



SENATE FINANCE AND PUBLIC ADMINISTRATION

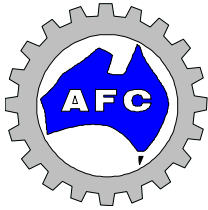
LEGISLATION COMMITTEE

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

SUPPLEMENTARY SUBMISSION

Submission Number: Australian Finance Conference

Submitter Details: 12a



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4 April 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,

PRIVACY REFORM – EXPOSURE DRAFT PRIVACY BILL - CREDIT REPORTING

The Australian Finance Conference (AFC), the national finance industry association, appreciates the opportunity provided, and extension given, by the Committee to comment on the Exposure Draft Privacy Bill – Credit Reporting Provisions (draft CRPs). AFC membership includes a range of credit providers, financiers, receivables managers and the two principal Australian consumer credit reporting agencies. A current membership list is attached. AFC credit provider member companies provide the full range of lending financial services and have a particular interest in the credit reporting proposals both in relation to their consumer and commercial businesses. These Members deal directly with their customers as well as through intermediaries (eg finance brokers).

In considering the draft CRPs the AFC has endeavoured to take into account various Members' views and business models. Our comments take note of the extensive privacy reform process which has preceded the release of the draft CRPs. The AFC has been pleased to have participated in this including through our submissions and stakeholder discussions with the Australian Law Reform Commission (ALRC) and the Government in its response to the reform recommendations contained in the ALRC Report (No. 108): "*For Your Information: Australian Privacy Law & Practice*" [FYI] and stakeholder forums arranged through the Department of Prime Minister & Cabinet.

In summary, for reasons that follow:

- The AFC supports a process of modernising and simplifying the regulation of the handling of credit reporting information though noting the reform context of current regulation that, despite its complexities and out-dated approach, has arguably worked well through the last 20 years.
- In particular, the AFC supports and commends the Government on the proposed inclusion of the five additional data sets and ability to pre-screen to exclude adverse credit risks from marketing lists. These initiatives build on and enhance the responsible lending processes currently undertaken by our Members (both from a prudent lender and compliant corporate entity perspective). Both customers of consumer credit and with industry participants will benefit.
- AFC suggests a less prescriptive and complex approach than that taken in the draft CRPs (eg in relation to definitional triggers – see Attachment 1) would better achieve the Government's objectives.
- A range of technical issues with the draft CRPs have been identified (see Attachment 2), some of which have been provided to the Department of Prime Minister and

Cabinet for consideration. Should these be matters the Committee believes are better directed for further consideration by the Department, we would be happy to work with the Department outside the Committee process in this regard.

In support of the AFC position, general comments on the draft CRPs follow and more detailed comment on specific provisions have been dealt with in the attachments.

Government Objectives & Parameters of Regulation

Importantly, the Government has committed to creating a comprehensive credit reporting framework through the inclusion of five new data elements on the consumer component of an individual's credit report. In line with AFC submissions, both customers and the industry will benefit from this initiative through the consequent flow-on improvement in individual credit assessments, complementing the industry's responsible lending, in practice and in compliance with the Government's National Consumer Credit reforms. We commend the Government's commitment in this regard.

On a broad level, the Government has also committed to redrafting and updating the Privacy Act to ensure technological neutrality and make the law clearer and easier to comply with. The draft CRPs are intended to replace the current overly complex and prescriptive Part IIIA of the Privacy Act, to provide more user-friendly regulation of credit reporting in line with those of the ALRC's recommendations that it has accepted. As a matter of principle, the AFC equally supports these objectives as beneficial to both industry participants and customers.

The move in both drafting style and policy implementation process to principles-based regulation over recent years (eg with Anti-Money Laundering and National Consumer Credit) would appear to provide a method through which the Government could achieve these objectives with the credit reporting provisions. However, we are concerned that the Government's approach in the draft CRPs is a reversion to a more-prescriptive method of regulation, which, in our view, detracts from achievement of the underlying objectives of improved clarity and understanding. This approach has necessitated extensive definitions to support the substantive provisions. The complexity of definitions that results is addressed later. We recommend further consideration being given to the drafting approach adopted to facilitate a more principles-based outcome which allows compliance in a cost-effective way to suit relevant business models while still achieving balance with the individual's right to privacy in relation to credit reporting information.

Reform Context

In compiling our comments we note the difficulty caused by the absence of significant components of the reform framework; namely,

- regulations dealing with a number of issues (eg including permitted uses/disclosures, detail on the repayment history and consumer liability information).
- the Credit Reporting Code to cover a range of operational matters. In relation to the Code, we note the lead-role that the Australasian Retail Credit Association (ARCA) has taken in assisting to develop this Code building from the current framework. We understand that the Code is proposed to cover principles of reciprocity, data governance including a single data standard together with particular operational issues committed to by the Government that have been provided for under the draft CRPs together with matters covered in the current Code and not dealt with in the draft CRPs. We look forward to working with ARCA in this development process.
- the Stage 4 draft legislation covering matters relating to the Australian Information Commissioner including the power and process for approving Codes; and

- requisite transitional provisions (eg to support at commencement of the new law the inclusion of historic repayment performance information to enable the identified value of the reforms for consumers and industry to be gained from the outset).

We have also tried to take into account the components of the first tranche of the Stage 1 privacy reform, the Australian Privacy Principles and associated provisions (the APPs), which have been referred to your Committee for consultation, but again, note the dynamic nature of the process and delay to-date in finalisation and release of the report.

