Submission by the

Financial Rights Legal Centre;

Australian Communications Consumer Action Network;

Australian Privacy Foundation;

Consumer Action Law Centre; and

Financial Counselling Australia (FCA)

Treasury

Exposure Draft: *National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018*, 8 February 2018

23 February 2018

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

Introduction

Thank you for the opportunity to comment on the Exposure Draft of the *National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018* (**CCR Bill**). This joint consumer submission has been prepared by the Financial Rights Legal Centre in consultation with the Australian Communications Consumer Action Network (**ACCAN**), the Australian Privacy Foundation (**APF**), the Consumer Action Law Centre (**CALC**), and Financial Counselling Australia (**FCA**).

Thank you for the opportunity to comment on the Exposure Draft. We will address the following consumer concerns:

- broad concerns about comprehensive credit reporting (**CCR**);
- lack of clarity around repayment history information and financial hardship;
- credit scores; and
- including CCR Objectives in the Statutory Review.

Broad concerns about CCR

Consumer representatives believe that introducing mandatory credit reporting will lead to a number of unintended negative consequences and significant problems for consumers.

CCR is still relatively new, having only commenced in March 2014. There are still important issues that have not been settled in relation to the new regime, with very little data from the new datasets being reported and serious disagreement about the interaction between credit law and privacy law.

The categories of additional data that are able to be voluntarily reported under the March 2014 laws are:

1. loan details/loan type (e.g. home loan, credit card);
2. amount of loan, whether the person is the borrower co-borrower or guarantor,;
3. who the loan is with;
4. whether the account is open or closed;[1] ;
5. Repayment history information (**RHI**): Repayment history of the loan for the previous two years.[2]

[1] these first four categories are often referred to as the first four datasets

[2] the fifth dataset

These categories are in addition to information previously collected such as inquiries about loans (applications) and defaults.

Consumer representatives have no problem with the first four categories of information being included on credit reports.. This information is crucial to a proper responsible lending assessment.

RHI is more fraught as it is inextricably linked with consumers' rights to access the hardship provisions under the credit law (this is discussed in more detail below).

The amount of data on a person's credit report will also increase dramatically as lenders are compelled to participate in the CCR regime, which will proportionally increase the potential errors that might occur that consumers will need to dispute. This is particularly the case with RHI which will be updated monthly with up to two years of data available at any one time.

We are also concerned that some lenders are likely to use this increased information not to deny people credit where it appears their finances are already stretched, but to charge those customers more for credit. We may see a significant increase in price discrimination including an influx of expensive, priced-for-risk products, such credit cards charging up to 48 per cent per annum for those deemed risky. These toxic products already exist in other countries like USA and the UK. Risk based pricing exacerbates inequality, as consumers deemed higher risk not only pay more for credit, but are at greater risk of default because of those higher repayments. Consumer representatives are also concerned that, under Section 20G of the *Privacy Act* relating to the permitted use for pre-screening, credit providers could nominate eligibility requirements to be used by credit reporting bodies to assess consumers whose credit information indicates higher risk to receive direct marketing for more costly credit products.

Debt Management Firms

Another unintended negative consequence of the increase in data available on credit reports is a potential boom in debt management firms (**DMFs**), otherwise known as "debt vultures". According to our experience with the National Debt Helpline and also based on research by ASIC[3], we know there has been a huge growth in unregulated DMFs in Australia in recent years. DMFs target people struggling with debt, promising to clean or fix their credit reports. DMFs regularly mislead people about the nature of their service/product and charge thousands of dollars for poor quality services. They also use customer's enquiries about fixing their credit report as an opportunity to steer debtors into unsuitable debt agreements or other expensive and often inept debt negotiation services. Putting more information on credit reports will just turbo-charge these unregulated businesses.

With the Financial Services Royal Commission underway, now is the time for Government to be focused on enacting legislation through a lens of fairness and community expectation. Consumer representatives are seriously concerned that making CCR mandatory before all of

[3] REP 465 Paying to get out of debt or clear your record: The promise of debt management firms. Released 21 January 2016. Available at: http://download.asic.gov.au/media/3515432/rep465-published-21-january-2016.pdf

these important issues have been addressed will only lead to more disputes going to external dispute resolution (**EDR**) and court, and more predatory debt management firms targeting vulnerable people. At the very least, the regulation of debt management firms must be accelerated.

