Answers to questions on notice, received from the Office of the Australian Information Commissioner following a public hearing in Melbourne on 15 May 2018, received on 27 June 2018.

At the committee's public hearing for the inquiry into the National Consumer Credit Protection Amendment (Mandatory Consumer Credit Reporting) Bill 2018 in Melbourne on 15 May 2018, representatives from the Office of the Australian Information Commissioner (OAIC) took on notice to provide the legal advice obtained by the OAIC in relation to the reporting of 'repayment history information' for the purposes of the Privacy Act (the legal advice):

> **Ms Higgins:** Our advice was informed by discussions with ASIC. It was our understanding that the advice that we provided was not inconsistent with the provisions in the National Consumer Credit Protection Act that is regulated by ASIC in relation to hardship.
>
> **Senator McALLISTER:** Can I follow up on this issue around ASIC? In the process that you went through with ASIC, you say that he provided the legal advice to ASIC. Did they provide a response to you?
>
> **Ms Higgins:** It is my recollection that they did but I cannot recall whether that was in writing or in telephone discussions with our counterparts in ASIC. I can take that on notice.
>
> **Senator McALLISTER:** Yes, and, if you're able to provide the legal advice and if you could table ASIC's response to you, if in writing, I would appreciate it. The key issue seems to be around whether or not this second category of arrangement, which you describe as an indulgence, is in fact the kind of relief that is anticipated under the Consumer Credit Protection Regulations. Your assertion, I think, is that it is not; that it is an informal arrangement that therefore doesn't engage all of the other consequences that would ordinarily flow from someone being given relief under the National Consumer Credit Protection Regulations.[1]

The legal advice obtained by the OAIC and subsequently provided to the committee is at Attachment 1.

1 Economics Legislation Committee, National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018, *Official Committee Hansard*, 15 May 2018, p. 5.

Ben Katekar

ATTACHMENT 1

NEW/CHAMBERS

Level 34 126 Phillip Street
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[redacted]

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2 March 2017

Caren Whip
Director, Dispute Resolution
Office of the Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

Dear Ms Whip,

Repayment history information and consumer credit temporary payment arrangements

I provide my opinion on the 2 questions you have asked. I have used the following abbreviations:

Act	*Privacy Act 1988* (Cth)
CCC	consumer credit contract
CP	credit provider
CR Code	*Privacy (Credit Reporting) Code 2014*
CRB	credit reporting body
RHI	repayment history information
TPA	temporary payment arrangement (being an arrangement between the CP and the consumer which does not amount to a variation of the original CCC).

A. Your 2 questions and the executive summary of my answers

Question 1: Where a CP discloses RHI to a CRB during a TPA, must that information be reported:

a. by reference to the terms of the TPA; or

b. by reference to the original CCC?

Answer: It depends on whether the CP could maintain enforcement action against the consumer for default of the original CCC despite the consumer complying with the TPA. That depends on the circumstances in which the TPA was created. If the CP would be estopped from maintaining any such enforcement action then the answer is (a): the TPA.

Question 2: If a CP makes a representation to a consumer that their RHI will be reported by reference to the terms of the TPA (or does not discuss this issue at all with the consumer), and the CP then discloses RHI to a CRB based on the original CCC

i. would this breach the Act?

ii. would an equitable remedy be available to the consumer?

Answer: This depends on what the CP was required to do under the Act. If the Act required the CP to disclose RHI against the original CCC then the answer is "no" on both counts. If the Act required the CP to disclose RHI against the TPA then the answer is "yes" on both counts.

B. Question 1: Where a CP discloses RHI to a CRB during a TPA, must that information be reported against the TPA or the original CCC?

(a) The central issue: what is the yardstick?

2. The nub of this question is whether compliance by a consumer with a TPA is nevertheless reportable as adverse RHI.

3. In almost all scenarios I can think of where a TPA is entered into, the consumer will have fallen foul of the due dates for payment under the original CCC, or is about to do so – otherwise there would have been no need for any TPA. Thus, by definition, during the course of a TPA, the dates for payment under the original CCC will not be met.