Other laws relevant to consumer credit (eg the National Credit Act, ASIC Act) that may inter-relate with the compliance framework detailed in the draft CRPs have also been considered, though, again, it should be noted that many of these laws have also been the subject of extensive reform and have recently only commenced so that our Members' have limited experience of their impact.

We would therefore appreciate the opportunity to revisit our comments or to raise any additional issues with the draft CRPs, if required, following the release of other components of the reformed law including the Committee's report relating to the draft APPs.

On a practical level we also note, AFC members and others that operate in the consumer credit market have been subject to regulation of credit reporting under the current Part IIIA of the Privacy for close to 20 years. In large measure, the workability of Part IIIA was achieved through the industry consultative process engaged in by the Privacy Commissioner that resulted in the Credit Reporting Code which provides the detail on a range of technical and operational matters in a manner that appropriately balanced the individual's privacy right. Part IIIA and the Code have required consideration and application to a market that has seen extensive changes in business processes and product innovation in that time, including the emergence and dominance of electronic media. Significant compliance infrastructure (including documentation, systems development and staff training) has been put in place and managed throughout that period both by credit reporting agencies and credit providers. Arguably, based on the level of customer satisfaction and the growth of the consumer credit market in Australia over that period, the regulatory framework has stood the test of time.

Nevertheless, in line with the ALRC's recommendation, as supported by the Government, the AFC believes it timely to revisit Part IIIA and the Code to modernise the language, to facilitate better understanding and clarity and to do so in a way that is technologically neutral to reflect modern business practices. We also note that various aspects of policy reform have been announced by the Government, including a more comprehensive report, and that these will necessitate change. However, our suggestion is that these variations can occur to facilitate a regulated environment that is currently working, rather than necessitating a new compliance framework.

Complexity of Drafting & Approach: Definitions

We acknowledge the drafting challenge to reflect and regulate the complexities of the information exchange that occurs within the credit referencing process. Central to the process are credit reporting agencies that generally do not deal with the individual but are heavily reliant on the information handling practices of third party subscribers (eg credit providers) who deal with the individual. Also, information collection and handling may involve a considerable number of entities beyond a credit provider depending on the distribution network model utilised (eg use of finance brokers), the funding model that is in place (eg securitisation) and the type of market/products in which it engages in (eg consumer vs commercial). Potential variation in information-handling processes (eg electronic vs manual/paper) and record management (eg centralised facility on-shore vs. off-

shore) from one credit provider to another is also noted. The CRPs need to be flexible enough to provide a compliance framework that overlays these complexities in a commercially efficient and reasonable manner for all regulated entities and in a way that appropriately balances the privacy right of the individual customer.

While appreciating the difficulty, because of the prescriptive approach to drafting that has been adopted in the draft CRPs, the definition provisions are central to their operation. It is therefore critical that the definitions are clear, easily understood and reflect Government policy. We are concerned that the vast number of definitions, coupled with their inter-relationship and placement at various parts of the draft CRPs rather than in a central dictionary or interpretative section results in a highly complex framework, which challenges understanding.

For example, pivotal to the compliance framework for the information handling by a credit provider which is to be regulated under the draft CRPs is the term: **credit eligibility information**. It is critical for a credit provider to be able to identify what information that it handles that meets this definition as this will dictate the parameters of compliance with the draft CRPs. However, the definition of credit eligibility information builds on a significant number of other definitions, all of which need to be considered by the credit provider to determine what information it handles needs to meet the compliance framework in the draft CRPs. We have attempted to illustrate the process and highlight the challenge for the credit provider in Attachment 1. We also note that this is but one defined term that is relevant to the compliance consideration.

We have also identified a number of other shortcomings with the current draft of a number of the definitions. For example:

- the parameters of the concepts defined appear to extend beyond what was intended to be regulated (eg the definition of credit reporting business);
- there is variation between terms used and defined in the draft CRPs and other laws (eg credit defined in the NCA; ASIC Act) where either it would appear the terms were intended to have the same meaning or they should have the same meaning to assist understanding and compliance with consumer credit regulation generally. Even a slight variation in definition of a term from one Act to another potentially creates a need for each regulated entity to consider the compliance outcomes of the variation. Where the variation is for reasons of format rather than substance, we submit it should not occur to avoid this eventuality.
- no definition has been provided (eg for the term: *derived* for CRP derived information) and the term is critical to understanding what is encompassed within the regulated framework.

Further detail for particular definitions and other sections is provided in Attachment 2.

Regulated Information: Credit Scorecards

We note the Government intention that the inclusion of information derived from credit information by credit reporting agencies or credit providers will capture credit scorecards (see *Draft CRP Companion Guide p 8*). Customer rights to access credit scores and credit scorecards was the subject of extensive consideration by the ALRC while conducting its privacy reform reference. In the ALRC Discussion Paper (DP 72) which preceded release of its final Report and recommendations, the ALRC suggested the following:

Proposal 55-3

The proposed Privacy (Credit Reporting Information) Regulations should provide that the information to be given if an individual's application for credit is refused based wholly or partly on credit reporting information should include any credit score or ranking used by the

credit provider, together with explanatory material on scoring systems, to allow individuals to understand how the risk of the credit application was assessed.

