



10 August 2021

Ms Ilana Madjar
Senior Legal Counsel
Australian Retail Credit Association
GPO Box 526,
Melbourne VIC 3001

Email: CRCode@arca.asn.au

Dear Ms Madjar

ARCA Credit Reporting Code hardship reform changes

Thank you for the opportunity to comment on this consultation paper.

The Energy & Water Ombudsman NSW (EWON) investigates and resolves complaints from customers of electricity and gas providers in NSW, and some water providers. EWON receives and responds to complaints from customers on metering work and electricity supply interruption issues relating to retailer and distributor activities. Our comments are informed by our investigations into these complaints, and through our community outreach and stakeholder engagement activities.

We have only responded to those questions in the consultation paper that align with issues customers raise with EWON, or with our organisation's operations as they relate to these reform changes.

If you would like to discuss this matter further, please contact me or Rory Campbell, Manager Policy and Research, on (02) 8218 5266.

Yours sincerely

A handwritten signature in black ink that reads "Janine Young".

Janine Young
Ombudsman
Energy & Water Ombudsman NSW

ARCA Credit Reporting Code hardship reform changes

The Energy & Water Ombudsman NSW (EWON) investigates and resolves complaints from customers of electricity and gas providers in NSW, and some water providers. EWON receives and responds to complaints from customers on credit issues relating to their energy or water bills. Our comments are informed by our investigations into these complaints, and through our community outreach and stakeholder engagement activities.

We have only responded to those questions in the consultation paper that align with issues customers raise with EWON, or with our organisation's operations as they relate to this rule change.

The proposed amendments to the *Privacy (Credit Reporting) Code 2014 (Version 2.1)* (CR Code), including those relating to 'financial hardship information' (FHI) and 'financial hardship arrangements' (FHA), are not directly relevant to issues customers raise with EWON or our organisation's operations for the following reasons:

- Energy and water retailers do not hold Australian Credit Licences and do not access or disclose 'repayment history information' or consumer liability information.
- Energy and water retailers will not access or disclose 'financial hardship information' about 'financial hardship arrangements' under the new provisions.
- A payment plan or hardship arrangement with an energy or water retailer for an energy or water account does not fit the definition of 'repayment history information' as defined in the *Privacy Act 1988* (Privacy Act).
- A payment plan or hardship arrangement with an energy or water retailer for an energy or water account does not fit the definition of a 'financial hardship arrangement' as defined in the *National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Act 2021* (amending Act).

We have provided comments on questions relating to two issues that ARCA is exploring, being:

- the treatment of joint accounts; and
- when a 'financial hardship arrangement' is considered to be 'made'.

Our comments are informed by our investigation of complaints about joint accounts and financial hardships arrangements in relation to energy accounts, with acknowledgement that the operation of energy accounts does not directly align with repayment history information (RHI), FHI and FHA as defined in the CR Code and Privacy Act.

We have also provided information about emerging energy retailer business models.

The issues raised by these emerging business models are beyond the scope of the amendments currently under consultation. We have raised these issues as they should be considered in the the Office of the Australian Information Commissioner's (OAIC) Independent Review of the CR Code and Part IIIA of the Privacy Act, which is due to be completed by October 2024.



Treatment of joint accounts

8A.1(i) – Hardship reforms – treatment of joint accounts

Question 18. Noting that the fundamental ‘account-based’ approach could be considered as part of the Independent Review of the CR Code, do you agree with the proposal in subparagraph (i) that (subject to the terms of the contract and any other laws), an FHA can be made with the agreement of one joint account holder? If not, please provide reasons.

EWON agrees with the proposal that an FHA can be made with the agreement of one joint account holder. This approach aligns with the treatment of joint energy accounts, where requiring the agreement of all joint account holders to form a hardship arrangement can create a barrier to hardship assistance access. See Case Study 1 in **Attachment 1** for a complaint to EWON that illustrates this.

Formation of a ‘financial hardship arrangement’

8A.1(h) – Hardship reforms – when is a temporary relief or deferral FHA formed

Question 15? Do you agree with the proposal that a ‘proactive offer’ of assistance does not create an FHA unless the customer indicates their acceptance of that offer? If not, please provide reasons.

