



**Submission by the
Financial Rights Legal Centre;
Australian Communications Consumer Action
Network;
Australian Privacy Foundation;
Consumer Action Law Centre; and
Financial Counselling Australia (FCA)
Consumer Credit Legal Service (WA)**

Senate Standing Committees on Economics

National Consumer Credit Protection Amendment
(Mandatory Comprehensive Credit Reporting) Bill
2018, 20 April 2018

20 April 2018

Introduction

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

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

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

Broad concerns about CCR

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

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

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

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

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

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

² the fifth dataset

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

RHI is more fraught as it is inextricably linked with consumers' rights to access the hardship provisions under the credit law (this is discussed in more detail below). There are several issues around how and when RHI should be reported that have not been resolved even in this final run up to the data reporting going live. How RHI should be reported when a customer is in financial hardship is a big one, but there are other unresolved issues as well including how the monthly grace period should work and how often a customer will get the benefit of a grace period. Consumer advocates and industry openly disagree about the requirements of the credit and privacy laws surrounding these issues and we are prepared to take multitudes of consumer credit reporting disputes through the ombudsmen and courts once this data starts appearing on individual credit files.

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

We are also concerned that some lenders are likely to use this increased information not to deny people credit where it appears their finances are already stretched, but to charge those customers more for credit. We may see a significant increase in price discrimination including an influx of expensive, priced-for-risk products, such credit cards charging up to 48 per cent per annum for those deemed risky. These toxic products already exist in other countries like USA and the UK.³ Risk based pricing exacerbates inequality, as consumers deemed higher risk not only pay more for credit, but are at greater risk of default because of those higher repayments. Consumer representatives are also concerned that, under Section 20G of the *Privacy Act* relating to the permitted use for pre-screening, credit providers could nominate eligibility requirements to be used by credit reporting bodies to assess consumers whose credit information indicates higher risk to receive direct marketing for more costly credit products.

Debt Management Firms

Another unintended negative consequence of the increase in data available on credit reports is a potential boom in debt management firms (DMFs), otherwise known as "debt vultures". According to our experience with the National Debt Helpline and also based on research by ASIC⁴, we know there has been a huge growth in unregulated DMFs in Australia in recent years. DMFs target people struggling with debt, promising to clean or fix their credit reports. DMFs regularly mislead people about the nature of their service/product and charge

³ See the "Barclays' Bank Credit Building Card" which is a credit card to "build your credit rating" but comes with a 35% APR: <https://www.barclaycard.co.uk/personal/barclays-initial>

⁴ REP 465 Paying to get out of debt or clear your record: The promise of debt management firms. Released 21 January 2016. Available at: <http://download.asic.gov.au/media/3515432/rep465-published-21-january-2016.pdf>

thousands of dollars for poor quality services. They also use customer's enquiries about fixing their credit report as an opportunity to steer debtors into unsuitable debt agreements or other expensive and often inept debt negotiation services. Putting more information on credit reports will just turbo-charge these unregulated businesses.

With the Financial Services Royal Commission underway, now is the time for Government to be focused on enacting legislation through a lens of fairness and community expectation. Consumer representatives are seriously concerned that making CCR mandatory before all of these important issues have been addressed will only lead to more disputes going to external dispute resolution (EDR) and court, and more predatory debt management firms targeting vulnerable people. At the very least, the regulation of debt management firms must be accelerated.

Repayment History Information and Hardship

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

Our interpretation of the law is that RHI must accurately reflect variations of a contract (including financial hardship variations under the credit law) – an interpretation supported by the Financial Ombudsman Service, Australia.⁵ This common sense interpretation is however not uniformly shared by the financial services sector. Consumer representatives are deeply concerned that RHI data will be wildly inaccurate if the banks start reporting customers as making payments late when those consumers have called up and arranged a hardship variation as they are legally able to do under the credit law. It is our strong view that they are not making late payments since the contract has been mutually agreed to be varied. It is critical that this area of the law (and how it will work in practice) is clarified as soon as possible. We have just been informed by one of the big four banks that as a direct result of this uncertainty they will simply be withholding RHI for Hardship accounts for the period the customer is in Hardship until the issue has been resolved.

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

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

⁵ See Financial Ombudsman Service, Determination 422745, 21 April 2016
<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/422745.pdf>

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

The current legislative silence on the interaction of hardship and RHI is unhelpful to all stakeholders. The law, the Credit Reporting Privacy Code or regulatory guidance should make it clear that where there is a change to the payment arrangement with a consumer, and the consumer is meeting their payment obligations under this arrangement, then RHI should reset to zero.

Consumer Representatives strongly disagree with the Office of the Australian Information Commissioner's (OAIC's) interpretation of when an amount is 'due and payable' under the *Privacy Act* as per its guidance that was recently published on its website.⁶ The OAIC has limited its interpretation of 'due and payable' to the legal entitlement to maintain an action for recovery, but has not considered the requirements under the *Credit Act* which impact directly on when an action for recovery can be maintained.