Importantly, however, in the final Report, the ALRC noted that important differences between the Australian credit industry's credit scoring system in contrast to practices in the US meant that imposing detailed obligations to provide information to individuals about credit scoring (including scorecards) (as occurs in the US) may not be appropriate or practicable. In particular, Australian credit scoring systems (or scorecards) are relatively more dependent for their predictive power on internal credit provider data, derived from application forms and information about existing customers, as opposed to information from credit reporting agencies. The scorecards vary significantly and are considered commercially sensitive by industry participants.

As a consequence and to balance the underlying objective of providing customers with adequate information to assist them to correct any inaccuracies or false assumptions attributable to credit reporting information, the preferred requirement was a general explanation of the use of credit scoring. As a consequence, the ALRC did not recommend a mandatory provision of information about credit scoring, but suggested instead, *'that the provision of information, including about credit scoring, on refusal of credit is an appropriate subject for Office of the Privacy Commissioner guidance'* (ALRC FYI Report 108 p1989).

The Government response to the ALRC FYI Report 108 did not appear to specifically consider this issue. The basis for the assertion in the Companion Guide appears to stem from the use of the broad term "derived" without definition in the draft CRPs. However, we submit that this assertion lacks merit given the consideration and conclusion reached by the ALRC. We therefore submit that the draft CRPs, in particular the definitions of credit reporting information and credit eligibility information should clearly note that credit scorecard information is not included. We further suggest that the proposed ALRC solution of guidance from the Office of the Australian Information Commissioner is the better approach for both customers and the credit industry.

Regulated Access: Mandatory EDR Membership

By way of context, we note that the ALRC recommended that credit providers should only list overdue payments or repayment performance history where the credit provider is a member of an external dispute resolution (EDR) scheme approved by the Privacy Commissioner. The Government responded, accepting the recommendation, but indicating an intention to extend the EDR membership requirement to **all** credit reporting agencies and credit providers that list **any** information about an individual in a consumer credit report. Of note, the Government recognised the EDR Schemes approved by ASIC (eg under the National Consumer Credit reforms) and indicated that the approval power of the Information Commissioner should have a broad discretion to recognise these for privacy purposes. This is essential for AFC members and others in the industry, which as a credit licensing requirement, have become members of ASIC approved EDR schemes.

The Government's commitment to requiring EDR membership has been included in the draft CRPs (eg s. 132 Disclosure of Credit Reporting Information to a CRA). However, the implementation proposed highlights the broad parameters of the draft CRPs and the current access to consumer information potentially by either consumer or commercial providers of credit.

In short, a financier that operates purely in the commercial market, is currently able to access the consumer component of a commercial customer's file (subject to relevant compliance requirements – eg pre-access obtaining of customer acknowledgments/

consent). The financier does not, however, list any information (eg defaults) on the consumer file, merely wanting access to that information to facilitate a holistic credit assessment of the commercial customer (ie taking into account behaviour/exposure for both consumer and commercial arrangements).

Under the draft CRPs, in particular s. 132, should a commercial financier wish to continue to have disclosed to it by a CRA the consumer component of a file, it would be required to become a member of an approved EDR scheme. This has the significant consequence of opening all aspects of commercial credit transactions provided by a credit provider to consideration of the approved EDR Scheme (subject to its Terms of Reference). We query whether this outcome reflects the Government's intention. Mandatory membership of EDR schemes for providers of small business credit remains a matter of policy consideration under the COAG Phase 2 national credit reforms. The outcome of s. 132 would appear to be at odds with the Government's commitment to that consultative process and commitment to best practice regulation (eg targeted regulation to address an evidence-based market failure or consumer protection risk). As a consequence, we recommend re-drafting of the draft CRPs to restrict mandatory EDR scheme membership to credit providers that list default and repayment performance history information. This would also align with the tiered access of the scheme under the draft CRPs which would restrict a commercial credit provider's access to repayment performance history information because they do not engage in NCC-regulated credit activities and would not be licensed under the National Credit Act.

Compliance Risk: Criminal Offences

We query the need for inclusion of criminal offence provisions in the draft CRPs. The Government accepted the ALRC recommendation (Recommendation 59-9) that credit reporting criminal offences should be removed from the Privacy Act and civil offences were more appropriate for breach of any provisions relating to credit. We recommend the omission of criminal offences to align the draft CRPs with the Government's commitment.

We would be happy to discuss these further or provide additional information. Please feel free to contact me _____ or our Corporate Lawyer, Helen Gordon, _____ or both via _____.

Kind regards.

Yours truly,

Ron Hardaker
Executive Director

Attachments:

1. Definition of Credit Eligibility Information
2. AFC Comments on draft CRPs
3. List of AFC Members

DEFINITION OF CREDIT ELIGIBILITY INFORMATION

The following example, attempts to show the various definitions that a credit provider would need to consider in determining what information falls within the definition of credit eligibility information and is therefore regulated under the draft CRPs. Each defined term has been highlighted and the definition included in the colour used to highlight the defined term when it first appears.

credit eligibility information about an individual means:

- (a) **credit reporting information** about the individual that was disclosed to a **credit provider** by a **credit reporting agency** under Division 2 of Part A; or
- (b) **CP derived information** about the individual.

credit reporting information about an individual means **credit information**, or **CRA derived information**, about the individual.

credit information: see section 181.