Repayment History Information and Hardship

RHI, as discussed above is the CCR dataset that consumer representatives have the most concerns about. This is because RHI is inextricably linked with consumers' rights to access the hardship provisions of the credit law: ss72-75 the *National Credit Code (**NCC**) under the National Consumer Credit Protection Act 2009 (**Credit Act**).*

Our interpretation of the law is that RHI must accurately reflect variations of a contract (including financial hardship variations under the credit law) – an interpretation supported by the Financial Ombudsman Service, Australia.[4] This common sense interpretation is however not uniformly shared by the financial services sector. Consumer representatives are deeply concerned that RHI data will be wildly inaccurate if the banks start reporting customers as making payments late when those consumers have called up and arranged a hardship variation as they are legally able to do under the credit law. It is our strong view that they are not making late payments since the contract has been mutually agreed to be varied. It is critical that this area of the law (and how it will work in practice) is clarified as soon as possible. We have just been informed by one of the big four banks that as a direct result of this uncertainty they will simply be withholding RHI for Hardship accounts for the period the customer is in Hardship until the issue has been resolved.

The mandatory reporting of RHI is likely to discourage people from accessing financial hardship arrangements that they are legally entitled to, if RHI information does not reset to zero when a person has been given permission to make a late or lower payment.

The consumers we speak to on the National Debt Helpline are overwhelmingly concerned about their credit reports and credit scores and the impact upon this information by any actions they take. These people need to be confident that they will be treated fairly if they do the right thing and contact their credit provider for a financial hardship arrangement when they cannot pay, but will be able to get back on track within a reasonable time.

The Government has been strong in its support for consumer access to financial hardship arrangements. It is critical that the Government continues this important policy and ensures that people who make arrangements to vary their credit contracts are not penalised for doing so.

The current legislative silence on the interaction of hardship and RHI is unhelpful to all stakeholders. The law, the Credit Reporting Privacy Code or regulatory guidance should make

[4] See Financial Ombudsman Service, Determination 422745, 21 April 2016 https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/422745.pdf

it clear that where there is a change to the payment arrangement with a consumer, and the consumer is meeting their payment obligations under this arrangement, then RHI should reset to zero.

Consumer Representatives strongly disagree with the Office of the Australian Information Commissioner's (**OAIC's**) interpretation of when an amount is 'due and payable' under the *Privacy Act* as per its letter on 14 March 2017: see **Attachment A**. The OAIC has limited its interpretation of 'due and payable' to the legal entitlement to maintain an action for recovery, but has not considered the requirements under the *Credit Act* which impact directly on when an action for recovery can be maintained.

It is a requirement under the *Privacy Act* that to list RHI it is necessary to be a licensed credit provider under the *Credit Act*. Accordingly, the operation of the *Credit Act* is a key consideration in determining the meaning of "due and payable".

In our view, if an arrangement has been made under the *Credit Act* then an amount cannot be due and payable.

In our view, if an arrangement has been made with a consumer to change their payments, and the consumer is meeting their payment obligations under that arrangement, then the original amount cannot be due and payable.

The operation of the hardship provisions of the *Credit Act*

The hardship provisions of the NCC (being schedule 1 of the *Credit Act)* are contained in ss. 72 to 75. Change on the grounds of financial hardship is a key consumer protection for consumers in financial hardship. It is a key public policy (repeatedly endorsed by Government) that consumers have the ability to ask to vary their credit contract if they can show that they can reasonably repay the loan if the variation was granted.

There is no requirement or mention in the provisions that the hardship is required to be temporary. The requirement is that the consumer must be able to reasonably repay the loan.

