

CONSUMER CREDIT REPORTING AND HARDSHIP
SUBMISSION TO ATTORNEY-GENERAL'S DEPARTMENT

JUNE 2018

ANZ SUBMISSION

1. ANZ welcomes the opportunity to comment on the Attorney-General's Department's consultation paper *Consumer Credit Reporting and Hardship*.
2. We have previously indicated our support for Comprehensive Credit Reporting (**CCR**) in our submission to the Senate Economics Legislation Committee review of the *National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018*. Our preference is that the Attorney-General's Department (**AGD**) finalise this review before major banks are required to report repayment history information (**RHI**).

Summary

3. CCR is an important tool for credit providers (**CP**) to improve outcomes for consumers and the quality of credit decisions. By increasing the level of information available, CCR will reduce the likelihood of consumers obtaining credit they cannot afford to repay and assist CPs to meet their obligations under the responsible lending provisions of the *National Consumer Credit Protection Act 2009 (Cth)* (**NCCP Act**).
4. The introduction of mandatory CCR has, however, highlighted the uncertainty about the reporting of RHI where a hardship arrangement is in place. That is, where a CP and a customer experiencing hardship enter into a temporary arrangement under which it is agreed the customer may make less than the minimum repayment under their credit facility for a limited period of time (**also known as an 'indulgence' we use the term 'arrangement'** in this submission).
5. In these circumstances, the question is whether RHI ought to be reported against the original terms of the contract or the terms of the arrangement. This question turns on **whether the original payments remain "due and payable" pursuant to section 6V of the Privacy Act**.
6. The Office of the Australian Information Commissioner (**OAIC**) has provided guidance on this issue stating that where a CP represents that it will not take enforcement proceedings for the period an arrangement is in place the originally contracted payments are no longer **"due and payable"**. We do not agree with this view. We do not believe an agreement to suspend enforcement action for a period of time means the relevant repayments under the original contract are not due and payable. Outstanding interest and arrears continues to accrue while an arrangement is in place **by virtue of the repayments remaining "due and payable" over this period**.
7. We also question on what basis a CP can enter into an arrangement, which is premised on the CP not taking enforcement action for a specified period, while retaining its right to do

just that. This is not consistent with ASIC Regulatory Guide 96 Debt Collection Guideline: For collectors and creditors (**RG 96**), which states that taking enforcement proceedings in these circumstances may constitute unconscionable conduct. Signatories to the Code of Banking Practice (**COBP**) are contractually required to comply with RG 96¹ and for other lenders it represents, at a minimum, good industry practice.

8. We understand there is concern that if RHI is reported against original contract terms during an arrangement, that customers may be reluctant to contact a CP about their hardship. We also recognise the importance of our credit reporting system distinguishing between customers who have proactively sought to manage their financial commitments through a period of financial hardship and those who have missed payments without explanation. On that basis, we support the introduction of a flag to accompany, or replace, RHI while an arrangement is in place.

Reporting RHI where an arrangement is in place

9. Under Section 72 of the NCC a consumer can provide a hardship notice to a CP seeking a variation to their credit contract. The CP is required to respond to the request within a specified period set out in section 72(5) (while a variation request is being considered by a CP, enforcement action is prohibited² and default listings cannot be made³). The CP can only respond in one of two ways: by agreeing to vary the contract⁴ or rejecting the variation request⁵. Where a contract has been varied, our view is that RHI should be reported against the terms of the contract as varied. In order to make it clear to other CPs that a variation has occurred we propose that a variation flag ("V") is reported for the month in which the variation is agreed.
10. There is no available option under the NCC for the CP to provide an arrangement.⁶ For example, a 30 day moratorium on repayments will entail a **waiver of the bank's enforcement** rights for a period of 30 days. While the waiver may give rise to a right of estoppel on behalf of the customer to prevent the bank from taking enforcement action (during the 30 day period), it does not constitute a variation of the underlying credit contract because it is temporary in nature with interest and arrears continuing to accumulate in line with the original contract. The legislation, in this respect, is out of step with common practice within the industry to provide arrangements for short term assistance.

¹ Section 32.1 and Section 12.3 COBP

² Section 89A NCCP

³ **Section 9.1 of the Credit Reporting Code** provides that "a CP must not disclose an overdue payment in relation to consumer credit to a CRB as default information... if the individual has made a hardship request.." and, if the request is refused, at least 14 days after the CP has notified the individual of the rejection. The definition of "hardship request" in the Code excludes a "once-off, short payment extension" that is not regulated by legislation or an industry code.

⁴ Section 72(4)(a) NCCP

⁵ Section 72(4)(b) NCCP

⁶ ASIC *Information Sheet 105 Dealing with consumers and credit* states that the responsible lending provisions do not apply to hardship variations unless additional credit is provided or existing obligations are refinanced under a new credit contract. It also states, however, that "failure to pay sufficient regard to affordability could leave the variation open to challenge as unjust: see s76 of the National Credit Code".

11. We support amendments to the *Privacy Act* to specify how RHI should be recorded where an arrangement is in place and is being met. The reporting of RHI should recognise that even where a CP has agreed to suspend enforcement action during the arrangement, and may be estopped from taking such action while the arrangement is being observed by the customer, **repayments under the original contract continue to become 'due and payable' for the purposes of the definition of RHI.**
12. Our preference is that the hardship and variation flags **are included as 'credit information'** under the *Privacy Act* and operate as follows:
- (a) The hardship flag would be applied at the point at which the CP agrees, in response to a request for hardship assistance that comes within section 72 of the NCC, to enter into an arrangement (denoted as "A" for arrangement in the below diagram);
 - (b) The hardship flag would remain in place while the arrangement is on foot and the debtor is complying with its terms;
 - (c) The hardship flag would be removed when the contract is varied or the debtor is no longer complying with the terms of the arrangement;
 - (d) Where the contract is varied a variation flag (denoted as "V" for variation) should be applied for the month in which variation has occurred; and
 - (e) Where a hardship flag accompanies RHI data, it should remain on the credit report for 24 months (as its purpose is to provide context to the RHI).

Example of 12 months of RHI reported values

Month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
RHI value	0	0	A	A	A	A	A	A	A	A	V	0

13. Use of a flag is preferable to reporting a customer, who is meeting the terms of an arrangement, **as up to date (as a '0')**. **The risk of reporting a customer as '0' is that, while they may be meeting the arrangement, in many situations they will still have unpaid arrears, and arrears continuing to accrue during the arrangement, which will need to be dealt with at its conclusion. The arrears may be capitalised, but not in all situations, and generally not if the customer is unable to establish they can service the new arrangement. Reporting '0' in these circumstances** may lead to credit being extended to consumers which they cannot afford to repay and, for CPs, may constitute a breach of section 21R of the Act which requires that a CP must not provide information which is false or misleading in a material particular.
14. In our view, a flag alone will generally be sufficient to indicate an arrangement is in place and that comments about the cause of any underlying hardship are not necessary (with an exception where a natural disaster has occurred and hardship assistance is automatically extended to any person impacted by the event). We anticipate that customers who have a

hardship flag on their credit report are more likely to be referred for manual assessment and contacted by a CP to talk through the specifics of their situation (as opposed to customers who have failed to meet repayments without explanation). We note that freeform fields are currently available on credit reports but are rarely utilised and not picked-up by automated assessment processes.

Ends