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8 June 2018

Commonwealth Attorney-General's Department
Rights and Protections - Privacy
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Dear Sir/Madam,

Review of Consumer Credit Reporting and Hardship

National Legal Aid (NLA) represents the directors of the eight state and territory legal aid commissions (LACs) in Australia. The LACs are independent statutory authorities established under respective state or territory enabling legislation. They are funded by State or Territory and Commonwealth governments to provide legal assistance to disadvantaged people.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- obtain access to independent legal advice;
- afford the appropriate cost of legal representation;
- obtain access to the federal and state and territory legal systems; or
- obtain adequate information about access to the law and the legal system.

Legal Aid Queensland has prepared the attached submission in response to the discussion paper on Consumer Credit Reporting and Hardship released by the Attorney-General's Department.

National Legal Aid (all LACs) endorse this submission.

Please do not hesitate to contact us if you require any further information.

Yours sincerely

A handwritten signature in black ink, appearing to read "John", followed by a large, sweeping flourish.

Dr John Boersig PSM
Chair

Consumer Credit Reporting and Hardship Discussion Paper

Submission by Legal Aid Queensland



Consultation – Consumer Credit Reporting and Hardship Discussion Paper

Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission to the Consumer Credit Reporting and Hardship Discussion Paper released for consultation by the Attorney General’s Department. LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of “giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way” and is required to give this “legal assistance at a reasonable cost to the community and on an equitable basis throughout the State”. Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ’s services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ’s lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ’s Consumer Protection Unit lawyers have extensive experience providing specialist advice and representation to vulnerable clients in consumer credit and credit reporting matters. The unit provides advice to clients as well as lawyers and financial counsellors throughout Queensland in relation to mortgage stress, housing repossession, debt, contracts, loans, telecommunications and unsolicited consumer agreements.

LAQ regularly assists and represents clients with both credit reporting and financial hardship issues. This submission is informed by that knowledge and experience.

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?**

In LAQ's submission, it is not certain how the forms of hardship arrangements discussed in this paper are currently treated in relation to consumer credit reporting. The reasons for this are:

- (a) In April 2016, the Financial Ombudsman Service (FOS) released Determination 422745¹ which set out its view that the Financial Services Provider (FSP) was unable to record missed payments as RHI after a repayment arrangement was entered into by the customer where the customer was meeting the new payment arrangement because the amounts were no longer due and payable.
- (b) In contrast, in March 2018, the Office of the Information Commissioner (OAIC) published its view on the meaning of "due and payable" in the context of RHI.² Its position does not explicitly reference the National Credit Code (NCC) and instead refers to a variation of the contract. Although not clear, it seems likely that the variation of a contract includes a contract varied on the grounds of hardship under the NCC. In the view of the OAIC, due and payable means "that the credit provider has a legal entitlement to maintain an action for recovery against a consumer in respect of a missed monthly payment."

In LAQ's view, the OAIC approach does not address:

- (a) The operation of a hardship notice and the subsequent stay on enforcement.³
- (b) The effect of a change either by agreement between the credit provider and the borrower or by an order of the court⁴. and
- (c) ASIC Class Order 14/41⁵ which allows simple hardship arrangements of less than 90 days to be made without putting those agreements in writing.

It is important to note the RHI can only be recorded for those loans that have responsible lending requirements and where the creditor belongs to an Ombudsman scheme approved by the OAIC. In general only credit providers and credit products regulated by the NCC can list RHI.

In LAQ's experience, financial service providers (FSP) enter into thousands of temporary or informal hardship arrangements that are longer than 14 days which under RHI have the potential to be reported as a late payment but are not recognised as formal hardship arrangements by FSP's. It appears that only those variations which are formally recorded in writing and result in new contractual documents are deemed as formal variation agreement by many FSP's. This difference in approach creates uncertainty for consumers.

In LAQ's view, the starting point for any discussion around the interaction of hardship and the credit reporting system is:

¹ <https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/422745.pdf>

² <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 Sections 72 (1) and 89A of the NCC

⁴ Sections 72 (4) and Section 74

⁵ <https://www.legislation.gov.au/Details/F2018C00143>

- (a) Hardship arrangements, whether formal or informal, should be viewed as an agreed variation to the credit contract. In our view there is no distinction between a hardship agreement made under the NCC process and the variation of the contract as described by the OAIC.
- (b) Most FSPs have developed effective and well managed financial hardship processes that are trusted by their customers.
- (c) Most customers are very aware of the importance of protecting their credit scores. Customers are willing to approach their FSP's to seek financial hardship arrangements because they are aware that entering into and then complying with an agreed financial hardship arrangement is a way of protecting the health of their credit report.
- (d) Customers are much less likely to approach their FSP for hardship assistance where there is a risk it will still have an adverse effect on their credit report.

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?

In LAQ's view, the starting point for facilitating an effective credit reporting system while respecting a customer's privacy requires consideration of the following points:

- (a) RHI should reflect payments that are made late by a customer.
- (b) RHI should always accurately reflect variations of a contract. This includes financial hardship arrangements made to the contract.
- (c) A customer is not making a late payment where they have contacted their FSP and agreed on a hardship arrangement, whether that is made orally, recorded in writing or results in a new contract being made between them.
- (d) A customer is not making a late payment where they comply with the terms of the agreed hardship arrangement made between themselves and the FSP.

