hardship arrangements and how they interact with the consumer credit reporting (**CCR**) framework. We will first address our main areas of concern regarding whether the regulatory framework should be amended to credit reports to reflect whether a consumer is in hardship. We will also address the specific questions provided in the Discussion paper.

Recommendations

1. **Hardship information should *not* be able to be recorded on consumer credit reports.**
2. **Banks need to immediately improve their responsible lending practices with existing sources of information including the new datasets which be incorporated into credit reports as a part of CCR, and should stop insisting that hardship flags are necessary for proper responsible lending assessments.**
3. **This Review should not recommend that hardship information should be allowed to be recorded on credit reports prior to the conclusion of the Royal Commission and the implementation of any relevant recommendations.**
4. **The current comprehensive credit reporting system should be allowed to function for at least three years, followed by a comprehensive review before any additional categories of information (hardship) are added to consumer reports. There should be demonstrable evidence that adding hardship information to credit reports is necessary for responsible lending before any additional reforms take place.**
5. **An independent comprehensive review must be conducted of the entire credit reporting system in 2022 before any additional reforms are recommended.**
6. **This Review must clarify how RHI should be reported for customers in financial difficulty. If such clarification is outside the AGD's jurisdiction than this Review must strongly recommend which regulator or regulators have the task of clarification and by what deadline.**
7. **Greater guidance is needed from regulators like ASIC, OAIC and APRA (preferably after consultation with stakeholders and each other) about how RHI should be reported for customers in financial difficulty, as well as written position statements and determinations from FOS (soon to be changing to AFCA).**
8. **Clarification in the Privacy (Credit Reporting) Code as well as the PRDE is needed for how hardship arrangements should be reported.**

9. Information about the reasons for hardship should absolutely NOT be included on consumer credit reports.

10. If the Attorney-General's Department is of the view that hardship information should be reported, then we are of the firm view that it should be a separate category of information with unique rules, not simply part of RHI. Hardship information should have its own clear rules in relation to collection, use and retention periods.

    a. Hardship information should not be recorded solely because a person has given a hardship notice.

    b. Hardship information should have a different retention period to RHI. It should be for the length of the arrangement, or six months (whichever is the shorter). If the consumer defaults on any arrangement, their RHI should be reported against the arrangement.

    c. Hardship information should only be visible to lenders assessing new applications for credit, not lenders who are accessing credit reports for credit management purposes.

    d. Using hardship information to call in or cancel another credit facility that is no in default should be prohibited.

11. If hardship is to be included on a credit report then we propose the following regulatory parameters should be introduced as a minimum:

    a. Only credit providers who are assessing new consumer credit applications should have access to hardship information, not existing lenders who might be monitoring a customers credit report for other permitted reasons.

    b. Credit providers should be prohibited from using hardship flags to price credit.

    c. The *National Consumer Credit Protection Act* should make it clear that lenders can only lend to consumers with hardship flags where:

        i. The consumer can demonstrate the cause of hardship no longer applies; or

        ii. The new credit contract is part of a consolidation or refinance that would reduce the consumer's repayments to an amount they could afford without hardship AND reduce their overall cost of credit.

    d. Hardship indicators would also need to be prohibited from being included in credit scores to the extent that this would defeat the previous principles.

12. Hardship information must not be made available to existing credit providers for credit management purposes and that the use of hardship information to call in other credit facilities that are not in default must be strictly prohibited.

Main areas of concern

Hardship flags or any other additional indicator of hardship should not be permitted to be shared as part of the credit reporting system

Consumer advocates strongly submit that any additional information permitted to be shared or held as part of the credit reporting system is inherently a further privacy intrusion and must be clearly justified in the public interest. This idea is supported by the Australian Law Reform Commission (**ALRC**) findings in their 2008 report which are referenced by the discussion paper for this review.[1]

Consumer advocates strongly oppose any extension of the *Privacy Act* to allow this new class of information to be shared because we think there are strong public interest arguments against sharing this type of information that outweigh the arguments in favour of incorporating hardship flags into credit reports, including that:

- Hardship flags will discourage consumers from seeking hardship;
- Customers in hardship will be pushed to riskier and more predatory lending options, or other drastic options to make ends meet;
- Hardship flags will prevent some customers in hardship from refinancing or restructuring to improve their situation;
- Hardship flags may lead to customers getting credit on worse terms;
- Consumers may find credit facilities cancelled once other lenders see hardship information listed on a credit report;
- Consumers may have their credit scores negatively impacted by hardship information, with potential implications for their access to essential services;
- The ability to report hardship information will not result in fair and consistent reporting;
- The new datasets already permitted (particularly current liability information) will greatly enhance responsible lending without the need for hardship flags.

Consequences of incorporating hardship flags into credit reports:

1. ***Hardship flags will discourage consumers from seeking hardship***

If hardship information is reported through the credit reporting system there is a genuine risk that consumers will be discouraged from contacting their lender when they are in financial

[1] Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108, 2008 p1840. Para 55.161 https://www.alrc.gov.au/publications/report-108

difficulty. This is already occurring as lenders seek to grapple with the transition to comprehensive credit reporting, as demonstrated by Sally's case study below. Talking to your lender about hardship is already a very challenging and even humiliating step to take. Callers to the National Debt Helpline regularly enquire about the impact on their credit report when having conversations about hardship.

Consumer advocates argue that Australia currently has world's most robust financial hardship laws in place, and over the last seven years those laws that have been supported by industry, consumers groups and Government. There has been considerable work by major lenders to have best practice policies in place for customers experiencing financial hardship. It is very disheartening to think that we are now considering undoing all that good work by consumers and industry alike because of additional reforms to credit reporting, especially when the last raft of credit reporting reforms have not even been tested in practice. Consumer advocates cannot emphasise enough what a bad outcome it would be for Australia to undermine financial hardship protections.

Case study –Sally's story

Sally called the National Debt Helpline in Victoria after she was made redundant at work. Sally told us that she has a $315,000 mortgage and $5,000 credit card with a BANK. While Sally says she is currently up to date with payments, she has no active income and her redundancy payment will only cover the next 6-8 weeks of repayments. Sally plans to go back to work but at a reduced capacity as she is caring for her daughter. Our financial counsellor suggested Sally contact the bank to seek a hardship arrangement in the short term to provide some breathing space.

Sally called back a few days later after having contacted the BANK hardship department. Sally said that she was told the hardship arrangement would be listed on her credit file, so she terminated the hardship inquiry. Sally told us that she was trying to be proactive and get things in place but the threat of the hardship variation being listed made her very uncomfortable and worried about the impact on her future.

Source: Consumer Action Law Centre

2. ***Customers in hardship will be pushed to riskier and more predatory lending options, or other drastic options to make ends meet;***

Consumer advocates are very concerned that people in financial difficulty will be driven to take other more desperate measures rather than ask for hardship assistance. For example, driven by fear that telling their bank they are in financial difficulty, customers might instead decide to take out pay day loans, refinance with predatory lenders, go without essentials such as adequate food or heating, or try to access their superannuation early to pay down arrears. Each of these options would lead to bad financial and social outcomes for people already in hardship.

