Inquiry into Exposure Draft of the Australian Privacy Amendment Legislation- Credit Reporting

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ANZ Submission to
Senate Standing Committee on
Finance & Public Administration
Legislation Committee

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INTRODUCTION

ANZ supports Comprehensive Credit Reporting (CCR) as an important tool that credit providers can use to improve the quality of credit decisions. In particular, CCR will help credit providers improve the level and efficiency of compliance with the responsible lending provisions of the National Consumer Credit Protection Act (NCCP Act). This has the important consumer benefit of helping to avoid over commitment.

These reforms will also result in an improved level of accuracy of customer credit data and require a simple and responsive complaints process to ensure errors are corrected promptly and easily.

Typically, consumers borrow from a number of credit providers. Under responsible lending reforms, lenders are required to “make reasonable enquiries about the consumer's financial situation” and “take reasonable steps to verify the consumer's financial situation”. This may include:

- verifying the customer’s level of existing debt with other credit providers
- assessing the consumer’s credit history including how they have managed debt in the past, and
- being aware of current or recent financial difficulty.

CCR can 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. CCR will:

- enable credit providers to consistently obtain timely and accurate information about existing liabilities and current capacity of the customer to service those liabilities
- allow credit providers to more reliably confirm the veracity of a customer’s credit application, and
- enable providers to look not only at negative behaviour but also positive credit behaviour as a means to verify the customer’s overall financial situation and aspects of their capacity to pay.

Users of credit information expect to be held to a high standard of care when dealing with consumers’ personal information. The Exposure Draft Bill (EDB) contains provisions for appropriate consumer and privacy protections on the use and disclosure of various groupings of information about credit. These protections include prohibiting the use of credit eligibility information by credit providers for direct marketing purposes and require the Credit Reporting Code of Conduct to be updated and approved by the Privacy Commissioner. The Code will set mandatory standards for compliance, access to information, data consistency and accuracy, complaints handling and independent oversight.

To deliver these benefits there are several aspects of the EDB that we believe could benefit from further refinement. The EDB exposes credit providers to substantial operational and regulatory risks in its current form, such as:

- inconsistencies between permitted disclosures by credit reporting agencies and permitted uses by credit providers. For example, credit providers can use credit eligibility information for account management but credit reporting agencies cannot disclose credit reporting information for that purpose. Consequently, the relevant sections of the EDB should be amended so that credit reporting agencies are permitted to disclose credit information for the same purposes that credit providers can use the information
- the omission of an element of knowledge, intent or recklessness required for a misleading and deceptive offence to occur. For example, credit providers will be engaging in misleading and deceptive conduct simply by disclosing information that is false, even if that information was given to the credit provider by a credit reporting agency or a consumer, and
- the potential requirement of credit providers to disclose commercially sensitive information such as internal assessment scorecards to consumers on request. With access to credit assessment methodologies individuals may be able to artificially structure applications for credit to enhance their chances of fraudulently obtaining credit. Neither the current Privacy Act nor the NCCP Act requires this information to be disclosed.

ANZ notes that the EDB and its subject matter are complex. ANZ suggests that a working group comprised of government, industry and consumer representatives be established to address issues that may arise as the legislation progresses to implementation and would welcome the opportunity to be involved in that working group.

This submission contains further detail on these and other matters. ANZ would be pleased to provide any further information about this submission as required, and can be contacted as follows:

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STREAMLINING THE OPERATION OF THE LEGISLATION

BROAD DEFINITION OF CREDIT REPORTING AGENCY

ISSUE

A credit reporting agency is defined as an entity that undertakes a credit reporting business as outlined in section 194. ANZ is concerned that the broad definition of credit reporting business may mean that credit providers could inadvertently be captured by that definition. The consequence of this would put credit providers in the untenable situation of being regulated as both credit providers and credit reporting agencies.

RECOMMENDATION

The definition of credit reporting business should be amended so that credit providers are excluded from the definition. Alternatively, the definition of credit reporting business should be amended to include a dominant purpose test, as is the case in Part II of the current Privacy Act.

Given the importance of the definition ANZ is of the view that the issue must be addressed in the EDB rather than the supporting Regulations.

COMMERCIALLY SENSITIVE INFORMATION

ISSUE

Potential Access to Commercially Sensitive Information

Section 146 requires credit providers to provide credit eligibility information to access seekers[1] on request. Credit eligibility information 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 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."