CRA derived information about an individual means any **personal information** (other than sensitive information) about the individual:

- (a) that is derived by a **credit reporting agency** from **credit information** about the individual that is **held** by the agency; 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**.

personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable:
(a) whether the information or opinion is true or not; and
(b) whether the information or opinion is recorded in a material form or not.

sensitive information means personal information that is:

- (a) information or an opinion about an individual's:
 - (i) racial or ethnic origin; or
 - (ii) political opinions; or
 - (iii) membership of a political association; or
 - (iv) religious beliefs or affiliations; or
 - (v) philosophical beliefs; or
 - (vi) membership of a professional or trade association; or
 - (vii) membership of a trade union; or
 - (viii) sexual orientation or practices; or
 - (ix) criminal record; or
- (b) health information about an individual; or
- (c) genetic information about an individual that is not otherwise health information; or
- (d) biometric information that is to be used for the purpose of automated biometric verification or biometric identification; or
- (e) biometric templates.

holds: an entity **holds** personal information if the entity has possession or control of a record that contains the personal information.

entity means:

- (a) an agency; or
- (b) an organisation; or
- (c) a small business operator.

record includes:

- (a) a document; or
 - (b) an electronic or other device;
- but does not include:
- (c) a generally available publication; or
 - (d) anything kept in a library, art gallery or museum for the purposes of reference, study or exhibition; or
 - (e) Commonwealth records (within the meaning of the *Archives Act 1983*) that are in the open access period for the purposes of that Act; or
 - (f) records (within the meaning of the *Archives Act 1983*) in the care (within the meaning of that Act) of the National Archives of Australia (the *Archives*) in relation to which:
 - (i) the Archives has entered into arrangements with a 20 person other than a Commonwealth institution (within the meaning of that Act); and
 - (ii) those arrangements provide for the extent to which the 23 Archives or other persons are to have access to those records; or
 - (g) documents placed by or on behalf of a person (other than an agency) in the memorial collection (within the meaning of the *Australian War Memorial Act 1980*); or
 - (h) letters or other articles in the course of transmission by post.

Note: For *document*, see section 25 of the *Acts Interpretation Act 1901*.

credit worthiness of an individual means the individual's:

- (a) eligibility to be provided with consumer credit; or
- (b) history in relation to consumer credit; or
- (c) capacity to repay an amount of credit that relates to consumer credit.

consumer credit means credit:

- (a) for which an application has been made by an individual to a credit provider, or that has been provided to an individual by a credit provider in the course of the provider carrying on a business or undertaking as a credit provider; and
- (b) that is intended to be used wholly or primarily:
 - (i) for personal, family or household purposes; or
 - (ii) to acquire, maintain, renovate or improve residential property for investment purposes; or
 - (iii) to refinance consumer credit that has been provided wholly or primarily to acquire, maintain, renovate or improve residential property for investment purposes.

residential property has the meaning given by section 204 of the ¹ National Credit Code (within the meaning of the *National ² Consumer Credit Protection Act 2009*).

credit provider: see sections 188 to 191.

credit reporting agency means:

- (a) an organisation; or
- (b) a small business operator; or
- (c) an agency prescribed by the regulations; that carries on a credit reporting business.

organisation: see section 17.

credit reporting business: see subsections 194(1) and (4)

agency: see section 16.

CP derived information about an individual means any personal information (other than sensitive information) about the individual:

- (a) that is derived from credit reporting information about the individual that was disclosed to a credit provider by a credit reporting agency under Division 2 of Part A; 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

It should also be noted that in addition to the definitions contained in the draft CRPs, a credit provider would also need to consider other legislation (eg the Commonwealth Acts Interpretation Act 1901; National Consumer Credit Act 2010) to further determine some of the words used in the above definitions.

They will also be required to consider the rules of statutory interpretation to determine what some of the terms may mean (eg derived) where they have not been defined in the draft CRPs or other relevant legislation. We also note that the term *derived* is particularly pertinent to determining the parameters of information regulated as credit eligibility information.



AFC COMMENTS – EXPOSURE DRAFT CREDIT REPORTING

PROVISION	ISSUE	AFC COMMENTS
PART B – OTHER RELEVANT PROVISIONS	DEFINITIONS	
s. 180 + s 194	Credit Reporting Agency + Credit Reporting Business	<p>We understand that it is the Government’s intention to extend coverage of the credit reporting provisions to a wider range of entities that they regard as being credit reporting agencies (CRAs) (eg Rec 54-4). The dominant purpose test is intended to be removed so that any business that engages in credit reporting regardless of whether it is a large or small component should be regulated under the draft CRPs as a CRA.</p> <p>The definition of CRA is based on the definition of credit reporting business. However, we suggest that the definition of a credit reporting business (and consequently definition of a CRA) may be unintentionally broader than the Government’s policy.</p> <p>For example, a current common industry practice for credit providers who are looking to offer credit is the exchanging of credit references with other credit providers. A normal component of this involves disclosing (with consent) personal information of a customer (existing or past) for the purpose of providing another entity with information about the individual’s history in relation to consumer credit (ie s. 180 defined credit worthiness of an individual). We understand that this practice is intended to be allowed to continue. As a consequence, as currently drafted any AFC credit provider member may meet the definition of a credit reporting business if it were to continue this practice. It would also likely meet the definition of an organisation (s. 17) and consequently be caught within the definition of a CRA (s. 180). We query whether this was intended. The inclusion of s. 194(3) adds a further aspect to our concern. We understand the intention was positive; namely, to ensure information sharing between related entities could continue without them being regarded as a CRA. However, it also potentially has the negative outcome of effectively indicating that a credit provider can fall within s. 194(1) without doing more than conducting its business of credit provision and consequently would be a CRA. We understand this was not the Government’s intended outcome.</p> <p>We note the regulation-making power to exempt businesses or undertakings from the definition. However, we suggest that, as it was not intended, it would be preferable to ensure the practice of a credit provider engaging in credit reference exchanges with another credit provider does not constitute a credit reporting business or undertaking and consequently will not meet the definition of a CRA.</p> <p><u>AFC Comment:</u></p> <ul style="list-style-type: none"> • We suggest narrowing of the definition of credit reporting

