



Consumer credit reporting and hardship

Purpose of review

The Attorney-General has agreed to a request from the Treasurer to review how financial hardship arrangements are reflected in the credit reporting system. This request was made in response to feedback received from stakeholders in the development of legislation to mandate the participation of large financial institutions in the consumer credit reporting system.

Examining the interaction between financial hardship information and the consumer credit reporting system involves policy considerations by both the Attorney-General's Department, due to its administration of the consumer credit reporting system contained in the *Privacy Act 1988* (the **Privacy Act**), and the Treasury, due to its administration of the *National Consumer Credit Protection Act 2009* (the **NCCP Act**).

Request for public submissions

This paper provides information on the current operation of the consumer credit reporting system and the operation of financial hardship arrangements. The paper seeks input from the community (by way of written submissions) about the reporting of financial hardship information in the consumer credit reporting system, including whether the current approach should be changed, the reasons for any proposed changes, and the nature of any proposed changes. While this paper concludes by identifying some issues that may be considered in providing submissions, submissions may provide any information and make suggestions relevant to the topic of this paper. To avoid any doubt, this paper is not a general review of repayment history information (**RHI**) in the consumer credit reporting system, however the interaction between RHI and hardship arrangement information is within the scope of this review.

Submissions to this review can be made to privacy.consultation@ag.gov.au.

The closing date for submissions is 10 June 2018. Late submissions may be considered by prior arrangement with the Attorney-General's Department (through the email address above).

Submissions will be made public (by being published on the Attorney-General's Department website) unless an express statement is included in the submission requesting confidentiality. If you request that your submission remain confidential, you are encouraged to consider whether the whole submission is confidential or whether some parts of the submission may be made public.

Overview of the consumer credit reporting system

Operation of the Privacy Act

Part IIIA of the *Privacy Act 1988* regulates the Australian consumer credit reporting system (the credit reporting system). Part IIIA is supported by the *Privacy Regulation 2013* and the *Privacy (Credit Reporting) Code 2014*. One of the objects of the Privacy Act is to facilitate an efficient credit reporting system while ensuring that the privacy of individuals is respected. In recognition of that objective, the laws about credit reporting are intended to balance an individual's interests in protecting their personal information with the need to ensure sufficient personal information is available to assist a credit provider to determine an individual's eligibility for credit. The credit reporting provisions do not regulate the process by which credit providers assess the risk of providing credit to an individual – this is a decision in the hands of the credit provider.

In general terms, the credit reporting system contains personal information about individuals over the age of 18 who have, or apply for, consumer credit¹. Credit providers supply credit information to credit reporting bodies. Credit reporting bodies collect and handle the credit information to create a database of credit information about an individual. The credit reporting bodies may only disclose an individual's credit information to a credit provider in defined circumstances, most commonly when an individual applies for credit. The credit reporting provisions in the Privacy Act were substantially reformed in 2012 to introduce a more comprehensive credit reporting system that included additional categories of credit information. This is discussed further, below.

To summarise, the Privacy Act regulates:

- what personal information can be included in the credit reporting system²
- the circumstances in which an individual's credit information can be collected by a credit reporting body
- how credit information can be used
- when, and to whom, credit information can be disclosed by credit providers and credit reporting bodies
- how credit information must be protected, including accuracy and security obligations, and
- how individuals can access, request corrections of, or complain about, their credit information.

The participation of credit providers in the credit reporting system is voluntary, though legislation has been introduced to Parliament to mandate the participation of the largest financial institutions (discussed further, below).

¹ For the purposes of this paper the description of the credit reporting system has been simplified – for example, while the credit reporting system also applies to guarantors or to individuals who apply for commercial credit in some circumstances, these are not relevant to this paper.

² A number of specific terms are used in the Privacy Act to refer to certain categories of personal information at different stages in the credit reporting system. These terms include: credit information (defined in section 6N of the Privacy Act); credit reporting information; credit eligibility information; and regulated information (all included in the definitions in section 6 of the Privacy Act), amongst others. For simplicity this paper refers generally to either credit information or personal information.