4. RHI is defined in s 6V(1) as follows (emphasis added)[1]:

> *"(1) If a credit provider provides consumer credit to an individual, the following information about the consumer credit is **repayment history information** about the individual:*
>
> *(a) whether or not the individual has met an obligation to make a monthly payment that is **due and payable** in relation to the consumer credit;*

[1] Clause 8.1 of the CR Code would appear to be a regulation for the purposes of s6V(2)(a), impacting on the circumstances in which a payment can be treated as overdue for the purposes of s6V(1). That clause requires a CP to give a 14-day grace period which must have expired before the monthly payment can be treated as being overdue. However, this is not germane to the issue raised by Question 1.

*(b) the day on which the monthly payment is **due and payable**;*

*(c) if the individual makes the monthly payment after the day on which the payment is **due and payable** – the day on which the individual makes that payment."*

5. The central issue is whether the terms of the original CCC inform when monthly repayments were "due and payable" for the purposes of s6V(1) of the Act - or whether the terms of the TPA reflect what is "due and payable". In other words: what is the yardstick against which to measure whether a monthly payment has been met: the original CCC or the TPA?

(b) Legislative imperative

6. I recognise that there are competing policy considerations advanced by [redacted] but I do not propose to delve into them here. However, there is a legislative imperative for both CPs and CRBs to know the answer. This is because:

   (a) It is an offence under s21D(1) for a CP to disclose credit information to a CRB. Subsections 21D(2) & (3) operate such that it will not be an offence if, inter alia, a CP discloses credit information that is in fact RHI within s6V (s21D(3)(c)).

   (b) The CRBs and CPs must take such steps as are reasonable in the circumstances to ensure that the RHI the CRBs collect is accurate, up-to-date and complete (respectively, sections 20N and 21Q).

   (c) It is an offence for CRBs to disclose, and for CPs to provide, RHI that is false or misleading (respectively, sections 20P and 21R).

7. Thus, the CPs and CRBs need to be satisfied that any RHI is within the s6V definition and is not false or misleading. It is thus imperative for them to know the correct yardstick against which a consumer's repayments are to be measured: the TPA or the original CCC.

(c) What is a TPA?

8. I have been instructed to assume that if an arrangement is entered into between a CP and a consumer that has the effect of varying the CCC, then the applicable yardstick for determining whether a monthly payment is "due and payable" under s6V is the varied CCC (consistently with the FOS determination in case no. 422745).

9. Thus, by definition, a TPA (for the purposes of this advice) is one under which the original CCC is not varied.

10. I have been instructed that a TPA:

    (a) Is a flexible temporary arrangement offered to consumers;

    (b) Is common practice across the industry;

    (c) Is not understood by industry to constitute a contractual variation;

    (d) May take a variety of forms, including making amends for arrears, a payment moratorium, or an arrangement for reduced repayments over a period of time.

(i) Where is the dividing line between a TPA and a variation to the CCC?

11. The first difficulty to confront is whether a TPA does in fact vary the CCC. A variation to an existing contract is a further contract, thus requiring consideration. Whether or not a contract has been formed is a legal question determined objectively; a party's subjective understanding is not determinative.

12. Consideration need only be nominal. A consumer's promise to perform an existing legal duty can still constitute good consideration to the CP if the CP receives practical or factual benefits from such performance, or if the CP avoids a disbenefit that might have resulted from the consumer's failure to perform.[2] Thus even if the effect of a TPA is only that the consumer agrees to a watered-down version of what the consumer has already agreed to do, a Court may still consider that there was valuable consideration since it is a better outcome for the CP than the disbenefit arising from the inevitable alternative of total default.

13. Thus a TPA may still amount to a variation of the CCC even though the CP thinks otherwise (or the industry generally). This may be a practical problem rather than a legal one.

(ii) Taxonomy of TPAs

14. At least two forms of TPA may arise:

    (a) The CP asks the consumer to enter into a payment arrangement of some kind that differs from the CCC and represents to the consumer that:

        (i) the CP will not enforce its rights against the consumer for its failure to make payments in accordance with the original CCC[3];

[2] *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723 (Santow J); *Tinyow v Lee* [2006] NSWCA 80 at [61] per Santow JA; *W & K Holdings (NSW) Pty Ltd v Laureen Margaret Mayo* [2013] NSWSC 1063 at [164]-[165] per Sackar J.