Case study –Jessica's story

Jessica, an Aboriginal woman with 4 children, found herself in severe financial hardship when her relationship of ten years broke down. At the same time as the separation she lost her job and discovered their financial situation was very different to what she had been led to believe. Frightened by debt collection calls and embarrassed about her situation, she applied for early access to her superannuation, rather than talking to her lenders to get some breathing space, or getting assistance from a financial counsellor. This withdrawal of her superannuation will have a significant effect on her retirement income and was an expensive option as it was taxed at 21%.

Source: Financial Rights Legal Centre

Case study –Prakesh's story

Prakesh had nearly $100,000 in credit card debt and was behind on all his payments. Desperate for a solution he refinanced all his credit cards onto a home loan with a second tier lender at a higher interest rate than his bank mortgage. Now 12 months later he is in arrears on his home loan and will no doubt have to sell the family home. After the costs of refinancing, and 12 months at a higher interest rate, he owes considerably more than before he refinanced.

Source: Financial Rights Legal Centre

See also Linda's story below.

3. ***Hardship flags will prevent some customers in hardship from refinancing or restructuring to improve their situation.***

    a. *Hardship flags will prevent consumers in hardship from being to refinance to repayments they can actually afford*

In the wake of the Global Financial Crisis, many consumers were stuck in high priced, non-bank mortgages with interest rates of 14% or more. At that time the Reserve Bank had been slashing the domestic cash rate and many major banks had reduced their rates to 8% or less. Consumers found themselves with insufficient income to meet their repayments at 14%, but could comfortably have done so at 8%. Unfortunately, many had already had defaults listed on their credit reports as a result of arrears on their mortgages and were no longer considered eligible to refinance. As a result they were forced to sell their homes. Consumers that were able to refinance before negative information was recorded on their credit files were much better off in the long run.

Consumer advocates fear that having a hardship flag placed on a credit report when people are in difficulty would prevent them from genuine refinancing options which would not only reduce their repayments to a manageable level, but also reduce their overall cost of credit.

b. *If consumers are no longer in actual financial hardship they should not be prevented from improving their situation with additional credit.*

Consumer advocates believe it would be unfair to prevent people from accessing credit once their hardship situation has been resolved. We are concerned that hardship flags would prevent consumers from accessing finance even when they are no longer in hardship, either because the flag stays on their report for too long or because lenders have internally recorded it even though the flag has since been removed. This outcome will likely to drive people to avoid working with their lenders when they are in financial trouble, and could be to the detriment of lenders and their customers.

Case study –Luke's story

Luke had been unemployed for some months when he sought a hardship arrangement on his credit card. He arranged to pay reduced repayments for 3 months. At the end of the 3 months he had found another job but was waiting to start work. He contacted his lender and made an arrangement to start paying off the arrears in addition to his normal repayments. He met the new arrangements and some months later was close to having caught up.

At that time he was offered an even better job with a higher salary but he would need to get a car loan as the new position did not involve a company car (it did provide a car allowance he could use to meet the repayments). He applied for and received the car loan, allowing him to increase his income and pay not only the new car loan, but the original credit card even faster.

Had his original hardship arrangement been listed on his credit report he could easily have been rejected for the car loan, to the detriment of all concerned.

Source: Financial Rights Legal Centre

4. *Hardship flags may lead to customers getting credit on worse terms*

Consumer advocates believe there is a big risk that people who have been flagged as experiencing financial hardship will be charged more for credit once lenders can see hardship information on their credit reports, making further hardship a self-fulfilling prophecy. More risk-based pricing is an expected outcome of comprehensive credit reporting. The credit industry strongly argues that the predictive value of repayment history information (**RHI**) is paramount to the whole comprehensive credit reporting regime.

Consumer groups have serious concerns that consumers showing an erratic repayment history won't be protected from new finance they cannot afford but instead will be offered more expensive finance. This will not only exacerbate inequality as those customers that have insecure income or other financial difficulties are deemed to be higher risk will pay more for credit. They will also be at greater risk of default because they are now expected to meet even higher repayments than their low risk counterparts.

The same argument applies to a hardship flag, although this is in many ways this would be worse because these are people who have firstly, identified a good reason for their payment difficulties and secondly, are working with their lender to rectify their situation. People who are in hardship, or have been in temporary hardship but are now back on track, may simply be offered more expensive credit, which does not advance responsible lending, and simply makes it more and more likely that people who have been in financial hardship will experience further hardship in the future.

5. ***Consumers may find credit facilities cancelled once other lenders see hardship information listed on a credit report***

Consumers in hardship regularly try to manage their hardship strategically. This may involve for example, paying their home loan as a priority and defaulting on unsecured credit, or identifying one credit card to keep up to date so that they maintain some access to credit while they seek hardship on other accounts. If consumers become aware that applying for hardship with one lender will alert their other creditors to their predicament they will go to considerable lengths to avoid disclosing their hardship to any lender.

Lenders already use default information on credit reports to manage customer accounts. For example, lenders may note that a consumer has defaulted on a consumer credit account with another lender and reduce their credit limit or cancel their card even though they are not in default on that particular account.

Lenders have the ability to use credit eligibility information under section 21H of the *Privacy Act*. Section 21H allows a credit provider to use information on credit reports for internal management purposes. Permissible uses include the lender's decision to manage its relationship with a customer, or to manage its business as a whole (for example, managing the business's overall level of risk exposure). The *Privacy Act* also allows lenders to use credit reporting information to assist a consumer to avoid defaulting (21H(5)). All of these permitted uses would allow a lender to justify using hardship information to cancel a credit facility.

A powerful example of how devastating this consequence of reporting hardship information could be is a customer entering into a pregnant pause arrangement following the birth of a child (this is a form of financial hardship). If that hardship information was to be listed on her credit report then other credit providers could cancel other credit cards upon seeing it. Having existing credit facilities cancelled (especially without much warning) could lead to terrible consequences if someone has a lot of bills or services set up as direct debits from that credit facility. Consumers regularly pay bills with direct debits including insurance, telecommunications, energy and water.

The impact of this problem on small business could be very serious. Financial hardship being listed in relation to a credit card used for personal purposes could lead to an on-demand facility being used for a business to be called in. This could cause a small business to go into liquidation. It would certainly not increase the chances of the personal credit card account getting back on track.

Case study – Annie's Story

Annie called the National Debt Helpline because one of her two credit cards has just been cancelled. She has just received a letter from one of the two lenders she banks with saying it has been notified of a default by Equifax for another credit/service provider. The letter says the lender is cancelling her credit card. She is not behind on her payments to this lender for her card. She wanted to know if this was allowed and if her other credit card is going to be cancelled as well?

Source: Financial Rights Legal Centre (S204288)

Under the current law, consumer advocates and financial counsellors have observed that avoiding a default listing has worked as an incentive to get people to contact their lender and get a hardship arrangement in place. When a caller to the National Debt Helpline, for example, has their head in the sand, our staff have until recently been able to confidently say that if the customer calls their lender, explains their situation, and enters into an arrangement there will be no default and the matter will remain between the customer and lender, provided they meet their obligations under any arrangement. This has been the best way to ensure their other accounts will not be affected. Further, their ability to get credit in the future will not be prejudiced as long as they get back on track. This regime has been supported by various industry Codes of Conduct and the relevant external dispute scheme rules. If asking for, or accepting a hardship arrangement, will result in a flag or other notation on the customer's credit report, this incentive will be lost. Some people may still apply for hardship, but only as a last resort to avoid enforcement action, and even then, only if they cannot come up with another (possibly more damaging) strategy.

