

Between the flags: Repayment History Information (RHI) for consumers in financial hardship

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A message from the ARCA Chief Executive Officer

The Australian Retail Credit Association's vision is to "improve people's lives through better credit decisions". This vision acknowledges that although access to credit must be appropriate, it is an essential part of financial inclusion. It also acknowledges that financial inclusion greatly assists with social inclusion, which in turn benefits the consumer, the community and the economy as a whole.

In pursuit of our vision, the Australian Retail Credit Association (ARCA) has been working to reform the way consumer (or retail) credit risk is managed. We have also taken a leadership role, on behalf of our Members, in advocating for the introduction of comprehensive credit reporting in Australia.

We know that comprehensive credit reporting increases access to responsible credit and provides greater inclusion in the financial system. Greater access to credit information also assists in identifying those consumers who are indebted beyond their means.

The ability to deal with financial difficulty or "hardship" has evolved since the Global Financial Crisis. This evolution has been led by industry (in the broader sense) who have assisted their customers deal with the short and long term impacts of hardship.

ARCA believes that the credit reporting system has a role to play in the early identification of hardship and we have consistently advocated that hardship should be one of the key pieces of information made available to credit providers when they are making credit decisions.

Currently the law does not allow credit providers to identify consumers who have entered into hardship arrangements. This has given rise to confusion for consumers and credit providers alike, where the true "credit picture" of the consumer is not accurately known.

This is a complex and often emotive debate that goes beyond the technical requirements of aligning regulatory expectations. It is a debate that must lead to a policy discussion and regulatory reform. This paper represents the first steps in generating the discussions we believe are necessary to reignite the reform process.

We believe that the solutions proposed in this paper strike the right balance between maintaining data accuracy, supporting responsible lending and promoting and encouraging early hardship assistance; while improving trust and confidence in the credit reporting system.

It will be a fine balance, but I believe this paper represents a significant step toward achieving meaningful and much needed reform.



Damian Paull
Chief Executive Officer

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1. Executive Summary

Disclosing repayment history information (RHI) for consumers in hardship has long been an issue among Members of the Australian Retail Credit Association (ARCA). ARCA does not consider that this issue will prevent or impact on transition to comprehensive credit reporting (CCR). However, it is an issue that – if left unresolved – may over time diminish the value of RHI and introduce a level of confusion and uncertainty for consumers engaging with the credit reporting system.

The key to the successful operation of the credit reporting system is for industry, through organisations such as ARCA, to proactively address these issues. By being leaders and actively seeking better outcomes for both industry and consumers, trust and confidence is bolstered in the credit reporting system.

This paper has been written as a ‘line in the sand’ on the issue of RHI and hardship. While industry, consumer advocate groups and regulators have been aware of this issue, a lack of agreement on the nature and scope of the issue has prevented meaningful reform from progressing.

This paper critically examines those issues, including whether the existing law adequately answers how RHI ought to be disclosed in hardship scenarios, and also whether the previous reform of the Privacy Act adequately dealt with RHI and hardship. This paper determines these issues do not provide a practical answer about how RHI ought to be disclosed in hardship situations, nor should they prevent further reform in this area.

Acknowledging that there remains a clear issue to be resolved, the paper analyses the approaches taken to RHI and hardship in the United Kingdom and New Zealand, seeking insights into how these jurisdictions have approached the issue and what Australia can learn and apply from these jurisdictions.

The paper then identifies and considers a number of possible solutions to this issue, being:

- Amending the Principles of Reciprocity and Data Exchange (PRDE) to include a requirement that, in a hardship situation, RHI disclosed for the consumer credit account is current and up-to-date.
- Amending the Privacy Act to enable a ‘hardship’ flag to be disclosed where repayments for a consumer credit account are impacted by that account being in hardship. There are a number of possible variants for this solution including the use of the flag on either a permanent or a temporary basis, the application of the flag as a payment status or an account status, the use of the flag in such a way to continue to reflect the age of arrears, or the use of a ‘disaster’ flag in addition to a hardship flag.
- Amending the Privacy Act to enable an ‘arrangement’ flag to be disclosed in a number of situations where the payment of an account is subject to an arrangement, including an arrangement bought about because of the hardship circumstances of the consumer.
- Use of multiple reporting systems to enable a credit provider to disclose RHI in a hardship situation for the purposes of a credit report, with such data possibly differing to other reporting of repayments, including APRA arrears reporting.

- Changing the Australian Prudential Regulation Authority (APRA) requirements concerning the ageing of arrears for accounts not subject to formal contract variation.
- Changing Australian Security and Investments Commission (ASIC) requirements relating to responsible lending and/or hardship notices.

The paper puts forward ARCA Members' recommended solution to this issue, being a reform enabling use of hardship flags.

2. Background

ARCA's vision is to improve people's lives through better credit decisions.

A critical component of fulfilling this vision is to ensure that the credit information used to support credit decisions provides an accurate and complete insight into a person's financial situation. In this context, the reporting of RHI for consumers, as a key part of Australia's transition to CCR, will both provide credit providers greater insights, while at the same time empowering consumers to use this information to influence better and more favourable credit decisions.

However, in developing the laws necessary to enable this transition to CCR, proper consideration was not given to how an individual's financial hardship may be reflected in the reporting of RHI. In the absence of any clear legal guidance or framework, credit providers (CPs) have been left with little direction or a consistent approach which would meet industry, consumer and regulator expectations.

Given that industry is currently transitioning to CCR, this issue ought to be resolved.

As the key industry association dealing with credit reporting issues, ARCA is well-placed to advance the discussion on RHI and hardship.

ARCA welcomes this opportunity to bring leadership to this issue. We are seeking to use this paper as a catalyst for the development and execution of clear guidance, and, if necessary, meaningful reform on this matter.

3. Purpose

This background paper is intended to provide our key stakeholders, including regulator and industry groups, with a background to the issues in disclosing RHI where a customer is in hardship. Further, it explores the current legal restrictions which have led to such uncertainty when it comes to dealing with the RHI for customers in hardship. It examines the reform process which led to the enactment of the *Privacy Amendment Act 2012*, predominantly to demonstrate that the issue of RHI and hardship, although touched upon as part of that reform process, was not tackled in a meaningful and considered fashion. Finally, this paper intends to pre-empt discussion of possible solutions to this issue, mapping out suggestions.

The paper is set out under the following headings:

- (a) What is the current issue with reporting RHI in hardship situations?

- (b) Do contract law principles and the National Credit Code effectively dictate how RHI ought to be disclosed for a consumer credit account in a hardship situation?
- (c) How was the RHI/hardship issue dealt with in the Privacy Reforms? What aspects of this issue were considered?
- (d) What approach have overseas jurisdictions taken to this issue?
- (e) What are suggested solutions to this issue?
- (f) Conclusion and recommendation.

The resolution of this issue is critical to ensuring that:

- Credit providers are able to disclose RHI with clear compliance expectations and understanding.
- Consumers understand fully what impact a hardship arrangement may have on their credit report.
- There is consistency in regulatory requirements, so that regulators can effectively monitor and manage compliance issues.

4. What is the current issue with reporting RHI in hardship situations?

In simple terms, the issue is that the manner in which RHI is reported in a pre-default hardship situation is unclear and uncertain. In ARCA's view, it was not dealt with adequately in the reforms to the *Privacy Act* which flowed from the passage of the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (the Privacy Law reforms¹), and does not appear to be simply solved by requiring a contract variation to be made where a consumer and the credit provider agree to hardship assistance (and reporting RHI on that variation).

Further, the issue becomes more complex because of competing regulatory requirements, namely:

- Under the *Privacy Act 1988* (the Act), there is a general requirement for credit information to be accurate, complete, up-to-date, relevant and not misleading². The disclosure of RHI enables the monthly reporting of a customer's account payment status, that is, whether the account is up-to-date and, if not, how overdue it is. Information about reporting RHI is contained within section 6V of the Act and paragraph 8 of the *Privacy (Credit Reporting) Code 2014* (CR Code). However, neither the Act nor the CR Code address how to report RHI where a customer is subject to hardship

¹ See section 6 of the paper, "How was the RHI/hardship issue dealt with in Privacy Reforms? What aspects of this issue were considered?"

² See, for example, sections 21U and section 20S of the *Privacy Act 1988* which oblige a CP (s21U) or CRB (s20S) to take reasonable steps to correct information which is inaccurate, incomplete, out-of-date, irrelevant and misleading (having regard to the purpose for which it is held)

arrangements. Indeed, of particular relevance is that no provision is made which enables a hardship status to appear on a credit file, except a new arrangement entered after default information has already been disclosed.

- Under the *National Consumer Credit Protection Act 2009* and the National Credit Code³ there are requirements which address both responsible lending and hardship obligations. The responsible lending obligations⁴ require a credit provider to make reasonable inquiries about a customer's financial situation, requirements and objectives, and take reasonable steps to verify their financial situation, assessing whether a credit contract is 'not unsuitable' for the consumer. The hardship obligations⁵

³ Schedule 1 of the *National Consumer Credit Protection Act 2009*

⁴ See sections 128 to 132 *National Consumer Credit Protection Act 2009* and Regulatory Guide 209 Credit Licensing: Responsible Lending Conduct

⁵Section 72 of the National Credit Code provides:

Hardship notice

- (1) If a debtor considers that he or she is or will be unable to meet his or her obligations under a credit contract, the debtor may give the credit provider notice (a **hardship notice**), orally or in writing, of the debtor's inability to meet the obligations.

Note: If the debtor gives the credit provider a hardship notice, there may be requirements (beyond those in section 88) that the credit provider must comply with before beginning enforcement proceedings—see section 89A.

Further information

- (2) Within 21 days after the day of receiving the debtor's hardship notice, the credit provider may give the debtor notice, orally or in writing, requiring the debtor to give the credit provider specified information within 21 days of the date of the notice stated in the notice. The information specified must be relevant to deciding:
 - (a) whether the debtor is or will be unable to meet the debtor's obligations under the contract; or
 - (b) how to change the contract if the debtor is or will be unable to meet those obligations.
- (3) The debtor must comply with the requirement.

Note: The credit provider need not agree to change the credit contract, especially if the credit provider:

- (a) does not believe there is a reasonable cause (such as illness or unemployment) for the debtor's inability to meet his or her obligations; or
- (b) reasonably believes the debtor would not be able to meet his or her obligations under the contract even if it were changed.

Notice of decision on changing credit contract

- (4) The credit provider must, before the end of the period identified under subsection (5), give the debtor a notice:
 - (a) that is in the form (if any) prescribed by the regulations and records the fact that the credit provider and the debtor have agreed to change the credit contract; or
 - (b) that is in the form (if any) prescribed by the regulations and states:
 - (i) the credit provider and the debtor have not agreed to change the credit contract; and
 - (ii) the reasons why they have not agreed; and
 - (iii) the name and contact details of the approved external dispute resolution scheme of which the credit provider is a member; and
 - (iv) the debtor's rights under that scheme

require an Australian Credit Licence (ACL) holder to consider changing a credit contract in response to a hardship notice from a customer. Typically hardship arrangements may take a number of forms, including a formal written contract variation, and also a 'simple arrangement' (which ASIC defines as an arrangement for no more than 90 days and which is exempt from written notice requirements). Financial difficulty obligations are also contained in paragraph 28 of the Code of Banking Practice and paragraph 24 of the Customer Owned Banking Code of Practice, which both set out obligations for subscribing banks when dealing with customers in financial difficulty⁶.

- Under Australian Prudential Regulation Authority (APRA) guidelines – APRA requires that “unless a loan is formally restructured, loans where regular contracted payments are reduced or temporarily suspended continue to accrue arrears for purposes of APRA reporting according to the original schedule of payments⁷”. This means that, in a situation where a credit provider has agreed with a consumer not to require payment of a credit account for a short period, but not yet take steps to formally restructure the credit account, APRA would expect that arrears would continue to accrue in respect to the credit account. These APRA guidelines are imposed on all Authorised Deposit-Taking Institutions (ADIs).