EWON agrees with the proposal that a ‘proactive offer’ of assistance by a credit provider does not create a FHA unless the customer indicates their acceptance of that offer. This aligns with EWON’s position in relation to energy accounts where retailers make proactive offers including:

- sending individual correspondence to customers with specific payment plan or hardship arrangement offers for their energy accounts; and
- sending general correspondence to groups of customers it has identified as potentially vulnerable (such as those living in bushfire-affected Local Government Areas) encouraging them to contact the retailer to discuss hardship assistance if required.

Our view is that a ‘proactive offer’ does not create a payment plan or hardship arrangement unless the customer explicitly accepts the offer, due to the potential negative impact for a customer who is not aware they have a payment plan or hardship arrangement in place and has not agreed to that plan or arrangement. Case Study 1 in **Attachment 1** illustrates this point.

8A.2 Generally – Hardship reforms – when is a temporary relief or deferral FHA Formed

Question 24. Subject to the further questions below regarding the specifics of the proposal, do you generally agree with our proposal set out in paragraph 8A.2? If not, please provide reasons and alternatives.

EWON agrees with the proposal to allow for flexibility rather than prescription so that, depending on specific circumstances, any particular arrangement (such as a ‘promise-to-pay’) could be considered as a FHA with mutual agreement. This aligns with the approach to hardship arrangements for energy accounts. Hardship arrangements for energy accounts must take into account factors including the customer’s capacity to pay, the customer’s arrears and the expected energy consumption over the next twelve months¹. Specifics such as duration and frequency are not prescribed. A short-term ‘promise-to-pay’ style arrangement is not precluded from being considered a hardship arrangement

¹ Rule 72 of the *National Energy Retail Rules*



if it takes into account the required factors, has been mutually agreed upon and the retailer has informed the customer of:

- the duration of the plan;
- the amount of each instalment payable under the plan, the frequency of instalments, and the date by which each instalment must be paid;
- if the customer is in arrears, the number of instalments to pay the arrears; and
- if the customer is to pay in advance, the basis on which instalments are calculated.

EWON also agrees with the proposal that, aside from individuals who may request hardship assistance, there is an expectation that a credit provider will have processes in place that seek to understand the reasons behind someone experiencing payment difficulty. This aligns with the approach to hardship arrangements for energy accounts. All energy retailers are required to have a hardship policy which contains processes to identify customers experiencing affordability issues, including self-identification by the customer and identification by the retailer.²

8A.2(c)(iii) – Hardship reforms – when is a temporary relief or deferral FHA Formed
Question 30. Do you have any comments in relation to this proposed subparagraph?

EWON agrees with the framing of the subparagraph to place the onus on the credit provider to 'disprove' the existence of a hardship request where the individual is not able to meet payments (rather than placing the onus on the individual to make the request). This position is informed by complaints we have received about default listings that centre on whether the energy retailer made reasonable attempts to assess the customer's financial circumstances in line with its obligation to consider hardship requests. See Case Study 2 in **Attachment 1** for an example.

New energy retail business models

ARCA has invited feedback about other relevant matters.

Energy retailers do not hold Australian Credit Licences. However, new energy retailer business models have recently been emerging, including an energy retailer that is a wholly owned subsidiary of a credit provider that holds an Australian Credit Licence and offers personal loans and 'buy now pay later' loans. This energy retailer has yet to commence retailing, but information about its business model indicates its intention is to have integration between the two entities whereby customers will have personal loans or 'buy now pay later' loans with the credit provider and energy accounts with the energy retailer.

At face value, the fact that the credit provider holds an Australian Credit Licence and the energy retailer does not, indicates that the credit provider alone is able to access or disclose RHI and FHI. Meanwhile, the energy retailer is in the same position as existing energy retailers in not accessing or reporting this information. However, it is unclear at this early stage exactly how the business model will work or what customer relationships with the two entities will look like. New energy retailer business models raise questions such as the following:

- Would it be possible for an energy retailer to access or disclose credit reporting information it would otherwise be unable to access or disclose by way of a business relationship with a credit provider that does hold an Australian Credit Licence?