PROVISION	ISSUE	AFC COMMENTS
		<p>business to ensure the practice of credit reference exchanges between credit providers does not unintentionally result in them meeting the definition of a CRA.</p>
s. 193	<p>Credit Amount interest + of</p>	<p>We note that there is variation between the draft CRP definition of credit and the term as defined in other relevant laws relating to consumer credit (eg National Credit Act -NCC; ASIC Act). For example,</p> <p>Example 1: Credit Draft CRP s. 193(1)(b) one person incurs a debt to another person and defers the payment of the debt. vs. NCC s. 3(1); ASIC Reg 2B(3)(a)(ii) one person incurs a deferred debt to another person.</p> <p>Example 2: Amount of Credit Draft CRP s. 193(2) amount of credit does not exclude interest charges NCC s. 3(1) interest charges are specifically excluded.</p> <p>Even slight variation in definition of term from one Act to another potentially creates a need for each regulated entity to consider the compliance outcomes of the variation. Where the variation is for reasons of format rather than substance and it would appear the terms were intended to have the same meaning or they should have the same meaning, to assist understanding and streamline compliance with consumer credit regulation generally, we suggest the same definition should be used.</p> <p>We also suggest that, the wording of the list of effectively deemed inclusions in the concept of credit as contained in s. 193(3) align with ASIC Reg 2B(3)(b), in particular, the omission of the qualifying words “of a kind referred to in that subsection that is” so that it refers to “a contract, arrangement or understanding for the hire, lease or rental of goods etc”.. This modernises the approach in the current Privacy Act definition and removes the linkage to debt deferral, a concept which would not appear to be relevant in the context of leasing/hire-purchase.</p> <p>AFC Comment:</p> <ul style="list-style-type: none"> We suggest, where possible and relevant, the same definition of credit (and any other relevant definition) be used in all consumer credit regulation, including the draft CRPs.
s. 180	<p>Consumer Credit Residential Property +</p>	<p>We reiterate our above comments in relation to the definition of credit and the need for uniform definitions across relevant consumer credit laws, including the draft CRPs.</p> <p>In particular, we suggest that, like the NCC, the intention should be the purpose for which the credit was provided/intended to be provided, not used/proposed to be used.</p> <p>We also note that under the NCC there has been a recent carve-out for credit for residential property investment where more than one dwelling is involved and the amount of credit exceeds \$5m (NCC Reg 65C) and query</p>

PROVISION	ISSUE	AFC COMMENTS
		<p>whether it is necessary for, and if so, intended that a similar carve-out be included in the draft CRPs. The end result, as we understand, would be that these transactions would be commercial credit, and the application of the draft CRP framework would be different than if they were treated as consumer credit transactions.</p> <p><u>AFC Comment:</u></p> <ul style="list-style-type: none"> We suggest, where possible and relevant, the same definitions be used in all consumer credit regulation, including the draft CRPs.
s. 181 + s. 180	Credit Information	<p>The definition of credit information (s. 181) is based on a number of terms defined in other sections of the draft CRPs. We have identified areas of operational concern with some of these other definitions that consequently affect the s. 181 definition.</p> <p><u>Identification Information Definition (s. 180)</u> As we understand, the Government policy (Rec 56-1) is to support the ALRC’s list of included information categories and these definitions are to implement that.</p> <p>We also note the interpretation of words will occur in the context of the Cwlth Acts Interpretation Act, and that words in the single number include the plural (s. 23). However, we note that the ALRC/Government has supported inclusion of any known <i>aliases</i> – and suggest that in this particular instance it may be appropriate to reflect in the s. 180 definition of identification information (b) that more than one alias/previous name is permissible.</p> <p><u>AFC Comment:</u></p> <ul style="list-style-type: none"> We suggest, in the interests of clarity and to assist understanding, that the plural be used in relation to alias and previous names in para (b) of the definition of identification information. <p><u>Consumer Credit Liability Information (s. 180)</u> (b) We understand that the access regime in relation to repayment history information requires CRAs to be aware whether a CP is a licensee or not. However, it is not clear why a provider would need to identify that they are a licensee as part of providing consumer credit liability information more generally. (d) & (g) We suggest the word date should be used rather than day (also where occurs in other provisions eg s. 185 Meaning of Payment Information; s. 187 Meaning of Repayment History Information). (e) Not clear what terms/conditions relating to repayment are intended to be covered her. Presume it is account features or attributes (eg fixed or revolving; P&I or Interest only; secured or unsecured). (g) We suggest that it would be preferable if it were clearly specified that the termination/cessation is linked to the cessation of the contract, arrangement or understanding under which consumer credit was provided in preference to just using the defined term consumer credit.</p> <p><u>Repayment History Information (s. 187)</u> See later comments in relation to s. 187 meaning of repayment history information.</p>

