AUSTRALIAN
RETAIL
CREDIT
ASSOCIATION

1 February 2022

Dear

CP354 ASIC relief for simple arrangements following a hardship notice

Thank you for the opportunity to provide a submission on CP354 *ASIC relief for simple arrangements following a hardship notice*.

A. Preliminary comments on the current financial hardship legislation

1) ARCA, in the role of CR code developer under the *Privacy Act*, has recently undertaken a comprehensive consultation process to develop changes to the *Privacy (Credit Reporting) Code 2014* (CR Code) in response to the new hardship reporting framework introduced by the *National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Act 2021* (which comes into effect on 1 July 2022).
2) That consultation process revealed much about the challenges experienced by both industry and consumers (and their representatives) in relation to requesting and agreeing financial hardship assistance, and the application of the *National Credit Code* (NCC) and Privacy Act/CR Code hardship frameworks.
3) Credit providers need to ensure their hardship assistance is responsive to the customer's personal circumstances. However, at the same time, a credit provider must be able to provide hardship assistance at scale. This was most clearly demonstrated during the early stages of the COVID-19 pandemic when unprecedented numbers of customers required urgent relief on their loan accounts.
4) Importantly, the consultation process confirmed that credit providers have a clear commitment to assist customers who are experiencing financial difficulty. However,

the strict regulatory regimes relating to financial hardship under both the NCC and the Privacy Act – and the resultant 'compliance risk' those regimes impose on credit providers – have the potential to result in credit providers taking an overly cautious approach to the provision of hardship assistance to customers in need (which could, in turn, take focus away from the need to provide timely and appropriate assistance to those customers).

5) In relation to the NCC hardship regime, we note that the level of compliance risk for credit providers is raised by:
    a. The nebulous concept of a 'hardship notice' under section 72(1). Our consultation demonstrated that different stakeholders often have very different views on when such a notice has been given by a customer. Given that the giving of a 'hardship notice' triggers the regulatory obligations under section 72, it creates an inappropriate level of uncertainty for credit providers to not have certainty whether those obligations apply to a particular customer interaction (noting our comments below regarding the potential for the CR Code hardship reporting changes to provide credit providers more certainty);
    b. The significant legal penalties for failing to provide a written notification under section 72(4) and the mandatory breach reporting requirements that attach to that section (which effectively multiply the impacts of not identifying a hardship notice and/or sending the correct section 72(4) notice on time); and
    c. The overly prescriptive notification requirements under the NCC, which (given the default position for 'paper' communications) are not suited to the need to give timely confirmations to consumers. Those requirements also have not taken into consideration more recent developments affecting the credit industry, such as the change to Australia Post's delivery times which have been pushed out from 3 days to, for many customers, 6 or more days. As the timelines for giving notice under section 72(4) are based on when the customer receives the notice, those Australia Post changes have significantly cut the time that credit providers have under section 72(4) to send the written confirmation.
6) Given all the above, a credit provider may feel that they are required to take an overly cautious approach to engaging with the customer. This could, for example, result in the credit provider prematurely sending a 'rejection' response to a customer in some circumstances (given the uncertainty of sending paper notices to the customer by mail and the significant penalties that attach for non-compliance). This is clearly not a good consumer outcome; noting that a customer requesting financial hardship assistance is already likely to be in a more vulnerable position.
7) While we recognise that this consultation process is limited to the issue of whether the simple arrangement exemption should be extended, we recommend that ASIC and Treasury consider whether the current NCC hardship framework is consistent with good consumer outcomes. We note that we are not suggesting that the framework should be completely overhauled.
8) Importantly, we consider that the significant amount of work done by all stakeholders through the CR Code consultation process – and the resulting framework in paragraph 8A of the CR Code – will give credit providers more certainty as to the expectations relating to the provision of hardship assistance. The framework will also ensure better and more consistent outcomes for consumers (particularly as a result paragraph 8A.2 which sets out situations in which the credit provider should expressly ask the customer if they want to make a hardship request and paragraph

8A.5 which sets out the requirement to advise the customer about the credit reporting impacts of the arrangement).

