SENATE FINANCE AND PUBLIC ADMINISTRATION

LEGISLATION COMMITTEE

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

SUPPLEMENTARY SUBMISSION

Submission Number: **2a**

Submitter Details: **National Australia Bank**

National Australia Bank

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

Via email: fpa.sen@aph.gov.au

Dear Ms McDonald

Exposure Draft of Australian Privacy Amendment Legislation – Credit Reporting

The following submission is made on behalf of National Australia Bank Limited (NAB) in response to the Exposure Draft provisions relating to credit reporting amendments to the Privacy Act 1988.

NAB welcomes the opportunity to contribute to this submission with feedback on the Credit Reporting Exposure Draft. NAB is supportive of the creation of comprehensive credit reporting and is committed to finding practical positions that will balance consumer, business and public policy goals.

Yours sincerely

David Fodor
Chief Credit Officer – Personal Banking

Barbara Robertson
Chief Privacy Officer & Head of Notices

Introduction

NAB is supportive of the creation of more comprehensive credit reporting through the inclusion of the five new data elements as it will benefit both consumers and industry. Comprehensive credit reporting will enhance transparency resulting in improved credit decision making (responsible lending), will result in improved risk ratings and credit management and will assist in verifying a consumer's financial position.

NAB has had the opportunity to review the submission from the Australasian Retail Credit Association (ARCA), of which we are a member. NAB agrees and supports ARCA's submission.

General Comments

Following review of the Credit Reporting Exposure Draft, NAB is concerned that the provisions could be overly prescriptive and complex in detailing how some data will be regulated relative to other data. While acknowledging that credit reporting may require some unique treatment beyond the proposed Australian Privacy Principles, the level of prescription particularly in regards to operational matters should be reduced. By including more by way of principles to drive outcomes, adequate controls can be implemented with a greatly reduced risk of creating 'practicality' issues from prescribing how those outcomes are to be achieved.

The current level of emphasis on how outcomes are achieved runs a high risk of the Act becoming quickly outdated, hampering innovation, and not being sufficiently flexible to deal with unforeseen situations.

NAB has reviewed the Credit Reporting Exposure Draft and provides the below feedback noting that this feedback may change once the below mentioned additional components of the framework are available for review:

- the Regulations;
- the Credit Reporting Code of Conduct;
- Stage 4 legislation covering the powers and functions of the Australian Information Commissioner; and
- any transitional provisions.

NAB would welcome the opportunity to revisit our feedback or to raise any additional issues with the Credit Reporting Exposure Draft following the release of these additional components.

Key Concerns

NAB has identified a number of key concerns with the Credit Reporting Exposure Draft ("the ED") along with other concerns with the drafting of the provisions. NAB acknowledges the need to strike an appropriate balance between privacy protection, benefits to the public from more responsible lending and commercial practicality and provides the below feedback and recommendations within that context.

1. Complaint Handling

NAB acknowledges that an effective complaint handling process is critical to the overall success of the credit reporting system for both consumers and those that use credit reporting information.

Australian Standard (AS) ISO 10002-2006 is widely recognised as the best practice for managing consumer complaints and is widely applied across sectors and scalable to suit a range of organisations. NAB has existing processes in place to ensure compliance with AS ISO 10002-2006 and ASIC Regulatory Guide 165 – Licensing: Internal and external dispute resolution ("RG165"). RG165 includes specific timelines and procedures that apply to the handling of consumer complaints.

There are several areas of concern with the ED provisions relating to complaint handling including:

a) The requirement to respond to complaints within timeframes that differ to existing industry standards.
b) The requirement to manage complaints in a specific manner that removes the flexibility required to ensure that processes can be adapted as technological advancement occur e.g. requiring *written* responses to be issued.
c) The requirement that the first party contacted with a complaint must undertake to notify 'everyone' who has received the incorrect information, collate the necessary information to respond to the complaint and then respond on behalf of all relevant parties.
d) Inconsistent obligations on credit reporting agencies versus credit providers (s159).
e) The ED does not specify whether the stated timeframes are business days or calendar days.

