SENATE FINANCE AND PUBLIC ADMINISTRATION

LEGISLATION COMMITTEE

Exposure Drafts of Australian Privacy Amendment Legislation: Part II Credit Reporting

SUPPLEMENTARY SUBMISSION

Submission Number: **15a**

Submitter Details: **Australian Bankers' Association**

AUSTRALIAN BANKERS' ASSOCIATION INC.

Steven Münchenberg
Chief Executive Officer

Level 3, 56 Pitt Street
Sydney NSW 2000

31 March 2011

Ms Christine McDonald
Committee Secretary
Senate Standing Committee on Finance and Public Administration
Parliament House
CANBERRA ACT 2600

Email: fpa.sen@aph.gov.au

Dear Ms McDonald,

Exposure Draft of the Australian Privacy Amendment Legislation - Credit Reporting (EDCR)

The Australian Bankers' Association (ABA) is the peak national body representing banks that are authorised by the Australian Prudential Regulation Authority to carry on banking business in Australia and to describe themselves as banks.

The ABA's membership comprises 23 banks. Members include the four major Australian banks, regional and smaller Australian banks and a broadly representative range of international retail, commercial and wholesale banks operating in Australia.

The ABA is pleased to see the EDCR that will implement long awaited reforms of the credit reporting provisions of the Privacy Act that were first enacted in 1990 and to have the opportunity to provide its views to your Committee on the proposed provisions.

1. General comments

In addition to the review of the provisions of Part 111A of the Privacy Act, the ABA particularly welcomes the introduction of a more comprehensive system of credit reporting as a tool to better inform credit risk decisions that our members and other credit providers make in accordance with both prudential and consumer credit regulatory responsibilities. This will be a valuable addition to what is currently seen as an outdated and largely inadequate system of negative reporting in Part 111A.

The five additional data elements for comprehensive credit reporting as recommended by the Australian Law reform Commission in its report[1] of its review of Australia's privacy law that have been adopted by the Commonwealth Government will be an important aid to compliance. Under the responsible lending obligations of the National Consumer Credit Protection Act 2009 (NCCP) a credit provider is obliged to take reasonable steps to verify a consumer's financial situation before entering into a credit contract with the consumer. The proposed more comprehensive credit reporting provisions will facilitate compliance with this obligation and improve efficiencies for credit providers.

The further five elements are in stark contrast with the information that is currently available under the negative credit reporting system and what more will be available to credit providers with comprehensive credit reporting to inform their credit decisions.

The ABA acknowledges and commends the extensive work that the Australasian Retail Credit Association (ARCA) has carried out over several years to provide a strong basis for taking Australia's credit reporting system forward into the 21st century. A number of the ABA's member banks have actively participated in the developmental work of ARCA.

Therefore, the ABA is pleased to provide its general support to ARCA's submission to the Committee's inquiry.

2. Matters for further consideration

There are several matters that the ABA wishes to bring to the Committee's attention that may require further consideration.

2.1 Credit Reporting Code of Conduct

We support the tiered regulatory model with primary legislation, regulations and a Credit Reporting Code of Conduct (Code).

The Code development should be industry led, consultative and build on the existing Code as the starting point and with necessary changes to update it and to bring it into conformity with the overarching legislation.

2.1.1 A comprehensive industry led mandatory and binding Code

We support the view that as is the case with the existing Code, the new Code should be mandatory and binding on credit reporting agencies (CRA's) and credit providers (CPs).

The ABA considers that the EDCR should make it clear that the Code is intended to be mandatory, binding and that, for the avoidance of regulatory arbitrage, lack of competitive neutrality and certainty for consumers, there should be a single Code only. This would be consistent with the ALRC's approach to the objective of consolidating privacy regulation as much as it is feasible to do.