The provisions are very straightforward and in summary they operate as follows:

1. The consumer gives notice that they are unable to pay (either orally or in writing) s.72(1)
2. Once the hardship notice is given there is a stay on enforcement (s.89A)
3. The Credit Provider (**CP**) can ask for further information and the consumer is required to supply that information (s.72(2) and (3))
4. The CP either agrees to the change and provides details of the agreed variation OR the CP refuses giving reasons and provides details of the relevant EDR (s.72(4) and s.73)

The OAIC view is inconsistent with the above legislation. The inconsistencies are:

1. There is no concept of a temporary repayment arrangement compared to a variation. There is only an agreed variation. An agreed variation can be of any length of time.
2. Postponement of enforcement is an agreed variation under the NCC. In fact in the previous *Uniform Consumer Credit Code* (s.68) a postponement of enforcement was a specified option.

3. The test of whether the CP could maintain enforcement action is necessarily affected by s. 89A. In the vast majority of circumstances, once the debtor has given a hardship notice, RHI cannot be listed.

Simple Arrangements vs "Indulgences"

Regulation 69A of the National Consumer Credit Protection Regulations 2010 grants CPs relief from giving a debtor notice confirming an agreement to change the credit contract on grounds of hardship if the agreed arrangements reduce the debtor's obligations for *a period of less than 90 days*. The original relief was until March 2014. This has since been extended by ASIC Class Order CO14/41[5] to March 2018. This has no impact on the process above. It simply changes whether an agreement must be reflected in writing. It does not change the process or its legal effect in any other way.

We are very concerned that the OAIC's current interpretation of this issue will drive industry to work on an RHI "loophole" where CPs can grant consumers "indulgences" to pay a few payments late but specify that this is not a variation under the *Credit Act*. For example, the CP tells the consumer:

"Yes, it is OK if you make a few payments late" but then sends something in writing to the consumer which confirms the details of the arrangement but goes on to state that it is not a variation of the contract.

Consumers who do not understand the implications of this (most of them) will be very disappointed if they later discover their credit report has been adversely affected, leading to further distrust of the industry and increased complaints. If the credit provider does the right thing under the law and explains that the arrangement is not a hardship variation under the law (their hardship notice has been refused) and that their credit report will show their repayments as late despite the arrangement made there will also be an increase in complaints to EDR as consumers seek to enforce their hardship rights under the law..

Consumer representatives have already seen evidence that this is already occurring. Lenders routinely agree to fairly minor contractual variations, including decreased payments or no payments over a number of months, without recognising the arrangement as a contractual variation. While there was no adverse impact on the consumer this was of little consequence. Under CCR there will be a clearly adverse impact on consumers when lenders do not recognise a hardship notice under the Code and continue to report negative RHI despite the existence of an arrangement.

This type of approach would not comply with the *Credit Act* nor is it good public policy on hardship. This result has the potential to undermine a great deal of work and industry commitment to best practice hardship policies. This would be a profoundly disappointing outcome.

[5] https://www.legislation.gov.au/current/F2014L00135

Recommendation

1. **Consumer representatives support the mandated supply of the first four CCR datasets (loan details, credit limits, etc.), but do not support mandating the supply of RHI at this time.**
2. **Alternatively the Mandatory CCR Bill should reinforce that where a CP agrees to an arrangement with a consumer, RHI should reset to zero and remain so while the consumer is complying with the arrangement.**
3. **Alternatively ASIC should be tasked with clarifying this position in technical standards and guidance.**
4. **Debt Management Firms must be regulated as soon as possible, starting with compulsory membership of AFCA.**

Hardship Flags

Consumer representatives want to be clear that we do not believe any kind of Hardship Flag is required to resolve this problem of RHI in hardship.

A hardship flag will:

- Discourage consumers from contacting their lender when they are in financial difficulty. This is already a very challenging and even humiliating step to take.
- Drive consumer to take other more desperate measures (taking out pay day loans, refinancing to predatory lenders, prioritising less crucial payments to avoid collections activity) leading to worse outcomes
- Cause consumers to have more difficulty getting back on track financially in the longer term. They may not be able to refinance to a better rate, for example, enter a genuine debt consolidation, or obtain a loan that would increase their earning capacity (a car required to accept a job for example).