[3] Such failure may have already occurred at the time of the TPA, or it may be prospective

(ii) such non-enforcement only applies for as long as the consumer complies with the arrangement;

(iii) if the consumer fails to comply then the CP will enforce its rights as against the original CCC.

I will refer to this as a "***Forbearance TPA***".

(b) The CP informs the consumer that:

(i) the CP reserves the right to enforce its rights under the CCC but has not yet decided if and when it will do so;

(ii) the consumer's compliance with the arrangement may – or may not - affect the CP's decision about whether or not to exercise its enforcement rights;

(iii) irrespective of whether the consumer complies with the arrangement, the CP:

A. may still enforce its rights under the CCC; and

B. will in any event disclose the consumer's RHI against the obligations under the CCC.

I will refer to this as an "***Indicative TPA***". It might be said, of course, that in truth this is no "arrangement" at all.

(d) Meaning of "due and payable"

15. "Due and payable" is not defined in the Act.

(i) It means: the CP has a legal entitlement to maintain an action for recovery against the consumer

16. In *Griffin Energy Group Pty Ltd (subject to a deed of company arrangement) v ICICI Bank Ltd (Singapore Branch)*[4] the New South Wales Court of Appeal considered the meaning of "due and payable". Although it was in the context of a clause in a contract, the observations of the Court indicate that the expression is likely to have the same meaning in a statutory context. This is because the older authorities on

[4] *Griffin Energy Group Pty Ltd (subject to a deed of company arrangement) v ICICI Bank Ltd (Singapore Branch)* [2015] NSWCA 29; (2015) 317 ALR 395 (joint judgment of Ward and Leeming JJA and Sackville AJA).

which the Court relied in *Griffin Energy Group* in determining the proper construction of "due and payable"[5] considered the expression in a statutory context.

17. In *Griffin*, the final instalment of $150 million (as part of a $740 million purchase price for shares in two coal mining companies) was due to be paid on 1 March 2015. That day was a Sunday. Under the sale agreement the payment was to be paid on the next business day in Perth, which happened to be the following Tuesday since it was a bank holiday in Perth (but nowhere else in Australia). Security for the $150 million payment were three letters of credit of $50 million each issued by a Singapore bank that also expired on 1 March 2015 but which could be presented up to the end of the following business day – but that was Monday in Singapore. The question was whether the $150 million was "due and payable" on that Monday even though the sale agreement operated to require payment on the Tuesday.

18. The relevant statement of principle in *Griffin Energy Group* appears at paragraphs [53] and [54]. The Court said (emphasis added):

> *"[53] There is in our view no reason why the expression "due and payable" in [the relevant contract clause] should not be given its ordinary meaning. If [the relevant contract clause] merely used the word "due", the appellants' submission [i.e. that the reference to "due and payable" means merely that the debt exists, regardless of the time at which it can be enforced] might have some force. As Gibbs CJ observed in Clyne v Deputy Commissioner of Taxation (1981) 150 CLR 1 at 8 ; 35 ALR 567 at 570 ; [1981] HCA 40:*
>
> > *"[t]he word "due" is ambiguous; can mean owing, although not payable until some future date or it can mean presently payable." ...*
>
> *[54] As Gibbs CJ's observation in Clyne implies, a debt may be due without being payable: see also at CLR 15; ALR 576 per Mason J.* ***A debt is payable if the time for payment has arrived and an action to recover it can be maintained by the creditor****: Mack v Commissioner of Stamp Duties (NSW) (1920) 28 CLR 373 at 383; [1920] HCA 76 per Isaacs J (Rich J agreeing).* ***This means that an amount is payable if the creditor has a legal entitlement to maintain an action for recover*** *[sic]."*

19. The Court of Appeal found that the $150 million was not "due and payable" on the Monday in Singapore, it was only "due and payable" on Tuesday in Perth (by which time the letter of credit had expired). An application for special leave to appeal to the High Court against the decision of the Court of Appeal was dismissed on 7 August 2015.[6]

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[5] *Clyne v Deputy Commissioner of Taxation* [1981] HCA 40; 150 CLR 1; *Mack v Commissioner of Stamp Duties (NSW)* [1920] HCA 76; 28 CLR 373, cited in *Griffin Energy Group Pty Ltd* at [53] and [54] respectively.