S158 of the ED states that the respondent for the complaint must within 7 days give the individual written notice that acknowledges the complaint and sets out how the respondent will deal with the complaint (refer (b) above). A reasonable number of complaints are actually resolved within 48 hours therefore a written acknowledgement letter would be unnecessary and potentially irritating for the consumer. In this instance, any notification requirement should be dependant on whether a complaint has already been resolved, and should remain technology neutral to ensure that the most appropriate method is used e.g. telephone (verbal) update, SMS, email etc, with an appropriate formal record / file note retained.

The ED requirement mentioned in the (c) above appears to be a simple requirement however the first point of contact may not always be best placed to manage a complaint. It may be necessary to refer a consumer to the most appropriate respondent. In addition, the level of prescription proposed in the ED in relation to how operational processes must work, rather than focusing on the outcome that it seeks to deliver, will result in a complex process.

To illustrate, a consumer may complain to a credit provider who is not responsible for the credit reporting information that is in dispute. Operational complexities would make it difficult for the first point of contact to effectively manage the complaint and this would adversely impact the consumer. In such circumstances, and consistent with the ALRC recommendations and the Government's response, NAB suggests that industry should take responsibility for an effective referral process to ensure the complaint is acknowledged, managed and resolved by the relevant supplier of the disputed credit reporting information, rather than by the first point of contact (where these are different parties). The prescribed timeframe for providing the consumer with a determination should not start until the relevant party has received the complaint.

NAB recommends that the ED requirements for dealing with complaints are reviewed to ensure they compliment other regulatory and best practice requirements currently imposed on industry. Existing External Dispute Resolution (EDR) schemes including the Financial Ombudsman Service (FOS) and the Telecommunications Industry Ombudsman (TIO), should also be consulted to ensure that a simple, effective and consistent complaint handling process is implemented as part of these reforms.

2. Complexity & number of definitions

There are a large number of definitions in the ED which are contained at the end of the document. In some instances, the definitions build on a number of other definitions e.g. credit eligibility information, which leads to unnecessary complications and duplication and makes comprehension difficult. The ED also relies on definitions contained in other legislation, and in other instances does not contain key definitions e.g. credit manager.

It would be easier to read the Credit Reporting Exposure Draft if all definitions were relocated to a single dictionary or for those more specific definitions applicable to credit reporting agencies and credit providers, to relocate them to the relevant divisions to which they primarily relate.

NAB also recommends that the definitions be reviewed in consultation with industry to ensure they reflect the intentions of government.

3. Regulation of de-identified information

NAB is concerned with the provision relating to de-identified credit reporting information in s115.
De-identified credit reporting information is not currently regulated through the Privacy Act, and the ALRC Report 108 'For Your Information: Australian Privacy Law and Practice' did not contain a recommendation to regulate this information. In addition to this, the Government response to the ALRC Report did not require the regulation of de-identified information.

De-identified credit reporting information is not personal information and therefore should not be subject to regulation as part of the ED. A restriction on de-identified information would place an enormous restriction on the research and development of innovative, new risk assessment tools, as any use of such data to develop these new tools would need to be approved in advance by the regulator on the basis of the research being in the public good – a challenge to build the case *before* the analysis is actually undertaken.

Consequently, the inclusion of provisions that would place new, complex obligations that would incur significant administrative costs on Credit Reporting Agencies for no discernable consumer benefit should be reviewed. The ability of credit reporting agencies to maximise the effectiveness of de-identified data benefits not only credit providers through better and more effective service but also consumers through product innovation, and better and more targeted risk assessment to promote responsible lending.

NAB therefore recommends that the regulation of de-identified information (s115) be removed from the ED.

Additional Issues

NAB has also identified a range of concerns with the drafting of the provisions which are noted below.

PART A – CREDIT REPORTING		
Division 1 – Introduction & application of this Part		
ED Ref	**Heading/s**	**Comments**
	S100 Guide to this Part S101 Credit to which this Part applies	
Division 2 – Credit reporting agencies		
ED Ref	**Heading/s**	**Comments**
Subdivision A	*Introduction and application of this Division* S102 Guide to this Division S103 Application of this Division to CRA S104 Application of the APPs to CRAs	S103(3) covers CP derived information held by a CRA however it is unclear why a CRA would hold CP derived information.
Subdivision B	*Consideration of information privacy* S105 Open & transparent management of CRI	S105(4) appears to allow each CRA to have their own data standard. This would be impractical from a credit reporting system perspective and add enormous cost for all users.
Subdivision C	*Collection of credit information* S106 Collection of solicited credit info S107 Dealing with unsolicited credit information	S106 appears to attach a limitation on the collection of identification information which may impact on a CRAs ability to conduct identity verification services. Suggest an exception be included for these purposes.
Subdivision D	*Dealing with CRI etc* S108 Use or disclosure of CRI S109 Permitted CRA disclosures in relation to individuals S110 Use or disclosure of CRI for the purposes of direct marketing S111 Use or disclosure of pre-screening determination S112 Destruction of pre-screening determinations S113 No use or disclosure of credit reporting information during a ban period S114 Adoption of government related identifiers S115 Use or disclosure of de-identified information	S113 prevents a CRA from using or disclosing credit reporting information during a ban period however the ED does not include notification requirements so that a CP is advised that a ban period is in place. S115 refer comments in 3 above.