We do not believe that a hardship flag is necessary to perform a very effective responsible lending assessment:

- Lenders should be seeking verification of income and expenses in any event (this would reveal if a consumer was not working, for example)
- The first 4 CCR data sets will provide very important information to assist with more accurate credit assessment than is sometimes possible in the pre-CCR environment because lenders will be able to see all of the consumer's existing liabilities.
- Most consumers in hardship will have erratic RHI in any event, rendering the hardship flag somewhat redundant (consumers do not often contact their lender before they

ever miss a payment) and it is the nature of hardship that they will likely also default on their arrangement sometimes because they will be juggling many competing priorities.

Further, as with RHI, while some lenders may use hardship flags to exclude consumers from getting inappropriate credit, others may simply offer credit at a higher price to cover the risk.

Hardship flags will only serve to further disincentivise consumers from proactively reaching out to lenders when they are in financial difficulty, undermining the current financial hardship protections. There should be a solid evidence base for the need for this reform sufficient to outweigh the obvious downsides.

The need for a hardship flag should be reviewed once the system has been in operation for a reasonable period of time so that whether there is any real residual need for a hardship flag can be evaluated on evidence rather than conjecture.

Recommendation

5. **The need for a hardship flag should be reviewed once the system has been in operation for a reasonable period of time so that whether there is any real need for a hardship flag can be evaluated on concrete evidence.**

Credit Scores and Reciprocity principles (s. 133CV)

Consumer representatives are becoming more and more concerned about credit scores. Credit scoring information is becoming more and more important in lending decisions in Australia, and will likely become important in other services as well (i.e. telecommunication services, tenancy). Credit scores are unregulated, opaque and not required to be included on a consumer's free credit reports.

A likely consequence of mandated CCR is the increase in the use of credit scores in lending decisions and the use of credit scores to charge certain individuals increased interest rates for credit. Credit scores are the numerical expression of the level of a person's credit worthiness, derived from the information available on a consumer's credit report (presumably). The increased data that will be available about consumers on their credit reports as a consequence of the mandated CCR regime under this Bill will be incorporated into the current black box algorithms[6] Credit Reporting Bodies (**CRBs**) are using to generate credit scores. These will become clear indicators of consumers that have a less than perfect repayment history. Although this information could and might be useful in responsible lending decisions,

[6] Blackbox algorithms are those that are created without any knowledge of how they are created

consumer representatives' key concern is that credit scores will be obtained by lead generators and marketers to help target direct marketing of toxic or exploitative products to particular vulnerable cohorts that are deemed by a lender to be profitable.

Under *Privacy Act* 'CRB derived information' under s 6(1) of the Act means any personal information (other than sensitive information) about the individual:

a. that is derived by a credit reporting body from credit information about the individual that is held by the body; and

b. that has any bearing on the individual's credit worthiness; and

c. that is used, has been used or could be used in establishing the individual's eligibility for consumer credit.

This definition clearly covers credit scoring information (as was the intent of the legislation according to the Explanatory Memorandum[7]). However, the Determination made by the OAIC in 2016[8] has thrown into question the status of credit scoring information and when under the *Privacy Act* it can or must be supplied to access seekers. The Commissioner found that because Equifax (formerly Veda) does not "hold" credit scores, the *Privacy Act* does not require Equifax to provide them to consumers when they request a free credit report.

> "In my view, a VedaScore does not constitute credit reporting information that Veda holds at the time of an access request for a free credit report, simply because at that time, a score doesn't exist."[9]
>
> …
>
> "The VedaScore is derived information from the source information, however it is only obtained following the application of an algorithm to source information, factoring in various inputs at the time of access. It does not come into being until that derivation process has occurred. In other words, there is no VedaScore that is held by Veda at the time an access seeker who is not a subscriber requests a credit report free of charge." [10]

The net result of this is that consumer's wanting to access their bureau score have to either pay for it (at least one large CRB is using this as leverage to encourage people trying to access their free report to purchase the premium costly service instead) or use third parties that mine their information for marketing purposes.