[6] *Griffin Energy Group Pty Limited (Subject to a Deed of Company Arrangement) & Anor v ICICI Bank Limited (Singapore Branch) & Ors* [2015] HCATrans 174.

20. Two further points emerge from *Clyne*. First, Gibbs CJ considered that when the word "due" is used in the ITAA without the accompanying word "payable" it will prima facie mean simply owing[7]. Second, the meaning of "due and payable" must be determined by its context[8]. This is a fundamental rule of statutory interpretation in any event[9].

(ii) The insolvency line of authorities

21. There is a long line of authorities concerning the meaning of solvency (such as under s95A of the *Corporations Act*, which states that a person is solvent only if the person is able to pay their debts as and when they become due and payable).

22. Those authorities require a company's financial position to be considered as a whole taking into account commercial realities, including industry practices as to enforcement, and whether a creditor is likely to insist on timely payment[10]. It has been suggested that, on the strength of these authorities, "due and payable" in s6V may need to take into account periods of grace or forbearance irrespective of a CP's strict legal rights to maintain proceedings for recovery.

23. In my opinion these cases are of little utility in interpreting the expression "due and payable" in s6V of the Act. This is because the context is different.

24. The question of solvency focuses attention on "*what it is reasonable to expect in a given set of circumstances, such a consideration necessarily being made by someone operating in a practical business environment. Attention is focussed at whether the person would expect that at some point the company would be unable to meet a liability*".[11]

25. On the other hand, s 6V(1) focuses attention on whether "the individual has met *an obligation* to make *a monthly payment* that is *due and payable* in relation to *the* consumer credit" (emphasis added); it focuses on a particular obligation to make a particular payment under a particular contract.

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7 At 9 and 10.
8 At 8, and at 15 per Mason J
9 *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [23]-[25] per French CJ and Hayne J
10 *Sandell v Porter* (1966) 115 CLR 666 at 670 per Barwick CJ; *Southern Cross Interiors Pty Ltd (in liq) v DCT* (2001) 53 NSWLR 213 at 224-225. Other cases referred to by my instructors in footnote two of the observations, namely, *Re New World Alliance Limited (Receiver and Manager Appointed); Sycotex Pty Ltd v Baseler and Others (No 2)* [1994] FCA 1117; 51 FCR 425 (Gummow J); *Standard Chartered Bank of Australia Ltd v Antico* [1995] NSWSC 31; 38 NSWLR 290 (Hodgson J). This line of authority was referred to in *Illawong Village Pty Limited v State Bank of New South Wales* [2004] NSWSC 18 (Campbell J)
11 *Re New World Alliance Limited (Receiver and Manager Appointed); Sycotex Pty Ltd v Baseler and Others (No 2)* [1994] FCA 1117; 51 FCR 425 at 434 per Gummow J.

26. Support for this approach can be found in *Illawong Village Pty Ltd v State Bank of NSW* [2004] NSWSC 18. In that case, Illawong had claimed that the State Bank had overcharged it interest. One of the issues was whether the State Bank was entitled to charge default interest after the expiry of a fixed term loan when the bank had not forced repayment but allowed it to run. Campbell J (as his Honour then was) considered both the principles in *Clyne* and the meaning of "due" in the bankruptcy context[12]. His Honour (semble) held that the bankruptcy principles did not resolve the interpretation of clause 3.3 of the Mortgage in that case, being whether the loan was past "due" to the State Bank thus permitting it to charge the default rate[13].

27. A further consideration is that, if the flexibility permitted in insolvency context is adopted in the construction of the expression "due and payable" in s 6V(1), it would result in a considerable reduction to the extent to which credit reporting laws can serve their intended purpose. On the approach that I propound, RHI is determinable by reference to what a CP can enforce against the consumer – not what it would enforce. If the insolvency principles were to apply, RHI may be infrequently reportable. Further, "due and payable" would have an uncertain meaning depending on the particular CP's appetite to proceed to enforcement – which is subjective, arbitrary and variable. Determining RHI by reference to a CP's willingness to enforce rather than its entitlement to enforce may deprive the process of identifying RHI of objectivity, consistency or comparability. It would also place the CPs and CRBs at greater risk of breaching their obligations under the Privacy Act by unintentionally misreporting RHI.