PROVISION	ISSUE	AFC COMMENTS
		<p><u>Statement of an Information Request (s. 183)</u> See later comments in relation to s. 183 meaning of information request.</p> <p><u>Default Information (s. 182)</u> See later comments in relation to s. 192 meaning of default information – guarantors.</p> <p><u>Payment Information (s. 185)</u> See later comments in relation to s. 185 meaning of payment information.</p> <p><u>Court Proceedings Information (s. 180)+ Publicly Available Information</u> We note amendments in the ACT (enacted by the ACT Crimes (Sentence Administration) Amendment Act 2010, that currently require CRA to include information on an individual’s credit file as part of the enforcement of court-imposed fines and suggest some reworking of these components of the definition may be required.</p>
s. 180	Credit reporting information + CRA derived information + CP derived information	<p>This term also builds on the definition of credit information so we reiterate the concerns identified above.</p> <p>However, it also introduces the concept of CRA derived information. This is also a concept use in relation to CPs – CP derived information. Again, while appreciating that the rules of statutory interpretation will assist understanding what is encompassed by these terms, we suggest that like the concepts of holds and collects it may be useful to define the term derived in the draft CRPs s. 180.</p> <p>We note our general comments in relation to the apparent intention that the term derived is intended to capture scorecard information and recommend for the reasons given a specific exemption be included.</p> <p>Further, we note that these terms are pivotal to the operation of the mechanics or regulatory framework under the draft CRPs, and consequently the importance of regulated entities having a clear understanding of what is encompassed. We are concerned that the current drafts may not achieve this. On our reading, for example, it would appear that should a credit provider collect information from a CRA, the collected information will effectively taint all information it handles in relation to the individual (ie become credit eligibility information) and be subject to the more specific CRP regulation rather than the APPs. The CP would either need an extremely sophisticated record management system that is able to flag and quarantine the CRA-collected information to minimise this compliance requirement or adopt a compliance framework that treats all information relating to that individual as if it were CRP-regulated information and applies the higher compliance requirements.</p> <p>We submit that a preferable approach may be to re-introduce the concept of a consumer credit information file (similar to Part IIIA) and the handling regulation reflects the entity which has control of the file.</p>
s. 182	Default information -	We suggest that, in line with the definition of consumer credit and the parameters of the term person when interpreted in line with the Cwlth

PROVISION	ISSUE	AFC COMMENTS
	Guarantor	Acts Interpretation Act (eg to also cover corporate entities) – that, as only an individual is likely to be involved with consumer credit as a borrower, instead of the term person, another term is used in this definition (eg any default by another individual (the borrower)).
s. 183	Meaning of Information Request	We suggest the terminology used in this section reflect the handling practices regulated under the draft CRPs and the APPs. For example, replacement of “if the provider has sought information” with, “if the provider has requested a CRA to disclose information”.
s. 187	Meaning of repayment history information	<p>We note that while the section refers to monthly payments that a regulation-making power has also been provided. This should facilitate the making of regulations to achieve standardisation of what constitutes a missed payment and the repayment cycle period.</p> <p>We also note the Government’s commitment to the historic aspect of the data (eg going back over a 24 month period) and note the omission of this component in the relevant draft definitions. We have assumed that this detail will be covered in the regulations to be developed. We also note the transitional / consequential provisions that will be required to ensure historic data can be disclosed / collected on commencement of the provisions to give this component value from the outset.</p> <p>As noted earlier (eg with the definition of consumer credit liability information para (d)(g)), we suggest that where a date is able to be identified (eg s. 187(1)(b)), that the section refer to date in preference to day.</p>
s. 188	Credit Provider	<p>We note that the Government’s intention (Rec 54-4) is to ensure as a minimum status quo with the classes of entities that currently meet the definition of credit provider and therefore potentially can access credit reporting regime.</p> <p>We note that consideration of the definition and whether it has achieved this outcome is made complex by new definitions of credit, consumer credit and commercial credit.</p>
s. 192	Access seeker	<p>We note Government’s intention (Rec 59-3) with this definition is to continue restricting third party access similar to the restrictions currently contained in PA s. 18H(3), but that it is not intended to place onerous restrictions on third parties who are assisting individuals to access CRA credit reporting information or CP credit eligibility information (like the National Relay Service (NRS) for hearing impaired customers unable to type).</p> <p>However, we are concerned that, in contrast to the Government’s intention the use of the words “assisting the individual to deal with” makes it difficult for the definition to be confined to third parties exercising rights of access on the individual’s behalf (which reflects the aim of s. 18H(3)) and may also encompass third parties assisting the individual to exercise</p>