---

[7] Explanatory Memorandum to the *Privacy Amendment (Enhancing Privacy Protections) Bill* 2012 which provides at page 147:

This provision permits the individual to obtain access to their credit reporting information. This includes both the credit information about the individual and the CRB derived information about the individual (for example, any credit scoring or analysis about the individual).

[8] Financial Rights Legal Centre Inc. & Others and Veda Advantage Information Services and Solutions Ltd [2016] AICmr 88 (9 December 2016)

[9] para 265,Financial Rights Legal Centre Inc. & Others and Veda Advantage Information Services and Solutions Ltd)

[10] para 262, Financial Rights Legal Centre Inc. & Others and Veda Advantage Information Services and Solutions Ltd

There is no mention of credit scoring information in the PRDE, nor in the Exposure Draft of the Mandatory CCR Bill. It is unclear whether credit scoring will be treated as it was intended under the *Privacy Act* (as CRB Derived information), or it will be treated as the OAIC has subsequently interpreted, incorrectly in our view.

Consumer representatives are concerned that the use of credit scores by the industry will have the impact of defeating the reciprocity goals of the Mandatory CCR Bill and the PRDE because they might be supplied to CPs or other lenders and service providers that are not supplying Comprehensive Information under Division 2 of the Bill or under the PRDE.

Recommendations

6. **Section 20R(1) of the *Privacy Act* should be amended to require credit reporting bodies to include credit scores with credit reporting information on request by an access seeker.**
7. **The Mandatory CCR Bill should clarify that credit scoring information which has been derived from RHI cannot be shared with a credit provider who has not supplied comprehensive credit information in accordance with s. 133CV.**

Statutory Review (s. 133CZH)

Consumer representatives support the inclusion at s. 133CZH of an independent review to be conducted in 2022. However, we strongly encourage the Government to ensure that this review covers the broader objectives 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."[11] 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.

[11] 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/

Recommendation

8. **The Mandatory CCR Bill should be amended at s. 133CZH to ensure that the broad objectives of CCR are covered in the independent review.**

Data security requirements

Consumer representatives support the inclusion of s. 133CR(1)(b)(ii) which gives CPs the ability to not supply data to a credit reporting body that the CP does not believe is complying with the data security requirements in the *Privacy Act*. We believe this subsection will drive better security standards across the entire industry by forcing banks to take responsibility for the security compliance of CRBs when they hand over customer data. This subsection also empowers banks to cease supplying customer data if a CRB demonstrates a major security breach which the banks reasonably believe amounts to non-compliance with s. 20Q.

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,

Karen Cox
Coordinator
Financial Rights Legal Centre
Direct: (02) 8204 1340
E-mail: Karen.Cox@financialrights.org.au

Australian Government
Office of the Australian Information Commissioner

www.oaic.gov.au
GPO Box 5218 Sydney NSW 2001
P +61 2 9284 9800 F +61 2 9284 9666
E enquiries@oaic.gov.au
Enquiries 1300 363 992 TTY 1800 620 241
ABN 85 249 230 937

Ms Kat Lane
Principal Solicitor
Financial Rights Legal Centre
By email: Kat.Lane@financialrights.org.au

Dear Ms Lane

Repayment history information reporting and informal payment arrangements

As you are aware, the OAIC was recently contacted by the Australian Retail Credit Association (ARCA), seeking the OAIC's views on how a payment arrangement that is characterised as a 'temporary payment arrangement' or 'indulgence' impacts the interpretation and reporting of repayment history information (RHI) under the *Privacy Act 1988* and the Privacy (Credit Reporting) Code 2014.

Following is an extract from the advice provided by the Australian Information Commissioner to ARCA on this matter.

Interpretation of 'due and payable'

As you know, section 6V(1) of the Privacy Act defines 'RHI' as:

> 'If a credit provider provides consumer credit to an individual, the following information about the consumer credit is repayment history information about the individual:
>
> (a) whether or not the individual has met an obligation to make a monthly payment that is **due and payable** in relation to the consumer credit;
>
> (b) the day on which the monthly payment is **due and payable**;
>
> (c) if the individual makes the monthly payment after the day on which the payment is **due and payable**—the day on which the individual makes that payment.'