6. ***Consumers may have their credit scores negatively impacted by hardship information, with potential implications for their access to essential services***

Although there is very little regulation or transparency around how credit scores are calculated, it seems inevitable that if hardship information is recorded on credit reports it will be incorporated into a person's credit score. Even if hardship flags are later removed from consumer credit files, it is possible that their internal bank scores or credit scores might be affected for years if a consumer's hardship information was recorded internally by a bank. The truth is we know very little about how scores are calculated and there are almost no rules around them.

Nevertheless, low credit scores can have a big impact on a person's financial situation and may lead to difficulty accessing other essential services such as residential leases, energy or water contracts or telecommunications services. Consumer advocates know that the *Privacy Act* currently prevents these non-Authorised Deposit-taking Institutions (**ADI**) services from accessing credit reports or comprehensively derived credit scores from the credit reporting bureaux, but it should be noted that landlords, energy retailers or telecommunication providers can ask for this information to be provided on an application form by the consumer directly. There is evidence that this practice is already taking place, and it is common in overseas jurisdictions.[2]

7. The ability to report hardship information will not result in fair and consistent reporting

There are many reasons why lenders agree to repayment arrangements and loan restructures. Unfortunately, there is a complete lack of clarity about what should be reported as hardship and what should not and a lot of capacity for unfair outcomes for customers in comparable circumstances. If a lender offers to convert a customer's credit card account to a personal loan to reduce his interest rate as a good will gesture even though he has never missed a payment but the lender is concerned he might be struggling, should that be reported as hardship? If not then why should it be reported as hardship if another customer reported payment difficulties and was offered the same solution? Similarly, why should a customer who consolidates her credit cards into her home loan or a personal loan voluntarily (quite possibly because of hardship but without ever discussing it with their lender), be treated differently to a customer who does the same because she has reported finding the repayments a struggle? If a lender extends a repayment holiday to every mortgage holder in a particular locality because of a natural disaster such as bushfire or flood, those customers would be furious if they discovered this would negatively impact on their credit reports. At the same time, why should a single customer who contacts the bank to ask for hardship in the same circumstances be treated any differently?

Case study –Amy's story

Amy called the National Debt Helpline in NSW when her husband became unemployed. Amy suffers from anxiety and depression and receives the Disability Support Pension. Her husband had been contributing to their $300,000 mortgage but could no longer do so. They decided to sell the property and approached her BANK for time to do so. Amy could have kept paying her share of the repayments until the property was sold (albeit with some difficulty) but her husband had not capacity to pay his share at all.

The BANK told her that while a hardship variation was a possibility it would involve her providing extensive documents to establish her financial position and would impact on her credit report. On the other hand, if she just sent them a copy of her agency agreement with the real estate agent (which she had been prepared to do in any event) they would give her 3 months to sell the property without any impact on her credit report.[3]

Amy was very concerned about anything that would affect her credit report because they had a lot of equity in the property and they would probably downsize after the sale. It was possibly they would need a small mortgage to purchase or locate to another property.

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[2] See Attachment A to this Submission: an example of a tenancy application that requires applicants to supply their own credit reporting information.

[3] This explanation from this BANK actually makes no sense in the current regulatory environment but that is beside the point here.

While the BANK was offering her a way out, there is no logic to why one route should affect her credit report and the other will not.

Source: Financial Rights Legal Centre

Amy's case above demonstrates not only the importance consumers place on preserving their credit worthiness, but also the inconsistencies in the arrangements offered by lenders and the potential impact of those options on a customer's credit report. The idea that hardship information is "factual information" that will be consistently reported is a fallacy. See also Bob's story below.

Recommendation

1. **Hardship information should *not* be able to be recorded on consumer credit reports.**

Consumer advocates disagree that hardship flags are essential for responsible lending assessments.

The credit industry argues that hardship flags will be useful for responsible lending assessments. No doubt there are many pieces of information that could potentially be useful for responsible lending purposes. However, there are other ways lenders can obtain and verify information about a potential borrower's financial situation which will not have the same negative consequences. The credit reporting chapter of the *Privacy Act* has never been about giving lenders every possible piece of information they may find useful but about striking an appropriate balance between competing objectives.

We refer the Attorney-General's Department to the recent NZ Privacy Commissioner report which found there was no evidence of comprehensive credit reporting improving responsible lending practices, even though NZ has hardship flags:

> *We have not found any compelling evidence of CCR:*
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> …
>
> *Making a substantial contribution to responsible lending practice.*[4]

There is significant room for improvement in responsible lending practices in Australia using the data sources already available. Consumer advocates do not believe that a hardship flag is

[4] Privacy Commissioner, New Zealand, *Comprehensive Credit Reporting Six Years On: Review of the operation of Amendments No 4 and No 5 to the Credit Reporting Privacy Code*, 10 April 2018. P36, Part 2 Findings. https://www.privacy.org.nz/assets/Uploads/Report-on-Review-of-CRPC-Amendments-No-4-and-No-5-PDF.pdf

necessary to perform an effective responsible lending assessment. Instead lenders should be seeking verification of actual income and expenses as part of the application process, which would reveal if a consumer was not working, for example, or has insufficient income to meet their current liabilities.

Consumer advocates also believe that the first four CCR data sets relating to open account information will provide very important information to assist with more accurate credit assessment than has sometimes been possible in the pre-CCR environment because lenders will be able to see all of the consumer's existing liabilities.

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

As clearly exposed by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**the Royal Commission**), responsible lending failures by banks have been widespread. Banks have systemically relied on benchmarks to identify consumer expenditure rather than make detailed enquiries; they have relied on third party brokers and introducers to supply income and expenditure information in suspect circumstances; and they have ignored other obvious indicators of potential hardship (such as extending further revolving credit to consumers who were not paying down existing debt).

Systemic failure to lend responsibly means there are many people in hardship who in fact have a dispute about the lending by the bank and often do not know it. If this review concludes that hardship information should be allowed to be recorded on credit reports some people will end up with hardship flags when they are in fact a victim of irresponsible lending. That is unfair. Such a change would also increase the likelihood that the credit reporting system will be inaccurate because it will reflect poor credit management by a consumer rather than the underlying breaches of the credit law.

Lenders have been permitted under the *Privacy Act* for many years to list themselves on credit reports as existing credit providers, but many have not taken this opportunity. Further, there has been minimal voluntary use of the comprehensive credit reporting system since it was enacted in 2014. There is much lenders could do to improve their responsible lending practice without having access to consumer hardship information.

Consumer advocates argue that it borders on disingenuous in this context for lenders to now say that they cannot possibly lend responsibly without hardship flags being included on credit reports. They should use the information already legally available to them before arguing that yet more data sharing is required.

Finally, we note that this reform is being contemplated when the Royal Commission has yet to make its final report, which will likely have found widespread irresponsible lending and may look at redress schemes for consumers. Should this review conclude that from 2019 hardship information can be recorded on credit reports, consumers may have systemic rights to compensation for inaccurate listings for hardship because the listing should never have been made as the bank had breached the responsible lending laws.