This means that for CPs who are both regulated by ASIC and APRA, any RHI disclosed where a customer is subject to hardship arrangement must be consistent with any agreed arrangement, even if a simple arrangement, but must also accurately record whether or not arrears will continue to accrue for the loan. This could result in RHI being entered which reflects, during a simple arrangement, that a contract is overdue, though the CP and customer have agreed that payments are not required to be made during that period.

Given the impact that this issue may have across multiple regulators (ASIC, APRA, and the Office of the Australian Information Commissioner (OAIC)), any solution will need to address how each regulator's requirements are met when RHI is reported for a customer in hardship.

The following examples illustrate the issue:

Example 1

Alex is experiencing temporary financial difficulty and approaches her credit provider (an ADI) for hardship assistance. After discussion between the CP and Alex, it is determined that a three month payment moratorium would be appropriate. Then, at the expiry of this period, the CP will determine whether the financial difficulty being experienced by Alex has been resolved. At this stage, pursuant to section 72 of the National Credit Code, the CP will be taken to have refused to change the contract in response to Alex's hardship notice.

As such, because the CP has decided that changing the contract is not appropriate until such time as there is more certainty about the customer's financial difficulty, and the CP is regulated

⁶ The Code of Banking Practice is available at: <http://www.bankers.asn.au/industry-standards/ABAs-code-of-banking-practice>, and the Customer Owned Banking Code of Practice is available at: <http://www.customerownedbanking.asn.au/images/stories/publications/cobcop/COBCOP%20booklet%20-%20final%20web%20-%20Dec%202013.pdf>

⁷ APRA Letter to All Authorised Deposit-Taking Institutions, dated 8 August 2012

by APRA, it will be required to continue to report RHI in accordance with Alex's contracts and existing legislation (ie. continue to age the debt).

Accordingly, the RHI for Alex for this period of hardship assistance would appear as follows on her credit report:

Pre-hardship	Pre-hardship	Pre-hardship	During hardship	During hardship	During hardship	Post-hardship (after payment) ⁸	Post-hardship (no payment)
1	2	3	4	5	6	0	7

This method complies with the Act and CR Code requirements, because – in the absence of a formal variation to contract – it continues to accurately reflect the ageing of the debt pursuant to that contract.

Example 2

Bob is experiencing temporary financial difficulty, and his credit provider is not an ADI. After discussion between Bob and the CP, it is determined that it would be appropriate for the obligations to meet monthly payment obligations under the credit contract to be frozen for a period of time, at the expiry of which it is anticipated that the financial difficulty would have resolved.

As such, to reflect the hardship arrangement, the CP will place a temporary stop on ageing RHI during hardship.

Pursuant to this method, the RHI for Bob would be reported as follows:

Pre-hardship	Pre-hardship	Pre-hardship	During hardship	During hardship	During hardship	Post-hardship (after payment)	Post-hardship (no payment)
1	2	3	3	3	3	0	4

Because the credit provider is not required to continue to age the debt, this method also complies with the Act and CR Code requirements. That is, the entry of the same RHI status for consecutive months accurately reflects the fact that the CP treats the debt at that same RHI level.

To be clear, although both these examples involve outcomes which are, in ARCA's view, legally compliant, it remains an issue that Alex and Bob, who may be in similar financial situations, will have this reflected in different entries on their credit report. Why is this an issue?

It is an issue for a number of reasons:

- It devalues RHI as data set, although noting that there may only be a small amount of consumer credit accounts impacted by hardship so the overall system impact may be

⁸ This table assumes the post-hardship payment is made in full, of all outstanding arrears. However, it may be that a partial payment is made, in which case the RHI data entered will reflect the oldest outstanding payment (ie. if two outstanding payments were made, the figure entered would be a 4).

minimal⁹. RHI is intended to provide CPs an accurate insight into a consumer's payment behaviour. However, in the above situations, the RHI reflects more a CP's hardship policies rather than the consumer's payment behaviour.

- These differences in RHI make it more difficult for a CP to verify a consumer's financial situation, and to be in a position to meet responsible lending obligations. It also makes it very difficult for a CP reviewing a consumer's credit report to differentiate between those consumers who exhibit poor payment behaviour, and those consumers who are in hardship. In both examples, the RHI which is entered does not accurately reflect the consumer's financial situation. In Alex's case, it appears the consumer is seriously behind in their payments and without understanding the reason why, any other CP examining this RHI may conclude that the consumer is a high credit risk. In Bob's case, it appears the consumer is making regular repayments, including a lump sum payment at the end of three months. This may make the consumer appear less of a credit risk¹⁰.
- It is extremely confusing for consumers, particularly those who may have credit contracts with multiple CPs, who adopt different approaches to hardship. It sends a mixed message about the benefit of seeking early hardship assistance. This is because a consumer is likely to perceive the worsening of RHI, as occurs in Alex's case, as a disadvantage associated with seeking hardship assistance from that particular CP. Yet if that same consumer sought early hardship assistance from the CP in Bob's situation, they may end up in a better position. Most consumers are unlikely to appreciate the differences between CPs until they actually seek hardship assistance, compounding the confusion, unease and mixed messages.
- In any event, these discrepancies in entry of RHI could inadvertently flag that a consumer is in hardship, especially where the entry of RHI is frozen during a period of hardship yet the credit account arrears continue to accrue. RHI entries may flag for other CPs that a consumer is in hardship where there is a repeated entry of the same RHI value over a three month period, followed by either, in the fourth month, a 3 month lower RHI value (if payment in full is made), or a 3 month higher RHI value (if no payment is made)¹¹. This could appear on a credit report as:

Pre hardship	During hardship	During hardship	During hardship	Post-hardship (after payment)	Post-hardship (no payment)
0	1	1	1	0	4

⁹ There is currently no publicly available data about the number of consumer credit accounts in hardship (whether subject to informal or formal arrangement). Without this information it is difficult to determine the extent to which RHI will be impacted by those consumers in hardship situations. Even if a small amount of accounts are impacted, it remains that achieving consistency in RHI/hardship reporting will be a valuable outcome both for industry but also for consumers.

¹⁰ It should be noted that the overdue payments may still result in Bob appearing as a credit risk. However, a situation where such a risk would not appear on a credit report would be where a consumer seeks hardship assistance prior to their account becoming overdue. Therefore, nothing on the credit file would indicate whether the '0' reflects payments being made, or payments not being made (due to hardship).

¹¹ This may also happen in a situation where a consumer misses a monthly repayment, and thereafter makes a series of single payments, but without clearing the missed payment.

The second scenario is less likely to act as an RHI flag – although, given the second scenario requires a consumer to make a lump sum payment of four months' worth of arrears, it is also less likely to occur¹².

5. Do contract law principles and the National Credit Code effectively dictate how RHI ought to be disclosed for a consumer credit account in a hardship situation?

Consumer advocates consider this issue is addressed (save for the APRA reporting requirements) by the fact that where a customer is in hardship which has resulted in a change to the contract, this should be reflected in how RHI is entered for the account¹³.

In this section, ARCA has considered whether either contract law principles, or the obligations contained in the National Credit Code adequately answer how RHI ought to be disclosed where a consumer is in hardship. ARCA's view is that contract law principles do not assist, as informal responses to possible hardship do not amount to contract variations. Furthermore, simply suggesting that a CP is required to vary the contract even for those temporary informal situations, does not properly reflect the legal obligations contained in the National Credit Code.

It is worth considering an example which illustrates how the law supposedly adequately deals with hardship. In this example, Cate had a personal loan on a 3 year term with scheduled payments of \$300 each month. Due to an unexpected change in her financial circumstances, she has negotiated to extend the loan to a 6 year term, with payments of \$200 a month. The RHI will record whether or not Cate has then met these revised payment obligations.

This example assumes that the outcome of a hardship response is fixed and clear, and, in every instance, the response to hardship is either an immediate contract variation or a rejection of hardship and commencement of collection activity. However, the nature of hardship will often mean that clear and fixed outcomes will not always occur immediately.

The reasons why this occurs reflects the very uncertainty inherent in sudden and unexpected changes in life circumstances. For instance:

- A customer loses their job, but – when they call their credit provider to seek hardship relief – they have no certainty about when they will have another job. It may be that the situation is temporary, or it may be the situation is more long-lasting. Both the customer and credit provider may be reluctant to permanently change the loan term or repayment amount until such time as it clear how the situation may resolve.
- Similarly, a customer may have a sudden illness or family issue which has impacted on their ability to repay their loan.

¹² The reason this is less likely to occur is simply because a consumer who has recently experienced hardship may not have ready access to the funds (by way of savings or income) to make a lump sum payment. This may especially be the case if the consumer has multiple credit products, and has sought hardship assistance across a number of those credit accounts.

¹³ CALC letter to ARCA dated 23 September 2014

This is recognised in the Australian Bankers' Association Industry Guideline "*Promoting understanding about banks' financial hardship programs*", which identifies three broad categories of responding to a customer's financial difficulty, namely:

1. Late payment assistance – when a customer has a short term payment difficulty. Banks may offer a payment arrangement or deferral, and may refund or waive late payment or default fees.
2. When restoring a customer's financial situation is possible – short term arrangements include moving to interest-only or reduced payments for an agreed period of time, and longer term arrangements include extending a loan term, or requiring a change to the conditions of the existing credit contract.
3. When restoring a customer's financial situation is unlikely – options include agreeing on an alternative arrangement/plan/contract, refinancing, selling property or pursuing bankruptcy/insolvency arrangements¹⁴.

The ABA's Industry Guideline identifies a number of examples of possible hardship arrangements including:

- Postponed or deferred payments (moratorium)
- Capitalising or capping
- Loan restructure (loan extension)
- Payment holiday
- Interest-only repayments
- Temporary overdrafts or line of credit
- Loan freeze
- Offering information on different money management and banking arrangements
- Associated arrangements including refinance, debt consolidation, fee waivers and early access to term deposit accounts.

Some of these hardship arrangements will result in an immediate formal change to the terms and conditions of the credit contract. However, some of these hardship arrangements may be used as an interim measure, with any formal change to the terms and conditions occurring subsequently or, not at all, if not deemed necessary.

For example, a customer loses their job and immediately contacts their credit provider to advise of this, noting there is no certainty about the period they will be unemployed. In this circumstance, it may be appropriate for the credit provider to implement a moratorium for a three month period, on the proviso that this will be reviewed at the expiry of this period.

At the end of this period, any of the following may occur:

- The customer has experienced a short period of unemployment, and is now re-employed. The customer has made extra payments to bring any arrears up-to-date. There is no need to make any changes to the credit contract, and the customer can resume normal payments.

¹⁴ Australian Bankers' Association Inc, "Promoting understanding about banks' financial hardship programs", Industry Guideline, Version 2.0, March 2015, page 2

- The same scenario as above, however, due to the sudden lack of funds arising from the unemployment, the customer is seeking to have the arrears capitalised, and the credit contract will be formally varied.
- The customer remains unemployed, and it does not appear likely that they will be employed in the near future. A change to the contract due to hardship is unlikely to place the customer in a position that they can repay the loan. Instead, the customer may need to discuss possible alternative arrangements to repay the debt, including sale of secured assets, or alternatively, whether the customer may need to consider bankruptcy.

In these circumstances, only the second scenario will result in a formal change being made to the credit contract.

This needs to be considered in light of the assertion that every hardship arrangement should result in a contract variation. Putting aside that such an approach would remove the flexibility inherent in the responses highlighted in the example, the issue is, does the law require this response?

Common law – contract variation

For a credit contract to be varied at common law, it would need to be demonstrated that the ordinary principles of contract formation have been met. In particular, there must be certainty of terms of the varied contract, and adequate consideration passing between the contracting parties to support such an agreement to vary.

Part of the reason why a short-term informal hardship arrangement does not appear to amount to a variation of the underlying credit contract is that there will often be uncertainty as to the terms of the contract, incorporating this short-term arrangement. That is, although it may be agreed that a consumer is not required to make payments for a three month period, until the expiry of this period it will not be clear how this three month payment gap impacts on the remaining payment obligations. It may be that the payment terms will need to be varied, to increase the payments to allow repayment of the missing three months, or alternatively, the contract term lengthened by three months. However such a variation to the underlying contract will invariably occur after a review of the consumer's situation at the expiry of this informal arrangement.