---

[1] ALRC "For Your Information" Report 108 Australian Privacy Law and Practice May 2008

The references in the EDCR to the Code are quite limited, do not confine its scope but provide for certain aspects, some that must be included in the Code and others that are optional (below "M" indicates mandatory; "O" indicates optional) as covered in the following clauses:

- 105(2) a CRA must implement practices, procedures and systems and enable the CRA to handle inquiries or complaints about its compliance with the Code (comply with whatever may be included in the Code);
- 105(4)(h) a CRA's policy must include how an individual may complain about its compliance with the Code and how the complaint will be handled (M on the basis of the likelihood that IDR will be included in the Code);
- 110(2) is a direct market exception that applies provided there is compliance with "any requirements" (not necessarily only applicable to direct marketing) set out in the Code (among other things in 110(2))(O);
- 119(4) a CRA is to provide access in a manner set out in the Code (M);
- 131 (1)(a) a CP has an obligation, in addition to Australian Privacy Principle (APP) 5, to disclose at or before the time of collection of personal information that is likely to be disclosed to a CRA certain information that is to be specified in the Code (O);
- 142(2)(c)(ii) a CP must give notice of a declined application for consumer credit and to include any other matters specified in the Code (O);
- 146(4) a CP must give access to credit eligibility information in a manner set out in the Code (M).

Therefore the Code must cover at least:

- Compliance with complaints handling,
- A CRA's manner of giving access, and
- A CP's manner of giving access.

ARCA's proposed approach involves the development of a comprehensive Code that should not be confined only to the matters referred to in the primary legislation and regulations. The ABA supports the concept of a Code that covers all the relevant operational aspects of the credit reporting regime.

In particular, the ABA recognises the importance of data quality for both consumers, CP's and CRA's. The ABA supports ARCA's proposal for a consistent data standard across the credit reporting system.

2.1.2 Internal and external dispute resolution

The Code should avoid overlapping or being inconsistent with other financial services regulation such as any internal dispute resolution (IDR) and external dispute resolution (EDR) requirements.

For credit licensees under the NCCP these are mandatory requirements. The Australian Securities and Investments Commission through its regulatory guides RG139 and 165 has reinforced and spelt out the further details of these requirements. If the Code is to deal with these matters it will be necessary for the Code to be able to align complaints timeframes and other processes with RG165.

There are provisions in cl.158 the EDCR that would be inconsistent with RG165 and should be amended if RG165 is to become the IDR standard for financial services organisations, for example -

- a complaint must be in writing which is inconsistent with other regulatory guidelines and does not provide flexibility for technological advances;
- cl.158(5) imposes a 30 day timeframe to respond to a complaint - which is inconsistent with RG165 paragraph RG165.90(1) which provides for a 45 days period to respond through IDR; and RG165.100 which provides for 21 days to respond to a complaint concerning a default notice;
- cl.158(5) suggests that the 30 days begins from the date a complaint is made, instead of when the complaint is received;
- cl.158(1) requires that a recipient write to the customer 7 days after receipt of the dispute to acknowledge receipt of the complaint and to advise of the IDR process is also inconsistent with RG165;
- cl.158 appears to impose the first party contacted with a complaint to respond to the complaint, however the first point of contact may not be best placed to manage the complaint; the Code could develop an effective referral process to manage and resolve the complaint with the respondent to be the responsible party;
- the addition to the written notice from the respondent at the conclusion of the IDR process (cl.158(4)) that must refer to the Commissioner as well as the respondent's EDR scheme differs from the equivalent procedure under RG165 and could confuse the complainant about who will review the complaint (one or the other or both).

To ensure these compliance inconsistencies are obviated the EDCR could be amended to provide that for those organisations that are subject to IDR and EDR licensing obligations under the NCCP, those obligations apply and for others that are not subject to these requirements, a default IDR and EDR regime in the EDCR is to apply.

2.2 Definitions and drafting comments

The ABA supports the definition and drafting comments provided by ARCA and member banks in their submissions respectively.

There are some similar comments and points of emphasis that the ABA wishes to provide in this section.