Recommendation 1: We consider that outcomes for consumers and industry would be improved by:

(i) ASIC providing recognition that the hardship reporting framework under paragraph 8A of the CR Code provides a common sense approach that can also help credit providers meet their obligations under section 72;

(ii) ASIC and Treasury to continue considering ways in which the provision of the written confirmation under section 72(4) can be provided in a more timely, efficient and effective manner (i.e. which is likely to involve better allowance for the electronic provision of such notices); and

(iii) ASIC providing guidance on when and how credit providers may request temporary relief from the strict obligations of section 72(4) when dealing with high volumes of hardship requests (such as happened in the early stages of the COVID-19 pandemic and in response to some natural disasters).

B. Is the current simple arrangement exemption being relied upon?

9) Based on a survey of our credit provider Members, there appears to be little reliance on the current simple arrangement exemption (see Appendix A for a summary of the survey). To the extent that Members noted that they relied on the exemption, this was in the context of 'collections arrangements' where such reliance is arguably not necessary (i.e. as there is no relevant 'hardship notice') or not permissible (i.e. as there is typically no agreement to 'change the credit contract').

10) The simple arrangement exemption was initially developed in response to concerns that almost all 'collections' conversations could involve a 'hardship notice'[1] and that, as a result, section 72(4) would impose an onerous burden on credit providers to send written notices in response to those 'hardship notices' (even for very simple 'promise-to-pay' arrangements). This is reflected in a comment from one Member that they rely on the exemption for less formal collections arrangements (such as promises-to-pay) "where it is not clear whether the customer has given a 'hardship notice' and/or a less formal 'collections arrangement' is put in place (rather than a more formal 'hardship arrangement')".

11) While some Members still hold the above concern, the survey of our Members shows that the majority of credit providers are now comfortable that a 'collections arrangement' (such as a 'promise-to-pay') does not generally involve a hardship notice.[2]

[1] That is, the concept of a hardship notice involved a 'hair trigger'.

[2] We note that it is possible for the 'promise-to-pay' to be put in place following a 'rejected' hardship notice. However, the credit provider would need to provide a written notice under section 72(4)(b) as part of/before putting that arrangement in place. Under paragraph 8A.2(c) of the CR Code, the credit provider would also need to tell the customer that the promise-to-pay was *not* a temporary FHA (and that the customer's repayment history information may reflect the late payments).

12) In addition, the proposed paragraph 8A.2 in the *Privacy (Credit Reporting) Code 2014* (CR Code) relating to the reporting of financial hardship information in the credit reporting system, will apply a framework that helps credit providers to establish whether or not a 'hardship request' (as that term is used in the CR Code) has been given.
13) In essence, the CR Code sets out circumstances in which a credit provider would be expected to expressly ask whether the customer wants to give a 'hardship request' (which is equivalent to hardship notice under the NCC). If a customer declines to make a hardship request, under the CR Code, the credit provider has comfort that no such request has been made.
14) In addition, paragraph 8A.5 of the CR Code will, in respect of collections arrangements, require the credit provider to explain to the customer that the customer's credit report may record the payments as missed during the arrangement. It will also require the credit provider to explain that a financial hardship arrangement will result in financial hardship information be reported.
15) While the CR Code provisions do not directly impact a credit provider's obligations under section 72, we note that, during our consultation process, stakeholders have broadly recognised that the provisions provide a sensible way for a credit provider to confirm whether or not a hardship notice has been given.
16) Accordingly, the concern that formed original basis for the simple arrangement exemption (i.e. as described in paragraph 10), above) is largely no longer relevant.
17) Where a true 'financial hardship arrangement' is agreed,[3] our survey showed that no credit providers rely on the current exemption. That is, all credit providers sent written confirmation of a 'financial hardship arrangement' regardless of its length.[4]

    Recommendation 1: If ASIC is broadly comfortable with the framework set out in paragraph 8A.2 of the CR Code (which allows a credit provider to distinguish between a 'temporary FHA' and a standard collections arrangement (e.g. a 'promise-to-pay')), we consider that there is no real need for the continuation of the simple arrangement exemption in its current form (although noting our comments in paragraph 0, above regarding the need to ensure that the written notification under section 72(4) can be sent in a more timely, efficient and effective manner).

C. Need for confirmation that 'temporary FHAs' do not trigger section 72(4)(b)

18) If a hardship notice has been given by a customer, the content of the written notice required to be given by the credit provider under section 72(4) depends on whether the credit provider and the debtor "have agreed to change the credit contract".
19) If the credit provider and the debtor do not agree, the notice must include the reasons for the credit provider not agreeing and, significantly, explain the customer's right to complain to AFCA (a 'rejection notice').