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		<p>those rights themselves (like the National Relay Service or a translator service).</p> <p>AFC Comment</p> <ul style="list-style-type: none"> We suggest revision of the words “<i>assisting the individual to deal with</i>”.
PART A - DIVISION 1	INTRO & APPLICATION	
s. 100 + 101	Application / Nexus	<p>We note the intention to limit the application of the draft CRPs to credit with an Australian-link. We understand this is intended to reflect the Government’s response in relation to foreign credit and foreign credit providers (eg Rec 54-5).</p> <p>However, we note difficulties of interpretation that may arise with Australian-residents temporarily overseas that apply for credit. If the application is mailed from overseas, would it be regarded as having been applied for in Australia? A better approach may to expand the provision to cover an application that is made or received in Australia.</p>
PART A – DIVISION 2	CREDIT REPORTING AGENCIES	
Relevant to various provisions in Div 2	Use of word agency as the short-form reference to a Credit Reporting Agency	<p>In many of the provisions in Division 2, the word “agency” has been used as the short-form reference to a Credit Reporting Agency (CRA). However, we also note the intention (see s. 180) to define the term agency (in s. 16) to cover government sector entities and to use the term agency throughout other provisions in the reformed Act. We also note the further complication that the Government’s policy (Rec 54-4) is that government sector entities that carry on a credit reporting business should be regulated as a credit reporting agency.</p> <p>AFC Comment:</p> <ul style="list-style-type: none"> To assist understanding and minimise potential for confusion, we suggest a word or term other than agency should be adopted as the short-form reference to a CRA in Division 2.
s. 105(4)	Privacy Policy Contents	<p>We understand that a key objective of the reform is to set high level principles that enable entities to structure compliance appropriately.</p> <p>As noted in our comments on the APPs provided to the Senate Committee, the prescriptive approach of mandating the contents for inclusion in a Privacy Policy set out in draft CRP s. 105(4) would appear to be at odds with this objective.</p> <p>At present, details of contents of Privacy Policies have been dealt with as a matter of Guidance by the Privacy Commissioner rather than prescribed in the relevant principle. We submit that this is the better approach to achieve the reform objectives.</p> <p>AFC Recommendation:</p> <ul style="list-style-type: none"> Omit s. 105(4) from s. 105 and leave guidance on content of

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		<p>Privacy Policies as a matter for the Australian Information Commissioner (the regulator).</p>
s. 106	Collection of Solicited Information	<p><u>Permitted Collection – Authorised or required by or under Australian Law s. 106(2)</u> We note the global context in which many of our Members operate and query the basis on which this permission has been restricted to Australian law. We have raised a similar issue in our response to the Senate Committee in relation to the APPs.</p> <p><u>Permitted Collection – Individual Over 18 and Information Covers Matter that Existed or Occurred before the individual turned 18 s. 106(4)(c)(d)</u> We submit that s. 106(4)(d) should, like s. 106(4)(c) be qualified by some test of knowledge/reasonableness in relation to the period that the information relates. For example (4)(c) and (d) might be reworded: <i>(c) the agency knows, or believes on reasonable grounds that:</i> <i>(i) the individual is at least 18 years old; and</i> <i>(ii) the information does not relate to an act, etc, that occurred or existed before the individual turned 18; and</i></p>
Inter-relationship of s. 109(1) Table Item 1 & s. 136 Table Item 1	Permitted CRA disclosures Item 1 – Consumer credit related purpose + Permitted use of credit reporting information	<p>We understand that the intention of these two sections is to permit a CP to request disclosure or a CRA to disclose credit reporting information to a CP for internal management purposes of the CP that are directly related to the provision or management of consumer credit by the CP. However, the disclosure by the CRA is on the basis of assessing an application for consumer credit – as covered by the first limb of the definition of consumer credit related purpose. We are concerned that these two components do not align given the first, namely the management of account, could occur at any time including after an application has been assessed and before the consumer credit is terminated yet the permitted disclosure arguably is limited to the initial assessment process. We appreciate that this may reflect a similar anomaly in the current PA credit reporting provisions and suggest that the revision may provide an appropriate opportunity to resolve this anomaly.</p>
s. 110 - 112	Permitted use - pre-screening	<p>As a matter of policy we commend the Government’s inclusion of provisions to facilitate the use / disclosure of credit reporting information for the sole purpose of excluding adverse credit risks from marketing lists. The formal acknowledgement of this process should provide compliance comfort. The ability to utilise the process will continue to enhance the responsible lending practices of our Members.</p>
Subdivision E – Integrity	Offences	<p><u>Offence (s. 117)</u> We had understood that the Government intended that criminal offence provisions be removed in preference to civil penalty provisions. We query therefore the inclusion of, for example, the offences in s. 117 (1).</p>

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PART A – DIVISION 3	CREDIT PROVIDERS	
s. 130	Application of CRPs + APPs	<p><u>CP Derived Information</u> We note out earlier comments in relation to the concept of derived in relation to this section and others within Division 3 where it has been used.</p> <p><u>Interaction between draft CRPs & APPs</u> We note the intention to clarify the Government’s intention as set out in Rec 54-2, that credit providers may have an obligation to comply with the CRPs and/or the APPs in relation to credit information and credit eligibility information.</p> <p>We suggest that an additional paragraph be considered for inclusion in this section to also reflect the Government’s intention (in Rec 54-2), that if there is inconsistency between the draft CRPs and the APPs, that a credit provider should comply with the more specific or different standards in the draft CRP provision.</p>
s. 131	Additional Notification	<p>We note the challenge for credit providers that this additional obligation will bring.</p> <p>To achieve the Government policy while minimising compliance risk, we suggest that some test of reasonableness should be considered in relation to the notification required in this provision. For example, (b) take reasonable steps to otherwise ensure that the individual is aware of those matters.</p> <p>We also assume that incorporation by reference (eg through hyperlink to relevant parts of a credit provider website) would meet this requirement.</p> <p>We query whether a better approach may be to continue the current practice of requiring a customer to be informed at or before time of collection on a generic basis of information exchanges between the credit provider and credit reporting agencies, but then requiring the more specific detail to be provided at a later (more relevant point) [eg query about accuracy of data following access request].</p>
s. 132	Disclosure of credit information to a CRA	<p><u>Membership of an Approved EDR Scheme (s. 132(2)(a))</u> As noted in our general comments, we query whether this provision reflects the Government’s intention (Rec 59-7). In our view, it may be far broader unless an additional provision be included to the effect that the approved EDR scheme oversight is restricted to consideration of complaints relating only to regulated-credit reporting matters. Otherwise, this provision has, in our view the unintended and significant consequence of opening all aspects of commercial credit transactions provided by a credit provider to consideration of the approved EDR Scheme (subject to its Terms of Reference) that it becomes a Member in order to enable it to continue to access consumer credit information about an individual in relation to possibly only some of those transaction (eg for guarantee related purposes). Membership of EDR for providers of small business credit remains a matter of policy consideration under the COAG Phase 2</p>