ANZ is concerned these definitions will mean that credit providers may be required to disclose commercially sensitive credit assessment methodologies (such as internal assessment scorecards and other evaluative information that may be derived from credit

1 Being the individual or a person assisting the individual to deal with a credit reporting agency or credit provider (section 192)

reporting information) as there appear to be only very limited circumstances in which access can be refused.

In contrast, subsection 142(c)(ii) sets out what must be disclosed to an individual if an application for credit is declined due to credit eligibility information that was disclosed by a credit reporting agency. In such cases the disclosure is limited to the contact details of the credit reporting agency and anything specified in the Credit Reporting Code.

ANZ notes the current National Privacy Principles do not require access to personal information where that access would reveal evaluative information generated within an organisation in connection with a commercially sensitive decision-making process.[2] The exposure draft of the Australian Privacy Principles (APP) contains a similar provision to limit disclosure of commercially sensitive information.[3] 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 also recognised within the requirement to provide an individual with a copy of their credit assessment under section 132 of the NCCP Act and ASIC Regulatory Guide 209 (RG 209). Under RG 209 a credit provider is required to ensure the assessment given to a consumer is, "concise and easy to understand, and include[s] reference to the relevant factual information…"[4] However ASIC also states that, "[ASIC does] not expect you to disclose the commercially sensitive lending criteria on which your credit decisions are based."[5]

Credit providers should not be required to disclose commercially sensitive information. With access to credit assessment methodologies individuals may be able to artificially structure applications for credit to enhance their chances of fraudulently obtaining credit.

It should also be noted that a credit provider could hold credit information and CP derived information about an individual but not hold CRA derived information. As section 149 is currently structured a credit provider could be required to correct CRA derived information even when it is not in possession of that information.

Corrections to Commercially Sensitive Information

Individuals are also able to request that corrections be made to CP derived information and CRA derived information under section 149. As this information is an assessment by either the credit provider or credit reporting agency of the individual's credit worthiness, ANZ does not believe that individuals should be entitled to amend that assessment. Instead individuals should be able to request corrections to the credit information that feeds into those assessments.

[2] National Privacy Principle 6.2
[3] Draft Australian Privacy Principle 12, section 13(3)(j)
[4] RG 209.82
[5] RG 209.85

RECOMMENDATION

Section 146 should be amended so that APP 12 applies to the disclosure of credit eligibility information.

Section 149 should be amended so that individuals and access seekers cannot request amendments to commercially sensitive information. This section should also be redrafted so that requests for corrections to information are limited to information actually held by the credit provider.

OFFENCES

ISSUE

False and Misleading Offences

Under section 144 a credit provider commits an offence if it discloses credit information or uses credit eligibility information that is false or misleading in a material particular. As the section is currently worded there is no element of knowledge, intent or recklessness required for an offence to occur.

This appears to be problematic for credit providers as they may commit an offence simply by using credit eligibility information supplied by a credit reporting agency 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 therefore committing another offence.

A similar provision applies to credit reporting agencies and credit reporting information under section 117. Credit reporting agencies will commit an offence by disclosing false information they believed to be true. As with credit providers, credit reporting agencies will not be able verify false information without committing an offence.

Collection of information

Under subsection 143(1) credit providers are required to ensure that credit eligibility information they collect is accurate, up-to-date and complete. ANZ believes this provision is unnecessary as there is a similar requirement in proposed APP 10. The provision also seems unnecessary given the agreements that must be entered into between credit reporting agencies and credit providers under section 116.

RECOMMENDATION

Sections 117 and 144 should be amended to include an element of knowledge, intent or recklessness on the part of the credit provider or credit reporting agency.

Subsection 143(1) should be removed to streamline compliance requirements to credit providers and avoid overlap with other provisions in the EDB.

STRUCTURE OF THE LEGISLATION

PERMITTED USES AND DISCLOSURES OF CREDIT INFORMATION

ISSUE

Alignment of permitted disclosures and permitted uses

It is ANZ's understanding that credit reporting agencies' permitted disclosures must align with credit providers' permitted use provisions. Otherwise the flow of credit information and functions undertaken by both sets of stakeholders may become disjointed. It appears that there may be unintended inconsistencies in the EDB between the permitted uses of credit eligibility information by credit providers and permitted disclosures by credit reporting agencies.

As an example, item one of the table setting out permitted CP uses in section 136 permits a credit provider to use credit eligibility information for "internal management purposes of the provider that are directly related to the provision or management of consumer credit by the provider" provided the information was disclosed under item one of subsection 109(1). Item one of subsection 109(1) permits disclosure for a "consumer credit related purpose" which, under section 180, is limited to assessing an application for consumer credit or the collection of overdue payments.