[3] That is, an arrangement that is put in place following and in response to a clearly identified hardship notice from the customer (usually following a more detailed assessment of the customer's financial circumstances).
[4] Although a number of Members noted that there may be circumstances in which such an exemption could be useful (i.e. such as happened during the early stages of the COVID-19 pandemic). See Recommendation 1 for what we consider should be done to help industry deal with those situations.

20) It is generally recognised that many credit providers may, in response to a hardship notice, provide hardship 'assistance' in a way that does not *contractually* vary the customer's repayments (at least initially). That is, during the agreed period of reduced payments, the ordinary contractual repayments will fall due and, if not paid by the customer, remain overdue. However, the credit provider will, for the term of the arrangement, agree not to take action in respect of those overdue payments. At the end of the period, the customer will be contractually obliged to pay the overdue amount, however the credit provider and customer will typically enter a further arrangement to deal with those payments. Our survey showed that 10 out of the 20 credit providers which responded typically provide reduced payment hardship arrangements in this manner (including 4 of the largest lenders)[5].
21) This type of arrangement is known as a 'temporary FHA' under the CR Code. Importantly, for the purposes of credit reporting, the customer's repayment history information will reflect the terms of the arrangement rather than the contract. That is, the repayment history information would show the customer as 'up to date' if they met the terms of the arrangement (even though they are contractually overdue).
22) However, such arrangements do not alter the individual's obligations in relation to the credit. Rather they, by definition, provide 'relief from or deferral of' those obligations. The Privacy Act makes it clear that this is the case *despite* the contractual repayments not being changed (see section 6V(1A)).
23) As a result, it is possible that, despite agreeing to a temporary FHA, the credit provider has not 'agreed to change the credit contract' as provided for in section 72(4). This would, technically, then require the credit provider to provide a rejection notice. This would be confusing to consumers and inconsistent with the conversations that the credit provider had otherwise had with the consumer.
24) We note that in CP354.18 – 26, ASIC discusses when there has been an agreed 'change to the credit contract'. In the note to CP354.20 ASIC states that "where a credit provider acknowledges or represents to the consumer that they will not enforce their rights under the contract if the temporary arrangement is complied with, there is likely to be a change to the credit contract for the purpose of the National Credit Code provisions". This would suggest that ASIC considers that a 'temporary FHA' would not require a rejection notice (i.e. as a temporary FHA would invariably include such an acknowledgement or representation).
25) While we support that outcome, we have concerns with the logic expressed in the note. For instance, almost every 'promise-to-pay' arrangement would also include a representation to the customer that the credit provider will hold further collections activity for the term of that arrangement. However, we do not think there is any suggestion that such arrangements would involve an 'agreed change to the credit contract' (particularly as, for the purposes of reporting repayment history information, the payments will be treated as 'missed'). We consider that this approach also creates a potential inconsistency between section 72(4), under which the temporary FHA is considered to 'change' the contract and the Privacy Act, under which the temporary FHA does not change the contract.
26) We also note that the discussion in CP354.20 refers to when an arrangement is (or is not) 'likely' to involve an agreed change to the credit contract. As noted in section A, the application of section 72 of the NCC is already vague and uncertain given the nebulous concept of a 'hardship notice'. Given the significant penalties that apply to a

[5] Two credit providers responded that they typically provided assistance through both contractual and non-contractual arrangements.

failure to send the correct written notification under section 72(4), we consider that credit providers need greater certainty as to which notice is required when agreeing to a 'temporary relief or deferral' hardship arrangement (i.e. a temporary FHA under the CR Code).

Recommendation 2: ASIC to provide clear confirmation that a 'temporary FHA' agreed under the CR Code does not require a credit provider to send a 'rejection notice' under section 72(4)(b). This confirmation should be provided by way of class order or, if ASIC does not consider this to be allowable, by change to section 72(4).

