

Inquiry into Privacy Amendment (Enhancing Privacy Protection) Bill 2012

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ANZ Submission to the
Senate Legal and Constitutional
Affairs Legislation Committee



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INTRODUCTION

ANZ supports the introduction of the Australian Privacy Principles and Comprehensive Credit Reporting (CCR) and is pleased to provide a submission on the Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (the Bill).

ANZ considers that the introduction of CCR will importantly improve the quality of credit providers' decisions. It may facilitate more responsible lending by providing a more complete picture of, and practical access to, customers' financial commitments and credit behaviour across the credit providers they use.

While ANZ is pleased that the Bill has been tabled in the Parliament, ANZ has a number of concerns with the current drafting of the Bill. This submission provides further details regarding those concerns and covers the following matters:

- Disclosure of credit eligibility information to recipients that do not have an Australian link
- Reporting and use of accurate hardship information
- Definition and operation of repayment history information
- Access to and correction of commercially sensitive information
- Use of de-identified information
- Offence provisions
- Complaint handling
- Extra-territoriality.

ANZ also wishes to note that it supports the submissions made to the Committee by the Australian Bankers Association and the Australasian Retail Credit Association.

ANZ would be pleased to provide any further information about this submission as required, and can be contacted as follows:

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OPERATION OF THE LEGISLATION

AUSTRALIAN LINK REQUIREMENT

ISSUE

The provisions set out in Part IIIA of the Bill restrict a credit provider from disclosing credit eligibility information (CEI) to certain recipients that do not have an Australian link. This includes recipients such as related bodies corporate, debt collection agents, guarantors, mortgage insurers and debt assignees.¹

Broadly, an entity has an Australian link where:

- it is formed, incorporated or created in Australia, or
- it carries on a business in Australia and the information was collected or held by the organisation in Australia.

ANZ is concerned that this restriction on disclosure of CEI will effectively prohibit legitimate business practices and is in excess of the cross border protections applied to other types of information under the Privacy Act. As currently drafted, the restriction will have a significant negative affect on ANZ's business and the ability of Australia's financial services sector to structure business operations and information sharing practices to promote efficiency.

The current Bill provisions would mean an Australian-based organisation would not be able to transfer CEI to a wholly owned offshore entity for the purposes of that entity performing services for the organisation. This is even where, consistent with new Australian Privacy Principle (APP) 8, the organisation takes steps to ensure the offshore entity is subject to the same standards of conduct and controls in relation to the CEI.

This restriction does not provide substantively improved privacy protection for Australian consumers. The Bill allows the cross-border disclosure of other forms of sensitive information, such as health information and the customer's credit card transactions, provided the disclosing organisation complies with APP 8. Under APP 8 and section 16C of the Bill, the (Australian-based) disclosing entity remains liable for the treatment of a customer's information which is disclosed to an offshore entity. It is not clear why the disclosure of CEI for legitimate business purposes should be treated more restrictively than information that is likely to be as sensitive.

ANZ is concerned that in attempting to achieve a closed credit reporting system for Australia so that enforcement action can be taken against all recipients of CEI, the current drafting gives rise to unintended consequences and in particular:

- will interfere with an organisation's ability to structure its business operations and information sharing practices to promote efficiency
- will have a detrimental impact on the competitiveness of Australian organisations with an international presence

¹ See sections 21G(3)(b) or 21J, 21L or 21M.

- will apply to disclosures to related entities where the recipient is subject to the same privacy controls and policies as the Australian-based disclosing entity, and
- is inconsistent with other provisions of the Privacy Act which allow for cross-border disclosure of information without the need for the recipient to have an Australian link.

RECOMMENDATION

ANZ recommends that the Australia link requirement be removed for disclosure of CEI for legitimate business purposes to an offshore entity that is an agent or related body corporate of the disclosing entity. ANZ also recommends that APP 8 applies to offshore disclosure of credit information in the same way it applies to other forms of personal information. These recommendations are predicated on the disclosing entity remaining responsible in the event of a privacy breach.

In the alternative, ANZ recommends that the exemption from the Australia link requirement apply, at the very least, to a related entity of the disclosing entity where the disclosure is for legitimate business purposes. This treatment would be consistent with the application of section 13B of the Privacy Act to other types of personal information.