Division 2 – Credit reporting agencies *(continued)*		
ED Ref	**Heading/s**	**Comments**
Subdivision E	*Integrity of CRI* S116 Quality of CRI S117 False or misleading CRI S118 Security of CRI	Reciprocity is the foundation for ensuring accurate, up to date, complete and relevant credit reporting information. To ensure compliance with the integrity obligations, reciprocity needs to be a key feature of compliance with the credit reporting system, rather than a commercial or business decision taken on a case by case basis. The inclusion of the principle of reciprocity in a binding, mandatory Credit Reporting Code of Conduct is key to ensuring compliance with this obligation. It is also expected that the Information Commissioner will monitor compliance with the Credit Reporting Code of Conduct. S117 We support the reference within s117 & s144 to "a material particular" requirement in reference to any claim of credit reporting information being false or misleading. However we further suggest a threshold assessment be articulated in relation to this concept.
Subdivision F	*Access to, and correction of, information* S119 Access to CRI s120 Correction of CRI S121 Individual may request the correction of credit information etc S122 Notice of correction etc must be given	S119 appears to reduce an individuals access rights. Currently an individual can pay to get a copy of their report within 24 hours however s119(3) provides that a CRA "must respond to the request within a reasonable period, but not longer than 10 days, after the request is made." S120 - Where a CRA corrects personal information & the correction relates to information previously disclosed to other parties, they are required to give each recipient of the information written notice of the correction *unless it is impracticable for them to give the notice*. This carve out appears to be in conflict with subdivision E obligations (integrity of information). S121 allows an individual to request the correction of credit information in the event that personal information is inaccurate, out of date, incomplete or irrelevant. S122 outlines notification requirements attached to this correction. NAB believes that a correction request from an individual is likely to be in the form of a complaint and suggests that the obligation and processes associated with a correction request *from an individual* be managed via the complaints process (Division 5) to avoid a scenario where we end up with 2 different correction obligations.
Subdivision G	*Dealing with CRI after the retention period ends etc* S123 Destruction etc of CRI after the retention period ends S124 Retention period for credit information - general S125 Retention period for credit information – personal insolvency information S126 Destruction of CRI in cases of fraud S127 Dealing with information if there is a pending correction request etc S128 Dealing with information if an Australian law etc. requires it to be retained	S126 provides that a CRA only has to notify a recipient that they have destroyed credit reporting information about an individual in cases of fraud if the individual requests the CRA to. The obligation should be on the CRA to automatically notify recipients. S127 provides that a CRA must not destroy credit reporting information if immediately before the retention period ends there is a pending correction request in relation to the information. We are unsure of the purpose of holding off on the destruction of information so that it can be corrected and then immediately destroyed.