Further, in respect to substantiating that a variation has occurred, there is an issue as to whether, in the case of a short-term informal hardship arrangement, the parties have provided adequate consideration to support a variation to the contract being made. The CP will have agreed to not enforce the payment obligations owed by the consumer, which does not appear supported by any new consideration (and any subsequent payment made by the consumer for arrears will simply be in accordance with their existing payment obligations). Indeed it is difficult to argue that an agreement not to make a payment is supported by adequate consideration.

A more coherent view of the contractual impact of a short-term informal hardship arrangement is that no such variation to the original contract has occurred. Instead, ARCA's assessment is that the following has occurred:

- A separate contract may be said to have been formed, simply in respect to the informal hardship arrangement (although again, this may be difficult to establish, given the lack of consideration); or
- The CP has granted an indulgence to the consumer and has waived or is otherwise estopped from exercising its rights to terminate the credit contract by reason of the consumer's non-payment of the monthly payment amounts. Alternatively, even if the CP has not waived its rights, it is otherwise prevented from terminating its credit contract by reason that such a termination would be unconscionable.

In both instances, there has been no change to the original credit contract. As such, the payment obligation which exists under the original credit contract remains unaffected by either the separate contract, or by the waiver and estoppel. Relevantly, as concerns the disclosure of RHI in respect to these payment obligations, the original credit contract will not reflect that such obligations are met and 'current and up-to-date' during the short-term hardship arrangement.

National Credit Code

One view of the obligations under the National Credit Code (NCC) appears to be that, in every instance where a customer and CP respond to a hardship notice by not rejecting the hardship and treating the customer in breach of the contract, that this response or arrangement ought to be the subject of a variation to the credit contract.

However, this suggestion over-simplifies the requirements of the NCC. In particular, section 72 of the NCC¹⁵ provides:

- If a debtor considers they are unable to meet their obligations under a credit contract, they may give their credit provider a hardship notice.
- The credit provider may request further information from the debtor, by providing notices within specified time periods – noting that the further information must be relevant to deciding whether the debtor is unable to meet their obligations under the contract, or how to change the contract if the debtor is unable to meet their obligations.
- By a specified period, the credit provider must then provide notice of its decision which records either that the debtor and CP have agreed to change the contract, or that there has been no agreement to change the contract, the reasons why and the debtor's rights to have the matter considered by the credit provider's external dispute resolution scheme.

Under ASIC Class Order 14/41, the requirement to provide written notice of the contract change does not apply to any agreement that defers or reduces obligations for a period of less than 90 days.

Relevantly, the provision does not stipulate, that:

- If a CP receives a hardship notice from a debtor, it must change the credit contract.
- The only suitable response to a hardship notice is a variation to the contract.

¹⁵ Inserted in full at footnote number 5

It is also notable that the language used in this provision is ‘change’ to the contract. It is arguable that ‘change’ to the contract has a much broader meaning than giving effect to a formal contract variation and would include the grant of an indulgence.

Instead, the NCC appears to enable the flexible approach to hardship situations, as described above. Such an approach is appropriate, given the nature of hardship and the need for this flexibility to provide outcomes beneficial to both consumers and CPs. In light of this, the argument that the NCC requires a contract variation in situations of hardship cannot be sustained. Moreover, the NCC provisions do not answer the issue of how RHI ought to be disclosed where the NCC provisions are otherwise being adhered to.

6. How was the RHI/hardship issue dealt with in the Privacy Reforms? What aspects of this issue were considered?

There appear to have been significant gaps in the discussion and resolution of the RHI/hardship issue, leading to the enactment of the Privacy Reforms. These gaps include:

- The nature of hardship
- Temporary arrangements pending contract variations
- Agreed process for disclosing RHI where a customer is in hardship

Ultimately the government appears to have relied predominantly on the policy position put forward in the report from the Australian Law Reform Commission (ALRC) that preceded the Privacy Reforms on this matter. That position was limited to the observation that reporting a pre-default scheme of arrangement may not be desirable, given the absence of any significant support for the reform from consumer advocate groups¹⁶.

Annexure A to this paper sets out details of the Privacy Reforms process, and details the submissions and recommendations made about the RHI/hardship issue as part of the ALRC inquiry (August 2008), the Senate Finance and Public Administration Committee inquiry (October 2011), the House of Representatives Standing Committee on Social Policy and Legal Affairs inquiry (September 2012) and the Senate Standing Committee on Legal and Constitutional Affairs inquiry (September 2012).

The gaps in the reform process are examined further below:

The nature of hardship

At its heart, the key issue in consideration of this matter during the Privacy Reforms appears to have been an incomplete understanding of what hardship means, and how it would be appear on a credit report, even without the use of a pre-default arrangement or a hardship flag.

Much of the discussion of hardship was focussed on natural disasters (with the Queensland floods having recently occurred at the time of the inquiries). Little or no information was adduced about the various forms of hardship, nor the proportion of hardship claims arising from natural disasters, as opposed to an unexpected change in financial circumstances due to illness, job loss, and or other life circumstances.

¹⁶ ALRC, “For Your Information: Australian Privacy Law and Practice”, dated 12 August 2008 at 58.37

Industry representatives proposed to the Senate Finance Committee that a distinction be made between hardship arising from natural disasters, and other circumstances of ordinary hardship, with the result that only ‘compassionate action in difficult circumstances’ be flagged on a credit report.

No information was provided about the portions of hardship arrangements arising from natural disaster, as opposed to those hardship arrangements that are the result of any other change in the individual’s circumstances (for example, loss of job or illness). Legal Aid Queensland, in its submission to the Senate Finance Committee, did raise examples involving a borrower who proactively wanted to change their loan repayments in circumstances in which they were \$100,000 ahead in repayments and, further, were wanting reduced repayments over a period of maternity leave.

Although these examples took the discussion of hardship further than that of natural disaster, they involved situations where a borrower was seeking to proactively change their loan terms and conditions, as opposed to a situation where a borrower may be in temporary hardship brought about by a sudden change in circumstances.

Understanding the nature of hardship, including the type, number and extent of hardship arrangements, is critical to then understanding the difficulties that arise in how these arrangements may then be recorded on an individual’s RHI.

Temporary arrangements pending contract variations

Throughout the reform process, the position adopted by consumer advocates was that all hardship arrangements (whether temporary or permanent) would result in a contract variation and, as such, RHI would simply be entered to reflect whether or not the new arrangement was being adhered to.

As set out in section 5 of this paper, this approach over-simplifies the law regarding variations, and does not properly account for how RHI ought to be entered where a temporary arrangement is in place, and no formal variation has occurred.

The fact that the Act provisions were silent on what to do in this circumstance, was raised by Mr David Niven of the Financial Ombudsman Service (FOS) in an oral submission to the Senate Legal and Constitutional Affairs Committee, as follows:

“The difficulty with the bill is that it is simply silent on that situation. The difficulty that arises is that the ground rules as to how that ought to be treated by a credit provider acting in good practice are unclear. You will be making a payment arrangement but you will nonetheless be behind on your contractual repayments. There will then be an issue as to whether or not that is a variation: is that a binding variation so that I am no longer as a consumer in default, or is it, as the upmarket lawyers call it, simply an indulgence so that they are prepared to accept that without prejudice to their rights and I could still be listed? There are then a series of issues, such as: while I am negotiating that, as the Ombudsman said, although I am in default, should I then be safeguarded from being listed during that period? These are all issues that are arising in disputes we are getting

at the moment. Unfortunately, the bill simply does not take a policy stance either way on any of those issues. I think that is unfortunate. ”¹⁷

Interestingly, the fact that the *Privacy Amendment (Enhancing Privacy Protection) Bill 2012* (the Bill) was silent on this issue was then acknowledged by Ms Katherine Lane, of the then-Consumer Credit Law Centre (NSW), although she suggested that this omission was ultimately a good outcome, as follows:

“I think it is essential that consumers are encouraged to request financial hardship when needed. If there is a negative consequence of doing that, that would be very unfortunate. I support the bill being silent on this issue. I think it is something that could be worked out perhaps in the regs or the code. It is certainly something I strongly advocate to make sure that with anything that happens it is absolutely clear that consumers are encouraged to apply for hardship and there are no negative consequences in doing that so that people can manage their finances in a responsible way. Again, I think this should be managed outside the bill. I do think it needs to be sorted out. There is a good argument for leaving it silent permanently anyway, simply because if the repayment history is put in it will deal with some of that in that way – although I am arguing not for repayment history. But I am also arguing for a period of grace, if the government is so minded to continue with repayment history anyway. I think all the detriments, the little bits of negatives, are going to occur anyway, but we should put no impediments on consumers applying for hardship. ”¹⁸

The desire to ensure that consumers were not dis-incentivised from applying for hardship assistance early appears to have been more persuasive than the desire to ensure that there was a legislated approach to dealing with entering RHI for temporary hardship arrangements. However, this approach has failed to take into account that in the absence of a legislated approach, a consumer may still be dis-incentivised from applying for hardship assistance early (or at all), because there is no clear understanding of how any hardship would be reflected on a consumer's credit report.

Agreed process for disclosing RHI where a customer is in hardship

As set out above, the assumption that appears to have been made through the law reform process was that – without the government approving either a hardship flag or a pre-default listing arrangement - there would still be a clear process for ensuring that RHI could be listed where a customer is in hardship, without that customer being harmed by reason of their hardship.

That assumption was challenged by industry submissions, which highlighted that, in the absence of an agreed process, a customer would be recorded as being overdue or delinquent. For instance, NAB's submission to the Senate Finance Committee highlighted:

¹⁷ Committee Hansard for Senate Legal and Constitutional Affairs Committee (10 August 2012), page 31

¹⁸ Ibid

“If the restrictions on credit reporting do not cater for instances of hardship pre-default then these customers credit reports will start to show delinquency issues that are indistinguishable from situations where this is not the case.”¹⁹

Similarly, ANZ warned in its submission to the Senate Finance Committee:

“If credit providers are unable to disclose hardship arrangements that are entered into prior to default it will result in adverse repayment history being reported for the individual. The credit provider will be required to disclose that the individual did not make their standard monthly repayment even though they have not entered into an alternative arrangement with the credit provider.”²⁰

However, the government did not appear to respond to these submissions, as noted above with the final result being simply to refer back to the outcome of the ALRC inquiry. Again, the ALRC’s report did not address how RHI would be disclosed when a consumer is subject to hardship assistance. Instead, the ALRC’s view was simply that:

“The ALRC is not convinced that allowing the reporting of schemes of arrangement without a default report being listed first is desirable – especially in the absence of any significant support from consumer groups for such a reform.”²¹

In ARCA’s view, the absence of reform which adequately addresses the issue of RHI and hardship results in poor outcomes and uncertainty for consumers, industry and regulators.

7. What approach have overseas jurisdictions taken to this issue?

It is difficult to gain much guidance from overseas jurisdictions on approaches to this issue, predominantly because of the differences in approach taken to both CCR, and also the tie-in with responsible lending obligations. However, both the United Kingdom and New Zealand, being credit reporting systems with close alignment to Australia’s credit reporting system, have addressed this issue. In the United Kingdom, an ‘arrangement’ flag is used, whereas in New Zealand, a ‘hardship flag’ is used. We have set out below details of both these approaches.

United Kingdom

On 1 January 2014, the Information Commissioner’s Office published its *Principles for Reporting of Arrears, Arrangements and Defaults at Credit Reference Agencies*. It is drafted in clear and direct language, with the purpose of ensuring consumers are made aware of how information will be reported on their credit file.

It is based on five principles:

1. Data that is reported on your credit file must be fair, accurate, consistent, complete and up to date.
2. Should a payment not be made as expected, information to reflect this will be recorded on your credit file.
3. If you offer or make a reduced payment, how it is reported will depend on whether it is agreed with the lender.