In LAQ's submission, the most effective way of achieving this balance are:

- An agreed repayment arrangement whether it is made under the NCC or informally (outside the NCC process, if that is possible) means that RHI is set to zero.
- where an FSP and a customer mutually agreed to vary a contract, RHI should set to zero while the application is considered and a hardship arrangement is agreed. When the agreed arrangement is complied with by the customer, the RHI should remain at zero.

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?**

LAQ refers to its answer to Question 2 that sets out that where a hardship agreement is made between an FSP and a customer regardless of the way in whether it is an informal or formal arrangement, RHI should be set to zero when the agreement is made and as long as the borrower is meeting the obligations under the hardship arrangement

- 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)?**

LAQ does not support the listing of hardship arrangements. That is because a variation of a contract whether formal or informal does not necessarily mean that the borrower is in hardship and a greater credit risk. For example if a borrower was going overseas for three months, they may ask their lender to either pay 3 months in advance or ask the lender to allow them to pay the 3 months of repayments on their return. In other cases borrowers might be years ahead in repayments on home loans, but want to take a payment holiday for a variety of reasons. In none of these cases the borrowers are in hardship but they may want a variation to the contract which may or may not be recorded formally. It would be unfair if these arrangements would affect that borrower's credit rating.

Even if hardship was flagged in reports we do not support the reasons for hardship being included. In LAQ's submission, this information can be directly obtained from an individual consumer, or with their permission, from an existing FSP. This approach more adequately protects the privacy of the individual customer while still providing FSP's with a means of obtaining information that is relevant to the credit decision that they are making. In addition the reasons for asking for a variation of the contract are varied and are a subjective rather than an objective assessment so are likely to be inaccurate.

- 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?**

LAQ refers to its answer to Question 2, which sets out its view on the appropriate relationship between RHI and hardship information.

- 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?**

LAQ refers to its answer to Question 2, which sets out its view on how hardship information should be used in the context of RHI.

- e. What are the expected consequences for individuals about whom hardship information is reported? How might any risks arising from these consequences be mitigated?**

In LAQ's view, if hardship information is reported as part of RHI, the consequences may be that:

- (a) Individuals will be less likely to approach their FSP to seek financial hardship when they are in vulnerable or difficult circumstances. In LAQ's experience, when individuals do

not seek financial hardship when they are in difficult circumstances it has a detrimental effect on their longer term financial and mental well-being.

- (b) Individuals may be discouraged from seeking early assistance. The earlier a borrower seeks assistance the more likely it is that they can meet their obligations under the hardship agreement and the earlier they are likely to seek advice about realistic options. For example if a person is experiencing hardship, a hardship agreement may include selling the home. If the home is sold the loan is paid in full. If there is negative RHI or a hardship flag it may mean that the person finds it difficult to obtain future credit even though they have not breached their obligations under the loan.
- (c) If financial hardship assistance is sought and reported, it may detrimentally affect the customer's credit score and risks customers in vulnerable circumstances:
 - (i) having less access to affordable credit; and
 - (ii) being charged higher differential pricing as a result of being in hardship.

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)?

LAQ refers to its answer to question 2 which sets out its view on the appropriate interaction between RHI and hardship arrangements.

In the event that LAQ's view is not supported and additional hardship information is included on a customer's credit report, LAQ supports that information being automatically removed from a customer's credit report at the end of the hardship period.

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?

In LAQ's view, the inclusion of additional hardship information is unlikely to change many, if any, existing processes of the FSP because a lot of the information about a consumer's financial circumstances that leads to them applying for hardship is already available to FSP's who are undertaking appropriate responsible lending inquiries.

If the new information is incorporated into an FSP's assessment processes, it is likely to lead to the consequences set out in LAQ's answer to question 3e.

- 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.**

In LAQ's submission if an FSP is examining:

- (a) A new application for credit or
- (b) An application to extend credit

Under the responsible lending regime of the NCC they are required to assess the credit's affordability for the customer by looking to:

- (i) The customer's income and expenses;
- (ii) The customer's requirements and objectives.

In LAQ's view, information about a customer's income and expenses already provides an FSP undertaking a responsible lending assessment with all the information it needs to determine whether the customer is in financial hardship.

FSP's already have enough information about a customer's hardship to undertake and meet their responsible lending obligations.

5. Are there any other issues involving hardship and the credit reporting scheme that should be considered in the course of the review?

LAQ supports the existing financial hardship arrangements that have developed in FSP's that on a daily basis assist customers in vulnerable circumstances to gain relief from financial hardship when they are in trouble. This relief has allowed many of them to work their way out of financial difficulty and get their lives back on track.

It is vital that financial hardship's interaction with credit reporting does not discourage people in difficult circumstances from seeking help.

It is important that where customers and their FSP reach agreement, either informally or formally, about a variation to the contract on the grounds of financial hardship, that that be reflected on that person's credit report by the RHI being set to zero so long as the agreement is being met by the consumer.