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		<p>national credit reforms. The outcome of s. 132(2)(a) would appear to be at odds with the Government’s commitment to that consultative process and commitment to best practice regulation (eg targeted regulation to address and evidence-based market failure or consumer protection risk).</p> <p><u>Individual Over 18 and Information Covers Matter that Existed or Occurred before the individual turned 18 s. 132(2)(b)(c)</u> We submit that s. 132(2)(c) should, like s. 132(2)(b), be qualified by some test of knowledge/reasonableness in relation to the period that the information relates. For example (2)(b) and (c) might be reworded: <i>(c) the provider knows, or believes on reasonable grounds that:</i> <i>(i) the individual is at least 18 years old; and</i> <i>(ii) the credit information does not relate to an act, etc, that occurred or existed before the individual turned 18; and</i></p> <p><u>Repayment History Information (s. 132(2)(d)(iii)</u> We suggest that some reference to compliance with the Credit Reporting Code may also be required in this sub-paragraph.</p>
s. 133 + s. 185	Disclosure of Payment Information	We query the application of s. 133 (taking into account the definition in s. 185) should a part-payment only of the amount listed as in default be paid by the individual.
Subdivision C – Dealing with Credit Eligibility Information		As noted earlier, the uncertainty created by the use of the term derived (eg CP derived information) in the definition of credit eligibility information raises difficulty in determining the potential operation and consequent issues with the sections in Division 3 Subdivision C of the draft CRPs.
s. 135 (3) + s. 135(4) + s. 187	Permitted disclosure of repayment history information between CPs	We are concerned that the inter-relationship of these provisions and potential broad interpretation of repayment history information may result in a consequence (which in our view is unintended) of limiting the information that may be exchanged between credit providers under current credit reference exchanges. We suggest that this may be avoided if the repayment history information reference in s. 135(4) is limited to CRA derived information.
Subdivision D – Integrity	Offences	<p><u>Offence (s. 144)</u> We had understood that the Government intended that criminal offence provisions be removed in preference to civil penalty provisions. We query therefore the inclusion of, for example, the offences in s. 144 (1)(2).</p>
Complaint Handling – dispute resolution	Various Provisions	<p>We note the inclusion of provisions relevant to complaint handling. We also understand that it is intended that complaint handling be dealt with in further detail in the industry-developed Credit Reporting Code.</p> <p>We recommend that the draft CRPs (and Code) should deal with this issue on a high-level only, rather than dictate time-frames, methods of contact, and other specific detail. AFC members and others in the credit industry are highly regulated in relation to complaint handling (eg for credit licensees – compliance is largely dictated by the ASIC Regulatory Guides – RG 165 and RG 139). We understand regulated entities from other sectors</p>

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		(eg the telecommunications sector) equally have current complaint handling obligations.

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AFC MEMBER COMPANIES

Advantagedge Financial Services	Nissan Financial Services
Advance Business Finance	Once Australia t/as My Buy
Alleasing	PACCAR Financial
American Express	Provident Capital
Automotive Financial Services	Profinance
Bank of Queensland	RABO Equipment Finance
BMW Australia Finance	RAC Finance
Branded Financial Services	RACV Finance
Capital Finance Australia	Resimac Limited
Caterpillar Financial Australia	Retail Ease
Centrepoint Alliance	Ricoh Finance
Citi Australia	RR Australia
CNH Capital	Service Finance Corporation
Collection House	Sharp Finance
Commonwealth Bank of Australia	SME Commercial Finance
Credit Corp Group	Solar Financial Solutions
De Lage Landen	St. George Bank
Dun & Bradstreet	Suncorp
Esanda	Suttons Motors Finance
FlexiGroup	The Leasing Centre
Ford Credit	Toyota Financial Services
GE Capital	United Financial Services
Genworth Financial	Veda Advantage
GMAC	Volkswagen Financial Services
HP Financial Services	Volvo Finance
HSBC Bank	Westlawn Finance
Indigenous Business Australia	Westpac
Institute of Mercantile Agents	Wide Bay Australia
International Acceptance	Yamaha Finance
John Deere Credit	ZoomLion Finance & Leasing
Kawasaki Finance	
Key Equipment Finance	
Komatsu Corporate Finance	<u>Professional Associate Members:</u>
Leasewise Australia	Allens Arthur Robinson
Liberty Financial	CHP Consulting
Lombard Finance	Clayton Utz
Macquarie Equipment Rentals	Dibbs Barker
Macquarie Leasing	EDX Australia
Max Recovery Australia	Henry Davis York
Members Equity Bank	
Mercedes-Benz Financial Services	