REPORTING AND USE OF ACCURATE HARDSHIP INFORMATION

ISSUE

The Bill provides that new arrangement information² is a component of credit information and can be disclosed to a credit reporting body (CRB) provided certain conditions are complied with. The definition of new arrangement information requires that default information has already been disclosed to the CRB by the credit provider. ANZ considers that this is a prohibitive view of the provision of new arrangement information as borrowers and credit providers often enter into temporary repayment arrangements (ie. no or lower repayments for a short period) prior to default occurring, to assist borrowers in the management of their finances and to overcome short term difficulties. This includes temporary hardship arrangements because of natural disasters and the like.

If credit providers are unable to disclose hardship arrangements that are entered into prior to default to CRBs (and therefore if CRBs are unable to provide that information to credit providers participating in the credit reporting system), consumers may suffer detriment because of adverse repayment history being reported in the intervening period.

Where a temporary arrangement is in place, and even though an individual is meeting the terms of that arrangement, credit providers will be required to report that the individual did not make their required monthly payment. The consequence is that an individual who is complying with a temporary arrangement will be treated in the same way as an individual who has simply failed to make required payments.

² As defined by section 6S to be inter alia the new terms and conditions of a credit contract that has been varied due to a default or serious credit infringement.

ANZ considers that the Bill should provide a mechanism to indicate that an individual is subject to a hardship arrangement, such as a temporary hardship flag. The flag would only be visible when the individual was in a hardship arrangement and would be removed once the hardship arrangement ended. Such an approach would reduce the chance of a consumer in hardship being inappropriately provided additional credit but would not adversely impact the ability of the consumer to obtain credit in the future.

Alternatively, repayment history information under section 6V should be defined more broadly so that it can include an indication of whether an individual is in hardship and subject to a hardship arrangement.

Either of the suggested approaches would enable credit providers to accurately report the status of a customer experiencing temporary hardship but making payments as agreed between the parties. There are adverse consequences for both the individual (such as the increased likelihood of future credit applications being declined) and credit providers if an individual's repayment history shows either that they are making their regular monthly repayment or are not making any repayments when in fact a hardship arrangement is in place.

RECOMMENDATION

The Bill should facilitate the use of a temporary flag to indicate that an individual is subject to a hardship arrangement. The meaning of new arrangement information should be amended to allow a credit provider to report to a CRB a new arrangement that is agreed to prior to default. Alternatively, the definition of repayment history information should be amended to allow hardship arrangements to be reported. ANZ believes this will benefit both credit providers and consumers.

ACCESS TO AND CORRECTION OF COMMERCIALLY SENSITIVE INFORMATION

ISSUE

Access to commercially sensitive information

Section 21T requires credit providers to provide CEI to access seekers³ on request. CEI includes CP derived information which is defined as information:

- “(a) that is derived from credit reporting information about the individual that was disclosed to a credit provider by a CRB under Division 2 of Part IIIA; and
- (b) that has any bearing on the individual's credit worthiness; and
- (c) that is used, has been used or could be used in establishing the individual's eligibility for consumer credit.”

³ Being the individual or a person assisting the individual to deal with a CRB or credit provider (section 6L(1)).

ANZ is concerned that as drafted, these provisions may result in credit providers being required to disclose commercially sensitive credit assessment methodologies, information and opinions (such as internal assessment scorecards) to access seekers. ANZ is also concerned that CP derived information could include information that is derived not only from credit reporting information, but also the credit provider's own information such as internal risk analysis that takes into account other economic or commercial factors.

ANZ notes that the existing National Privacy Principles do not require an organisation to provide access to personal information where that access would reveal evaluative information generated in connection with a commercially sensitive decision-making process⁴. APP 12 contains a similar provision which limits the disclosure of commercially sensitive information.⁵ In such cases, the organisation may give the individual an explanation for the commercially sensitive decision rather than direct access to the information.

The importance of commercially sensitive information is recognised in the Explanatory Memorandum to the Bill which states that "... while the individual can obtain access to the CP derived information about them, this does not provide them with a right to access the methodology, data analysis methods, computer programs, or other information that the credit provider may use to manage their credit eligibility information or to analyse the credit reporting information to produce the CP derived information."⁶ This limitation is not currently reflected in the Bill.