The case study below demonstrates a victim of irresponsible lending that would never have been in hardship and would never have gone into a "debt spiral" with payday lenders if the bank had not breached its responsible lending obligations in the first place.

Case study –Linda's story

Linda is a separated mum with an adult son and dependent grand-daughter.

A financial counsellor referred Linda to CCLSWA with various debts including a home loan, personal loan, credit card and multiple pay day loans. She had negotiated multiple hardship arrangements, but they were due to expire and Linda was at the end of her tether; she believed bankruptcy was her only option.

CCLSWA's review and assessment of Linda's various loan applications revealed that Linda's financial hardship stemmed from her unsuitable home loan. Her need for payday loans was fueled by her inability to meet living expenses while servicing her unsuitable home loan.

No sensible assessment could have determined that the payday loans were suitable given that they post dated and helped to service an unsuitable home loan!

Linda was very fortunate, given the current property market in WA, to be able to sell her home without a shortfall. Thereafter, CCLSWA assisted Linda establish breaches of responsible lending in connection with her home loan, personal loan, credit card limit increases and pay day loans. Ultimately, Linda received a refund of all interest, fees and charges paid in connection with the unsuitable loans of over $90,000. After offsetting other debts with her home loan provider, she received nearly $50,000 cash in hand.

This is an example of a consumer who managed to come back from the brink of bankruptcy and who now looks forward to a healthy financial future.

Source: Consumer Credit Legal Service WA

Recommendations

2. **Banks need to immediately improve their responsible lending practices with existing sources of information including the new datasets which be incorporated into credit reports as a part of CCR, and should stop insisting that hardship flags are necessary for proper responsible lending assessments.**

3. **This Review should not recommend that hardship information should be allowed to be recorded on credit reports prior to the conclusion of the Royal Commission and the implementation of any relevant recommendations.**

There should be no further reform without testing the mandatory comprehensive credit reporting system and then identifying a clear need for further privacy intrusion.

The 2014 changes to the *Privacy Act* which allowed significantly larger amounts of information to be collected and shared in Australia have barely been used and we have no indication of whether they will deliver any promised benefits to consumers or the economy as a whole. Australians should not be forced to endure an additional privacy intrusion by adding a new class of information (hardship) to their credit reports before there is evidence that the current CCR changes are inadequate for responsible lending.

The NZ Privacy Commissioner in the report mentioned above found that in New Zealand comprehensive credit reporting has not delivered the promised individual, community or economic benefits that were used to justify the privacy intrusion involved in changing to a positive reporting regime.

> *Until substantial evidence of benefits to individuals, their communities and the economy is available, the case does not exist to intrude further into individual privacy by adding additional classes of personal information.*[5]

Hardship flags will only serve to discourage consumers from working with their lenders when they are in financial difficulty, undermining the current financial hardship protections under the law, which have been very effective in Australia. There should be a solid evidence base for the need for this reform sufficient to outweigh the obvious downsides. We do not believe such a case has been made, or can be made until the system has been in operation for a reasonable period.

Comprehensive Review

Consumer advocates strongly submit that the entire credit reporting regime undergo a comprehensive independent review three years after the commencement of mandatory comprehensive credit reporting. Consumer advocates support the inclusion of an independent review in the current mandatory CCR bill to be conducted in 2022[6]. However, we have strongly encouraged the Government to ensure that this review covers the broader objectives

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[5] Privacy Commissioner, New Zealand, *Comprehensive Credit Reporting Six Years On: Review of the operation of Amendments No 4 and No 5 to the Credit Reporting Privacy Code*, 10 April 2018. P37, Part 2 Recommendations.

[6] National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018, 20 April 2018, s. 133CZH

of comprehensive credit reporting, and not only the operation of the supply requirements detailed in this Bill.

Government has repeatedly ensured the Australian public that the new mandatory CCR regime will “ensure good customers are rewarded with better deals” as well as “improve the capacity of lenders to meet their responsible lending obligations.”[7] Consumer representatives want to ensure that these expected achievements of a mandatory CCR regime are being met and that the benefits outweigh any negative consequences.

We support the current Explanatory Memorandum to the bill which includes more detail about the objectives of an independent review:

> *… the Government expects that the review could consider:*
>
> - *how the specific objectives of the mandatory regime have been met, including whether sufficient participation by credit providers in the voluntary regime has been achieved;*
> - *the benefits for consumers and small businesses from the mandatory regime;*
> - *options for broadening the scope of the mandatory regime (including access by non-Australian credit licence holders to information supplied under the regime); and*
> - *whether further measures are required to maintain the security of comprehensive credit information (including to facilitate new technological solutions for data exchange).*

We also point to the recent comprehensive review of CCR that took place in New Zealand as a model for the type of review that should take place in Australia before additional reforms are recommended.

Recommendations

4. **The current comprehensive credit reporting system should be allowed to function for at least three years, followed by a comprehensive review before any additional categories of information (hardship) are added to consumer reports. There should be demonstrable evidence that adding hardship information to credit reports is necessary for responsible lending before any additional reforms take place.**

[7] Media Release from Office of the Treasurer, The hon Scott Morrison MP “Mandating comprehensive credit reporting” 2 November 2017. Available at: http://sjm.ministers.treasury.gov.au/media-release/110-2017/

5. **An independent comprehensive review must be conducted of the entire credit reporting system in 2022 before any additional reforms are recommended.**

Allowing hardship information on credit reports will not fix the current confusion about reporting RHI for customers in financial difficulty.

It is important to note that permitting hardship information on credit reports will not address the current confusion about how to report RHI for customers in financial difficulty. RHI will continue to be a required category of information and credit providers will still need clarification on how to report it in a range of circumstances including hardship. How will RHI be reported after a flag is in place? Will RHI start again at zero once a hardship arrangement is in place? What if there is a dispute about whether or not a customer should have been given a hardship arrangement? Should all arrangements reset RHI to zero?

In short, consumer advocates believe that if a customer gives a hardship notice, and the bank agrees to a repayment arrangement, RHI should be reported as up-to-date as long as customer is complying with the agreed arrangement. The Office of the Australian Information Commissioner (**OAIC**) Guidance is insufficient because it does not directly address the credit providers' obligations under the credit law, and it creates further uncertainty by relying on estoppel arguments to determine whether or not RHI should be reported as late. This is not consistent with either data uniformity aspirations or fair hardship processes, and it leaves it up to the credit provider to engineer whether they are reporting consumers late or not by how they choose to communicate with them. The OAIC's envisioned reporting process is also likely to lead to customer complaints and disputes in external dispute resolution (**EDR**) because of its inherent uncertainty.

The Discussion Paper for this review does not quite represent the existing hardship regime accurately. There is no difference at law between temporary financial hardship and longer-term financial hardship. Under the National Credit Code a consumer gives a hardship notice if they are unable to pay. The credit provider is then required to give consideration to varying the contract. The credit provider should consider two factors:

1. Whether there is a reasonable cause for the debtor's inability to pay, and
2. Whether the debtor will be able to meet their obligations under the contract if it were varied as requested.