Regulatory oversight of the credit reporting system

The credit reporting system is regulated by both the Office of the Australian Information Commissioner (**OAIC**) and the Australian Investments and Securities Commission (**ASIC**). The OAIC is an independent Commonwealth statutory agency. The role of the OAIC in relation to the credit reporting system is to regulate the handling of personal information under the Privacy Act and other relevant legislation. The OAIC has powers to work with entities to facilitate legal compliance and best privacy practice, as well as complaint-handling, investigative and enforcement powers to use in cases where a privacy breach has occurred.

ASIC is the national regulator for consumer credit and consumer leases under national credit legislation. The laws ASIC administers in relation to credit include responsible lending obligations and protections around hardship. ASIC also has a role under the mandatory comprehensive credit scheme (discussed in further detail below) in monitoring compliance with the scheme. ASIC will also be provided with new powers to collect information and require audits to confirm the supply requirements are being met. ASIC can prescribe the technical standards for the reported credit information.

Development of the comprehensive credit reporting system

Australian Law Reform Commission Report 108

As part of its 2008 review of the Privacy Act, the Australian Law Reform Commission (the ALRC) considered the credit reporting provisions in the Privacy Act, including their purpose, scope, and operation. The ALRC recommended extensive changes to the credit reporting provisions, the most significant of which was to include additional categories of personal information in the credit reporting system. In addition to the existing categories of negative information (eg defaults), these new categories were to include: type of credit account; date that a credit account was opened; date an account was closed; the current limit of open accounts; and repayment history information (RHI, but referred to by the ALRC as repayment performance history). The ALRC also considered the inclusion of hardship information in the credit reporting system in the context of examining repayment history information (RHI) and schemes of arrangement³. The review resulted in ALRC Report 108, *For Your Information: Australian Privacy Law and Practice*.

Repayment history information

The ALRC report recommended that some RHI should be included in the credit reporting system subject to adequate responsible lending obligations being in place. The ALRC report recommended RHI in the credit reporting system should comprise only information indicating:

- whether, over the prior two years, the individual was meeting his or her repayment obligations as at each point of the relevant repayment cycle for a credit account; and, if not
- the number of repayment cycles the individual was in arrears.

³ Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108, 2008, pp 1839-40, 1943-46.

This information was included due to the predictive value of RHI in the credit reporting system. The ALRC report noted the inclusion of this information would result in a reduction in information privacy. The ALRC report recommendations were silent on whether, or how, the reporting of RHI should deal with financial hardship.

Schemes of arrangement

The ALRC assessment of schemes of arrangement in the 2008 review is also relevant to hardship⁴. Schemes of arrangement involve an individual entering into a new arrangement with a credit provider to repay a debt. At the time of the 2008 review, the reporting of such arrangements in the credit reporting system was dependant on there being a default or a serious credit infringement as well as a formal written arrangement involving a substantial renegotiation of the terms of the loan.

In the absence of support from consumer groups, the ALRC report stated it was not convinced of the desirability of the credit reporting system permitting a scheme of arrangement to be reported without the need for a default to be listed first. Quoting a submission from Consumer Credit Legal Centre (now known as the Financial Rights Legal Centre) the ALRC report stated that 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 terms’⁵.

Privacy Amendment (Enhancing Privacy Protection) Act 2012

The *Privacy Amendment (Enhancing Privacy Protection) Act 2012* amended the Privacy Act to implement the Australian Government’s response to many of the ALRC report recommendations, including by introducing the more comprehensive credit reporting system set out in Part IIIA of the Privacy Act, supported by regulations made in the Privacy Regulations as well as by a credit reporting code of conduct made pursuant to new provisions in Part IIIB of the Privacy Act.

The Enhancing Privacy Protections Act did not provide for the inclusion of hardship information in the credit reporting system. The Explanatory Memorandum (the EM) for the legislation makes specific reference to hardship arrangements in the context of ‘new arrangement information’ (what the ALRC report referred to as schemes of arrangement), a defined term in the Privacy Act.

