



27 January 2022

Susanne Noack, Senior Manager, Credit & Banking
Australian Securities and Investments Commission
Level 7, 120 Collins Street,
Melbourne VIC 3000
email: susanne.noack@asic.gov.au

Dear Susanne Noack,

ASIC Consultation Paper 354: Relief for simple arrangements following a hardship notice [CO 14/41]

Thank you for the opportunity to comment on ASIC's decision whether to extend the operation of CO 14/41 or to allow it to expire. The Financial Rights Legal Centre (**Financial Rights**) has drafted this submission with the support and input of the following consumer organisations:

- Consumer Credit Legal Service (WA) Inc
- Consumer Action Law Centre
- Financial Counselling Australia

Overview

Consumer organisations believe **Class Order 14/41 should be allowed to expire in March 2022**. This instrument no longer serves a regulatory purpose in light of the major reforms that have taken place in consumer credit reporting. We believe the continued operation of CO 14/41 will create confusion in a regulatory area that is already extremely complex and confusing for all stakeholders. The continued operation of CO 14/41 will have a detrimental impact on consumers, in particular causing harm for consumers that need a notification in writing of the terms of any hardship arrangements they have agreed to, even if they are for less than 90 days.

The Instrument no longer addresses an identified issue and extending it will have a detrimental impact on consumers (and will continue to do so beyond 1 July 2022)

The exemption for credit providers to not provide written notification to their customers when simple arrangements are agreed to after a hardship notice, was first introduced in 2013 following changes to the hardship provisions of the National Credit Act. The purpose of

granting relief for simple arrangements was to encourage credit providers to be flexible and nimble about supporting customers in hardship. The legal requirements for credit providers to consider a customer's hardship notice were relatively new and not yet embedded as normal or best practice.

At the time, however, consumer organisations argued against the provision of the relief. Our view was then, and remains, that all variations should be confirmed in writing. This means there is no later misunderstanding about the arrangement and ensures there is a clear record.

Since then, the regulatory landscape has continued to evolve. When the exemption was first introduced (and later extended) there was less of a downside for consumers in accepting a simple arrangement or short term deferral on loan payments, since information about hardship arrangements was private and not recorded on credit reports or shared with other lenders.

Nearly ten years later lending practices and the regulatory landscape have changed significantly. First, short term hardship arrangements for customers in financial difficulty are common and well embedded in Australian consumer credit practices. Credit providers should no longer need to be given special encouragement to be flexible with customers in financial difficulty. Offering customers changed payment terms when they are struggling with financial hardship is considered best practice and is strongly supported by AFCA and both the ABA and COBA Codes of Practice.

In particular clause 177 of the ABA Code of Practice commits banks to tell customers in writing whether they will provide help in relation to financial difficulty and the reasons for the decision. Clause 178 provides that banks will provide the main details of any arrangements in writing. Similarly, clause 154 of the COBA Code of Practice provides that signatories will provide confirmation of financial difficulty assistance in writing. These commitments are not limited by the class order. Given the majority of consumer credit lending in Australia is governed by these codes, we submit that all lenders should commit to the same arrangements, i.e. to provide written notification when all hardship arrangements are agreed. Further, merely being required to confirm an arrangement (simple or otherwise) for the consumer in writing should not impact any creditor's decision on whether to offer hardship assistance in any way whatsoever.

Second, from 1 July 2022 the regulatory landscape for financial hardship and credit reporting will change considerably. From 1 July 2022 there **will** be a consequence for consumers that agree to a 'simple arrangement' – it will be recorded on their credit report and that information will be visible to other lenders for at least 12 months. Consumers need to be given clear notification of the terms of those arrangements, how to comply with them, what will happen when the arrangements end, and what will be recorded on their credit report. Granting relief to credit providers from providing those written notifications will have a detrimental impact on consumers.

The continued extension of the original exemptions (set out in ss 69A and 69B of the *NCCP Regulations 2010*) was to allow ASIC time to continue to consult with industry and affected stakeholders in relation to the hardship process and the interaction with credit reporting requirements. The most recent extension in 2020 was to allow Government to progress legislation to implement the mandatory comprehensive credit reporting regime and to introduce financial hardship information as a new category of information in credit reporting. These matters have now been settled, and the relief for simple arrangements should expire.

The regulation of consumer credit reporting and financial hardship is complex and confusing and CO 14/41 adds to that complexity

There are numerous terms used by industry, consumer groups and in formal regulation that all refer to various permutations of the same thing: 'simple arrangements'. It has become clear in the last several years as Government has started to formally regulate how financial hardship arrangements are recorded in credit reports that credit providers offer their customers a variety of informal temporary arrangements which the credit provider does not consider a formal variation of the contract. These might be called

- indulgences,
- promises to pay,
- forbearances,
- informal agreements, or
- temporary deferrals.

None of these terms are standardised or used in a consistent way across stakeholders. It is also nearly impossible for a consumer (or even a consumer advocate) to differentiate what a credit provider might consider an 'indulgence' from a 'simple arrangement' or a short term contract variation.