¹⁹ NAB Supplementary Submission to the Senate Finance Committee, dated 24 March 2011, page 10

²⁰ ANZ Submission to the Senate Finance Committee, dated 31 March 2011

²¹ ALRC, “For Your Information: Australian Privacy Law and Practice”, dated 12 August 2008 at 58.37

4. If you fall into arrears on your account, or you do not keep to the revised terms of an arrangement, a default may be recorded to show that the relationship has broken down.
5. When an account is closed, the record should properly reflect the closing payment status of the account and any agreement between the parties.

In terms of whether hardship will then be recorded on a credit file, it is useful to refer directly to the content of principle 3 which provides:

“Agreed reduced or revised payments

If, due to financial difficulty, your lender agrees to a reduced or revised payment with you, this will be reflected on your credit file. How revised or reduced payments are shown on your credit file will depend on whether it is a temporary or permanent change to the agreement. The account may or may not be in arrears at the time of the change.

Should a *permanent* change in the payment terms be agreed by the lender, there will normally be a new agreement signed and the revised terms will be reported going forward.

This may mean that a new limit, account and/or term is shown on your credit file and performance will be reported against that going forward.

As long as you comply with the revised terms arrears will not accrue further or be shown although any arrears reported under the previous terms will stay on your credit file.

Should a *temporary* reduction in the payment amount be jointly agreed between you and your lender, this ‘arrangement’ will be recorded at the CRAs.

This may also occur if there is a temporary change in terms (that is not part of the product) such as a payment holiday or change to interest only.

Depending on the period and amount of the arrangement, arrears may continue to be reported. Such temporary arrangements may last for some time but are generally expected to revert to the contracted terms at some future point. For such accounts arrears may continue to be calculated in accordance with the contracted terms.

The record must show that the account is the subject of special terms. The reporting of this fact may be different depending on the product and the CRA.

It is important that you are made aware when such arrangements are made and maintained, that it will show on your credit file and that whilst arrears may accrue and increase, a default will not be recorded.

Following a satisfactory period of payments under a temporary arrangement, and if the lender agrees, the status on your account may be set to zero; although the history will remain. This can be described as capitalisation, re-scheduling or re-aging. Depending on the product this could result in adjustments as to how your account is reported on your credit file e.g. the payment amount, repayment period as well as the status. Should you make full payments from this point onwards your account will be classified as being up to date.

If after a period of time a permanent change in terms on an account occurs then if appropriate, the revised terms should be recorded at the CRAs and payment performance calculated against the new terms; in such circumstances there will no longer be an arrangement in place.”

This guidance makes it very apparent that any temporary arrangement with a credit provider will appear on a credit report. It doesn't provide a 'one size fits all' type solution, recognising some lenders will continue to age a debt during an arrangement, whereas others may not, but this will depend on the terms agreed between lender and customer.

New Zealand

In New Zealand, the ability to disclose a hardship status as part of an RHI record is made possible by the definition of RHI, contained within section 5 of the *Credit Reporting Privacy Code 2004*. This partly mirrors the Australian definition (under section 6V of the *Privacy Act*), providing that repayment history information is:

- “in relation to a credit account for which there are periodic payments:
- (a) whether or not in any given month a periodic payment is due and payable;
 - (b) where a periodic payment is due and payable in that month, whether or not the individual concerned has made that payment;
 - (c) any other information required to identify or classify the payment.”

The provision in subsection (c) is a departure from the Australian definition, broadly enabling a range of additional information about the payment to be disclosed.

The provisions in the New Zealand *Credit Reporting Privacy Code 2004* have been operationalised by the Retail Credit Association of New Zealand (RCANZ) Credit Reporting Industry Requirements. This document enables hardship information relevant to a payment to be disclosed in two ways:

1. As part of an account status – which will record that an account is in hardship at a particular time period.
2. As part of a payment status – which will record that a particular payment is subject to hardship.

It is possible for hardship to be recorded as both an account and payment status. In this regard, section 14.1 “Hardship Reporting” provides:

“It is the choice of the credit reporters to either report hardship in either or both the account status and payment status fields as defined by sections 13.2 and 13.15 respectively.

The definition of Hardship should be in line with the Credit Providers classification.”

In terms of entry of hardship as an account status, section 13.2 sets out the Account Status Table and provides for a 'H' code for 'Hardship'. In addition, the following codes are used:

- A – Active
- C – Closed

- D – with Debt Collector, account closed with Credit Provider
- U – with Debt Collector, but account still open with Credit Provider
- G – Scheme of Arrangement
- I – Inactive (no utilisation)
- N – Closed involuntarily – no further credit available and no remaining outstanding balance. Credit is terminated or otherwise ceases to be in force
- S – Suspended
- X – Debt sold

In terms of the entry of hardship as a payment status, section 13.15 sets out the Payment Status Table, which reflects the practice in the Australian CR Code of assigning a number between 0 to 6 with this number representing the age of the payment due. In addition, the Payment Status Table enables:

- H – Hardship – Customer in hardship
- R – Re-aged – An account has been re-aged by credit provider.

Beyond this industry requirements document, there is no other explicit provision in the relevant legislation (*Privacy Act 1993*) or the *Credit Reporting Privacy Code 2004* which sets out additional rules or requirements about reporting hardship for RHI²². There is also no prohibition on reporting RHI reflecting an account is in hardship.

8. What are suggested solutions to this issue?

ARCA believes that this is an issue which needs to be resolved, to provide certainty in RHI and hardship reporting for consumers, industry and regulators. Given the transition to CCR is currently occurring and is likely to increase at a significant level over the next 12 to 18 months in Australia, the need to find a solution is imperative. It should be noted that the vast majority of RHI will not be impacted by hardship. Although figures are not available on the number of customers whose repayments will be affected by hardship, it can be anticipated that the number is less than five percent, and more likely one or two percent.

Solving this issue is therefore unlikely to impact on CCR transition in any meaningful way. Nonetheless, solving this issue is worthwhile for industry, regulators and consumers. With this in mind, the key objectives of any solution should include the following:

- Preserving the value of RHI as a data set, which will aid a CP's use of comprehensive credit reporting information.
- In preserving the value of RHI, the value of the credit reporting system should, as a whole, remain strong. It is critical to promote trust and confidence in the credit reporting system, and ensure there is no perception that the credit reporting system is either open to abuse, or unreliable.
- Maintain consumer confidence in both the credit reporting system, and financial system as a whole, in respect to the entry of RHI in relation to their consumer credit accounts, and further, their ability to seek hardship assistance.

²² It should be noted that the New Zealand *Privacy Act* does not set out credit reporting obligations in the same manner that the Australian *Privacy Act* does; instead these obligations are addressed in the New Zealand *Credit Reporting Privacy Code*.

- Enable regulators to easily identify and regulate their respective requirements, without putting those regulated organisations in a position of conflict.

The key objectives of solving this issue will need to be carefully addressed and, given the potential conflict between these key objectives, balanced wherever possible.

Based on discussions to date, we have identified the following possible solutions to this issue:

1. Requiring credit providers to report a consumer in hardship as 'current and up to date', supported with an amendment to the Principles of Reciprocity and Data Exchange (PRDE).
2. Use of a hardship flag on a credit report, on either a temporary or permanent basis.
3. Use of an arrangement flag on a credit report.
4. Using two systems to report repayment history, with one being used for credit reporting and the other being used to meet prudential requirements.
5. Changing APRA requirements.
6. Changing ASIC requirements.

We have set out below an analysis of each of these possible solutions, and where possible have sought to identify what the solution looks like, the impact for consumers, CPs, technology, legislation/regulation, and what next steps for implementation would involve.

'Current and up-to-date' requirement, with PRDE amendment

What does this solution look like?

This solution has been proposed by consumer advocates to the Australian Competition and Consumer Commission (ACCC) as part of the authorisation application for the PRDE.

In particular, the joint consumer advocate submission (provided by Consumer Action Law Centre, Financial Rights Legal Centre and Financial Counselling Australia, dated 1 April 2015) proposed that:

"...[i]t should be clear under Principle 1 that where a CP has chosen to contribute comprehensive information under the PRDE, the CP must not disclose a payment as overdue if the individual entered into a hardship arrangement. During the period of the hardship arrangement, RHI should be recorded as "Current up to and including the grace period", in accordance with clause 8.2(c)(i) of the *Credit Reporting Code* (the CR Code). If CPs are offering genuine hardship arrangements, the debt is no longer 'overdue' for the hardship period meaning it should not be reported as such.

'Hardship arrangement' should also be defined in the definitions section of the PRDE. For example: 'Hardship arrangement' means a consumer has made a 'hardship request' as defined in section 1.2 of the CR Code and the consumer has formally agreed with a CP to a moratorium or variation on payments for a certain period of time due to financial hardship.

Detailed guidance then needs to be produced to explain when credit reporting information can be disclosed for the purposes of assisting a debtor to avoid defaulting under clause 16.2 of the CR Code. At present clause 16.2 is open to wide interpretation [*sic*], which is concerning given the growing number of predatory business models purporting to assist consumers with debt problems."

ARCA's submission in response raised the following issues with this proposed solution:

"The PRDE is not in a position to resolve this issue, because requiring or allowing a CP to list an account in hardship as "current" would risk:

- breaching an ADI's APRA reporting requirements, since the account is continuing to age during that period and the information disclosed to APRA does not reflect the ageing of the debt;
- contravening ASIC requirements under the National Credit Code, because failing to disclose an account as overdue will have an impact on the responsible lending obligations of other CPs who lend to that customer; and
- potentially breaching a CP's obligations under the Privacy Act to ensure that credit information is accurate, and not misleading.

It is anticipated that, by the time a significant volume of repayment history information is being exchanged, this issue will have been resolved in consultation with the regulators, industry, and consumer advocates, and any resultant changes to legislation or regulatory requirements will have occurred. If this has not occurred at this stage, then it is possible that the PRDE could be varied to enable an exception to RHI reporting where a customer is in hardship (resulting in no RHI being disclosed for that customer for that period). Variation to enable such an exception would be a last resort, and used only as an interim measure because:

- the non-reporting of RHI by a CP who otherwise reports RHI may inadvertently flag that the CP's customer is in hardship (as this would be one of the few reasons why that CP has not disclosed RHI for that customer);
- CPs who are seeking to avoid meeting their contribution obligations could rely on this exception, which could impact on the amount of RHI being disclosed; and
- critically, not all CPs who contribute RHI are required to be signatories to the PRDE, so any approach that relies on the PRDE framework could only provide partial solution at best."

In their subsequent submission in response to ARCA's comments, the joint consumer advocates stated:

- they are not convinced the non-reporting of RHI would operate as an inadvertent hardship flag, and that future discussion needs to be informed by independent research, as well as a survey of CPs.
- "...[w]e query whether CPs would provide hardship to consumers merely to avoid meeting their contribution obligations under the PRDE. In relation to non-signatories ... we believe that the PRDE has an important role to play in leading the industry in relation to this issue, and that it could provide a 'best practice' model for all CPs reporting RHI."
- This issue has been ongoing for a number of years, and needs to be resolved. A shorter authorisation period for the PRDE was proposed (3 years rather than 5 years), with re-authorisation conditional on formal resolution of the treatment of hardship variations on credit reports.

The position remains that this solution will be unworkable. In addition to the reasons set out in ARCA's submission response, the following ought to be considered:

- Requiring a credit account to be listed as 'current and up to date' when the hardship arrangement between CP and consumer may include an acknowledgement of arrears, would mean the information on the credit report differs to the hardship arrangement.
- As much as there is a desire to ensure consumers are encouraged to seek early hardship assistance, this needs to be balanced with the desire to ensure that those same consumers are not able to conceal their financial position from other potential lenders, which in turn could result in a worse outcome for that consumer (who could otherwise be advanced additional credit which he or she is not in a position to repay). Further, and with the appropriate consumer education, the possible impact of not seeking early hardship assistance (ie. RHI reflecting a worsening financial situation, but with no explanation of hardship) should arguably work as a motivator for a consumer to proactively manage their financial conduct and seek hardship assistance.