The structure and sequential arrangement of the EDCR is of concern. This approach uses a blanket preclusion of data exchanges with the addition of sixteen different definitions for data sets aimed at singling out specific allowable exceptions to the overarching prohibition.

This is similar to the approach taken with existing Part 111A. There is an appreciable risk that by adopting a restrictive and prescribed approach to permitted data exchanges in conjunction with a broad scope of the legislation could mean that the legislation becomes outdated quite quickly as industry innovation occurs and needs change. ARCA's recommendation that consideration is given to limiting the breadth of the legislation and associated regulations including revisiting the notion of the "credit information file" that is found in current Part 111A.

There are a number of new definitions to replace some of the definitions in existing Part 111A which in themselves are helpful, although there are concerns over certain of the definitions which are highlighted in ARCA's submission.

2.2.1 Credit reporting business

The definition of **credit reporting business** in cl.194(1) of the EDCR appears to include credit providers. If this is intended this would be a major policy change compared with existing Part 111A. A credit provider's business or undertaking does include collecting, holding, using or disclosing personal information about the credit worthiness of individuals within its organisation and activities of its employees. From this definition it would follow that a credit provider would be a **credit reporting agency** under the definitions found in cl.180.

There appears to be an omission in the drafting as the existing definition in Part II of the Privacy Act in effect excludes credit providers from the meaning of "credit reporting business". The new definition omits reference to necessity for there to be a sole purpose or "dominant purpose" criterion. This sole or dominant purpose clearly distinguishes a credit provider from a CRA.

The change will complicate comprehension of the EDCR and can be contrasted by example with the NCCP where a clear distinction is drawn between a credit provider and a credit assistance provider and where each regulatory regime is separately confined to each category. This approach should be emulated under the EDCR.

It is noted that cl.194 (4) provides for a regulation to exclude certain classes of businesses from the proposed definition. For certainty going forward either the EDCR should be amended accordingly or the form of a regulation that would achieve the same result is released in the course of this consultation.

On a related point, cl.189 of the EDCR treats an agent of a CP as a CP itself. Cl.189 appears to recreate section 11B(4B) of the Privacy Act with respect to an agent acting on behalf of a CP.

Some of the ABA's members operate branch structures as franchises. These franchisees are agents of the principal bank and their operations are seamless to the customer, branded as the bank and they create deposits and credit facilities as items on the bank's balance sheet. Under the NCCP these franchised branches are treated as credit representatives of the licensee bank. A similar approach may need to be taken under the EDCR because the franchisees are not licensees within the meaning of the NCCP and hence the EDCR.

Under the NCCP the bank as licensee is liable for the conduct of its credit representatives. There is scope for this to be addressed under the regulation making power in cl.194(4).

A further related point is that cl.108 (4) restricts a CRA's disclosure of repayment information to licensees within the meaning the NCCP.

A similar question arises under cl.110 and direct marketing and whether the disclosure of credit reporting information (except consumer credit liability information and repayment history information) may be made only to a CP licensee.

If the recipient of the repayment information is the credit representative of the NCCP licensee and not a licensee, it is assumed that if the relationship of CP and credit representative is addressed in the EDCR, as suggested, these aspects also will be addressed.

2.2.2 Direct marketing and the National Consumer Credit Protection (Home Loans and Credit cards) Bill 2011

This matter is provided to the Committee for its information only as an example of some of the difficulties faced by financial services organisations in implementing their compliance arrangements where there are potentially inconsistent legislative policy positions.

The ABA recognises that this is not an issue arising from the EDCR that requires an amendment to the EDCR. If it is to be addressed at all, it should be addressed in the National Consumer Credit Protection (Home Loans and Credit cards) Bill 2011 (Bill).