Recommendation 3: In the alternative, ASIC to provide clear guidance as to when a temporary FHA will or will not involve an agreed 'change to the credit contract'. For example, does a temporary FHA involving 3 months of $0 payments – followed by the *prospect* of a 6-month payment test period (also a temporary FHA) before the re-aging of the arrears (a variation FHA) – involve an agreed change to the credit contract? If it depends on the precise nature or wording of the arrangement, what can a credit provider do to ensure that it is deemed to involve a change to the credit contract (so that the credit provider is not required to give conflicting message that a Privacy Act financial hardship arrangement has been 'agreed' and an NCC variation has been 'rejected)?

If you have any questions about this submission, please feel free to contact me oor Michael Blyth.

Yours sincerely,

Mike Laing
Chief Executive Officer
Australian Retail Credit Association

Appendix – results of ARCA Member survey

1) In response to CP354, we surveyed our credit provider Members to understand whether they currently relied on the simple arrangement exemption. That survey asked whether those Members relied upon the exemption in respect of (i) 'collections agreements'; and (ii) 'financial hardship arrangements'.
2) We had responses from 20 credit providers, of which:
    a. 12 were authorised deposit taking institutions (ADIs) and 8 were not ADIs;
    b. 7 were 'larger' credit providers and 13 were 'smaller' credit providers.[6]

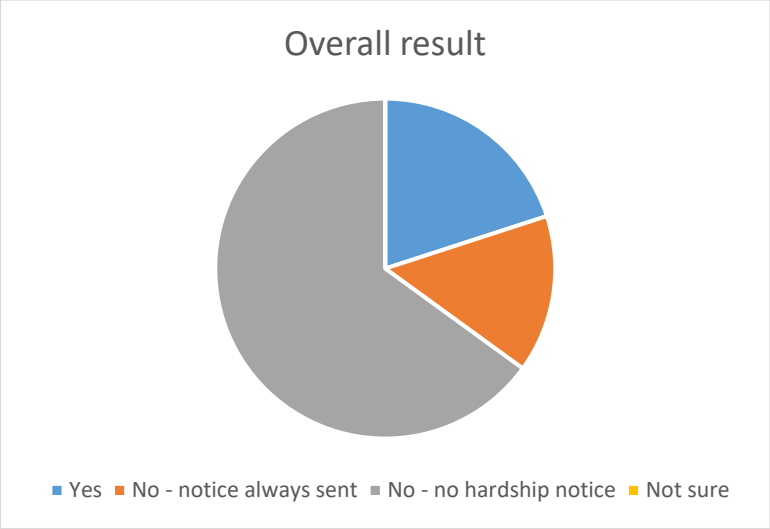
'Collections arrangements'

3) A collections arrangement was described in the survey as referring to "less formal 'collections arrangements' (such as 'promises-to-pay')".
4) We note that such arrangements generally do not involve a change to the contract under section 72(4). Likewise, they would not generally constitute a financial hardship arrangement under the new credit reporting hardship regime (i.e. repayment history information would reflect the delinquency status under the credit contract and no financial hardship information would be reported). Accordingly, while the simple arrangement exemption may have originally been introduced to address concerns that almost all 'collections' conversation could involve a hardship notice, in practice it is likely that a credit provider cannot validly rely on the exemption for these types of arrangements.[7]
5) If a credit provider responded that they did not rely on the simple arrangement exemption in relation to collections arrangement we asked whether this was because:
    - "we send a written notice under section 72(4) for all collections arrangements (regardless of their length)"; or
    - "a collections arrangement does not involve a 'hardship notice' and, therefore, we are not required to send a written notice under section 72(4) (even though we may still provide some form of written confirmation of the arrangement)".
6) We have combined the answers to the two questions in the results below.
7) **Overall question:** In relation to less formal 'collections arrangements' (such as 'promises-to-pay') do you currently rely on the simple arrangement exemption (for at least some products)?
8) **Response options:**
    - Yes
    - No - We send a written notice under section 72(4) for all collections arrangements (regardless of their length)
    - No - A collections arrangement does not involve a 'hardship notice' and, therefore, we are not required to send a written notice under section 72(4) (even though we may still provide send some form of written confirmation of the arrangement)
    - Not sure