Hardship flag

What does this solution look like?

A hardship flag would work on the basis that, where a customer is in hardship, rather than repayment history continuing to be reported for that customer's particular account, during the period of hardship a 'H' would appear on their credit report.

Similar to the approach adopted in New Zealand, that hardship flag could be entered as an account status, or as a payment status, or both. It is also possible that a hardship flag could be entered as a shadow field against the ordinary RHI payment status. This would mean that there would be two entries in the RHI field, the record of the actual payment status, and a record as to whether or not there is a situation of hardship.

It is assumed that the hardship flag will only be used for those situations where the hardship has not resulted in an immediate variation of contract – because for those situations the RHI can properly reflect whether or not the new variation is being met. This assumption may need to be further tested and examined.

An additional option may be for a 'disaster' flag to be entered, in addition to a hardship flag. The use of a disaster flag could be used for those circumstances of natural disaster, where a consumer has been impacted or resides within a region affected by natural disaster. The distinction between the hardship and disaster flags would recognise that, for a disaster situation, an immediate response may be required to allow for the impact of a natural disaster on a consumer, with the assessment of a consumer's financial circumstances superseded by the urgency and import of the natural disaster. In this way, it could be possible for a disaster flag to be followed by a hardship flag, once the impact of a natural disaster on a consumer's financial circumstances has been assessed. An additional benefit of a disaster flag would be that credit providers could mark consumers in a whole region with the flag, demonstrating positive steps towards dealing with a class of consumers that may have been the victim of a natural disaster, without requiring each of them to individually request such a flag be added to their credit report.

The hardship (and/or disaster) flag could either be permanent or temporary. If permanent, it would remain on the credit file for 24 months²³. If temporary, it would remain on the credit file during the period of hardship, to be updated (or possibly corrected) once the hardship has finished. Any update (or correction) would then reflect:

- If the hardship has resolved and arrears are either up-to-date, or the loan agreement has varied to account for any hardship, then the hardship flag would be replaced with RHI which reflects that, during the previous hardship period, the account was current and up-to-date.
- If the hardship has not resolved and the CP and customer have agreed that hardship assistance is not appropriate, then the hardship flag would be replaced with RHI which reflects the accrual of arrears during the hardship period.

Credit provider impact

For a CP, the impacts are:

- Systems impacts
- Responsibilities as CP who receives notice that its customer has a hardship flag with another CP

Systems impact

There will be different impacts depending on whether a permanent or temporary hardship flag is adopted. If permanent, it will require a CP to enter RHI once, reflecting the hardship flag (against the payment status). Alternatively, if the hardship flag was entered against the account status, this would be a separate disclosure of information, and the RHI would otherwise be entered to reflect the payment status.

If temporary, it will require entry of RHI twice, both when the hardship period occurs and subsequently once the hardship has ended. The use of the temporary flag will be much more difficult to implement from a systems point of view, and will also require clear processes about when any hardship flag is required to be updated.

That is, a protocol would need to be developed which would set out how RHI would appear when a hardship flag is removed. If there was no consistent means for reporting RHI status following removal of a temporary flag, this could mean that the same issues as posed in section 4 of this paper (“What is the current issue with reporting RHI in hardship situations?”) with some CPs entering arrears during this period, and other CPs freezing arrears, may arise.

Responsibilities as CP receiving notice that its customer has a hardship flag

A CP is able to receive an alert when information is disclosed about its customer (by another CP) which may indicate that the customer is at significant risk of default. Indicators which may ordinarily prompt the issue of an alert may include RHI which is more than 3 months overdue, or disclosure of a default (noting that each CP will determine these indicators depending upon

²³ This accords with the retention period for RHI, as set out in section 20W (item 2) of the *Privacy Act*

their own risk policy). Not all CPs will set up these alerts, so whether an alert will be generated may depend on each CP and their policy and approach.

That aside, a hardship flag on a credit report is likely to be a factor which indicates a customer is at a significant risk of default. The question for the CP will be what they do with that information. It is possible they may:

- Contact the customer to ascertain whether they require hardship assistance in respect to the accounts they have with the CP that has received the alert.
- Limit their exposure by reducing limits for facilities, or reviewing repayment terms.
- Do nothing, but wait and see what happens.

For both CPs and consumers, it may be appropriate that guidance exists which clearly sets out the expectations and obligations for those CPs who receive alerts that their customer is in hardship with another CP.

Consumer impact

The consumer impact has been identified as a prospect that a consumer will not seek hardship assistance because they are afraid that it will mean they have a negative credit report.

This possible impact was articulated in the joint consumer advocate submission to the Australian Competition and Consumer Commission regarding the authorisation of the PRDE, dated 14 August 2015, where it was stated at page 2:

“We note that ARCA has previously supported the use of temporary hardship flags on credit reports in place of RHI, despite the concerns raised about ‘inadvertent’ hardship flags. We have rejected previous proposals for temporary hardship flags, as we are concerned this would cause many debtors to avoid asking for a hardship variation if they knew that other CPs will be informed about the hardship variation and may react by closing or restricting existing credit contracts.”

We have been informed by financial counsellors and other professionals working in this sector, that their most vulnerable consumers – and particularly those likely to be subject to hardship arrangements – are very aware of their credit reports, and ‘paranoid’ about negative information on their credit report.

Much as for a consumer entering bankruptcy, the decision to enter bankruptcy may have negative connotations which may outweigh (in the consumer’s mind at least) the benefits for that consumer, there is a prospect that negative repayment information on a credit report will carry the same negative connotations for consumers. Given there has been considerable investment in reinforcing the message that consumers experiencing financial difficulty ought to contact their CP as early as possible, it is imperative that this solution not undermine that strong message.

If it were to transpire that consumers avoided seeking hardship assistance because of the fear of its impact on their credit report, they would likely have a worse credit report in any event – because the report would instead show a deteriorating financial position, rather than reflect positively that a consumer has taken steps to proactively address a situation of hardship.

If a hardship flag were adopted as a solution, work would have to be done to reinforce a message that a hardship flag is not a negative flag on a credit report. As well as consumer education, this may also involve the need for:

- Guidance about the obligations imposed on a CP whose customer is in hardship with another CP (as discussed above).
- A temporary flag, rather than a permanent flag – alternatively, if a permanent flag is used, clear information about how a previous hardship flag will impact on a consumer when he/she apply for new credit. The question for CPs will be to what extent they can reinforce the message that seeking early assistance remains a better outcome than having a financial position deteriorate.

Technical impact

A hardship flag would be a separate ‘data set’ entered on a credit report. The Australian Credit Reporting Data Standard (ACRDS) would need to be amended to enable this, and further, if a temporary flag were enabled, to include rules around the updating of the flag.

Legislative/regulatory impact

The use of hardship flags would require an amendment to the Privacy Act definition of ‘repayment history information’, which currently only enables RHI to reflect if an account is up-to-date or overdue.

Consideration would also need to be given to whether the National Credit Code hardship provisions or ASIC regulatory guidance would need to be amended to address any issue about the impact of a hardship flag on these hardship requirements.

The impact of a hardship flag for key regulators may be:

- ASIC: as noted above, impact on NCC hardship provisions. Further, the use of hardship flags may impact (to a lesser degree) as a factor which supports an assessment as to whether or not a loan is ‘not unsuitable’ (within a CP’s responsible lending obligations).
- APRA: the requirement to age debts in arrears would need to accommodate the use of a hardship flag, to recognise that the flag effectively puts a stop on the ageing of the debt, during that period – but that there are clear and identifiable reasons for this stop.
- OAIC: if the Privacy Act were amended, this would require the Privacy Commissioner to regulate the use of hardship flags. In consultation with key stakeholders, the OAIC may also need to consider whether an amendment to the Privacy (Credit Reporting) Code is required to further operationalise use of the hardship flag, or the issue of regulatory guidance.

Arrangement flag

What does this solution look like?

An arrangement flag works in a similar manner to a hardship flag. The key difference is that an arrangement flag will have broader application, and will indicate whether or not a consumer

has entered into an arrangement to meet their payment obligations, irrespective that the reason for the arrangement may be due to a range of factors, which could include hardship.

It would need to be determined how much information about the arrangement would be disclosed on a credit file. For instance, would the disclosure simply be an 'A' flag (with no other details), or would it set out the terms and length of the arrangement.

It would be more difficult for an arrangement flag to be temporary, given that this would require consideration of the nature of each arrangement (whether hardship or otherwise) – and it would be inappropriate in every instance to remove the arrangement entry and replace it with either current or aging RHI.

Credit provider impact

The CP impact will be similar to the impacts of a hardship flag, with the noticeable differences being:

- Capacity in systems to record a wide range of arrangements, not simply hardship; and
- Less certainty around responsibilities of a CP upon being notified their customer has entered into an arrangement with another CP. Unlike a hardship flag, which clearly points to issues affecting a consumer's capacity to repay, an arrangement may not necessarily be an indication of hardship.

The greater issue for CPs will also come from having to classify an arrangement. It could be that every promise a consumer makes to pay an overdue amount constitutes an 'arrangement'. By applying the arrangement flag to a broad range of circumstances, it may be difficult for CPs to distinguish between those traditional hardship consumers, and those consumers who may not be in a situation of hardship but are making promises to meet their payment obligations. This could considerably dilute the value of an 'arrangement'.

Consumer impact

The consumer impact may differ to the use of hardship flags because an 'arrangement' will not necessarily equate to hardship. As such, it may be that consumers feel that an arrangement on their credit report does not have the negative connotations that a hardship flag does.

However, where a consumer has sought and been granted hardship relief, the fact is a consumer may then see information on their credit report which would not otherwise have been there (but for the grant of hardship relief).

Like the hardship flag, the key to ensuring a consumer understands and is comfortable with the use of an arrangement will be proper consumer education. The tie-in to proper consumer education ought to be input from CPs about when they will use an arrangement flag, and what steps they may take if they are notified their customer has entered into an arrangement with another CP.

A further issue for consumers with the use of an 'arrangement' flag may be, as eluded to above in the discussion of CP impacts, the fact that all consumers – both those in hardship and those simply making promises to pay – will be grouped together under the 'arrangement' flag.

Technical impact

Like a hardship flag, an 'arrangement' would be a separate data set on a credit report. As noted above, it will need to be determined how much information about the arrangement will be reported (terms, amount, length etc). Both the arrangement itself, as well as any additional information about the arrangement, would require an amendment to the ACRDS.

Legislative/regulatory impact

Again, like a hardship flag, the use of an 'arrangement' would require an amendment to the definition of 'repayment history information' in the Privacy Act, to enable an arrangement to be disclosed which would indicate that an arrangement – rather than an indication of whether or not an account was up-to-date – would still constitute RHI. Alternatively, or possibly as an additional amendment, given the Privacy Act already makes provision for 'new arrangement information' for payments of credit accounts post-default, these provisions could be amended to provide for pre-default arrangements.

APRA, ASIC and the OAIC would likely have the same issues to consider for arrangements as they would for hardship flags, although noting that the fact an arrangement would not necessarily mean hardship, could impact on the regulatory approach adopted.

Multiple reporting systems

What does this solution look like?

Multiple reporting systems would mean that a CP maintain the following sets of records:

- Records which can be disclosed to APRA, which will reflect the aging of the debt, even where that debt is subject to hardship
- Records which can be disclosed to CRBs, which will reflect the agreed RHI entry for the hardship arrangement.

This does not mean there will be an agreed way of reflecting hardship on a credit file: it will be a matter for each CP to determine, based on the agreement made with the consumer.

Credit provider impact

The CPs impacted by this approach would largely be those APRA regulated CPs, although it is possible that non-APRA regulated CPs may be subject to other regulation which could still necessitate the use of multiple reporting systems. The impact on those credit providers of multiple credit reporting systems would include:

- Costs of establishing and maintaining two separate reporting systems
- Clear communications with customers
- Account management of customers
- Use of credit reporting system

Cost of establishing and maintaining two separate reporting systems

Establishing and maintaining two separate reporting systems could conceivably double the costs of establishment and maintenance of systems, although this would depend on whether the data disclosed in one system could be shared (and then amended) with the other system.