The National Credit Code does not contemplate whether the hardship will last for 3 weeks and means the debtor will miss one payment or whether it will last 6 months. The only relevant questions are whether the debtor has a reasonable cause (illness and unemployment are given as examples but are not exhaustive) and whether the debtor is likely to be able to get back on track if given the hardship assistance.

An example often given for an "indulgence" (a term that has no legal definition or standing) is that a person has had an unexpectedly high bill (such as energy or urgent car repairs). The person has indicated to his or her lender that a few payments might be late before the person's finances stabilise. The lender says it is OK if the person misses two payments but then is expected to be caught up by the time the third payment is due. We would argue that this is a reasonable hardship cause and that the consumer can clearly get back on track. This is therefore a hardship variation as characterised by the National Credit Code.

Similarly the credit laws do not require a particular process to be followed for a credit provider to agree to a hardship variation. The credit provider may ask for additional supporting information in order to consider a hardship request but it is not compelled to. The simple act of communicating its agreement to a varied payment arrangement is sufficient for it to constitute a hardship variation. There is no need to alter contractual documentation or for agreements of less than 90 days, even confirm the arrangement in writing. [8]

If a lender does not agree to a variation because one of the relevant criteria has not been met then the lender is entitled to reject the variation but they must notify the consumer of the reasons for rejection, their rights under the Code and the details of the relevant EDR scheme. Credit providers claim that they give "indulgences" where they do not agree to hardship but do agree to postpone a payment. In these circumstances the lender must follow the rejection procedure above. Any lender purporting to give an "indulgence" by telling the customer that they will not enforce their late payment, but that it is still due and payable, is at risk of creating an estoppel. If the consumer arguably meets the hardship criteria, the credit provider is also at risk of falling foul of the hardship provisions unless they go through the rejection procedure set out in the Code

The fact that there is currently no consensus among the four major banks on how to report hardship under the current regime is evidence that the OAIC Guidance has not been sufficient to resolve the issue. This lack of consensus will also mean the data itself will be unreliable and inconsistent. Consumer advocates argue that there should be improved guidance and oversight by the Australian Securities and Investments Commission (**ASIC**) to make sure that lenders are meeting their hardship obligations under the law. We reiterate that this guidance will be required whether or not the law is changed to permit hardship flags.

Consistent with our arguments in relation to hardship flags, we do not consider it fair to consumers, or desirable from a public interest perspective, that consumers who are actively working with their credit provider to address their financial hardship should have late repayments reported while they are complying with those arrangements.

Case study –Bob's story

Bob is obtaining counselling for a gambling addiction and with the assistance of his mother (acting under Power of Attorney) sought assistance from CCLSWA in relation to his credit card debts.

Frequent and repeated gambling transactions caused Bob to exceed his $4000 credit card limit with Big4 Bank.

[8] Except as required by the 2013 Code of Banking Practice ref cl. 28.8.

Whilst the extent of Bob's gambling addiction was apparent on the face of his credit card statements, Bob's mother also brought it to the attention of Big4 Bank, and with her intervention, Bob repaid and closed his credit card account in August 2017.

Regardless, Big4 Bank assessed Bob as suitable for another credit card in September 2017 with a limit $6,000.00. When that credit card was approaching its limit, Big4 Bank assessed Bob as suitable for another credit card in October 2017 with a limit of $15,000.00.

In response to allegations of irresponsible lending, Big4 Bank offered to waive a significant portion of the debt. It was proposed that Bob would repay the remaining reduced debt by minimum monthly installments, interest free.

Bob obtained a copy of his credit report and noted that his RHI already disclosed his repayment delinquency. Bob queried how the settlement offer and his new repayment arrangement would be reflected in his RHI.

Big4 Bank were initially unclear in their response, but when pressed suggested that the credit card accounts be closed and the agreed minimum monthly repayments be made to a deposit account nominated by Big4 Bank – i.e., not a reportable credit account.

Source: Consumer Credit Legal Service WA

While we support this lender looking for an appropriate solution for this customer, this is an example of how a vulnerable consumer may be incentivised to accept a lender's offer rather than risk having alternative payment arrangements reflected in their RHI. Consumer advocates worry that under the current reporting uncertainty lenders have the ability to manipulate whether altered payments are listed as RHI depending upon how they set up the arrangement and how they represent the arrangement to the debtor (See also Amy's case above). We assert that it is a responsible consumer who pro-actively seeks a hardship variation and that, not infrequently, the foundations of his or her hardship is the lender's initial failure to lend responsibly. Reportable hardship arrangements will only discourage responsible consumers even more from serving hardship notices while at the same time potentially aiding and abetting lenders to sweep breaches of responsible lending under the carpet.

Recommendation

6. **This Review must clarify how RHI should be reported for customers in financial difficulty. If such clarification is outside the AGD's jurisdiction than this Review must strongly recommend which regulator or regulators have the task of clarification and by what deadline.**

Responses to guiding questions

1. **Is there sufficient certainty in how the forms of hardship arrangements discussed in this paper are currently treated in relation to consumer credit reporting? If not, what are the imbalances that are evident in the current system? That is, what are the reasons for change and why should hardship arrangements be included in the credit reporting system?**

Consumer advocates are of the view that there is not sufficient certainty of how hardship arrangements are currently treated. However, we believe there *could* be more certainty with regulator leadership (probably ASIC) and published regulatory guidance. We do not believe change to the system is necessarily required in order for the interaction between the *National Consumer Credit Protection Act* and the *Privacy Act* to be made sufficiently clear.

This issue is discussed in great detail above.

2. **If the current mechanisms for how hardship arrangements (formal or informal) are reported are not effective to facilitate an efficient credit reporting system while ensuring that the privacy of individuals is respected, how should this be addressed? Are there reforms that could be implemented within the current regulatory framework? Are there non-legislative options available?**

Consumer advocates argue that it is unknown whether the current mechanisms are effective or not effective to facilitate an efficient credit reporting system because they have not had a chance to go into effect or be measured. To date Australia has never experienced the 40% critical mass of data that the Productivity Commission said was necessary for an efficient system.[9]

Consumer advocates believe that there are non-legislative options that could clarify how hardship arrangements should be reported under the current system. The most important of the non-legislative options include greater guidance from regulators like ASIC, OAIC and the Australian Prudential Regulatory Authority (**APRA**)[10] (preferably after consultation with stakeholders and each other) and maybe also written position statements and determinations from the Financial Ombudsman Service (**FOS**) (soon to be changing to the Australian Financial Complaints Authority (**AFCA**)).

We also think clarification in the *Privacy (Credit Reporting) Code* as well as the Principles of Reciprocity and Data Exchange (**PRDE**) for how hardship arrangements should be reported are

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[9] Australian Government Productivity Commission, Inquiry Report No 82, *Data Availability and Use*, page 20.

[10] The role of APRA would be simply to confirm that reporting to APRA for prudential purposes is distinct from the lenders credit and privacy law obligations.

good non-legislative options for ensuring that the current credit reporting mechanisms are used fairly and consistently. Amendments to the Credit Reporting Code and PRDE would still be binding and enforceable on industry without requiring legislative change.