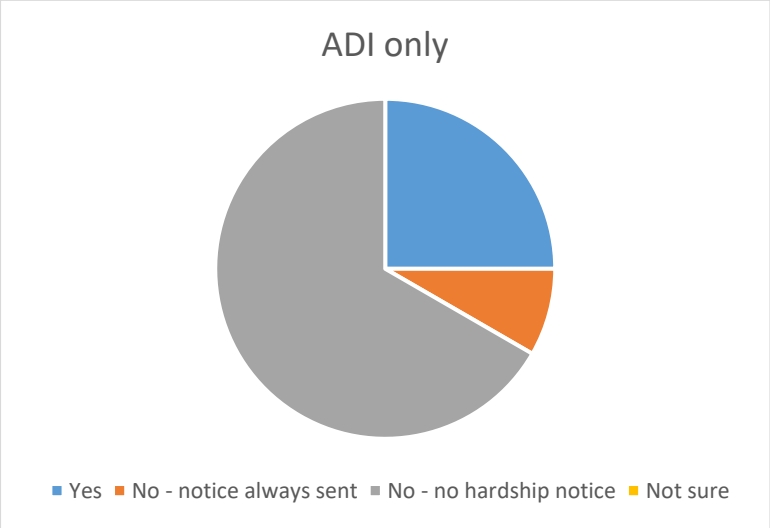
[6] We classified 'larger' credit providers as those credit providers which fall within ARCA's own Membership categories of Tier 1 and 2 (which include the major banks plus the next 4 largest lenders). 'Smaller' credit providers were all other Members (which include mid-sized banks, mutual ADIs, finance companies and fintechs).

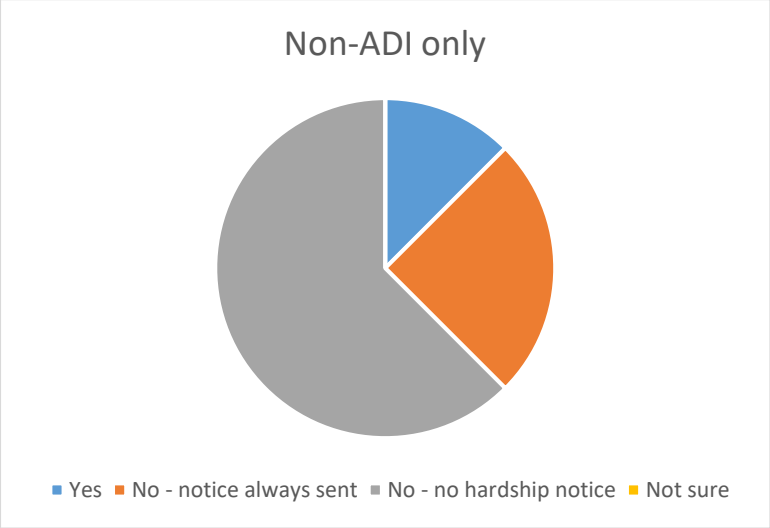
[7] To be clear, this does not mean those credit providers which answered 'yes' to this question are non-compliant. Rather, in practice, those collections arrangements are likely to not involve a 'hardship notice'.

9) The overall result was:

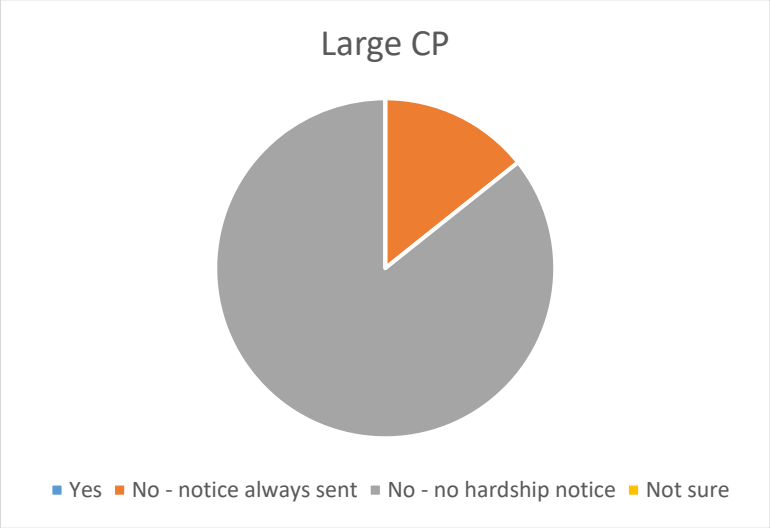


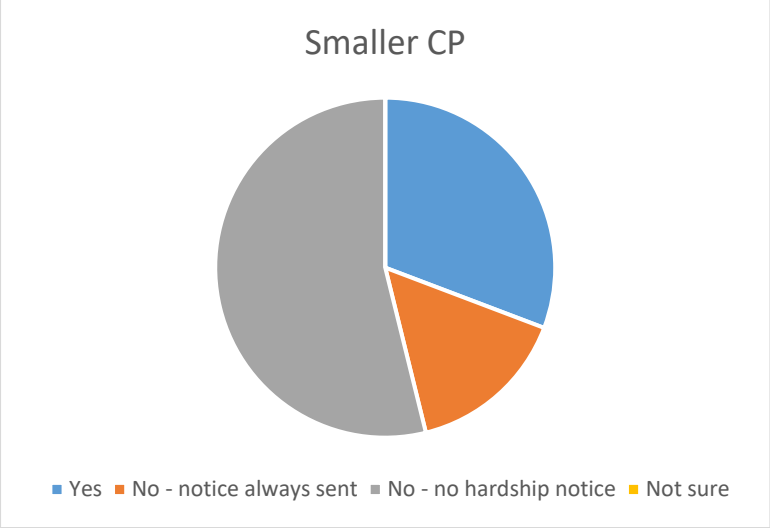
10) The result based on ADI status was:





11) The result based on size of credit provider was:



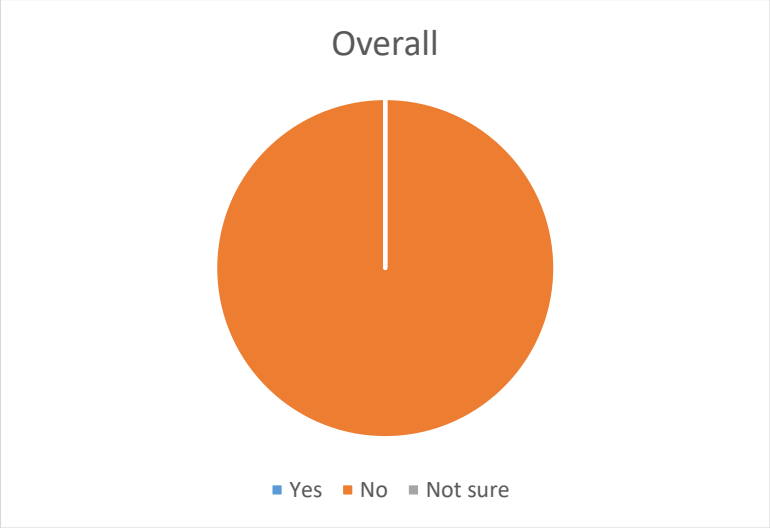


12) As can be seen, few credit providers consider that they rely on the simple arrangement exemption in relation to collections arrangements (and all of those are smaller credit providers).
13) Further, most credit providers take the view that those arrangements do not involve a 'hardship notice' and, therefore, the obligation within section 72(4) are not triggered. We note that, based on comments received in relation to the survey and other feedback, many credit providers will still send a form of confirmation to the customer (even though they are not required to under section 72(4). Further, from 1 July 2022, credit providers will, under the new paragraph 8A.5 of the CR Code, be required to provide an explanation to the customer of how the collections arrangement will impact the RHI reported in respect of the credit contract.

'Financial hardship arrangements'

14) A financial hardship arrangement was described in the survey as referring to "more formal 'hardship arrangements'".

15) Such arrangements are more likely to be put in place once a credit provider has recognised that a customer has given a 'hardship notice' and the credit provider has assessed the customer for the assistance. The provision of 'financial hardship assistance' is typically subject to a separate 'financial hardship' policy and, for many lenders, is undertaken by a separate 'financial hardship' team.
16) A 'financial hardship arrangement' is typically put in place if the credit provider 'accepts' the customer request for hardship assistance; however, we note our discussion in section C as to whether those arrangements always involve an 'agreed change to the credit contract'. These arrangements would ordinarily constitute a financial hardship arrangement under the new credit reporting regime (either a 'temporary FHA' or 'variation FHA').[8] That is, RHI would be recorded based on the arrangement and a financial hardship information would be reported.
17) **Question:** In relation to more formal 'hardship arrangements' do you currently rely on the simple arrangement exemption (for at least some products)?
18) **Response options:**
    - Yes
    - No – we send written confirmation of all formal 'hardship arrangements' regardless of length
    - Not sure
19) The overall result for that question was:



20) Given the above result, we have not broken the results down further.
21) As can be seen, no respondent credit provider considers that they rely on the simple arrangement exemption in relation to financial hardship arrangements. However, a number of credit providers noted in their comments that they thought that the availability of the exemption was beneficial in some circumstances (such as those experienced by industry at the start of the COVID-19 pandemic).

