

7 June 2018

Attorney General's Department
National Circuit,
Barton ACT 2600

Via email: privacy.consultation@ag.gov.au

Commonwealth Bank welcomes the opportunity to comment on the Attorney General's review into the reporting of repayment history information (RHI) in a future credit reporting system.

Commonwealth Bank is captured by the mandatory credit reporting requirements set out in legislation currently being considered by Parliament¹.

As has been noted in previous submissions, Commonwealth Bank understands and supports the goals of the mandatory comprehensive credit reporting regime and the bank has already invested significant resources to meet the timeframes established by the Government.

Existing Consumer Protections

The framework for reporting RHI in a comprehensive credit reporting regime was established in 2012² by the then Labor Government and provides important consumer protections, including:

- Providing consumers access to "simpler, quicker and cheaper"³ external dispute resolution mechanisms for credit reporting disputes;
- Limiting the sharing of comprehensive credit data to credit providers who are subject to the National Consumer Credit Protection Act (ie, it excludes the provision to third parties such as utility providers, who are able to access this data in other jurisdictions such as New Zealand);
- Limiting the retention of such data to two years, instead of five.

Additional consumer protections are included in the Credit Reporting Code. For instance, in the reporting of repayment history information (RHI), a customer can only be listed as having missed a

¹ National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018

² Privacy Amendment (Enhancing Privacy Protection) Bill 2012

³ Nichola Roxon, Second Reading speech, 23 May 2012. Available online at:

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=ld%3A%22chamber%2Fhansard%2Fa097ab46-bef0-4ed3-b3f0-27f3b075e04e%2F0013%22>

repayment if the amount was not paid at the end of the month and remained unpaid at the end of a 14-day 'grace' period⁴.

The 2012 amendments to the Privacy Act were silent on the treatment of the reporting RHI for customers who have sought hardship arrangements with their credit provider.

The Privacy Act does not allow a credit provider to share information with other providers about whether a customer has asked for, or has been granted, a hardship agreement.

Reporting RHI – Current Approach

The Commonwealth Bank is strongly committed to helping customers who are experiencing hardship. We actively encourage all customers in hardship to approach the bank as soon as possible to discuss their circumstances.

There is a crucial interdependency between the reporting of RHI and the effective operation of our hardship programs. Anecdotally, a significant number of customers ask about the impact on their credit score when applying for hardship.

As outlined in the Attorney General's discussion paper, there are three outcomes for how RHI will be reported for customers who have applied for hardship:

- a) In circumstances where the Commonwealth Bank accepts a formal variation to the credit contract under section 72 of the National Consumer Credit Protection Act, the RHI will be reported against what is "due and payable" according to the updated contract.
- b) Where a hardship arrangement is rejected under section 72 of the National Consumer Credit Protection Act, and there is no informal agreement between the parties, RHI will be reported against what is "due and payable" according to the original contract.
- c) Where there is an informal, temporary agreement between the bank and a customer but the contract has not been formally varied, the RHI will continue to be reported against the original credit contract.

Industry participants essentially only disagree about how to report RHI for the third category of customers; the first two categories have been uncontentious to date.

Regulatory Uncertainty

There is some level of uncertainty from Government and regulators as to how RHI should be reported for customers who have been granted an informal, temporary agreement.

⁴ Privacy (Credit Reporting) Code 2014, Clauses 8.1 and 8.2.

Both the Labor Government and the current Coalition Government have stated that the purpose of reporting RHI is to “improve credit decisions”⁵ and to ensure credit providers have an “enhanced capacity to meet their responsible lending obligations”⁶.

ASIC has likewise stated that the consumption of comprehensive credit data is a “valuable tool to help verify a consumer’s financial situation”, that may in the future be included in the “reasonable steps” a credit provider may have to take to meet their responsible lending requirements⁷.

It follows from this view that the policy intent of the comprehensive credit reporting framework is to provide objective information about a customer’s financial position. A credit provider could conclude from this that customers on informal, temporary agreements should have their RHI reported according to their original contract, so that they do not fall deeper into indebtedness at a time of acute financial stress.

Against this view, the Financial Ombudsman Service has stated that consumption of RHI is unnecessary for a lender to meet their responsible lending requirements⁸.

Flowing from this, the FOS and consumer advocates have argued that RHI for consumers on informal, temporary agreement should be adjusted to reflect the agreed repayment schedule, rather than the original contract⁹.

Guidance provided by the OAIC has not clarified a financial institution’s obligations in relation to reporting RHI, stating only that it should be “determined on a case-by-case basis”, noting that where a credit provider does not make representations to the customer that they will postpone enforcement, the RHI should be reported according to the original contract.

Taken together, the views provided by the FOS and OAIC have resulted in inconsistent guidance provided to credit providers. Following the guidance of the OAIC could result in an adverse finding in an external dispute resolution scheme.