These costs could make reporting RHI unaffordable for some CPs and this could in turn affect participation in RHI reporting. Lowered participation in RHI reporting may diminish the value of credit reporting as a tool to verify a consumer's financial position.

Clear communications with customers

Two separate reporting systems would mean that the same customer would be treated in one system as overdue, yet appear to have an unblemished record in the other system. For call centre staff dealing directly with customers, this increases the possibility of providing inconsistent and confusing information to the customer. By accessing the customer account system designed to adhere to APRA requirements, rather than the credit reporting system, the customer could be provided conflicted information.

Account management of customers

Two separate reporting systems could also compromise the account management for a customer. Account management is based on using the customer information to determine a customer's creditworthiness and their ongoing ability to repay credit or, where they chose to apply for it, be extended further credit. Account management is critical for a CP to have a full understanding of a customer's risk profile.

In a situation where there are separate reporting systems, the question will be: what information from which reporting system is relied upon for account management? Tied into the need to have clear communication with customers: how does a CP explain to a customer that it has treated them slightly differently (taking into account their hardship, for instance), if the customer has otherwise been told by the CP that they have an unblemished record?

Use of credit reporting system

The credit reporting system is required to provide accurate, complete and up-to-date information for each consumer. However, where a CP is disclosing information which is only accurate for its credit reporting system (with different information being reported to APRA), this distorts the overall accuracy of the information. This is especially so when it is considered that the CP, armed with access to both of its systems, will manage the customer appropriately – however, all other CPs dealing with that same customer will only have access to the credit reporting system information about the customer.

This may, in turn, impact on a CPs' ability to use credit reporting information to verify a customer's financial position, which may hinder compliance with responsible lending obligations.

In addition, each CP may treat hardship differently when disclosing RHI for their credit reporting system records. Even though a separate system will be maintained for APRA purposes, some CPs may opt to record RHI as overdue, whereas other CPs may opt to record the RHI as up-to-date. This could diminish the value of RHI, given it will be difficult to rely on this data to properly ascertain whether or not a consumer is overdue.

Consumer impact

As set out above, consumers may be impacted if there is a CP breakdown in communication, or they are provided conflicting information about the impact seeking hardship assistance has on their credit account, and their credit report.

Where a consumer who has sought hardship assistance has RHI disclosed as ‘current and up-to-date’ throughout that period of assistance, it may also mean that any future CPs will be unaware of the previous hardship. Had those CPs been aware that a hardship arrangement had been made for a period, rather than payments made on time, this may have impacted their credit assessment of the customer.

However, for consumers who are reluctant to seek hardship assistance due to concerns about this appearing on their credit report, the fact that this may not appear on a credit report may encourage that consumer to seek assistance.

Technical impact

The technical impact would likely be significant, given two reporting systems would be required. However, the ACRDS would not need to be amended, given the RHI would be contributed in accordance with current reporting. Nonetheless, CP’s would require the technical capability to effectively manage two reporting systems handling the same information, albeit in a different manner. For smaller CPs these technical impacts and associated costs may make a transition to CCR costly.

Legislative/regulatory impact

If all APRA regulated CPs were required to maintain two systems, the question will be how could that be achieved? This may require a legislative amendment which explicitly provides that a consumer credit account could not be aged during a period of hardship assistance. This type of amendment would need to account for:

- Hardship assistance where the CP and consumer agree on terms which include that the debt ages, but payments may not be required
- Previous arrears outside of the hardship assistance period – would they be able to age?

APRA change to requirements

What does this solution look like?

Presently, APRA guidance requires an ADI to continue to age those accounts which are not subject to a formal restructure. This guidance appears to be consistent with international requirements related to Basel III (around bank capital adequacy, stress testing and market liquidity risk). The question is how any such amendment to the APRA guidance would meet these requirements? This would need to be canvassed with APRA.

A secondary issue will be how RHI will then be reported for those consumers in hardship. If the APRA guidance did not require arrears to be aged during an informal arrangement, what would the RHI entry be? Should that be standardised across CPs, and if so, how could such standardisation be achieved? Moreover, the same issues that are identified in the ‘Multiple Reporting System’ option above would be present.

ASIC change to requirements

What does this solution look like?

Changing the ASIC requirements would mean either:

- Changing rules around provision of hardship; or
- Changing responsible lending requirements.

It is clear that there is little appetite from ASIC to make these changes as a solution to this issue. Hardship and responsible lending are two extensive areas of regulation which are unlikely to be changed due to an issue in the credit reporting system.

It should, however, be noted that ASIC has expressed a clear expectation about the use of the credit reporting system, particularly comprehensive credit information, as a means to verify a consumer's financial obligations. In particular, in a submission to the ACCC (with respect to authorisation for the PRDE), it stated:

“Credit providers, which are subject to the Act's responsible lending obligations, must “take reasonable steps to verify” a consumer's financial situation. As noted in ASIC Regulatory Guide 209 *Credit licensing: Responsible lending conduct*, what constitutes “reasonable steps” may change as additional tools, such as the comprehensive credit reporting system, become available.

If a credit provider chooses not to use such a tool, ASIC would expect the credit provider to be able to explain why the use of the tool was not appropriate or what other steps the credit provider has taken to verify the consumer's financial situation. This factor would need to be considered by a credit provider when deciding whether to become a signatory and, if they become a signatory, at what tier (comprehensive or negative) to participate.²⁴”

9. Conclusion and recommendation

ARCA Members welcome the opportunity to lead consideration of solutions to this issue.

Having considered the possible solutions, ARCA Members have recommended that the solution to this issue is a reform which enables the use of hardship flags. The ARCA Board have approved this recommendation.

This solution has been clearly identified as the most appropriate solution. In expressing support for this option, Members have highlighted:

- A hardship flag places a credit provider in the best position to understand a consumer's circumstances. If a hardship flag is used in a consistent manner, it also removes the prospect of inconsistent treatment of consumer's in hardship.
- Providing a credit provider more data about a consumer's circumstances, rather than less, has a clear consumer benefit as it means a credit provider is better able to respond to that set of circumstances.
- It supports responsible lending, and prevents consumers being over-committed.
- It is the only option which does not undermine the integrity of RHI data.

²⁴ ASIC submission to the ACCC, 19.05.15, page 2

It is agreed by ARCA Members that the detail on the use of a hardship flag remains to be further discussed and agreed.

A number of Members further support the use of a hardship flag which would both provide an indication of hardship, but also provide an indication of age of arrears. This could be achieved either as two separate disclosures of information (possibly adopting the use of payment status/account status) similar to that used in New Zealand. Alternatively, it could be possible that the same hardship flag could convey this information, for instance, use of 'A', 'B', 'C' etc with each letter representing both a hardship and arrears status – eg. 'A' means hardship/current arrears; 'B' means hardship/30 days arrears; 'C' means hardship/60 days arrears.

Members also support the concept of a 'disaster' flag, although more discussion is required to understand when such a flag would be utilised.

It is recognised that a hardship flag has previously not been supported by consumer advocates. It remains the 'least worst' of the available solutions. ARCA believes the concerns expressed by consumer advocates can be addressed by:

- Regulation of the use of hardship flags, which impose obligations on how a hardship flag is notified to other credit providers, and treated by other credit providers.
- Consumer education and clear messaging by credit providers about hardship, and the impact of hardship on a credit file.

Annexure A – Overview of Privacy Act reform

The review of the previous Privacy Act provisions, and the proposed amendments occurred in four stages:

1. Australian Law Reform Commission (ALRC) inquiry into the Privacy Act which culminated in the release of its report, “For Your Information: Australian Privacy Law and Practice” on 12 August 2008 (**the ALRC report**).
2. In June 2010, the release of Exposure Drafts of the Australian Privacy Amendment Legislation, and referral to the Senate Finance and Public Administration Committee for inquiry and report, which was completed on 6 October 2011 (**the Senate Finance Committee Report**).
3. In May 2012, the introduction of the Privacy Amendment (Enhancing Privacy Protection) Bill 2012 which was referred for inquiry and report to:
 - a) The House of Representatives’ Standing Committee on Social Policy and Legal Affairs, which published its Advisory Report in September 2012 (**the House Social Policy and Legal Affairs Committee Report**); and
 - b) The Senate’s Standing Committee on Legal and Constitutional Affairs, which published its report in September 2012 (**the Senate Legal and Constitutional Affairs Committee Report**).

The ALRC Report

The ALRC considered both the list of arrangements post-default, as well as the ability to list an arrangement before a default is listed.

The ALRC’s discussion of listing pre-default arrangements was limited. It noted such a listing could be subject to shorter retention periods than other adverse listings, and that this could encourage credit providers to assist consumers in managing potential defaults.

It noted:

“Any such proposal would need to ‘balance the prevention of over-indebtedness with the desirability of preserving consumer options to reduce their financial difficulties by refinancing on more favourable terms²⁵.”

It then concluded:

²⁵ ALRC Report, at 58.36

“The ALRC is not convinced that allowing the reporting of schemes of arrangement without a default report being listed first is desirable – especially in the absence of any significant support from consumer groups for such a reform.²⁶”

The ALRC recommended that “where the individual has entered into a new arrangement with a credit provider to repay an existing debt – such as by entering into a scheme of arrangement with the credit provider – an overdue payment under the new arrangement may be listed and remain part of the individual’s credit reporting information for the full five-year period permissible under the regulations”²⁷.

This recommendation is significant because – as will become apparent from the discussion of the remaining reports below – it has consistently been relied upon to reject any consideration of the disclosure of hardship flags or arrangements as part of credit information.

In noting this, it should be observed that the only reason relied on by the ALRC for not adopting pre-default arrangement disclosure, is that it was ‘not convinced’, and there was an absence of any significant support from consumer groups.

The Senate Finance Committee Report

The Senate Finance Committee Report contains the most detailed consideration of the use of hardship flags of all the reports.

Its recommendation was that:

“...[c]onsideration be given to expanding the meaning of new arrangement information to include circumstances where an individual seeks new terms or conditions for their original consumer credit before they default.”²⁸

Its comments were as follows:

- The ALRC did not agree to the use of hardship flags but recommended the Government maintain the current arrangement in new legislation.
- It supports the views of consumer advocates – if a person has not defaulted, and enters into a variation for existing credit, no hardship variation should be recorded. If that person seeks further credit – a credit provider will have information about existing credit, and can make its own inquiries about a person’s reasons for seeking credit. Therefore addition of hardship flags is not warranted.
- It supports expanding new arrangement information to include where a person seeks a new arrangement before they default.

Government Response to Senate Finance Committee

²⁶ Ibid at 58.37

²⁷ ALRC Report, Recommendation 58-2

²⁸ The Senate Finance Committee Report, Recommendation 11, paragraph 4.69

The Government response to the Senate Finance Committee report, dated May 2012, noted the recommendation to expand ‘new arrangement information’ to include a pre-default arrangement.

The Government determined this should remain unchanged. This is because the Government response to the ALRC recommendation was that ‘new arrangement information’ would only apply post-default, and the definition of ‘new arrangement information’ should reflect that policy decision.

Summary of submissions to the Senate Finance Committee

ARCA’s submission, dated 16 March 2011, stated:

- The law should provide the flexibility that enables accommodation of unusual circumstances, such as natural disaster.
- A substantial proportion of hardship situations occur pre-default (the example of natural disasters was cited), but provision has only been made for post-default hardship.
- “If the restrictions on credit reporting do not cater for instances of hardship ‘pre-default’ then these consumers’ credit reports would start to show delinquency issues that are undistinguishable from situations where this is not the case, making it very difficult for them to get credit when they may well both need it and it would be ‘responsible’ to grant it.²⁹”
- The law should be able to flag ‘compassionate action in difficult circumstances’.