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

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

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

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

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

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

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

1. The consumer gives notice that they are unable to pay (either orally or in writing) s.72(1)
2. Once the hardship notice is given there is a stay on enforcement (s.89A)

⁶ "What does the term 'due and payable' mean in the definition of repayment history information?"

Available at: <https://www.oaic.gov.au/agencies-and-organisations/faqs-for-agencies-orgs/businesses/what-does-the-term-due-and-payable-mean-in-the-definition-of-repayment-history-information>

3. The Credit Provider (**CP**) can ask for further information and the consumer is required to supply that information (s.72(2) and (3))
4. The CP either agrees to the change and provides details of the agreed variation OR the CP refuses giving reasons and provides details of the relevant EDR (s.72(4) and s.73)

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

1. There is no concept of a temporary repayment arrangement compared to a variation. There is only an agreed variation. An agreed variation can be of any length of time.
2. Postponement of enforcement is an agreed variation under the NCC. In fact in the previous *Uniform Consumer Credit Code* (s.68) a postponement of enforcement was a specified option.
3. The test of whether the CP could maintain enforcement action is necessarily affected by s. 89A. In the vast majority of circumstances, once the debtor has given a hardship notice, RHI cannot be listed.

Simple Arrangements vs “Indulgences”

Regulation 69A of the National Consumer Credit Protection Regulations 2010 grants CPs relief from giving a debtor notice confirming an agreement to change the credit contract on grounds of hardship if the agreed arrangements reduce the debtor’s obligations for *a period of less than 90 days*. The original relief was until March 2014. This has since been extended by ASIC Class Order CO14/41⁷ to March 2018. This has no impact on the process above. It simply changes whether an agreement must be reflected in writing. It does not change the process or its legal effect in any other way.

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

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

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

Consumer representatives have already seen evidence that this is already occurring. Lenders routinely agree to fairly minor contractual variations, including decreased payments or no payments over a number of months, without recognising the arrangement as a contractual

⁷ <https://www.legislation.gov.au/current/F2014L00135>

variation. While there was no adverse impact on the consumer this was of little consequence. Under CCR there will be a clearly adverse impact on consumers when lenders do not recognise a hardship notice under the Code and continue to report negative RHI despite the existence of an arrangement. We know from discussions with several of the big four banks since the Mandatory CCR Legislation has been released that at least two of them are planning to do exactly this.

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

We recognise that the Attorney-General's Department has announced that it will lead a review into hardship arrangements and how they interact with the consumer credit reporting framework.⁸ Unfortunately no resolution or even a report will result from such a review in time to prevent inaccurate and harmful data from being recorded on consumer credit reports starting in July 2018.

Recommendation

1. Consumer representatives support the mandated supply of the first four CCR datasets (loan details, credit limits, etc.), but do not support mandating the supply of RHI at this time. RHI should be delayed until the AGD's review of financial hardship arrangements has been finalised and a clear resolution is reached regarding how banks should record RHI for customers in financial hardship.
 2. Alternatively the Mandatory CCR Bill should reinforce that where a CP agrees to an arrangement with a consumer, RHI should reset to zero and remain so while the consumer is complying with the arrangement.
 3. Alternatively ASIC should be tasked with clarifying this position in technical standards and guidance.
 4. Debt Management Firms must be regulated as soon as possible, starting with compulsory membership of AFCA.
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Hardship Flags

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

⁸ Attorney-General's Department Media Release: "Review of financial hardship arrangements" 28 March 2018. Available at: <https://www.ag.gov.au/RightsAndProtections/Pages/Review-of-financial-hardship-arrangements.aspx>

A hardship flag will:

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

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

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

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

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

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

Recommendation

5. The need for a hardship flag should be reviewed once the system has been in operation for a reasonable period of time so that whether there is any real need for a hardship flag can be evaluated on concrete evidence.
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Credit Scores and Reciprocity principles (s. 133CV)

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

A likely consequence of mandated CCR is the increase in the use of credit scores in lending decisions and the use of credit scores to charge certain individuals increased interest rates for credit. Credit scores are the numerical expression of the level of a person's credit worthiness, derived from the information available on a consumer's credit report (presumably). The increased data that will be available about consumers on their credit reports as a consequence of the mandated CCR regime under this Bill will be incorporated into the current black box algorithms⁹ Credit Reporting Bodies (CRBs) are using to generate credit scores. These will become clear indicators of consumers that have a less than perfect repayment history. Although this information could and might be useful in responsible lending decisions, consumer representatives' key concern is that credit scores will be obtained by lead generators and marketers to help target direct marketing of toxic or exploitative products to particular vulnerable cohorts that are deemed by a lender to be profitable.