With access to credit assessment methodologies, ANZ is concerned that individuals may be able to artificially structure applications for credit to enhance their chances of obtaining it fraudulently as they will be able to ascertain the criteria a credit provider uses and the weight given to each in assessing an application. This would enable fraudsters to provide information against these criteria that would lead to a favourable outcome and to share the information with others for the same purpose.

Corrections of Commercially Sensitive Information

Individuals are also able to request that corrections be made to CP derived information and CRB derived information under section 21V. As this information is an assessment by either the credit provider or CRB of the individual's credit worthiness, ANZ does not believe that individuals should be entitled to amend that assessment. ANZ accepts that individuals should be able to request corrections to the actual credit information that feeds into those assessments.

RECOMMENDATION

Section 21T should be amended to reflect the Government's intention as stated in the Explanatory Memorandum. This could be achieved by amending section 21T to provide that APP 12 applies to the disclosure of CEI.

⁴ National Privacy Principle 6.2.

⁵ Australian Privacy Principle 12.3.

⁶ Explanatory Memorandum, page 177.

Section 21V should be amended so that individuals and access seekers cannot request amendments to commercially sensitive information.

USE OF DE-IDENTIFIED INFORMATION

ISSUE

Section 20M permits a CRB to use or disclose “de-identified information” for the purposes of conducting research in relation to the assessment of the credit worthiness of individuals, subject to the CRB complying with rules made by the Information Commissioner under subsection 20M(3).

ANZ believes that section 20M is not required because once information is de-identified, it falls outside the ambit of the Privacy Act (in that it is no longer personal information). The identity of an individual cannot, by definition, be determined from de-identified information. As a result, there is no possibility of the information being used to the detriment of the individual.

Credit providers currently use de-identified information received from CRBs for internal credit modelling and portfolio management purposes, including the development and maintenance of score cards. These tools assist in the assessment of credit applications, identifying high risk credit exposures and help ensure that a credit provider lends responsibly.

ANZ is concerned that the restriction in section 20M on a CRB’s disclosure of de-identified information for conducting research in relation to the assessment of the credit worthiness of individuals is too narrow and will restrict credit providers from carrying out these essential activities.

RECOMMENDATION

Section 20M should be removed in its entirety.

Alternatively, the Bill should be amended to include an explicit right for CRBs to disclose, and credit providers to collect and use, de-identified information for internal credit modelling and portfolio management purposes. If section 20M is to be retained, the Bill should clarify the meaning of the expression “... conducting research in relation to the assessment of the credit worthiness of individuals” used in subsection 20M(3). ANZ recommends that conducting such research should involve the development and maintenance of credit scorecards, credit policy rules and the like by credit providers.

OFFENCE PROVISIONS

ISSUE

False and Misleading Offence – disclosure of credit information

Under section 21R, a credit provider commits an offence if it discloses credit information or uses CEI that is false or misleading in a material particular. As the section is currently worded there is no reference to the element of knowledge, intent or recklessness required for an offence to occur.

Practically, this will be problematic for credit providers as they may commit an offence simply by using CEI supplied by a CRB that they believe to be true, but which is in fact false. Furthermore, the credit provider is unable to verify the information without first disclosing it and is therefore at risk of committing another offence.

False and misleading offence - collection of information

Under section 21Q, credit providers are required to ensure that the CEI they collect is accurate, up-to-date and complete. ANZ believes this provision is unnecessary as there is a similar requirement proposed in APP 10 which is excluded by operation of subsection 21Q(3). The provision also seems unnecessary given the agreements that must be entered into between CRBs and credit providers under section 20N regarding the provision of information that is accurate, up-to-date and complete and the conduct of regular audits to confirm.

RECOMMENDATION

Section 21R should be amended to expressly refer to an element of knowledge, intent or recklessness on the part of the offender. In addition, subsection 21Q(1) should be removed to streamline compliance requirements applicable to credit providers and avoid overlap with other provisions in the Bill.

COMPLAINTS

ISSUE

The complaints handling requirements as set out in Division 5 of the Bill are inconsistent with the Australian Standard AS ISO 10002-2006 Customer satisfaction- guidelines for complaints handling in organisations and the Australian Securities and Investments Commission's Regulatory Guide 165 (RG 165) which applies to credit licensees.