(iii) Context of the Act: RHI cannot be misleading

28. As mentioned above, the CPs and CRBs must ensure that RHI is both accurate and not misleading. It may be argued that, if a consumer is complying with a TPA, then as a practical commercial matter, as between the CP and the consumer, the monthly payments are no longer "due and payable" under the original CCC; they have become "due and payable" by reference to the TPA.

29. Whether or not the consumer would be able to establish all three elements of an estoppel, the reality must be that - to a near certainty - no CP would proceed to enforcement if the TPA is being complied with.

30. Thus it may be argued that it would be misleading for a CP to generate RHI using the original CCC as the yardstick.

31. Added to that is the fact that, if enforcement action was taken, the consumer would almost certainly qualify for a postponement under section 94 of the National Credit

[12] at [244]
[13] at [247] and [251]

Code. Even though (as discussed below) in my view a postponement would not mean that the action for enforcement is not maintainable (just delayed), it lends weight to the proposition that s 6V should be interpreted by reference to the new timetable under a TPA rather than the original CCC.

32. This provides contextual support for the proposition that, if a Forbearance TPA is entered into, that should be the new yardstick to be applied under s 6V.

33. The above argument may align with the position of [redacted] on this issue but perhaps not with that of [redacted]. [redacted] may argue that:

    a. RHI is held is to provide information about the "credit worthiness" of an individual (ss 2A(e) and 6P);

    b. "credit worthiness" is defined to include "capacity to repay an amount of credit that relates to consumer credit" (s 6);

    c. TPAs are only ever entered into when consumers are having difficulty meeting their commitments;

    d. if the TPA becomes the new yardstick then the purpose of RHI providing information about consumers' credit worthiness would be undermined.

34. This may be at the heart of the difference between [redacted]. Both arguments have merit. It is difficult to determine which of them a Court would prefer; it could go either way.

35. However, for the reasons expressed below, in my opinion a Court would be more likely to find that once a Forbearance TPA is entered into, the monthly payments become "due and payable" under s6V by reference to that new timetable, not the original CCC.

(iv) Hardship and postponement under the National Credit Code

36. The National Credit Code includes provisions for hardship notices to be issued by consumers (section 72) and for postponement in the exercise of rights (section 94). In my opinion these do not impact on how s6V operates. Hardship notices may lead to variations in the CCC. In this event the CCC is varied so the RHI would be measured against the varied terms.

37. Postponement requests may result in the postponement of enforcement proceedings. In that event the CP may still maintain those enforcement proceedings based on the existing default; the CP is only being delayed. In other words: in my opinion, a postponed enforcement of a CCC based on an existing default does not change the

fact that the missed monthly payment triggering that default was "due and payable" under s 6V.

(e) Application

38. For the above reasons, in my view the expression "due and payable" in s 6V means that the CP has a legal entitlement to maintain an action for recovery against the consumer in respect of a missed monthly payment (where appearing in s6V(1)).

39. Plainly, if the CCC has been varied such that the due date for the monthly payment has changed then the RHI must be assessed against the changed date. The varied timetable becomes the new yardstick.

40. The question for me to answer is whether a varied timetable under a TPA would be a new yardstick under s 6V(1). This depends on whether, despite the TPA, the CP would have a legal entitlement to maintain an action for recovery against the consumer for non-payment of the monthly payment under the original CCC.

41. In my opinion, this depends on the type of TPA.

42. It has been said that the term "arrangement" has no fixed meaning, and "*is equally apt to describe a binding contractual variation or a complete estoppel as it is a circumstance in which a creditor whose debt is overdue takes no action because it has been told the debtor has no money but expects to be able to pay when a sale is made*".[14]

43. If the circumstances in which the TPA are entered into mean that the CP would be estopped from enforcing the CCC on the basis of a failure to pay in accordance with the original CCC, then the missed payment in question would not be "due and payable" under s 6V. The TPA would then be the new yardstick.