Under cl.110 that deals with direct marketing and the pre-screening process there is an inconsistency between the consumer opt out option in cl.110(5) and the proposed credit card reforms where customers must expressly opt in to receive credit limit increase invitations as defined in the National Consumer Credit Protection Amendment (Home Loans and Credit Cards) Bill 2011 (Bill) (see cl. 133BF (1) of the Bill)[2]. The definition in the Bill extends beyond offers by a credit card issuer to increase a customer's credit card limit to written communications inviting the customer to apply for an increased credit limit or to encourage the customer to consider applying for a higher limit.

From best practice regulation and compliance systems perspectives it is undesirable to have a different approach and compliance practice for one form of credit product (i.e. credit cards) with respect to direct marketing and another for other credit products. A customer might opt out of the pre-screening process but opt in to receive credit limit increase invitations only to be disregarded in a credit card marketing exercise on the very aspect the customer has sought to be included. This could include a customer with a questionable credit history seeing an opportunity to stay on a credit marketing list and avoid a pre-screening process by opting out of pre-screening but opting in to receive credit card limit increase invitations.

Of course, by the consumer not opting out of pre-screening it would be necessary for the customer to opt in to receive credit limit increase invitations.

---

[2] Note 1 to cl 133BF(1) provides "The consent must be express, and cannot be implied for the actions of the consumer or from other circumstances"

The ABA submits that the better approach in the interests of consistency in the law and customer experience is for the customer who has not opted out of pre-screening to be treated as willing to receive credit card limit increase invitations (as ultimately defined in the Bill).

2.2.3 Miscellaneous drafting comments

Cl.118 (2)(a) provides for the security of credit information but should be amended to include after "credit providers' where first appearing" "to such steps as are reasonable in the circumstances" to ensure the obligations for CRAs are the same as for CPs.

Cl.124 deals with maximum permissible retention periods for credit information. The retention periods of 2 and 5 years are insufficient because the terms of reference of the Financial Ombudsman Service (FOS) allow lodgment of disputes up to 6 years after the disputant became, or ought to have become, aware of the incurring of a loss or within 2 years after an IDR final response by the financial institution. It would be preferable for the FOS periods to be aligned with the EDCR from a privacy perspective.

Cl.142 provides for notification of refusal of an application for consumer credit. The notice is required to be given to the individual (which seems to be used in a singular sense as distinct from "other applicants" (see 142(1)(a)(ii)) but it would be odd if this did not also extend to the other applicants. However, this then raises the issue whether each applicant is to be notified that the credit has been refused based on the joint credit information or only that of one of the joint applicants.

Existing section 18M (2) of the Privacy Act makes a clear distinction between the position of an individual applicant and joint applicants, and to whom in the case of joint applicant such a notice is given.

Alternatively, this could be clarified so that the individual throughout includes the other applicants and whether the notice is given only to the individual (and individuals) whose information resulted in the decline decision or to the other applicants whose information would not have resulted in the application being declined as well. There would seem to be a privacy protection issue if this is not made clear.

Division 6 appears to reflect the Government's agreed response to ALRC recommendation 59-9 that the Privacy Act should be amended to remove credit reporting offences and allow a civil penalty to be imposed if there is a serious or repeated interference with privacy (ALRC recommendation 50-2). The draft provisions provide for both criminal and civil sanctions, but the criminal and civil penalties appear limited to entities that are not entities that are entitled to participate in credit reporting activity and CRAs appear to be not included at all in these provisions. An entity is defined in the draft as (a) an agency; or (b) an organisation; or (c) a small business operator. A CRA (having its own specific definition) therefore does not appear to fall within the definition of 'entity' resulting in both Divisions 6 & 7 not applying to credit reporting agencies which might be a drafting oversight.

On the other hand Division 7 provides for civil penalty orders that can be applied to any entity whether an entity is entitled to disclose or receive information under Divisions 2 or 3.

3. Concluding comment

The ABA appreciates the opportunity to participate in the Committee's inquiry on what is seen as an important micro economic reform initiative that will provide a better informed basis on which banks and other credit providers can provide credit as a key contributor to the economic well being and ability of Australians to participate in the financial economy.

Yours sincerely

Steven Münchenberg