Australian Banking Association

11 August 2021

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

Via email: mblyth@arca.asn.au

Dear Mr Blyth

2021 Credit Reporting Code consultation

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

Our position

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

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

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

Key recommendations

The ABA provides the following recommendations and observations:

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

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

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

Kind regards

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About the ABA

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

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

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Appendix A: Commentary on consultation paper

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

Promises to pay vs. financial hardship arrangements

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

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

ARCA proposal:

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

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

An example of the presumptions proposed include the following:

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

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

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

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

i) the arrangement is a variation FHA.

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

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

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

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

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

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

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

Backdating the start of a financial hardship arrangement

ARCA proposal:

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

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

Payment test and catch-up periods

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

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

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

ARCA proposal:

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

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

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

Treatment of joint accounts where abuse is present

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

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

ARCA proposal:

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

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

In addition, as an interim measure:

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

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

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

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

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

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

Other comments

Treatment of multiple FHAs

ARCA proposal:

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

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

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

Clarity is required over status of technical standards

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

Need for further examples

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

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

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