The EM specifically excludes hardship arrangements from ‘new arrangement information’ as well as any other agreements similar to hardship arrangements as they would ‘increase the risk that individuals may not seek hardship arrangements as permitted in appropriate circumstances’⁶. In accordance with the ALRC report recommendation the Enhancing Privacy Protections Act provided that ‘new arrangement information’ cannot be reported unless there is a default listing or serious credit infringement.

⁴ *ibid.* pp. 1943-46.

⁵ *ibid.* pp. 1946.

⁶ Explanatory Memorandum, *Privacy Amendment (Enhancing Privacy Protection) Bill*, 2012, p 127.

More comprehensive credit reporting

The amendments to the Privacy Act made by the Enhancing Privacy Protection Act commenced operation in March 2014 and introduced more credit information into the credit reporting system. The intention of these changes was to bring about a more comprehensive credit reporting system, moving away from the previous 'negative' system which contained information about credit defaults.

This more comprehensive credit reporting system is known as comprehensive credit reporting. Whilst referring to the Australian consumer credit reporting system as 'comprehensive' is widespread, it is relevant to note that the system does not include many types of information reported in some foreign jurisdictions, such as the outstanding balance of consumer credit.

Repayment history information

The additional information introduced into the consumer credit reporting system in 2014 included RHI. RHI is information about whether an individual has met their consumer credit payment obligations in a particular month.

Subsection 6V(1) of the Privacy Act defines the meaning of RHI as:

- a) whether or not the individual has met an obligation to make a monthly payment that is due and payable in relation to the consumer credit;
- b) the day on which the monthly payment is due and payable;
- c) if the individual makes the monthly payment after the day on which the payment is due and payable - the day on which the individual makes that payment.

Section 6V of the Privacy Act also provides a regulation making power to make provisions in relation to whether or not an individual has met an obligation to make a monthly payment that is due and payable in relation to consumer credit; and whether or not a payment is a monthly payment.

The Credit Reporting Code provides further detail on RHI. Paragraph 8 of the Credit Reporting Code provides that RHI is reported as either 'Current and up to date including the grace period', or as a number representing the age of the oldest outstanding payment. For example, if the amount is up to 29 days overdue it is represented by a '1', if the amount is 30-59 days overdue it is represented by a '2' and so on⁷. For an amount to be overdue it must be overdue at the end of the month it was due and a 14 day grace period must have expired⁸.

Only credit providers licensed under the NCCP Act are able to disclose and receive RHI⁹. This licensing requirement means that credit providers disclosing and receiving RHI are subject to the NCCP Act's responsible lending obligations. The licensing requirement means that some credit providers (such as utility providers) are excluded from reporting or accessing RHI.

⁷ Privacy (Credit Reporting) Code 2014, clause 8.1.

⁸ Privacy (Credit Reporting) Code 2014, clause 8.2.

⁹ *Privacy Act 1988*, 21D(3)(c)(i).

Uptake of more comprehensive credit reporting

The move to a more comprehensive credit reporting system in 2014 was strongly supported by the consumer credit industry¹⁰. However, this support has not, to date, translated into widespread voluntary participation in the credit reporting system by credit providers. In June 2017 the Australian Retail Credit Association (ARCA) reported ‘small volumes’ of more comprehensive credit data being shared¹¹. A number of inquiries, most notably the Financial System Inquiry in 2014 and the Productivity Commission Inquiry into Data Availability and Use in 2017, recommended the Australian Government consider mandating participation in the credit reporting system if voluntary participation rates did not increase¹².

In response, the Treasurer announced on 9 May 2017 that the Government would legislate a mandatory comprehensive credit reporting regime if credit providers are not reporting at least 40 per cent of their data by the end of 2017. Subsequently, on 2 November 2017, the Treasurer announced that the Government would introduce legislation requiring mandatory comprehensive credit reporting from 1 July 2018. This would require the four major banks reporting 50 per cent of their credit reporting information from 1 July 2018, increasing to all credit reporting information 12 months later.¹³ Accordingly, the *National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018* was introduced into Parliament on 28 March 2018 and, if passed, will introduce legislative requirements for large approved deposit-taking institutions to participate in the consumer credit reporting system.¹⁴

The mandatory consumer credit reporting scheme applies to ‘eligible licensees’, which initially will be large approved deposit-taking institutions (Australia’s four largest banks) that hold an Australian credit licence. These providers will be required to provide an initial bulk supply of information (with half the information required in mid-2018 and the remaining information in mid-2019, subject to the passage of legislation). There will then be an ongoing obligation on these providers to keep this information correct and up-to-date, and to supply further information as mandated by legislation.