² Section 44 of the *National Energy Retail Law*



- Will new payment arrangement models emerge for integrated personal loan products and energy plans that fit the definitions of RHI and FHI?
- How will related entities maintain data integrity where they have differing credit reporting obligations?

These issues have implications to consider, including:

- the potential for increased barriers to a customer's access to an energy account based on a credit check (and thereby electricity as an essential service); and
- ensuring hardship protections specific to energy are not diluted or lost.

The issues raised by the emergence of new energy business models are beyond the scope of the amendments currently under consultation. We have raised these issues as they should be considered in the OAIC's Independent Review of the CR Code and Part IIIA of the Privacy Act which is due to be completed by October 2024.

Enquiries

Enquiries about this submission should be directed to Janine Young, Ombudsman on (02) 8218 5256 or Rory Campbell, Manager Policy and Research, on (02) 8218 5266.

Case studies

Case Study 1

After over two years of unsuccessful attempts to contact the joint account holders for an electricity account, an energy retailer received a call from one of the account holders and was able to place them on a hardship arrangement during the call.

A customer had a joint electricity account with his partner. The customer called his retailer in March 2021 in response to a text message and was told that no payments had been received since December 2018. The customer said he was unaware of the accumulated debt of \$8,491 as he had not been receiving bills. The customer's bills and correspondence were being sent to a work email address, including multiple emails with payment arrangement offers. The customer said that he had changed jobs in December 2018 and no longer had access to the old work email address. The home number and mobile number recorded were correct but the customer had not responded to missed calls or voicemails until March 2021.

During that call, the retailer updated the customer's email address and identified that the customer was experiencing financial vulnerability. The customer agreed to a customer assistance arrangement of \$150 per fortnight with payment matching for every sixth payment, which took into account the customer's capacity to pay, the ongoing usage and the arrears. The joint account holder's agreement was not required to put the customer assistance arrangement in place. Given the retailer's difficulty in making contact with the customer over an extended period, it may have created a barrier to assisting the customer if the agreement of the joint holder had been required.

Under energy rules, a retailer is not obligated to offer hardship assistance if a customer has had two payment plans cancelled for non-payment in the last twelve months. The emails the retailer had sent offering payment plans were not considered to be payment arrangements as the customer had not contacted the retailer to accept them. The retailer was therefore obligated to offer the customer an opportunity on their customer assistance program as he did not have any previous broken arrangements.

EWON's review indicated that the retailer had made reasonable attempts to contact the customer using the contact details recorded, and there was no indication the customer had attempted to provide updated contact details prior to the call in March 2021. In recognition of the customer's difficult circumstances, the retailer applied all of the customer's missed pay on time discounts and a \$400 goodwill credit. This reduced the debt to \$6,300. The customer accepted this outcome as resolution of the complaint and continued to make payments in accordance with the hardship arrangement.



Case Study 2

A customer had a default placed on his credit file by an energy retailer, but had been making regular payments at the time of the default listing.

A customer had a default placed on his credit file on 7 January 2020 for \$3,266 relating to a solar purchase agreement with an energy retailer. The customer discovered the default when he applied for personal finance. The retailer advised the customer that the default listing complied with the requirements of the Credit Reporting Code and would not be removed. The customer considered the default listing was not reasonable as he had been making regular payments toward the debt at the time the default was listed.

EWON's review identified that the customer had agreed to a payment arrangement of \$247 per month commencing 30 August 2019. The customer made payments of \$60 per week, and was therefore falling short of the required monthly amount by less than \$10. This led to the payment arrangement being cancelled in November 2019. The customer had continued to pay \$60 per week after the payment arrangement was cancelled, through to the time the default was listed on 7 January 2020 and beyond. It was not clear whether the retailer had made reasonable contact attempts to discuss the shortfall with the customer and understand the reasons why he was not meeting the payment amount, such as whether he had simply miscalculated or whether he may be experiencing financial vulnerability. Based on this and other issues raised by EWON, the energy retailer agreed to remove the default listing. The customer accepted this outcome as resolution of the complaint.