'How is hardship given'

22) We also asked the credit providers about the form of 'hardship arrangements' that they typically provide.

[8] We note that the OAIC has recently suggested that a 'variation FHA' be called a 'permanent FHA'. We are currently in discussions with the OAIC regarding this proposal.

23) **Question:** In relation to 'hardship arrangements' that involve reduced payments for a short period (e.g. $0 payments for 3 months), which of the following best describes your organisation's ordinary approach to providing that assistance**?**

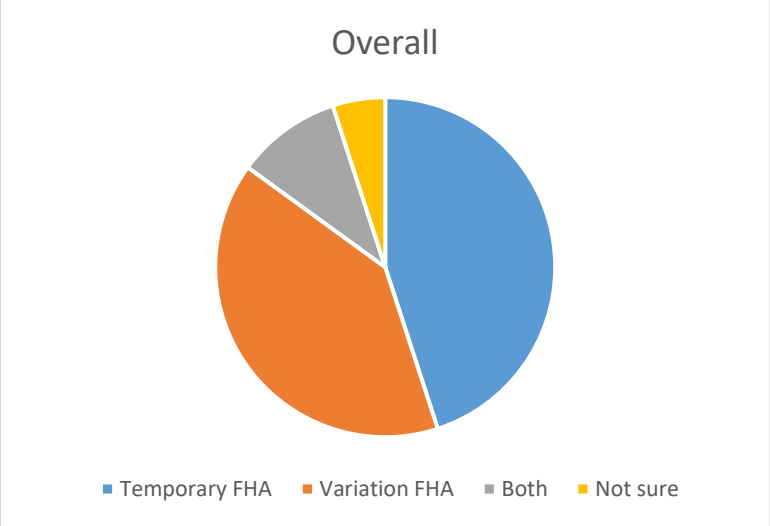
24) **Response options:**

- It will be offered by way of a temporary relief or deferral of the customer's payment obligations (i.e. a 'temporary FHA' under the new credit reporting hardship regime).
- It will be offered by way of an upfront variation to contractually reduce the payments that fall due in that short period (i.e. a 'variation FHA' under the new credit reporting hardship regime).
- Not sure.

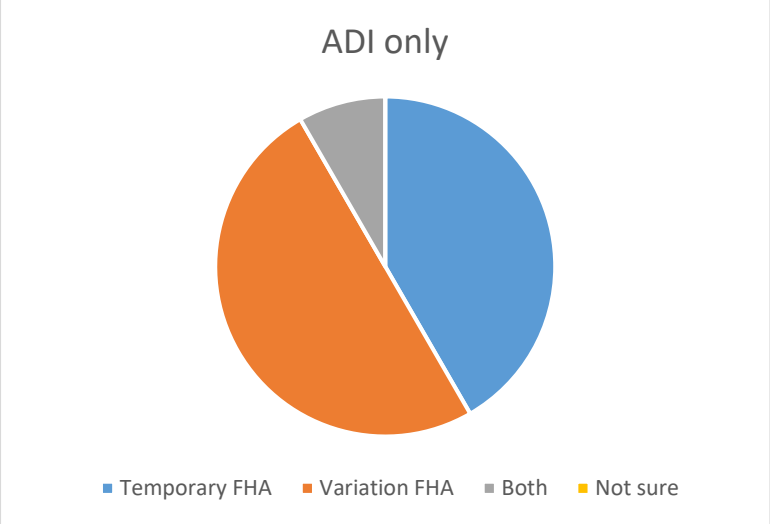
25) Two credit providers responded that both approaches could apply.