¹⁰ Australian Law Reform commission, *For Your Information Report: Australian Privacy Law and Practice*, Report 108, May 2008, pp 1810-20.

¹¹ Australian Retail Credit Association, *Credit Data Fact Base*, Volume 2, June 2017, p 2.

¹² Financial System Inquiry, *Final Report*, November 2014, p. xxiv. Productivity Commission Inquiry Report, *Data Availability and Use*, Report No. 83, 2017, p 38.

¹³ <http://sjm.ministers.treasury.gov.au/media-release/110-2017/>

¹⁴ https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6093

Outline of hardship

There are two categories of hardship information commonly discussed in the context of the credit reporting system and which are the subjects of this paper. One involves a permanent variation to the credit contract where the provider varies the contract to provide the consumer with a less fiscally strenuous repayment scheme; the other involves a temporary variation where the consumer requires short-term assistance. These are discussed below.

There may be other circumstances in which a consumer's credit repayments may be temporarily suspended. Most notably, financial institutions may offer temporary relief from credit obligations to any customers in an area that may be affected by natural disasters or other extreme situations. These temporary arrangements are offered voluntarily by financial institutions to all affected customers, irrespective of their specific circumstances or ability to continue to meet their credit obligations. Accordingly, these kinds of arrangements are generally not considered to be within the scope of hardship under the National Credit Code and are not further considered in this paper.

Hardship under the National Credit Code

Under the National Credit Code (contained in Schedule 1 of the NCCP Act) a debtor can request, and the debtor and credit provider may then agree to, a variation in the terms of a credit contract on the grounds of financial hardship¹⁵. The Privacy Act does not provide for the reporting of these hardship agreements in the credit reporting system.¹⁶

Forbearances and indulgences

The second category of hardship information, often referred to as indulgences or forbearances, relates to individuals in financial hardship who obtain a temporary alteration to their consumer credit contract. For example, a credit provider may agree to a temporary arrangement allowing a debtor to defer a repayment or repayments, or alter repayment amounts during a period of financial hardship.

As this type of hardship arrangement involves a temporary, rather than permanent, change to the terms of a credit contract, whether these delayed/altered payments are listed as RHI depends upon how the credit provider has represented the arrangement to the debtor. For example, if the credit provider has represented to the debtor that it will maintain the enforcement of missed payments notwithstanding the temporary arrangement, then the deferred/altered payments may be reported as RHI. However, if the credit provider has not made this representation it may be estopped from reporting the deferred/altered payments as RHI¹⁷.

¹⁵ *National Consumer Credit Protection Act 2009*, Schedule 1, Part 4, Division 3.

¹⁶ Note that the Privacy Act prohibits the collecting, use or disclosure of consumer credit information unless prescribed under the Act therefore prohibiting the reporting or disclosure of hardship arrangements entered into between a consumer and a credit provider.

¹⁷ Mr Timothy Pilgrim PSM, *Repayment history information reporting and informal payment arrangements*, letter to the Australian Retail Credit Association, 2017, p 2.

Relationship between hardship and Repayment history information

When an individual notifies their credit provider that they are experiencing financial hardship and may be unable to meet their obligations under a credit contract, there are a number of protections that are triggered. These include:

- a) Under section 89A of the NCC, where a credit provider has not yet issued a default notice and the consumer provides the credit provider with a hardship notice, the credit provider is prevented from commencing enforcement proceedings against the consumer until 14 days after the credit provider has issued the consumer with a notice under paragraph 72(4)(b) NCC that the credit provider has not agreed to change the credit contract.
- b) Under paragraph 9.1 of the Credit Reporting Code, where a consumer provides the credit provider with a hardship notice, the credit provider must not disclose an overdue payment as default information.