An efficient credit reporting system needs to be transparent and records need to be accurate and up to date. We believe this is possible under the current legal framework as long as lenders take a fair and consistent approach to reporting RHI for customers in financial hardship in line with the principles underlying the current law, which we believe will require better guidance from regulators and clear instructions in the Credit Reporting Code and PRDE.

Recommendations

7. **Greater guidance is needed from regulators like ASIC, OAIC and APRA (preferably after consultation with stakeholders and each other) about how RHI should be reported for customers in financial difficulty, as well as written position statements and determinations from FOS (soon to be changing to AFCA).**
8. **Clarification in the Privacy (Credit Reporting) Code as well as the PRDE is needed for how hardship arrangements should be reported.**

3. Some of the matters to be considered in determining regulatory/non-legislative options for action include:

a. What hardship information should be covered, and why? How should informal arrangements/indulgences be addressed?

Consumer advocates strongly disagree that any hardship information should be included on credit reports (neither formal nor informal arrangements) for all the reasons discussed above.

b. Should information about the reasons for hardship (such as loss of employment or ill health) be included? If so, how will this information be used and would this mean different consequences for individuals depending on the reason for hardship? If credit decisions are to consider the reasons for hardship, why can't this information be obtained directly from the individual (or, with their consent, from the relevant credit provider)?

Consumer advocates submit that information about the reasons for hardship should absolutely NOT be included on consumer credit reports. Including this type of information would be an extreme intrusion into Australian's privacy. Consumers would absolutely start to avoid contacting their banks when they were in difficulty, or begin to answer untruthfully if they thought information about their private circumstances (illness, unemployment, etc.) would be recorded on their credit reports.

In our experience credit assessment processes are by and large automated. It is extremely unlikely that lenders would be developing systems capable of discriminating between reasons for hardship unless there was a high degree of oversimplification and agreement on categorisation. Nor do we think this sort of discrimination between hardship sources by subsequent lenders is desirable or appropriate. To the extent that lenders would use such information it can and should be obtained directly from the individual when assessing a hardship request or a new credit application.

Recent prominent data breaches (including the CBA and Equifax data breaches) show that lenders and Credit Reporting Bureaus have yet to prove they have adequate security arrangements in place to protect the existing credit reporting information, let alone new classes of even more sensitive personal information.

Recommendation

9. **Information about the reasons for hardship should absolutely NOT be included on consumer credit reports.**

c. Should hardship information be a separate type of credit information which is separately reported and subject to specific rules, or should it be reported incidentally, as part of RHI? What is the appropriate relationship between hardship information and RHI?

Consumer advocates are strongly opposed to hardship being reported in any capacity.

Lenders should be doing proper responsible lending assessments by investigating and verifying a person's objectives and current income, expenditure and personal circumstances before making lending decisions.

If the Attorney-General's Department is of the view that hardship information should be reported, then we are of the firm view that it should be a separate category of information with unique rules, not simply part of RHI. Hardship information should have its own clear rules in relation to collection, use and retention periods.

i. *Hardship information should not be recorded solely because a person has given a hardship notice.*

If hardship information is going to be included on credit reports, then there should be no indication that a person has simply given a hardship notice. Only when a hardship arrangement has been agreed to by the lender and the consumer understands the implications of accepting the arrangement should a flag be added to his or her credit report. If flags were permitted simply because a person has given a hardship notice then it would be possible for a consumer to have an indication of hardship on his or her credit report without ever missing a payment. For example, a person could apply for hardship, be rejected, and then decide to sell an asset such as their home or car to meet their commitments, or postpone elective surgery so that they could keep paying. It would be highly unfair and prejudicial for a person who has taken these steps to find a hardship flag on their credit report.

ii. *Hardship information should have a different retention period to RHI*

If hardship information is going to be reported then the retention period for hardship should not be the same as for RHI. In many cases consumers get back on track very quickly and it would not be in the interests of consumers themselves, or of lenders, for a hardship flag to continue to affect their ability to apply for credit for two years.

Further, given the problems highlighted later in this submission in effectively enforcing any restrictions on use of this information, this information should be retained for the minimum periods considered necessary to alleviate potential unfair consequences.

Accordingly, hardship information, if recorded at all, should be for the lesser of the length of the arrangement, or six months (whichever is the shorter). If the consumer defaults on any arrangement, their RHI should be reported against the arrangement.

iii. *Hardship information should only be visible to lenders assessing new applications for credit, not lenders who are accessing credit reports for credit management purposes.*

iv. *Using hardship information to call in or cancel another credit facility that is not in default should be prohibited.*

As noted above and below, if consumers are at risk of having other cards and accounts cancelled or on-demand facilities called in, they will go to even greater lengths to avoid telling any lender about their hardship. Further, there could be a snowballing effect in destabilising their finances to the point where temporary difficulties become irreversible – including small business owners.

Recommendation

10. If the Attorney-General's Department is of the view that hardship information should be reported, then we are of the firm view that it should be a separate category of information with unique rules, not simply part of RHI. Hardship information should have its own clear rules in relation to collection, use and retention periods.

a) Hardship information should not be recorded solely because a person has given a hardship notice.

b) Hardship information should have a different retention period to RHI. It should be for the length of the arrangement, or six months (whichever is the shorter). If the consumer defaults on any arrangement, their RHI should be reported against the arrangement.

c) Hardship information should only be visible to lenders assessing new applications for credit, not lenders who are accessing credit reports for credit management purposes.

d) Using hardship information to call in or cancel another credit facility that is no in default should be prohibited.

d. How will the hardship information be used and should there be any restrictions on the use of this information? Who should be able to access hardship information and in what circumstances?

Consumer advocates can only speculate how hardship information will be used by the credit industry (or possible other industries) but we have serious concerns that this information will be used to either:

- Deny consumers new credit completely either during a period of hardship (which may or may not be appropriate) or even afterwards depending on the length of the retention period (which would be inappropriate);
- Offer consumers credit on much higher interest rates; and/or
- Cancel existing credit facilities.

Lenders argue that hardship records will be treated differently to defaults or negative RHI. It is difficult to see how this can be confidently stated considering how risk assessment tools are developed and unregulated. As we understand it, various potential data items about consumers' personal circumstances, attributes and the conduct of their accounts are input into the lenders' systems and then correlated with outcomes over time to determine the level of risk of default associated with each factor or combinations of factors. To this extent the potential impact of having hardship information on a credit report is impossible to predict without placing regulatory parameters around it. Further, any such regulatory parameters would be difficult to enforce in practice because lenders have an absolute discretion to refuse credit to anyone and to price credit according to their own commercial imperatives (within any applicable cost cap).

Even with regulatory parameters it is difficult to see how a hardship flag or indicator could not prejudice a person's application for credit as long as it remains on their report. Responsible lending obligations require lenders to determine that a particular potential debtor can afford his or her obligations under a credit contract without "substantial hardship". It is difficult to see how lenders will take the regulatory risk of approving credit for a person who already has a hardship indicator on their credit report. In fact, as discussed above we are concerned there is a real possibility that someone with an erratic repayment history might be more likely to get credit (albeit at a higher interest rate) than a person who has been branded as in hardship.