For a licensed credit provider, a complaint under section 23A is likely to also be a complaint for the purposes of RG 165. It will be difficult for licensed credit providers to comply with both sets of requirements. For example, subsection 23B(5) provides for a maximum timeframe of 30 days for resolution, or longer if the complainant agrees in writing. RG 165.94 provides for a maximum timeframe of 45 days with no possibility of extension.

As currently drafted, the complaint provisions will be practically difficult to comply with for both credit providers and CRBs. For example, under section 23C, a credit provider (recipient) who receives a complaint regarding incorrect credit information is required to notify all CRBs and other credit providers who hold the credit information of both the complaint and the outcome. The recipient will not be able to identify all holders of the information. The recipient will only be able to identify the CRB from which it obtained the information and the credit provider that initially disclosed the information.

Similarly, a credit provider that discloses incorrect information and is required to correct that information under either subsections 23C(5), 21U(2) or 21W(2) is required to notify every recipient of that incorrect information. The credit provider will not be able to identify every recipient, only those who it disclosed the information to directly. For example, if a credit provider discloses the information to a CRB the credit provider will not be able to identify who the CRB disclosed the information to. However as the Bill is currently drafted the credit provider may be required to notify these indirect recipients despite the practical difficulties associated with this.

Relevant timeframe for notification of correction

Paragraph 1.14 of the current Credit Reporting Code of Conduct requires a CRB to provide information about the correction of credit information to entities nominated by an individual as having received the incorrect information from the CRB within the last three months. This paragraph of the Code ensures the costs associated with maintaining correct information are minimised whilst also ensuring the adverse impact to affected individuals is minimised. Providing the correction to entities who received the initial information more than three months ago, and who are not nominated by the individual, is unlikely to alter the credit decisions made for the individual and therefore unlikely to benefit them.

RECOMMENDATION

The Bill should be amended so that credit providers who are licensees are under the same obligations for handling customer complaints as they are under AS ISO 10002-2006 and RG 165.

ANZ also recommends that:

- subsection 23C(3) be amended so that the receiving credit provider is only required to notify the CRB from which it received the information and the credit provider who initially disclosed the information
- subsections 21U(2), 21W(2) and 23C(5) be amended to clarify that a credit provider is only required to inform direct recipients of the incorrect credit information and that these entities are then required to disclose the correction to any entities to which they have provided the information, and
- the Bill is amended so that entities only have to be notified of a correction to credit information if they received the information within the last three months (or other suitable period) or are nominated by the individual to receive the correction.

EXTRA-TERRITORIALITY

ISSUE

ANZ believes the extra-territoriality provisions contained in the Bill will result in the provisions applying too widely to the acts and practices of Australian-based organisations with operations offshore and should be reviewed.

Existing section 5B(1) limits the operation of the Privacy Act offshore to acts and practices which (1) relate to the information of Australian citizens or persons with a presence in Australia; and (2) performed by an organisation with a link to Australia.

Amendments to this section remove the requirement for the act or practice to relate to the information of an Australia citizen or Australian residents (new section 5B(1A)). This means that the Privacy Act will apply to all the acts and practices of an organisation that is formed or incorporated in Australia, regardless of the nature of the personal information involved.

While ANZ understands the Government's policy is to extend protections in the Act to all persons who are dealing with an agency or organisation with an Australian link, the amendments will result in unintended consequences for organisations that are formed or incorporated within Australia.

The broad terms of the proposed extra-territoriality provisions will mean that the Privacy Act will technically apply to all offshore activities of an Australian organisation, even in circumstances where the business being conducted is completely unrelated to the organisation's Australian business.

For example, Australia and New Zealand Banking Group Limited (an Australian-incorporated entity) holds a licence in Singapore to conduct a banking business in that country. Under that licence, ANZBGL provides banking services as part of a business that is largely contained within Singapore and as a result, will collect personal information from Singapore nationals in accordance with local law.

Under the proposed amended extra-territoriality provisions of the Bill, the acts and practices of ANZBGL in collecting and dealing with the personal information of customers of its Singapore business would be subject to the terms of the Privacy Act, on the basis that ANZBGL is an organisation with an Australian link.

ANZ believes such a result is unintended and should be corrected.

RECOMMENDATION

The extra-territoriality provisions should be redrafted so that acts or practices of an Australian organisation are only caught by the Privacy Act where they are directly related to an Australian-based business.