The OAIC has obtained legal advice from Counsel, on the meaning of the term 'due and payable' in s 6V of the *Privacy Act 1988* (Cth) (Privacy Act) in relation to temporary payment arrangements, and has consulted with a range of stakeholders on this point.

In summary, while the term 'due and payable' is not defined in the Privacy Act, the OAIC understands the term 'due and payable' for the purposes of s 6V of the Act to mean that

the credit provider has a legal entitlement to maintain an action for recovery against a consumer in respect of a missed monthly payment.

OAIC view

I understand that a range of different payment arrangements may be made between a credit provider and an individual where the individual is unable to meet the terms of a consumer credit contract. Based on the legal advice obtained by the OAIC along with information provided by ARCA, the Financial Ombudsman Service (FOS), the Financial Rights Legal Centre (FRLC) and the Australian Securities and Investments Commission (ASIC), I am of the view that:

1. Where the arrangement is a variation to the terms of the consumer credit contract, then an assessment of whether RHI is 'due and payable' under s 6V(1) should be by reference to the terms of the varied contract.

2. Where there is no variation to the consumer credit contract and a temporary payment arrangement is made, whether RHI should be assessed by reference to the terms of the temporary arrangement or by reference to the underlying credit contract, will depend on the nature of that arrangement, particularly, whether the credit provider could maintain enforcement action against the individual for default of the original contract despite compliance with the temporary arrangement.

3. Two examples may assist in clarifying the above test:

    a. If the circumstances of the temporary payment arrangement are such that the credit provider would likely be estopped from enforcing the original consumer credit contract on the basis of a failure to pay in accordance with the original contract, then any missed payment under the original contract would not be 'payable' for the purposes of s 6V(1). For an equitable estoppel to arise, the CP must have represented to the consumer (or otherwise induced the consumer to adopt the assumption) that it would not enforce its rights under the original contract for failure to make the monthly payment(s) when due. In such circumstances, an assessment of whether RHI is 'due and payable' under s 6V(1) should be made by reference to the terms of the temporary payment arrangement.

    b. If the temporary payment arrangement involves no representation or assumed state of affairs that the credit provider would postpone enforcement under the original consumer credit contract (that is, where there is no giving rise to an estoppel) then any missed payment is 'due and payable' under the original contract, despite the temporary payment arrangement.

4. An assessment of whether RHI is 'due and payable' by reference to the original consumer credit contract or the temporary payment arrangement should be determined on a case-by-case basis, with reference to the principle outlined in (2) above.

If I were to investigate a potential breach of the obligations under Part IIIA and the Privacy (Credit Reporting) Code (Version 1.2) in relation to disclosures of RHI, I would expect a

credit provider to be able to demonstrate that it had taken reasonable steps to implement practices, procedures and systems that:

a. ensure compliance with RHI disclosure requirements, and

b. enable enquiries and complaints from individuals about the credit provider's compliance (s 21B of the Privacy Act).

Opportunities for further collaboration

I am acutely aware of the many complex policy issues for industry and consumers associated with assessing RHI where a temporary payment arrangement is in place.

In my view, these considerations require a coordinated approach to:

- ensure fair and consistent dealings with individuals and credit providers;
- ensure credit providers' practices, procedures and systems promote the transparent handling of personal information;
- support comprehensive credit reporting, and
- facilitate an efficient credit reporting system.

Given these complex considerations, the Commissioner suggests a collaborative process going forward, between his office, ASIC, ARCA, industry, consumers and other interested stakeholders. We would appreciate your views on this suggested approach. We have also sought the views of ARCA on this approach, and have provided the above advice and recommended approach to ASIC and the Financial Ombudsman Service.

Please feel free to contact Sophie Higgins on 02 9284 9775 or sophie.higgins@oaic.gov.au if you would like to discuss.

Yours sincerely

Melanie Drayton

Melanie Drayton
Assistant Commissioner
Regulation and Strategy

14 March 2017