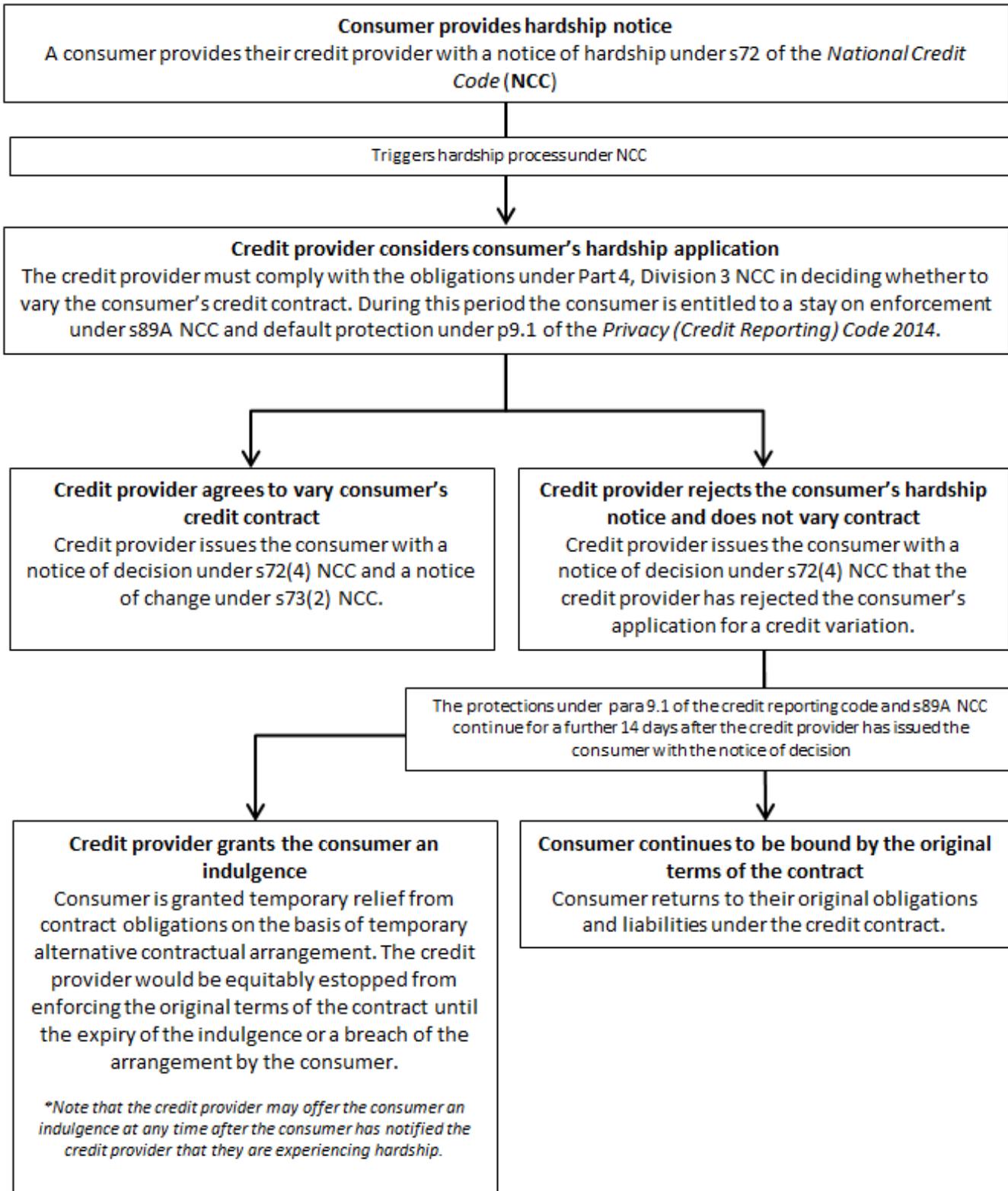
While there are clear statutory obligations placed on credit providers in relation to what actions they can take to recover payments from individuals who have notified hardship, how this circumstance is reported on a consumer's credit report is not addressed in the Privacy Act. As discussed above, Part IIIA of the Privacy Act clearly excludes hardship information from being included; however it is silent on how RHI should be treated in circumstances where a consumer has given notice of hardship.