⁵ Labor Attorney General Nicola Roxon stated in 2012 that the comprehensive credit data will provided “more information—with the appropriate privacy protections—so that they can make more accurate risk assessments”. See: Privacy Amendment (Enhancing Privacy Protection) Bill 2012, Second Reading speech, 23 May 2012. Available online at:

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2Fa097ab46-bef0-4ed3-b3f0-27f3b075e04e%2F0013%22>.

⁶ Coalition Assistant Treasurer Michael Sukkar stated that credit providers should “make lending and risk pricing decisions on the basis of comprehensive information, rather than a small fragment of the overall picture. See: National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018, Second Reading speech, 28 March 2018. Available online at:

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F1804b2ba-3f8e-4c54-abff-2dea8c0ce814%2F0005%22>

⁷ See for instance, ASIC letter to ACCC, dated 19 May 2015. Letter is available online at:

https://www.accc.gov.au/system/files/public_registers/documents/D15%2B69467.pdf

⁸ For instance, Philip Field, comments to industry forum, 27 April 2018.

⁹ Industry Forum, 20 April 2018

Potential Unintended Consequences

Informal, temporary agreements give customers and credit providers a level of flexibility that can lead to better outcomes for both parties. Commonwealth Bank strongly believes that this level of flexibility should be maintained. The main reasons for this are:

- a) Formal variations to a consumer credit contract trigger reporting requirements to APRA, including notification of when an impairment has been made. It cannot be assumed that all customers seeking temporary relief would qualify for a contract variation, under section 72 of the National Consumer Credit Protection Act, leading to a much higher number of customers being left with no relief whatsoever.
- b) The decision as to whether a customer is granted a temporary, informal agreement or a formal contract variation is not binary. A customer will often be given a temporary agreement in the short term and in the majority of cases, their repayments will be rehabilitated. If not, a credit provider will often work with the customer towards a more permanent arrangement.

The guidance provided by FOS is that RHI for temporary, informal arrangements be aligned with formal contract variations – in other words, repayments should be assessed against the amended agreement instead of the original contract.

This would likewise create additional problems for regulators:

- a) Noting that credit providers do not conduct an affordability assessment on the customer before granting a temporary, informal agreement, other providers may assume that the original affordability assessment reflects the customer's current circumstances, weakening the effectiveness of responsible lending checks.
- b) CBA has aligned the reporting of RHI data with our existing reporting requirements to APRA; a change to reporting RHI for credit reporting may result in having two parallel and inconsistent reporting frameworks.

Recommendations

In light of the above context and concerns, Commonwealth recommends a number of possible reforms to the credit reporting system that may increase the effectiveness of consumer hardship programs and ensure that consumers are not adversely affected from seeking hardship assistance.

Recommendation One: Hardship flags.

In principle, CBA supports the industry-proposed reform of introducing 'hardship flags', recommended by ARCA as part of a 2014 review of the CCR framework for dealing with customers in hardship.

A key principle of hardships flags is that customers should be left no worse off as a result of the flag in comparison to raw RHI data being reported with no context or additional information about their individual circumstances.

Experience in other jurisdictions where flags operate is that customers are still able to access further credit once their repayment history has been rehabilitated. In fact, where a flag shows that a customer has proactively approached their credit provider to discuss hardship, it will benefit the consumer as compared with showing missed repayment periods which is devoid of context. There are potential further consumer protections that may be available to strengthen ARCA's proposal. RHI currently only stays on a consumer's credit file for two years. However, banks may be able to further support customers by either removing the hardship flag once they have rehabilitated their repayments, or even including an additional flag to show that the customer is no longer in hardship.

CBA notes that this reform requires changes to the Privacy Act. However, the passage of the current bill to mandate the reporting of comprehensive credit data would not be dependent on these changes.

Recommendation Two: Regulatory flexibility

Although noting that the Privacy Act may need to be amended for the introduction of hardship flags, CBA recommends not enshrining changes to the reporting framework in legislation.

As hardship programs are always evolving, it would be more efficient to have industry participants and regulators working towards improving hardship programs via regulation and industry codes, such as the Credit Reporting Code.

Recommendation Three: Consistent and clear communication to consumers

The current level of uncertainty has undoubtedly increased the reluctance of consumers to approach their credit providers to ask for hardship assistance.

It is also important that these communications be clear and concise. They should be in plain English so that a customer can quickly understand the nature of the agreement they are entering into.

CBA is committed to working towards more transparency for consumers and consistency across the industry in how these reforms are explained to customers.

CBA will work with the ABA, ARCA and other industry participants to align the messages that will go to consumers, to avoid confusion and doubt about their legal rights.

Recommendation Four: Minimum standards for hardship programs

Although this is beyond the scope of the Attorney General Department's review, CBA strongly supports creating minimum standards across the industry for the operation of hardship programs – including temporary, informal arrangements.

This would result in more transparent and consistent treatment of vulnerable customers and may assist consumer advocates in educating their clients about their rights and available options.