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

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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.

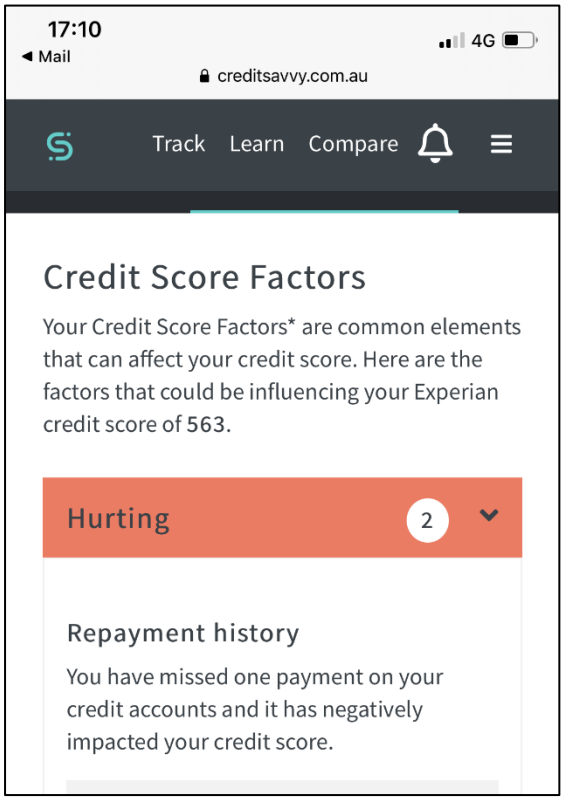
Nevertheless, the legislation clearly states that a credit reporting body must provide a consumer "*the **particular** credit information that is held by the body and from which the credit rating was derived*" and "*information about the relative weighting of*" that particular information (emphasis added). 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 (02) 8204 1384.

Kind Regards,

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