There has been some discussion within the credit provision section as to how subsection 6V(1) of the Privacy Act (which defines RHI, and is discussed earlier in this paper), should be treated where a consumer has given notice of hardship and the credit provider had granted an indulgence. As noted in the section above on forbearances and indulgences, whether a delayed or missed payment is reported and subsequently reflected on a consumer's credit report is dependent on the nature of the arrangement between the credit provider and the individual, and what representations were made by the credit provider.

In order to create certainty in relation to the operation of subsection 6V(1), the OAIC clarified their position on how forbearances should be treated, and how credit providers should interpret the term 'due and payable' in their FAQ 'What does the term 'due and payable' mean in the definition of repayment history information?'¹⁸ Broadly, the OAIC understands that the term 'due and payable' for the purposes of subsection 6V(1) of the Privacy Act to mean that the credit provider has a legal entitlement to maintain an action against a consumer in respect to a missed monthly payment. Where a variation of terms has occurred, 'due and payable' should be in relation to the terms of the varied contract, and where an indulgence has been made, the context is dependent on the nature of the arrangement. This is discussed in further detail in the OAIC's factsheet which should be referred to for the full discussion of their interpretation.

¹⁸ <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>

Overview of the NCC hardship process



Areas for review

In general terms, this review is seeking community input on:

- whether hardship is currently treated adequately under the credit reporting provisions in Part IIIA of the Privacy Act;
- whether there are opportunities for reform; and, if so,
- what reforms are appropriate.

The following list of questions has been prepared to provide assistance in identifying the issues. However, submissions are not required to address any or all of these questions and can address any relevant issues considered necessary.

1. Is there sufficient certainty in how the forms of hardship arrangements discussed in this paper are currently treated in relation to consumer credit reporting? If not, what are the imbalances that are evident in the current system? That is, what are the reasons for change and why should hardship arrangements be included in the credit reporting system?
2. If the current mechanisms for how hardship arrangements (formal or informal) are reported are not effective to facilitate an efficient credit reporting system while ensuring that the privacy of individuals is respected, how should this be addressed? Are there reforms that could be implemented within the current regulatory framework? Are there non-legislative options available?
3. Some of the matters to be considered in determining regulatory/non-legislative options for action include:
 - a. What hardship information should be covered, and why? How should informal arrangements/indulgences be addressed?
 - b. Should information about the reasons for hardship (such as loss of employment or ill health) be included? If so, how will this information be used and would this mean different consequences for individuals depending on the reason for hardship? If credit decisions are to consider the reasons for hardship, why can't this information be obtained directly from the individual (or, with their consent, from the relevant credit provider)?
 - c. Should hardship information be a separate type of credit information which is separately reported and subject to specific rules, or should it be reported incidentally, as part of RHI? What is the appropriate relationship between hardship information and RHI?
 - d. How will the hardship information be used and should there be any restrictions on the use of this information? Who should be able to access hardship information and in what circumstances?
 - e. What are the expected consequences for individuals about whom hardship information is reported? How might any risks arising from these consequences be mitigated?
 - f. Should there be other limitations or restrictions on the hardship information that is included in the credit reporting system? For example, should retention of the hardship information be limited (eg no retention once hardship period over)?
 - g. How is the inclusion of hardship information expected to operate in practice? For example, noting that most credit application processes are automated, what are the expected

consequences of including hardship information in this context, and how are practices in industry around these matters to be made consistent so that consumers are not dis/advantaged depending on the credit provider?

4. If financial hardship was included in consumer credit reporting, how would this impact credit providers' engagement with their responsible lending obligations:
 - a. Where a credit provider is assessing a new application for credit where a consumer's credit report represents that the consumer has recently entered into a hardship agreement.
 - b. Where a credit provider has extended credit to a consumer (whether ongoing, or a single loan), and the consumer enters into a hardship agreement with another credit provider which is then reported on that consumer's credit report.
5. Are there any other issues involving hardship and the credit reporting scheme that should be considered in the course of the review?