Division 3 – Credit providers		
ED Ref	**Heading/s**	**Comments**
Subdivision A	*Introduction and application of this Division* S129 Guide to this Division S130 Application of this Division to CPs	
Subdivision B	*Dealing with credit information* S131 Additional notification requirements for the collection of personal information S132 Disclosure of credit information to a CRA S133 Payment information must be disclosed to a CRA S134 Limitation on the disclosure of credit information during a ban period	S131 heading contains the word 'additional' however the ED does not contain provisions on "standard" notification requirements to which this section links. Suggest 'additional' be removed from the heading. ALRC Rec 56-10 included a reasonableness test in relation to when a CP must provide notification however this has not been included in the ED. A reasonableness test is required for phone applications to ensure that full notification disclosure can be provided as reasonably practical after the verbal application is received. S134 (2) requires that a CP not disclose credit information to a CRA during a ban period however the s113 does not require a CRA to notify a CP when a ban period is in place. How will a CP know that a ban period is in place?
Subdivision C	*Dealing with credit eligibility information etc* S135 Use or disclosure of credit eligibility information S136 Permitted CP uses in relation to individuals S137 Permitted CP disclosures between CPs S138 Permitted CP disclosures relating to guarantees etc S139 Permitted CP disclosures to mortgage insurers S140 Permitted CP disclosures to debt collectors S141 Permitted CP disclosures to other recipients S142 Notification of a refusal of an application for consumer credit	S136 (5) Column 2 states 'the purpose of assisting the individual to avoid defaulting on his or her obligations....." – suggest this be amended to 'the purpose of assisting the individual to avoid defaulting *or continue defaulting* on his or her obligations....." S140 is unclear on what information can and can't be provided to or obtained by debt collectors. The use of information for account management and debt collection purposes should be made clearer and simpler.

Division 3 – Credit providers *(continued)*		
ED Ref	**Heading/s**	**Comments**
Subdivision D	*Integrity of credit information & credit eligibility information* S143 Quality of credit eligibility information S144 False or misleading credit information or credit information S145 Security of credit eligibility information	Reciprocity is the foundation for ensuring accurate, up to date, complete and relevant credit reporting information. Credit reporting information must be shared on the principle that CPs should contribute all of their chosen level of data (negative, full or partial) to receive all data at the same level in return. Reciprocity is required to encourage users of credit reporting to provide their data, which in turn will ensure the most holistic picture of a consumer's credit profile possible. This profile will ensure more responsible lending decisions are made by users of the credit reporting system. The most effective way of ensuring data is accurate, up to date, complete and relevant is to ensure reciprocity is a key feature of compliance with the credit reporting system, rather than a commercial or business decision taken on a case by case basis.
Subdivision E	*Access to, and correction of, information* S146 Access to credit eligibility information S147 Correction of credit information S148 Correction of credit eligibility information S149 Individual may request the correction of credit information etc S150 Notice of correction etc must be given	S146 Access to credit eligibility information could capture commercially sensitive information such as credit policies and credit scoring details. Suggest that access to credit eligibility information should exclude commercially sensitive information. S49 allows an individual to request the correction of credit information in the event that personal information is inaccurate, out of date, incomplete or irrelevant. S150 outlines notification requirements attached to this correction. NAB believes that a correction request from an individual is likely to be in the form of a complaint and suggests that the obligation and processes associated with a correction request *from an individual* be managed via the complaints process (in Division 5) to avoid a scenario where we end up with 2 different correction obligations.
	S151 Guide to this Division S152 Use or disclosure of information by mortgage insurers & trade insurers S153 Use or disclosure of information by a related body corporate S154 Use or disclosure of information by credit managers S155 Use of disclosure of information by advisers etc	'Credit Manager' is not defined therefore we are unable to determine the potential impacts of this section.
Division 5 – Complaints		
ED Ref	**Heading/s**	**Comments**
	S156 Guide to this Division S157 Individual may complain to a credit reporting agency or credit provider S158 Dealing with complaints S159 Notification requirements relating to certain complaints	S159(2) requires a CRA to deal with a CP in relation to a complaint where the complaint relates to information that a CP holds. S159(3) requires a CP to deal with either a CRA or another CP in relation to a complaint where the complaint relates to information that a CRA or CP holds. Suggest that these obligations should be consistent for both CRAs and CPs i.e. a CRA should have to deal with another CRA.