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

- a. that is derived by a credit reporting body from credit information about the individual that is held by the body; and
- b. that has any bearing on the individual's credit worthiness; and
- c. that is used, has been used or could be used in establishing the individual's eligibility for consumer credit.

This definition clearly covers credit scoring information (as was the intent of the legislation according to the Explanatory Memorandum¹⁰). However, the Determination made by the OAIC in 2016¹¹ has thrown into question the status of credit scoring information and when under the *Privacy Act* it can or must be supplied to access seekers. The Commissioner found that because Equifax (formerly Veda) does not "hold" credit scores, the *Privacy Act* does not require Equifax to provide them to consumers when they request a free credit report.

⁹ Blackbox algorithms are those that are created without any knowledge of how they are created

¹⁰ Explanatory Memorandum to the *Privacy Amendment (Enhancing Privacy Protections) Bill 2012* which provides at page 147:

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

¹¹ Financial Rights Legal Centre Inc. & Others and Veda Advantage Information Services and Solutions Ltd [2016] AICmr 88 (9 December 2016)

“In my view, a VedaScore does not constitute credit reporting information that Veda holds at the time of an access request for a free credit report, simply because at that time, a score doesn’t exist.”¹²

...

“The VedaScore is derived information from the source information, however it is only obtained following the application of an algorithm to source information, factoring in various inputs at the time of access. It does not come into being until that derivation process has occurred. In other words, there is no VedaScore that is held by Veda at the time an access seeker who is not a subscriber requests a credit report free of charge.”¹³

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

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

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

We recognise that some changes have been made to the Mandatory CCR Bill after the Treasury consultation. These changes might have been made in order to address the problem described above.

Original Exposure Draft of Mandatory CCR Bill:

On disclosure of information supplied under Division 2

Information not to be on disclosed to a credit provider that has not disclosed half of its credit information

(1) A credit reporting body that is supplied information under Division 2 must not disclose any of that information to a credit provider if:

(a) the conditions in subsection (4) are not met for the credit reporting body and the credit provider; and

(b) all of the disclosures of credit information by the credit provider to the credit reporting body, whether under:

(i) section 21D of the *Privacy Act 1988*; or

(ii) Division 2 of this Part;

(c) relate to less than 50% of the eligible credit accounts held with the credit provider.

¹² para 265, Financial Rights Legal Centre Inc. & Others and Veda Advantage Information Services and Solutions Ltd)

¹³ para 262, Financial Rights Legal Centre Inc. & Others and Veda Advantage Information Services and Solutions Ltd

Current version of Mandatory CCR Bill:

133CZA *On disclosing information supplied under Division 2 etc.*

- (1) *This section applies to a credit reporting body in relation to the following information (the protected information):*
 - (a) *any information that the credit reporting body is supplied under Division 2;*
 - (b) *any CRB derived information (within the meaning of the Privacy Act 1988) that is derived from information that the credit reporting body is supplied under Division 2.*

While this change might make it more clear that CRBs cannot on disclose CRB derived information (as defined by the Privacy Act), it could be much clearer by adding the phrase “including credit scoring information”.

Recommendations

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

Consumer representatives support the inclusion at s. 133CZH of an independent review to be conducted in 2022. However, we strongly encourage the Government to ensure that this review covers the broader objectives of comprehensive credit reporting, and not only the operation of the supply requirements detailed in this Bill.

Government has repeatedly ensured the Australian public that the new mandatory CCR regime will “ensure good customers are rewarded with better deals” as well as “improve the capacity of lenders to meet their responsible lending obligations.”¹⁴ Consumer representatives want to ensure that these expected achievements of a mandatory CCR regime are being met and that the benefits outweigh any negative consequences.

We acknowledge that the current Explanatory Memorandum has been changed since the Treasury Consultation to include more detail about the objectives of an independent review:

The Bill is not specific on the scope of the review so as not to limit the review when it is established. However, the Government expects that the review could consider:

¹⁴ Media Release from Office of the Treasurer, The hon Scott Morrison MP “Mandating comprehensive credit reporting” 2 November 2017. Available at: <http://sjm.ministers.treasury.gov.au/media-release/110-2017/>

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

We would still encourage the Senate Committee to amend the actual Bill to reflect these critical objectives to ensure they are included in the independent review.

Recommendation

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

Consumer representatives support the inclusion of s. 133CR(5) which gives CPs the ability to not supply data to a credit reporting body that the CP does not reasonably believe is complying with the data security requirements in the *Privacy Act*. We believe this subsection will drive better security standards across the entire industry by forcing banks to take responsibility for the security compliance of CRBs when they hand over customer data. This subsection also empowers banks to cease supplying customer data if a CRB demonstrates a major security breach which the banks reasonably believe amounts to non-compliance with s. 20Q.

Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please do not hesitate to contact Financial Rights on [REDACTED]

Kind Regards,

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