If hardship is to be included on a credit report then we propose the following regulatory parameters should be introduced as a minimum:

1. Only credit providers who are assessing new consumer credit applications should have access to hardship information, not existing lenders who might be monitoring a customers credit report for other permitted reasons.
2. Credit providers should be prohibited from using hardship flags to price credit.

3. The *National Consumer Credit Protection Act* should make it clear that lenders can only lend to consumers with hardship flags where:
    a. The consumer can demonstrate the cause of hardship no longer applies; or
    b. The new credit contract is part of a consolidation or refinance that would reduce the consumer's repayments to an amount they could afford without hardship AND reduce their overall cost of credit.[11]
4. Hardship indicators would also need to be prohibited from being included in credit scores to the extent that this would defeat the previous principles.

We emphasise that we **do not** the think the above regulation of permitted uses would be sufficiently effective. Lenders are permitted to reject anyone for credit for their own commercial purposes. It would be very difficult for consumers to show that the hardship flag had been the sole reason for their rejection or for the price of credit they were offered. Similarly, credit scoring is opaque and unaccountable, with no oversight occurring of inputs and outputs and their potentially discriminatory effects.

On the other hand, keeping the retention period short, and only allowing lenders to see hardship information when assessing a credit application, are parameters which could (at least potentially) be more effectively enforced. However, the level of proactive regulator scrutiny required to enforce this would be considerable, and certainly in excess of any activity we have encountered in the privacy space to date.

Even legislative restrictions on permitted use require either proactive monitoring by the OAIC or consumer complaints with proof of misuse. Proof is often very difficult for consumers to come by. Proactive monitoring by the OAIC is unlikely, as they have only just recently admitted in a Senate Hearing in May 2018 that it "*has not carried out audits specifically of credit-reporting bodies for some time*" and that the 2014 CCR framework instead sets up monitoring obligations between credit providers and credit-reporting bodies.[12]

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[11] Consumer advocates are generally opposed to people in hardship being given more credit as a solution, but there are exceptions. Consumer advocates are generally not in favour of refinancing credit card debt over the life of a home loan, for example. This has the effect of both increasing the number of years over which the credit card debt is paid (often outweighing the savings due to the reduction in interest rate) and leaves the home owner as higher risk of default on their most important commitment, their mortgage. We also often see circumstances where this is done to mask a failure of responsible lending in the first place in relation to the credit card. However, moving a credit card debt to a personal loan with lower interest and set repayments can be a good solution for people who are struggling with revolving credit (provided there was no failure of responsible lending in the first place). Similarly, refinancing a home loan to a lower interest rate is also an effective way of addressing some types of hardship.

[12] Economics Legislation Committee hearing on the *National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018*, 15/05/2018; FALK, Ms Angelene, Acting Australian Information Commissioner, and Acting Privacy Commissioner, and HIGGINS, Ms Sophie, Director, Regulation and Strategy, Office of the Australian Information Commissioner. Pg 7 of Hansard Transcript. Available at: http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/910b3a61-5c1a-48ec-a292-d2fb3ad17945/toc_pdf/Economics%20Legislation%20Committee_2018_05_15_6117.pdf;fileType=app

Recommendation

11. If hardship is to be included on a credit report then we propose the following regulatory parameters should be introduced as a minimum:

    a) Only credit providers who are assessing new consumer credit applications should have access to hardship information, not existing lenders who might be monitoring a customers credit report for other permitted reasons.

    b) Credit providers should be prohibited from using hardship flags to price credit.

    c) The *National Consumer Credit Protection Act* should make it clear that lenders can only lend to consumers with hardship flags where:

        a. The consumer can demonstrate the cause of hardship no longer applies; or

        b. The new credit contract is part of a consolidation or refinance that would reduce the consumer's repayments to an amount they could afford without hardship AND reduce their overall cost of credit.

    d) Hardship indicators would also need to be prohibited from being included in credit scores to the extent that this would defeat the previous principles.

e. What are the expected consequences for individuals about whom hardship information is reported? How might any risks arising from these consequences be mitigated?

Most of the consequences to individuals about whom hardship information is reported are discussed in detail above. Here again is a list of what consumer advocates see as the most likely results for consumers:

- Consumers will be discouraged from proactively working with banks when in financial difficulty;
- Consumers in financial difficulty will be pushed to riskier and more predatory lending options, or other drastic options to avoid telling their lenders they are in hardship;
- Consumers who have had their hardship recorded will lose the ability to refinance or take our credit on better terms to deal with financial difficulty because hardship information will be used by lenders to deny credit;
- Consumers who have had their hardship recorded will have credit facilities cancelled because hardship information is used by other lenders for 'internal

lication%2Fpdf#search=%22committees/commsen/910b3a61-5c1a-48ec-a292-d2fb3ad17945/0000%22 management purposes' or to help customers avoid defaulting under section 21H in the *Privacy Act*;

- Consumers may have their credit scores negatively impacted, possibly making it difficult for them to access credit, or reasonably priced credit in the future;
- Consumers whose credit scores have been damaged may have difficulties accessing other essential services such as residential leases or communications services (landlords may ask for credit scores or credit reports on service applications directly from the consumer); and finally
- The impact on small business could be very serious. Financial hardship on a credit card could lead to an on-demand facility being called in. This could cause the business to go into liquidation.

The most effective way of avoiding all of the outcomes above is to retain the current system and not permit hardship information to be recorded on credit reports. Instead regulators should issue guidance clarifying that consumers who make arrangements with their lenders and comply with those arrangements should not have any adverse information on their credit reporting, including RHI. This way customers will not be deterred from seeking hardship and will have a strong incentive to comply with their hardship arrangements once made.

f. Should there be other limitations or restrictions on the hardship information that is included in the credit reporting system? For example, should retention of the hardship information be limited (eg no retention once hardship period over)?

If hardship information is going to be included in the credit reporting system then yes, retention should be limited to only the period of time when the customer is making reduced payments under a hardship arrangement or six months, whichever is the lesser.

We also reiterate our argument above that if hardship information is included in the credit reporting system this should not include hardship notice information. All of the consequences previously mentioned would be even more unfair if they occurred just because a consumer made a hardship notice and then never went on to need a repayment arrangement

Hardship information should also not be available for credit management purposes, only for credit assessment purposes on new accounts, or increased limits on existing accounts.

g. How is the inclusion of hardship information expected to operate in practice? For example, noting that most credit application processes are automated, what are the expected consequences of including hardship information in this context, and how are practices in industry around these matters to be made consistent so that consumers are not dis/advantaged depending on the credit provider?

Given the high level of automation in the credit industry, consumer advocates submit that the use of hardship information is unlikely to ever be particularly nuanced. The result of having a hardship flag is likely to be rejection of credit or higher priced credit. For this reason it is vital that if hardship information is permitted at all, the retention period should be short to minimise the punitive consequences.

h. If financial hardship was included in consumer credit reporting, how would this impact credit providers' engagement with their responsible lending obligations:

i. Where a credit provider is assessing a new application for credit where a consumer's credit report represents that the consumer has recently entered into a hardship agreement.

This has been discussed above (pgs 23-25.

ii. Where a credit provider has extended credit to a consumer (whether ongoing, or a single loan), and the consumer enters into a hardship agreement with another credit provider which is then reported on that consumer's credit report.