Legal Aid Queensland’s submission, dated 22 March 2011, stated:

- It does not support hardship flags.
- It relied on the following examples:
 - A borrower ahead \$100,000 on her home loan repayments, who wishes to reduce her minimum monthly payments to pay for school and holiday expenses. She is not in hardship. Her lender will not pursue her for making partial repayments.
 - The same borrower approaches her lender as she is about to go on maternity leave, and wants to change payments being made.
- It said it would not be appropriate for either of these situations to be identified as ‘hardship’.
- Distinguishing formal and informal variations is not helpful and will not assist consumers or lenders.

²⁹ ARCA Submissions to the Senate Finance Committee, 16 March 2011, page 15

- “Even where there is genuine hardship, hardship flags are a disincentive to enter into hardship arrangements. Borrowers will try to refinance, or do anything to avoid it, if they know a hardship flag will be placed on their credit report.³⁰”
- Regarding the situation of genuine hardship, it referred to an example of a borrower who had about \$15,000 in unsecured debt (not attracting interest), but because of concerns – including concerns about credit reporting – refinanced, at a cost of \$10,000 (refinance costs and interest). In this example, it is said the use of hardship flags (for the initial debt) would mean “she would have no choice but to refinance because it is very likely that a hardship flag would at the very least make it more difficult for her to borrow or she would have to pay significantly more for credit (risk based pricing).³¹”
- Individuals should be apply to vary their contract, without it blemishing their credit report. Until a variation is agreed, the repayment history should show missed payments. However, ‘repayment histories should reset to zero from the date the first varied repayment is due while the agreed arrangement is adhered to by the consumer.³²’

National Australia Bank’s (NAB’s) submission, dated 24 March 2011, stated:

- “hardship situations are assumed to only occur if the account has been in default however there are a significant number of hardship cases that occur pre-default, for example in the case of dealing with natural disasters. If the restrictions on credit reporting do not cater for instances of hardship pre-default then these customers credit reports will start to show delinquency issues that are undistinguishable from situations where this is not the case, making it difficult for them to get credit when they may well both need it and it would be responsible to grant it.³³”
- The draft law should be amended to ensure that the granting of compassionate action in difficult circumstances is able to be flagged.

Consumer Credit Law Centre (NSW)’s (CCLC’s) submission, dated 28 March 2011, stated:

- Under contract law, if parties agree to vary a contract, it will be varied and a CP would be unable to list ‘hardship’. In this regard, CCLC referred to the practice of granting moratoriums following the Queensland flood in 2011, to aid coping with costs of rebuilding – and not because consumers were unable to meet loan repayments (or there was any impact on their creditworthiness).
- In the case of this type of moratorium, “the difficulty with recording a negative repayment history or introducing a hardship flag in these circumstances is that the lender offered the arrangements unbidden. The credit report would just be misleading.

³⁰ Legal Aid Queensland submission to Senate Finance Committee, 22 March 2011, page 6

³¹ Ibid

³² Ibid

³³ NAB Supplementary Submission to the Senate Finance Committee, dated 24 March 2011, page 10

The consumer would also feel that they had been tricked into ruining their credit report.³⁴

- Under the National Credit Code, borrowers have the right to apply to vary their contract on grounds of hardship. “We argue that if a consumer approaches the lender prior to defaulting on a repayment, the lender agrees to a variation and the consumer adheres to that arrangement, then the credit report should still reveal an unimpaired repayment record. This is consistent with the concept of a contract variation under the law and with contractual principles. It is also consistent with the right to a hardship variation under the law.”³⁵
- In making this proposal, CCLC highlighted the harm that would arise from a hardship variation being recorded on a credit reporting including:
 - Consumers not seeking assistance because of fear of impact on their credit report
 - No incentive to seek early assistance, because the result for their credit report will be the same whether they make an official arrangement or not
 - Consumer seeks to refinance on less favourable terms to avoid a negative credit report – which has an impact on their long term capacity to recover from hardship
 - Period of temporary hardship may mean the consumer is charged a higher interest rate on future credit. This defeats the purpose of government initiatives which promote access to temporary hardship arrangements and financial rehabilitation.
- “Hardship is not an objective decision it is subjective. Accordingly, it is unworkable in privacy legislation. A hardship variation should be treated as an agreed variation and neither should result in a negative repayment history.”

Westpac’s submission, dated 29 March 2011, stated:

- The meaning of ‘new arrangement information’ ought to be extended to pre-default situations.
- “Westpac’s experience is that the majority of hardship cases occur prior to default, including where hardship has resulted from a natural disaster. Westpac recommends that the provisions be amended to allow for reporting of ‘pre-default’ arrangements in this context in order to distinguish a temporary inability to pay from unwillingness to pay.”³⁶

Australia and New Zealand Banking Group’s (ANZ’s) submission, dated 31 March 2011, stated:

³⁴ CCLC (NSW) Submission to the Senate Finance Committee, dated 28 March 2011

³⁵ Ibid

³⁶ Westpac submission to Senate Finance Committee, dated 29 March 2011

- The inability to disclose a pre-default arrangement was ‘prohibitive’, given borrowers and CPs often amend repayment arrangements prior to a default, including temporary hardship arrangements for natural disasters.
- “If credit providers are unable to disclose hardship arrangements that are entered into prior to default it will result in adverse repayment history being reported for the individual. The credit provider will be required to disclose that the individual did not make their standard monthly repayment even though they have entered into an alternative arrangement with the credit provider.³⁷”
- Repayment history information definition should enable an ability to indicate when an individual is in hardship. “There are adverse consequences for the both the individual and credit providers if their repayment history shows either that the individual is making their regularly monthly repayment or is not making any repayments when in fact a hardship arrangement is in place.³⁸”

The Credit Ombudsman Service Limited’s (COSL’s) submission, dated May 2011, stated:

- “we would expect that a customer’s repayment history should be reported after having taken into account any variations to the terms of the contract that the credit provider and the customer have agreed – in other words, the required timing and amount of each repayment are those which have been agreed by the borrower and the lender in the credit contract, and in any subsequent variation to the credit contract.³⁹”
- The result of temporary financial hardship should be that, from the time lender and borrower agree to vary repayment arrangements, the repayment history should be reported against those varied arrangements.
- “If the parties have agreed to vary the contract so that the times at which repayments are due and/or the amounts of the repayments have changed, it would be nonsensical to report repayment history against the repayment obligations as they stood before they were varied, or against any other repayment schedule.⁴⁰”
- In addition, if a lender wrongly refuses a hardship variation, the borrower should have the right to go back and have their repayment history corrected.
- In terms of whether ‘innocent’ late payments should be an exception to the requirement to report repayment history strictly on the basis of actual time of payment, this is unlikely to occur frequently enough to affect an assessment of an individual’s creditworthiness. However, COSL are willing to change its view on this, depending upon whether problems arise in practice.

³⁷ ANZ submission to Senate Finance Committee, dated 31 March 2011

³⁸ Ibid

³⁹ COSL Submission to the Senate Finance Committee, dated May 2011, pages 4 - 5

⁴⁰ Ibid, page 5

- “The integrity of the system requires it to contain an objective record of borrowers’ actual repayment histories, reported in a timely and consistent manner. There are many reasons why a customer’s payment may be late, and a repayment history database may not necessarily be the most appropriate place for all of those reasons to be identified and recorded.⁴¹”
- If certain late repayments were recorded as not being late it may mean:
 - The record was not true
 - There are potential for concerns with consistency about how such exemptions are managed in practice
 - It may make credit reports factually inaccurate and/or incomplete, but may also ‘serve to conceal important information or trends and may lead to mis-interpretation of credit reports’
 - “every exemption, allowance or concession made in relation to the reporting of a late repayment effectively diminishes the value to all customers of repayments that they do make on time, and devalues the overall impact of more comprehensive credit reporting by making it impossible to identify borrowers who truly do have a faultless repayment history”⁴².
- “In deciding what should be included in the repayment history database, the purposes for which the data is collected and used should be kept clearly in mind, as should the existence of the other permitted databases (such as the default reporting database), with a view to:
 - (a) Ensuring that data is collected and stored in the most appropriate of the various available databases, and
 - (b) Avoiding, or at least minimising, the inclusion in any database of additional data that would compromise the practical usefulness of that database as a means of achieving or being used for its intended purpose (it may be that, at least in some cases, assessment of the reason for a late payment and its implications should most appropriately take place, if required, outside of and separately from the credit reporting process).

Given the concern that still apparently exists about the reporting of repayment history after a loan agreement has been varied (for any reason, of which hardship is just one), we think it should be put beyond doubt by an express provision in the legislation.⁴³”

The Department of Prime Minister & Cabinet’s Response to proposals made by Veda Advantage, dated 2 September 2011, stated:

- Veda had noted further discussion is required on hardship flags between industry and consumer representatives, but had not put forward a proposal for change.

⁴¹ Ibid, page 6

⁴² COSL Submission to the Senate Finance Committee, dated May 2011, page 6

⁴³ Ibid, page 7

- “The Department notes that the ALRC considered proposals for reform of the listing of schemes of arrangement, including a proposal to list a scheme of arrangement without a default having first been listed. The ALRC was not convinced that such a reform was desirable, especially in the absence of any significant support from consumer groups for such a reform.

In the absence of an agreed proposal in the Veda submission, the Department’s view is that the exposure draft effectively implements the Government’s response to the ALRC recommendation 58-2.⁴⁴

Summary of Committee Hansard for Senate Finance Committee (16 May 2011)

- Carlo Cataldo, Chairman, ARCA:
 - The data standard could be used to differentiate between individuals who are ‘victims of circumstances’ where hardship is due to circumstances beyond their control, such as natural disaster, and those where hardship is due to them not meeting their financial obligations. This enables a fairer treatment of consumers depending on their circumstances.
 - “Australia has been unfortunate enough ... to be subject to a number of natural disasters. ARCA members have extended to their customers affected by bushfires and floods quite a number of arrangements. Typically they are regionally or postcode related and absolutely outside the individual’s control. Someone may have an absolutely pristine record in repayment with a financial institution but due to no issue of their own or not financial mismanagement of their own are not able to meet their obligations due to communications not being available or even due to not being able to get to their local branch for payment. Quite often institutions offer forbearance in arrangements reactively and proactively in those circumstances.

The difference with hardship that is related to unfortunate circumstances with credit providers’ customers such as illness, disability, sickness and loss of job would be a different set of circumstances. There needs to be an appropriate balance between where there is financial mismanagement on the part of a customer versus a natural disaster or some forbearance related to natural disaster. ARCA believes that standardisation around this space will allow institutions to develop a definition around those circumstances that would balance the consumer’s privacy as well as ensuring the credit providers do not subsequently further extend consumers under hardship situations as it stands right now.⁴⁵”

- Dr David Grafton, Commonwealth Bank of Australia (CBA):
 - Referred to CBA’s practice of proactive and reactive relief – with example of floods and Cyclone Yasi, and identifying affected postcodes, and suspending recovery of overdue payments for those postcodes, and proactively contacting customers in those postcodes in difficulty.
 - The difficulty with the requirements under the new legislation is distinguishing between customers who experience difficulties due to circumstances beyond their control, and those who have got themselves overcommitted.