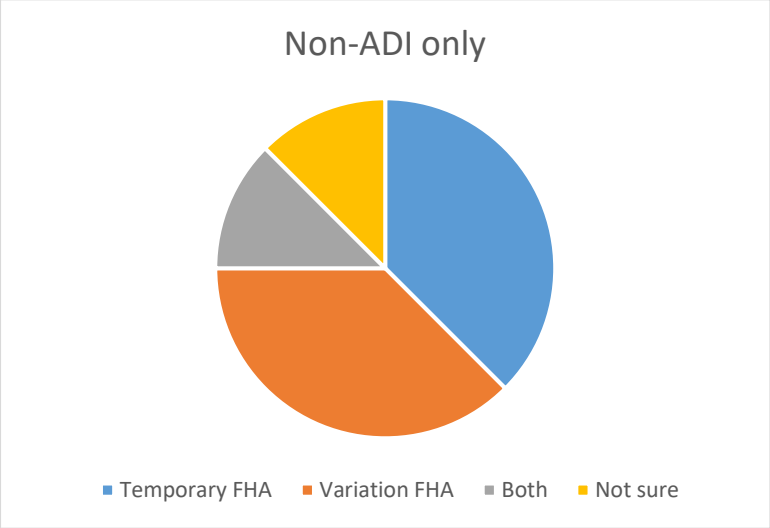
26) The results of this question help to illustrate the issue raised in section C of our submission. That is, credit providers that typically offer the arrangement by way of "temporary relief or deferral" may be required to give a customer a rejection notice under section 72(4)(b) despite agreeing to the arrangement.

27) The overall result for that question was:

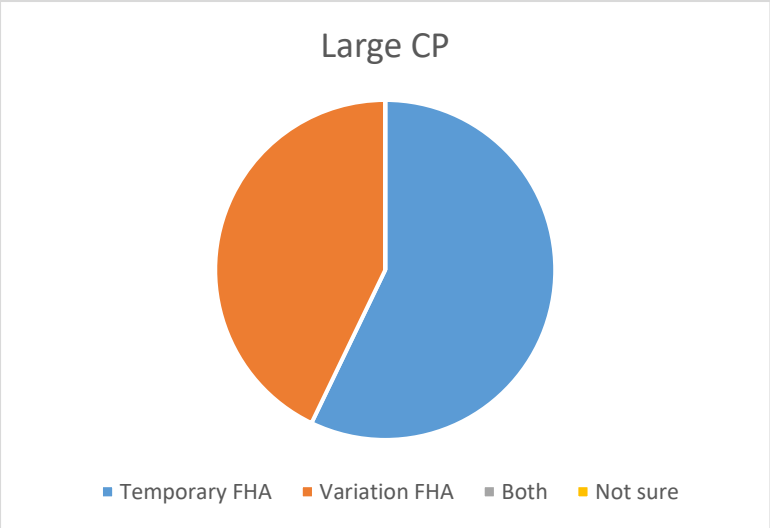


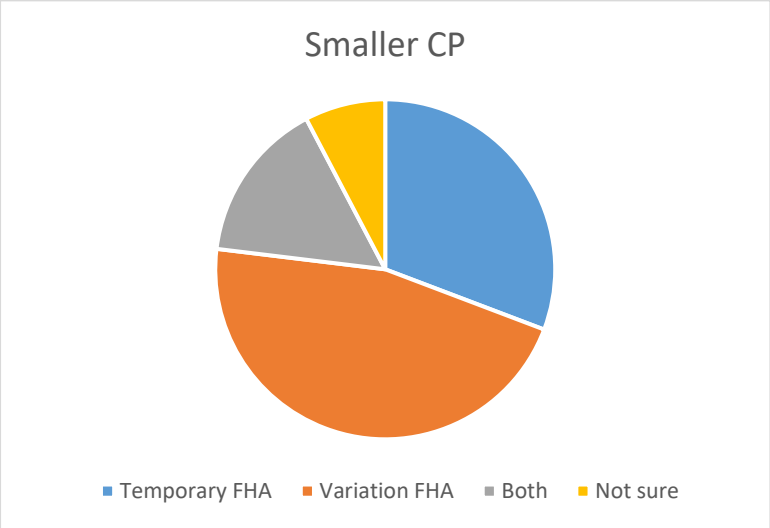
28) The result based on ADI status was:





29) The result based on size of credit provider was:





30) As can be seen, if a credit provider must give a section 72(4)(b) notice, notwithstanding that they have agreed to a financial hardship arrangement, this will impact a significant number of credit providers representing a very large number of hardship arrangements (as temporary FHAs are used more often by large CPs).