Division 6 – Unauthorised obtaining of credit reporting information etc		
ED Ref	**Heading/s**	**Comments**
	S160 Obtaining credit reporting information from a credit reporting agency S161 Obtaining credit eligibility information from a credit provider	We are CP or CRA? X161
Division 7 – Civil penalty orders		
ED Ref	**Heading/s**	**Comments**
Subdivision A	*Civil penalty provisions* S162 Civil penalty provisions S163 Ancillary contravention of civil penalty provisions	The penalties take no consideration of the intent behind a breach and could therefore impose significant penalties on an otherwise compliant organisation based on the activities of a single rogue employee. In addition, if a large scale breach occurs due to a technology failure for instance, the applicable penalty, if equal to the penalties for each breach incident, would be enormous. NAB recommends that breaches that are not wilful and deliberate should be approached with lesser penalties, and that actions undertaken by an organisation to remediate the breach should be able to mitigate the penalties in appropriate circumstances. S164 Civil penalty orders includes a 6 year period in which the Information Commissioner may apply to certain Courts for an order that the entity pay the Commonwealth a pecuniary penalty. The 6 year period is 1 year longer than the majority of the allowable retention periods of information, and 4 years longer than the retention period for a substantial number of elements. This could cause problems with information to which a complaint relates being destroyed. Suggest the provisions be amended to provide certainty of retention periods.
Subdivision B	*Obtaining a civil penalty order* S164 Civil penalty orders S165 Civil enforcement of penalty S166 Conduct contravening more than one civil penalty provision S167 Multiple contraventions S168 Two or more proceedings may be heard together S169 Civil evidence & procedure rules for civil penalty orders S170 Contravening a civil penalty provision is not an offence	
Subdivision C	*Civil proceedings & criminal proceedings* S171 Civil proceedings after criminal proceedings S172 Criminal proceedings during civil proceedings S173 Criminal proceedings after civil proceedings S174 Evidence given in proceedings for civil penalty order not admissible in criminal proceedings	

Division 8 – Miscellaneous		
ED Ref	**Heading/s**	**Comments**
	S175 Treatment of partnerships S176 Treatment of unincorporated associations S177 Treatment of trusts S178 Conduct of directors, employees or agents of bodies corporate S179 Conduct of employees or agents of persons other than bodies corporate	
PART B – OTHER RELEVANT PROVISIONS		
Division 1 – Definitions		
ED Ref	**Heading/s**	**Comments**
	S180 Definitions	Refer comments in 2 above. S180 definition of *identification information* doesn't include other forms of government identification other than a drivers licence. Other forms of government data e.g. passport number, should be included to assist CPs and CRAs in meeting other regulatory obligations e.g. AML / CTF Act requirements.
Division 2 – Definitions relating to credit reporting		
Subdivision A	*Credit information etc* S181 Meaning of credit information S182 Meaning of default information S183 Meaning of information request S184 Meaning of new arrangement information S185 Meaning of payment information S186 Meaning of personal insolvency information S187 Meaning of repayment history information	s182 Meaning of default information – the definition states that "the amount of the overdue payment is equal to or more than $100 or such higher amount as is prescribed by the regulations." This threshold is considered too high, particularly in relation to accounts with small credit limits (refer below examples). NAB recommends that the requirement be amended to not list **full balances** under $100. Example 1: A fully drawn credit card with a $500 limit has a minimum monthly payment of $10. Based on the $100 threshold, a credit provider will not be able to list a missed repayment until statement cycle 10 or at approximately 309 days past due. Example 2: A fully drawn credit card with a $1,000 limit has a minimum monthly payment of $20. Based on the $100 threshold, a credit provider will not be able to list a missed payment until statement cycle 5 or at approximately 103 days past due. s184 Meaning of new arrangement information – hardship situations are assumed to only occur if the account has been in default however there are a significant number of hardship cases that occur pre-default, for example in the case of dealing with natural disasters. If the restrictions on credit reporting do not cater for instances of hardship pre-default then these customers credit reports will start to show delinquency issues that are undistinguishable from situations where this is not the case, making it difficult for them to get credit when they may well both need it and it would be responsible to grant it. Suggest that ED provisions be amended to avoid creating a situation where the law precludes flagging compassionate action in difficult circumstances. s187 Meaning of repayment history information – the definition does not include the permitted timeframe for the reporting of repayment history (proposed to be 24 months).

Division 2 – Definitions relating to credit reporting *(continued)*		
ED Ref	**Heading/s**	**Comments**
Subdivision B	*Credit provider* S188 Meaning of credit provider S189 Agents of credit providers S190 Securitisation arrangements etc S191 Acquisition of the rights of a CP	
Subdivision C	*Other definitions* S192 Meaning of access seeker S193 Meaning of credit & amount of credit S194 Meaning of credit reporting business S195 Meaning of EDRS	S194 Meaning of credit reporting business – this definition appears to capture a bank as a credit reporting business as the definition appears to omit the sole purpose / dominant purpose test in the existing definition in Part II of the Privacy Act.