⁴⁴ Department of Prime Minister and Cabinet’s Response to Proposals made by Veda Advantage, provided on 2 September 2011

⁴⁵ Page 10

- **David Fodor, NAB:**
 - NAB adopted similar practice to CBA in terms of the Queensland floods – identified impacted postcodes, proactively offering payment arrangements and repayment holidays. Now winding back to business as usual, with 75% of customers back to the pre-flood position. This is a well established and well regulated practice.
- **Damian Karmelich, Dun & Bradstreet:**
 - The impact of an ‘act of God’ is not likely to be predictive of someone’s future credit performance. However the challenge is to define these, and exactly what they are.
- **Steve Brown, Dun & Bradstreet:**
 - With hardship – many situations are treated quite differently depending on the credit provider and sometimes that data would not be reported, or would be reported differently.
- **Karen Cox, CCLC:**
 - There should be no adverse consequences for a credit report in applying for, and being granted a hardship variation.
 - It is very important that this continue in the new system – because people are very concerned about approaching their credit provider and telling them they are having problems. If people are faced with adverse consequences, they may not try and solve their problems early – and may also be forced to resort to other lending options.
 - A simple variation for hardship should not result in adverse consequences for a credit report. “Sometimes those problems are permanent and it is inevitable that it will impact on their ability to meet their loan commitments long term and on their credit report. In a lot of cases those problems are temporary. We would not want to move to a system where people who had temporary problems were punished indefinitely despite the fact that they have got through that, either through being denied credit in the future or through having to pay a higher price for credit next time around. That is not the sort of country that I would like to consider that we have and I would not like us to see us move in that direction, even inadvertently because of the credit reporting system that we had put in place.⁴⁶”
 - Should be notice requirements for listing of repayment history information.
- **Kat Lane, CCLC:**
 - Example of Queensland floods – has nothing to do with credit worthiness, but is a massive natural disaster. “So if we had this legislation in place they all would have negative credit reports and they would be all coming and complaining, quite rightly, about how unfair it would be to be a situation where you are a victim of a natural disaster and you are in hardship for a decent reason, none of which is your own doing, and you now have a whole heap of defaults – little ones and twos against your name – simply because of that. One thing this legislation is missing is that concept of fairness.⁴⁷”

⁴⁶ Senate Finance Committee Hansard, 16 May 2011, page 30

⁴⁷ Senate Finance Committee Hansard, 16 May 2011, page 30

- Examples of car accident, or mail going missing – and this results in a one or two, and is not a fair reflection on your creditworthiness.
- Carolyn Bond, CALC:
 - We encourage consumers to talk to their credit provider early – so we are concerned that if talking to a credit provider had a negative impact on a credit report. An example of someone who is not in default but going through a tough time financially – if they ask a credit provider to lower payments for six months – “If that were flagged as hardship automatically, I think that you would find that people just would not do it unless they absolutely had no choice.”⁴⁸

The House Social Policy and Legal Affairs Committee Report

The Advisory report of the House Committee, dated September 2012, concluded in respect to the repayment history data provisions:

“The Committee notes concerns raised regarding the effect of the inclusion of repayment history provisions. However, responsible lending obligations already exist and, as per the recommendation of ALRC, consumer protections are included in the Bill.

The Committee supports the Government’s commitment to review the credit reporting provisions within five years of commencement.

The Committee is satisfied that the provisions as currently drafted are reasonable and balanced, and an appropriate review of their operations has already been agreed to.”

Summary of submissions to the House Social Policy and Legal Affairs Committee

Note that ARCA, ANZ and CCLC (NSW) made identical submissions to the House Committee, as it made to the Senate Legal and Constitutional Affairs Committee (detailed below).

Consumer Action Law Centre’s submission, dated 13 July 2012, stated:

- Any process relating to hardship variations should ensure a consumer is not discouraged from contacting their credit provider because they are in hardship, or are left worse off because they seek a hardship variation.
- There has been considerable work done to encourage consumers to seek hardship assistance early – but this work may be undone if consumers think requesting a hardship variation will have a negative impact on their credit history.

The Senate Legal and Constitutional Affairs Committee Report

The Senate Committee issued no recommendation in respect to amending ‘new arrangement information’ to cover pre-default hardship.

It stated it was concerned that the non-alignment of pre-default and post-default hardship could operate to the detriment of the individual. It relied on ANZ’s suggestion that the credit reporting system could note compliance with an arrangement, and avoid adversely affecting an

⁴⁸ Senate Finance Committee Hansard, 16 May 2011, page 36

individual's credit file. However, the Committee relied on evidence from Kat Lane of CCLC that such a notation could discourage consumers from seeking hardship.

For that reason, the committee agreed with the Department's view that:

"Hardship variations cannot be listed as part of an individual's credit reporting information. The Government is concerned that permitting the listing of hardship variations may act as a deterrent to individuals seeking hardship variations in appropriate circumstances (including following a natural disaster) and this would be contrary to the intention of providing the right to request a hardship variation.⁴⁹"

Summary of submissions to the Senate Legal and Constitutional Affairs Committee

ARCA's submission (identical to that submission provided to the House Committee), undated, stated:

- Its recommendation was that hardship arrangements be addressed in the CR Code, which would allow better alignment between the Privacy Act and the National Consumer Credit Protection Act provisions.
- Flexibility is needed in RHI, to accommodate for unusual circumstances, such as natural disaster.
- Industry data suggest that consumers commencing hardship arrangements may have no previous indication of deterioration in financial situation or at a minimum level of delinquency (less than would qualify for a default listing) – and would be better serviced by allowing arrangements to commence prior to a default listing.
- If situations of pre-default hardship aren't catered – credit reports of these consumers would be indistinguishable from regular delinquency.

ANZ's submission, dated 9 July 2012, stated:

- Mirrored much of the submission made to the Senate Finance Committee, and identical to the submission made to the House of Representatives Committee on Social Policy and Legal Affairs.
- The Bill should include provision for use of temporary hardship flags. "The flag would only be visible when the individual was in a hardship arrangement and would be removed once the hardship arrangement ended. Such an approach would reduce the chance of a consumer in hardship being inappropriately provided additional credit but would not adversely impact the ability of the consumer to obtain credit in the future.⁵⁰"
- As an alternative, RHI could be defined more broadly so it includes an indication of whether an individual is in hardship, or subject to a hardship arrangement.

⁴⁹ Report of the Senate Legal and Constitutional Affairs Committee, September 2012, page 114

⁵⁰ ANZ Submission to the Senate Legal and Constitutional Affairs Legislative Committee, dated 9 July 2012, page 6

- Recommendation:
 - Use of temporary hardship flags
 - Meaning of new arrangement information to include pre-defaults OR amend definition of RHI to enable hardship to be reported.

CCLC's submission, dated 18 July 2012, stated:

- At present, a person in 'default' can apply for hardship pre-default, and avoid the default listing being entered. However, under proposed RHI reporting, borrowers will now have an impaired credit file.
- An impaired credit history will limit the ability of consumers in hardship to restructure/refinance.
- "Clearly there is a balancing act to be performed in relation to balancing appropriate responses to hardship with a fair and accurate system for reporting defaults, and indeed alerting other potential lenders to hardship problems. However, a sudden death policy of immediate consequences for late repayment does not strike this balance. We submit that the current arrangements where defaults are not listed for *at least* 60 days, with the borrower being notified of the likely consequences of their continuing default prior to listing, and being given the opportunity to make and adhere to a repayment arrangement, strikes that balance⁵¹."
- Recommendation – "credit providers should not have any ability under the Bill to list a consumer as being in behind [*sic*] in their repayments where the consumer has made appropriate arrangements with the lender to vary their obligations.⁵²"

CCLC's response to questions on notice, dated 23 August 2012, stated:

- It would be inconsistent with National Credit Code and general contract law for a consumer to be listed as missing repayments where the contract has been varied.
- A hardship variation under the NCC requires that the borrower will reasonably expect to be able to meet the contract obligations if the terms were varied.
- "In these circumstances it is fair, logical and consistent with the objects of the law (to give people in financial hardship a reasonable opportunity to get back on track without penalty) to treat a hardship variation in the same manner as any other variation of the contract."
- Should be clear indication in the Explanatory Memorandum that the RHI regime should be consistent with the NCC and contract law.
- "A varied contract creates new obligations and it is those new obligations against which the consumer's obligations should be measured for repayment history reporting purposes. Put simply, if a credit contract is varied for any reason (hardship or otherwise) then a consumer's repayment history should not show a missed payment provided the

⁵¹ Consumer Credit Legal Centre (NSW) submission to the Senate Legal and Constitutional Affairs Committee, dated 18 July 2012, page 9

⁵² Ibid

varied contract is being complied with. This would not affect missed payments prior to the variation (which would remain for two years as usual).”

Financial Ombudsman Service response to questions on notice, dated 23 August 2012, stated:

- Regarding relationship between hardship provisions and default listings, consumers should be encouraged to make a hardship application as soon as possible – but this was focussed on a circumstance of the prospect of default listing being entered, with a recommendation that the Bill or Code should require any application for financial difficulty assistance to be considered before default listing a borrower.

ANZ response to questions on notice, dated 29 August 2012, stated:

- The disclosure of new arrangement information only post-default was prohibitive, and not in the best interests of consumers or credit providers.
- If credit providers can’t disclose pre-default hardship arrangements, this will result in adverse RHI being entered. That is, even where a temporary arrangement is in place, and the customer is meeting the terms of the arrangement, the credit provider will be required to disclose that the individual has not met their required monthly payment.
- Flagging temporary arrangements will enable more accurate reporting. A temporary flag will also mean that for those customers, returning to normal repayments, they will not be disadvantaged when they apply for future credit.

Attorney-General Department’s response to questions on notice, dated 3 September 2012, stated:

- The Government has not accepted that listing of hardship variations is a necessary component of the credit reporting system. The Government has accepted the ALRC recommendation 58-2 in respect to new arrangement information but it only refers to an arrangement made post-default or serious credit infringement.
- “The Department notes that submissions from consumer credit advocates are opposed to any approach to listing hardship variations that may discourage consumers from requesting hardship variations.⁵³”

Summary of Committee Hansard for Senate Legal and Constitutional Affairs Committee (10 August 2012)

- David Niven, FOS:
 - (Responding to a question as to whether there is any ability under the Bill for credit providers to have repayment arrangements noted) – “The difficulty with the bill is that it is simply silent on that situation. The difficulty that arises is that the ground rules as to how that ought to be treated by a credit provider acting in good practice are unclear. You will be making a payment arrangement but you will nonetheless be behind on your contractual repayments. There will then be an issue as to whether or not that is a variation: is that a binding variation so that I am no longer as a

⁵³ The Attorney-General’s Department Response to Senate Standing Committee on Legal and Constitutional Affairs, Questions on Notice, dated 3 September 2012, page 17

consumer in default, or is it, as the upmarket lawyers call it, simply an indulgence so that they are prepared to accept that without prejudice to their rights and I could still be listed? There are then a series of issues, such as: while I am negotiating that, as the Ombudsman said, although I am in default, should I then be safeguarded from being listed during that period? These are all issues that are arising in disputes we are getting at the moment. Unfortunately, the bill simply does not take a policy stance either way on any of those issues. I think that is unfortunate.⁵⁴

- **Kat Lane, CCLC:**
 - (when asked to comment on David Niven's statement)

"I think it is essential that consumers are encouraged to request financial hardship when needed. If there is a negative consequence of doing that, that would be very unfortunate. I support the bill being silent on this issue. I think it is something that could be worked out perhaps in the regs or the code. It is certainly something I strongly advocate to make sure that with anything that happens it is absolutely clear that consumers are encouraged to apply for hardship and there are no negative consequences in doing that so that people can manage their finances in a responsible way. Again, I think this should be managed outside the bill. I do think it needs to be sorted out. There is a good argument for leaving it silent permanently anyway, simply because if the repayment history is put in it will deal with some of that in that way – although I am arguing not for repayment history. But I am also arguing for a period of grace, if the government is so minded to continue with repayment history anyway. I think all the detriments, the little bits of negatives, are going to occur anyway, but we should put no impediments on consumers applying for hardship.⁵⁵"
 - Legislation is unfair – example of bank error – for instance, an issue with BPay which results in delay in payment, natural disasters such as Queensland floods, someone is in hospital. Need a concept of fairness.
- **Carolyn Bond, CALC:**
 - Key concern is that there are enough provisions to deal flexibly with hardship. Don't want people who are in hardship being disadvantaged because they put their hand up, and try and make an arrangement.

⁵⁴ Page 31

⁵⁵ Ibid

Annexure B – Commonly used acronyms

ABA –	Australian Bankers Association
ACCC -	Australian Competition and Consumer Commission
ACRDS -	Australian Credit Reporting Data Standard
ADI –	Authorised Deposit-taking Institution
APRA -	Australian Prudential Regulation Authority
ARCA -	Australian Retail Credit Association
ASIC -	Australian Securities and Investments Commission
CCR -	Comprehensive credit reporting
CP -	Credit provider
CR Code -	Privacy (Credit Reporting) Code 2014
NCC -	National Credit Code
RHI -	Repayment history information