Consumer advocates again submit that we are very concerned that lenders will use hardship information to justify cancelling existing credit facilities for customers, or initiating enforcement action that they would not otherwise have done. For example, when Hong Kong transitioned to a positive reporting regime in the early-2000's the lead up to the new regime saw a massive spike in bankruptcies. Fears that the revelation of previously undisclosed indebtedness by some individuals would result in creditors exercising enforcement remedies forced the Hong Kong Privacy Commissioner to put a 2-year moratorium on credit providers accessing positive data to conduct credit reviews.[13]

If lenders began calling in on-demand credit facilities (demanding payment in full), and cancelling cards or stopping other facilities (such as overdraft) after seeing hardship evidence on a credit report, that could be devastating to consumers who may only be in temporary financial difficulty. If a consumer is trying to proactively prioritise certain payments over others in order to make ends meet until starting a new job or receiving an expected payment, their entire financial circumstances could be destabilised. Hardship protections were put in place in Australia specifically to help consumers through temporary difficulties with minimal disruption and long term consequences.

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[13] TransUnion White Paper: *Full-File Reporting: How Positive Consumer Credit Data Can Improve Banking Efficiencies and Fuel Economic Growth*, 2007. Available at: https://www.transunion.com/docs/interstitial/TransUnion_WhitePaper_PositiveData_en.pdf

We strongly reiterate the need to ensure that any hardship information is not made available to existing credit providers for credit management purposes and that the use of hardship information to call in other credit facilities that are not in default is strictly prohibited.[14]

Recommendation

12. **Hardship information must not be made available to existing credit providers for credit management purposes and that the use of hardship information to call in other credit facilities that are not in default must be strictly prohibited.**

v. Are there any other issues involving hardship and the credit reporting scheme that should be considered in the course of the review?

Debt Vultures

People who contact us at the National Debt Helpline regularly raise concerns about their credit reports, and the impact that their credit report might have on their ability to obtain credit in future. We have seen a boom in unregulated credit repair businesses that promise to 'clean' or 'fix' credit reports that prey on people's uncertainty and concern about their credit worthiness. These businesses regularly mislead vulnerable people, and charge those who are least able to afford it expensive fees for poor quality services. These businesses thrive on the complexity of the current credit reporting system, and the fact that many people do not understand and feel ill equipped to navigate the system alone.

Case study –Chris's story

Chris called a credit repair company after seeing an ad on TV promising to wash his credit history clean. Chris had some business debt from running a dairy farm in Gippsland, and was concerned about his creditworthiness. The salesperson called back with good news – they would be able to fix his credit history! They promised to send him a booklet and forms to return and to assign him a case manager to help fix his credit history. The salesperson said that he needed to pay over $1000 immediately, otherwise they'd have to start the process all over again.

But as Chris said, "they were more than happy to take the money, but they did not provide the service". In fact, Chris didn't have any defaults or incorrect listings to "fix". The credit repairer hadn't bothered to check his credit report.

Chris's repeated requests for a refund were ignored until Consumer Action got involved.

[14] Section 300 and 301 of the Bankruptcy Act already render void any provision which would seek to make bankruptcy a default event under a mortgage or finance lease.

> Chris described the credit repair industry as "vultures" that are "preying on people in the community that can least afford to be parting with money".
>
> *Source: Consumer Action Law Centre*

Putting more information on credit reports will just turbo-charge these unregulated and harmful businesses. The current uncertainty about how RHI will be reported when customers tell their bank they are in financial hardship is exactly the kind of thing that debt management firms will exploit in order to charge high fees for services that at best could be achieved for free with the help of a financial counsellor and at worst are outright misleading and deceptive.

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 Financial Rights on (02) 9212 4216.

Kind Regards,

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Signatories

Australian Communications Consumer Action Network

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of communications services for all Australians.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will activate its broad and diverse membership base to campaign to get a better deal for all communications consumers.

Australian Privacy Foundation

The Australian Privacy Foundation is the primary association dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions.

The Privacy Foundation plays a unique role as a non-government organisation active on a wide range of privacy issues. It works with consumer organisations, civil liberties councils, professional associations and other community groups on specific privacy issues. The Privacy Foundation is also a participant in Privacy International, the world-wide privacy protection network. Where possible, it cooperates with and supports official agencies, but it is entirely independent - and often critical - of the performance of agencies set up to protect our privacy.

The Privacy Foundation is an entirely voluntary organisation. It is involved in a wide range of privacy issues. The following are regarded as the matters of highest priority:

- ensuring that the Commonwealth Government's changes to privacy legislation to cover the private sector give Australians real privacy safeguards
- contributing to the development of industry codes

- highlighting privacy risks in emerging technologies including biometrics
- participating in global efforts to make the Internet safe for personal privacy

Consumer Action Law Centre

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Financial Rights Legal Centre

Financial Rights Legal Centre is a community-based consumer advice, advocacy and education service specialising in personal credit, debt, banking and insurance law and practice. Financial Rights operates the National Debt Helpline, which is the first port of call for 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. We provide legal advice and representation, financial counselling, information and strategies, referral to face-to-face financial counselling services, and limited direct financial counselling. Financial Rights took over 25,000 calls for advice or assistance during the 2016/2017 financial year.

A significant part of Financial Rights' work is in advocating for improvements to advance the interests of consumers, by influencing developments in law, industry practice, dispute resolution processes, government enforcement action, and access to advice and assistance. Financial Rights also provides extensive web-based resources, other education resources, workshops, presentations and media comment.

Consumer Credit Legal Service (WA)

Consumer Credit Legal Service (WA) Inc. (CCLSWA) is a not-for-profit charitable organisation which provides legal advice and representation to consumers in WA in the areas of credit, banking and finance. CCLSWA also takes an active role in community legal education, law reform and policy issues affecting consumers.

CCLSWA is active in community legal education. Through the use of the media, seminars and publications, we aim to raise general public awareness of consumer rights in the area of credit, banking and financial services.

CCLSWA provides a consumer voice in Western Australia in relation to policy issues and proposed reforms of Western Australian legislation, and nationally on issues such as reforms to the National Consumer Credit Code. Other key policy activities are directed at lobbying for changes to unfair industry practices. In such policy activities, CCLSWA aims to work with other consumer groups to present a consolidated consumer voice.

Financial Counselling Australia

financial
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australia

Financial Counselling Australia (FCA) is the peak body for financial counsellors in Australia. Financial counsellors assist people in financial difficulty by providing information, support and advocacy. They work in non-profit, community organisations and their services are free, independent and confidential.

Consumer Credit Law Centre SA

Consumer Credit
Law Centre SA
Legal Advice and Services
Credit • Debt • Financial Counselling

The Consumer Credit Law Centre of South Australia (CCLCSA) was established in 2014 to provide free legal advice, as well as legal representation for disputes filed with External Dispute Resolution (EDR) schemes and financial counselling to consumers in South Australia in the areas of credit banking and finance. The Centre also provides legal education and advocacy in the area of credit, banking and financial services. The CCLCSA is managed by Uniting Communities who also provide an extensive range of financial counselling and community legal services as well as a range of services to low income and disadvantaged people including mental health, drug and alcohol and disability services.