Now that the mandatory comprehensive credit reporting regime is in place and the relevant provisions of the Credit Reporting Code are nearly finalised we have even more official terms added to this space:

- **Temporary financial hardship arrangement,**
- **Permanent/variation financial hardship arrangement,** and
- **Overdue payment arrangement** (which may be a temporary financial hardship arrangement or may just be a promise to pay).¹

In the context of all of the competing terms for temporary informal arrangements, CO 14/41 creates unnecessary confusion by creating special rules for 'simple arrangements'. In the face of new categories of financial hardship arrangements that have been set out in detail in the new Credit Reporting Code provisions, the term 'simple arrangements' should be retired from use.

The changes to consumer credit reporting that will begin in July 2022 and how they intersect with financial hardship will be significant. Consumer lawyers and financial counsellors need to get their heads around these changes in order to properly advise clients in financial stress. This is already an area of regulation that straddles several different major pieces of legislation

¹ See OAIC Consultation on application to vary the CR Code: <https://www.oaic.gov.au/engage-with-us/consultations/consultation-on-application-to-vary-the-cr-code>; Note the term "permanent/variation financial hardship arrangement" is not in ARCA's September application, but we have been notified by the OAIC that the final term will most likely include the word 'permanent' based on our feedback.

(NCCP, Privacy Act, ASIC Act, Credit Reporting Code). Allowing CO 14/41 to expire will mean there is one less legislative instrument that we need to keep in mind and one less ambiguous term ('simple arrangements') that we need to worry about.

New legislation was designed to resolve some of the confusion in terms

As ASIC has pointed out in Consultation Paper 354, the Explanatory Memorandum to the *National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Bill 2019* (2019 Bill) describes a financial hardship arrangement as follows:

Within the credit reporting system, a 'financial hardship arrangement' is any kind of agreement, arrangement or understanding that defers or reduces the obligations of a debtor for a temporary period, such as 'simple arrangements' within the meaning of ASIC Order CO 14/41, indulgences, forbearances and waivers. This broad definition is intended to recognise the diversity of arrangements that may exist between consumers and their credit providers which take into account individual circumstances.²

One of the legislative goals of this broad definition was to amalgamate and simplify all of the confusing and competing terms for informal temporary arrangements. Indulgences, forbearances, deferrals and simple arrangements are all either financial hardship arrangements (temporary or permanent) or an overdue payment arrangement which is not a FHA and so not recorded on a credit report (simply a promise to pay). Now that new terms have been consulted on extensively and defined through the Credit Reporting Code, regulators should strive to only use those terms. The term 'simple arrangement' is no longer serving a regulatory purpose.

New notification requirements in CR Code will eclipse the simple arrangements relief in most cases

The new financial hardship provisions in the Credit Reporting Code include notification requirements for all arrangements agreed to with a consumer, even those that are less than 90 days. The Credit Reporting Code is a legislative instrument so compliance is mandatory for all credit providers participating in comprehensive credit reporting, and over 95% of consumer credit accounts are included in the comprehensive credit reporting regime.³

Once the relevant Credit Reporting Code changes are approved by the OAIC, from 1 July 2022, if a credit provider agrees to a financial hardship arrangement with a customer, the credit provider must take reasonable steps to provide the individual with information that describes repayment history information and, if relevant, the financial hardship information that may be disclosed to a CRB as a result of the arrangement.

² See the Explanatory Memorandum to the 2019 Bill, paragraph 2.28

³ <https://www.creditsmart.org.au/comprehensive-credit-reporting/credit-providers-that-currently-participate-in-ccr/>

Under the new notification requirements at 8A.4⁴ of the Credit Reporting Code, information about a financial hardship arrangement can be given to a consumer verbally or in writing.

Consumer groups strongly support contemporaneous verbal notification that a financial hardship arrangement has been agreed to so that consumers can make informed decisions in real time about whether entering into such an arrangement (and having FHI recorded on their credit report) is what they want to do. However, written notification setting out the particulars of the change in payment terms under s73 of the National Credit Code is also important, even if it arrives later. This is because a consumer that agrees to a financial hardship arrangement will have FHI recorded on their credit report, and RHI will be determined based on that consumer's compliance with the terms under the arrangement. There will inevitably be disputes between consumers and credit providers about what the particulars of the arrangement were, whether the consumer complied with them, and whether the information recorded on the consumer's credit report is correct. Notification in writing from the credit provider under s73 of the National Credit Code about the particulars of the change in terms of the credit contract will be useful in preventing disputes later down the track, and will also be useful for consumers that need evidence that information on their credit reports is incorrect.

Recommendation

ASIC should allow the relief for simple arrangement following a hardship notice [CO 14/41] to expire on 1 March 2022.

Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please do not hesitate to contact Financial Rights on (02) 9212 4216.

Kind Regards,



Karen Cox
Chief Executive Officer
Financial Rights Legal Centre
Direct: (02) 8204 1340
E-mail: karen.cox@financialrights.org.au

⁴ Notification provisions around entering a FHA (see paragraph 8A.4), available at <https://www.oaic.gov.au/engage-with-us/consultations/consultation-on-application-to-vary-the-cr-code>