44. In general terms, equitable estoppel prevents a party (here, the CP) from unconscionably resiling from a representation or an assumed state of affairs which it has induced another party (here, the consumer) to rely upon or adopt as the basis of some act or omission which, if the representation or assumption were not adhered to, would operate to the consumer's detriment. The consumer would need to show:

    a. that the CP represented to the consumer (or otherwise induced the consumer to adopt the assumption) that it would not enforce its rights under the CCC for failure to make the monthly payment(s) when due (the "representation limb");

[14] *Emanuel Management Pty Ltd v Foster's Brewing Group Ltd* [2003] QSC 205; (2003) 178 FLR 1 at [181] per Chesterman J.

b. that the consumer relied on the representation (for example by fulfilling the terms of the TPA instead of seeking to pay out the CP and obtain an alternative source of finance – which the consumer may have done in order to avoid a negative credit report) (the "reliance limb"); and

c. that a departure by the CP from the representation or assumed state of affairs would be detrimental to the consumer (the "detriment limb"). Mere enforcement against the consumer may give rise to such detriment, as may a consequential negative credit report.

45. In my opinion, a Forbearance TPA would be likely to put the consumer in the position of being able to raise an estoppel defence to any attempt at enforcement by the CP (assuming the consumer had continued to comply with its terms). In those circumstances, in my opinion, a CP would not be able to maintain an action for recovery against the consumer in respect of the relevant missed monthly payment(s). In that event, even though the CCC may not have been varied, the missed monthly payment(s) were not "due and payable" for the purposes of s6V(1).

46. On the other hand, an Indicative TPA would not give rise to an estoppel. That is because there is no representation or assumed state of affairs that the CP would postpone enforcement. The "representation limb" would not be made out.

(f) Treatment of further breaches during or after a TPA

47. You have asked me to consider how RHI should be reported when:

(a) the consumer has breached the terms of the TPA; or

(b) after the TPA ends the consumer falls into breach of the requirements of the original CCC once re-implemented, or fails to meet a catch-up payment required by the TPA.

48. Where an Indicative TPA has been entered into, in my opinion in both cases the RHI should be reported against the original CCC.

49. Where a Forbearance TPA has been entered into, in my opinion the RHI should be reported against the dates on which payments were payable under the terms of that TPA. This is because, for the reasons explained above, while the TPA was current it governed the dates on which payments were "due and payable" in the relevant sense. A failure to adhere to that timetable needs to be measured against that yardstick. I do not think it is permissible to "rewrite history" because of a breach of a TPA and report RHI by measuring the non-payment against the timetable in the original CCC.

(g) Conclusion on question 1

50. For the above reasons, in my opinion:

    (a) Where a Forbearance TPA is entered into the RHI should be reported against the terms of the Forbearance TPA; but

    (b) Where an Indicative TPA is entered into the RHI should be reported against the terms of the original CCC.

51. A qualification must be added to this. In many cases it may be very difficult for a CP to determine whether:

    (a) the original CCC has been varied;

    (b) a Forbearance TPA has been entered into;

    (c) an Indicative TPA has been put forward to the consumer; or

    (d) in the case of any TPA, the CP would be estopped from maintaining any enforcement action against the consumer for failing to make a monthly payment in accordance with the original CCC.

52. If a CP gets it wrong, and releases RHI when it is not in fact RHI, the CP will have committed an offence under sections 21D and 21R. The CRBs would commit an offence under section 20P if they use or disclose it. This means that the CPs should send clear and unambiguous messages to consumers when entering into any TPA.

C. Question 2: If a CP represents that it will disclose RHI by reference to the TPA but does so against the original CCC, would that be a breach of the Act and/or would the consumer have equitable remedies?

53. This question hinges on the outcome of question 1. It needs to be answered by reference to two different assumptions:

    (a) The Act requires the CP to disclose the RHI by reference to the original CCC; and

    (b) The Act requires the CP to disclose the RHI by reference to the TPA.

(a) The Act requires the CP to disclose the RHI by reference to the original CCC

54. If a CP represents to a consumer that it will disclose RHI by reference to the TPA but the Act requires otherwise, then in my opinion the CP would breach the Act not to disclose the RHI by reference to the original CCC.

55. For the CP to do otherwise, and disclose RHI against the TPA when it is supposed to do so against the original CCC, would likely mean that the CP would:

    (a) contravene section 21R because the RHI would be false or misleading;

    (b) contravene section 21Q because the CP will have failed to take reasonable steps to ensure that the RHI is accurate, up-to-date and complete.

56. As for equitable remedies: I understand you are asking me whether a consumer could obtain an injunction against the CP to prevent the CP disclosing RHI against the original CCC when the CP had told the consumer it would not do that.

57. In my opinion the answer to that is "no". A failure by the CP to disclose the RHI against the original CCC (or to disclose against the TPA) would be a breach of the Act. Equity follows the law. A Court would not grant an injunction that would force a CP to breach the Act or prevent a CP from complying with it.

58. In my view no question of equitable estoppel interferes with this analysis. Even if a CP represented to a consumer that it would report RHI against the TPA, the consumer relied on that representation to its detriment, no relief would be available in equity to force a CP to report RHI against the TPA if the Act required the CP to report against the original CCC.

59. Putting it another way: I cannot see how it would be unconscionable for a CP to resile from its representation, or an assumed state of affairs, that RHI would be reported against the TPA if doing so would infringe the Act (and expose the CP to criminal sanctions). Thus in this scenario, no equitable estoppel could be made out as the requisite element of unconscionability could not be established.

60. The consumer may have other remedies against the CP but in my opinion an injunction to prevent the CP complying with the Act is not one of them.

(b) The Act requires the CP to disclose the RHI by reference to the TPA

61. This scenario is the converse of the first. If the CP seeks to disclose RHI against the original CCC when the Act requires disclosure against the TPA, then the CP would likely be acting contrary to sections 21Q and 21R of the Act (and also possibly in contravention of section 21D since the information disclosed was not in fact RHI).

62. Section 98 of the Act is the obvious basis on which for a consumer to seek an injunction. It provides (emphasis added):

> *Where a person has engaged, is engaging or is proposing to engage in any conduct that constituted or would constitute a contravention of this Act, the Federal Court or the Federal Circuit Court may, on the application of the*

*Commissioner **or any other person**, grant an injunction restraining the person from engaging in the conduct and, if in the court's opinion it is desirable to do so, requiring the person to do any act or thing*

63. The requirement (to the extent it still exists) that the right sought to be protected be "proprietary", does not apply to applications for injunctions to restrain breaches of statutory prohibitions.[15]

64. The words "any other person" in s98 are broad but in any event, the consumer would have a special interest "over and above that held by ordinary members of the public" in the enforcement of the CP's statutory duty under the Act[16].

65. For these reasons, in my view the consumer would therefore almost certainly be able to rely on s98 to obtain an injunction[17].

66. An injunction under s98 rests on the CP's breach of the Act rather than the CP's failure to act in accordance with its representation. As to that, the consumer would have a claim for misleading and deceptive conduct by the CP (under section 18 of the Australian Consumer Law).

67. That cause of action would be based on the CP's failure to act in accordance with its representation, plus the consumer's reliance and damage suffered as a result. The elements of this cause of action are largely the same as that required to raise an estoppel (above).

68. If made out the consumer may be able to obtain an injunction under s232 of the Australian Consumer Law.

69. Again it is difficult to see what role any equitable estoppel could play in this scenario. An injunction would be available under section 98 of the Act to ensure that the CP complied with the Act. An injunction would also be available under the Australian Consumer Law for misleading and deceptive conduct. There would be no barrier to the court providing such relief since the Court would be ordering the CP to do something that is required by the Act anyway – or not to do something that the Act

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15 *Cooney v Ku-ring-gai Municipal Council* (1963) 114 CLR 582.

16 *Onus v Alcoa of Australia Ltd* [1981] HCA 50; 149 CLR 27.

17 Injunctive relief is generally understood to be an equitable remedy. Initially, it was available only in equity, however there are now various statutory provisions which empower courts to grant injunctive relief (such as s 98 of the *Privacy Act*). The conferral of jurisdiction at law to grant injunctive relief under such statutory provisions does not, however, oust the jurisdiction of a court of equity to grant injunctive relief, even if the original basis of the equitable jurisdiction was the inability of the common law to grant any remedies (see J D Heydon, M J Leeming and P G Turner, "*Meagher, Gummow and Lehane's Equity Doctrines and Remedies*" (2015) 5th ed, at [21-055]).

forbids. In neither case would it be necessary for the consumer to establish unconscionability[18], which is often the most difficult element of estoppel to establish.

Yours sincerely

Ben Katekar

[18] Quite apart from the question whether an equitable estoppel could be used as a sword rather than a shield. The preponderance of recent authority is that it cannot be used as a sword.