ANZ's interpretation of the interaction between sections 109(1), 135, 136 and 180 is that a credit provider may use credit eligibility information for account maintenance or proactive portfolio review (prior to the credit account falling into arrears) but that a credit reporting agency is not permitted to disclose information to the credit provider to be used solely for that purpose.

The definition of commercial credit related purpose in section 180 has a similar effect of permitting a credit provider to use credit eligibility information for account maintenance on commercial credit but not allowing credit reporting agencies to disclose the information for that purpose (under subsection 109(1)).

Use of Information Related to Hardship

Use of credit eligibility information to assess applications for hardship relief, or validate concerns that a particular customer may be in early financial difficulty (both not involving an application for credit) could assist credit providers design and implement effective proactive measures (including temporary repayment arrangements) at an early stage to help prevent a customer falling into financial difficulty. ANZ's view is that the definition of consumer credit related purpose (which must be the purpose of the credit reporting agency's disclosure to the credit provider before the credit provider can use the information for internal management purposes) is not currently broad enough to cover use for the purposes of assessing a customer's application for hardship relief or to assess the need for early intervention to help the customer avoid financial hardship.

Consumer credit related purpose is the purpose of assessing an application for credit or the collection of payments. Hardship arrangements or strategies will rarely involve the provision of additional credit to the customer and will often occur before the credit provider has commenced formal debt collection action.

Item 5 of the table in subsection 136 which permits a credit provider to use credit eligibility information to assist the individual to avoid defaulting on their obligations may also be too narrow for this purpose. A credit provider may want to obtain a credit check to assess a hardship arrangement or other repayment strategy where the customer is in default, but is not yet at collections stage.

RECOMMENDATION

The relevant sections of the EDB should be amended so that credit reporting agencies are permitted to disclose credit information for the same purposes that credit providers can use the information. The permitted disclosures and uses must align to credit life-cycle practices relating to credit assessment, ongoing credit management and collections activity. In particular, permitted disclosures and uses should be expanded to include decisions relating to portfolio management and measures to help customers manage situations of potential financial hardship.

One possible approach could be to broaden the definition of “consumer credit related purpose” to allow credit reporting agencies to disclose credit information for a greater range of purposes.

Column 2 of item 5 in the table under section 136 should be expanded to say: ‘the purpose of assisting the individual to avoid defaulting (or continuing to default) on his or her obligations…’

PERMITTED CP DISCLOSURES

ISSUE

ANZ has identified several apparent inconsistencies in permitted CP disclosures. Sections 136-141 set out permitted CP disclosures and among other things permit the disclosure of credit eligibility information, which includes repayment history information, to mortgage insurers for, "…any purpose arising under a contract for mortgage insurance that has been entered into between the provider and the insurer." However subsection 135(4) prohibits the disclosure of repayment history information.

The removal of repayment history information from credit eligibility information would be problematic due to repayment history information being embedded in credit reporting information and credit eligibility information. Further, mortgage insurers, debt collectors and assignees will require access to repayment history information so they can manage their portfolios and have accurate conversations with the consumers about the debt due.

RECOMMENDATION

Section 135 should be amended so that repayment history information can be disclosed to entities such as debt collectors, assignees and mortgage insurers as a permitted CP disclosure.

NEW ARRANGEMENT INFORMATION AND REPAYMENT HISTORY INFORMATION

ISSUE

ANZ notes new arrangement information[6] is a component of credit information and can be disclosed to a credit reporting agency under section 184 provided certain conditions are complied with. These conditions include that default information has already been disclosed to the credit reporting agency. ANZ notes this is a prohibitive view of the provision of new arrangement information as borrowers and credit providers often amend repayment arrangements prior to default occurring to assist borrowers in the management of their finances. This includes temporary hardship arrangements as a result of natural disasters.

If credit providers are unable to disclose hardship arrangements that are entered into prior to default it will result in adverse repayment history being reported for the individual. The credit provider will be required to disclose that the individual did not make their standard monthly repayment even though they have entered into an alternative arrangement with the credit provider.

[6] As defined by section 184 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.

Similarly, repayment history information under section 187 needs to be defined more broadly so that it can include an indication of when an individual is in hardship. There are adverse consequences for both the individual and credit providers if their repayment history shows either that the individual is making their regular monthly repayment or is not making any repayments when in fact a hardship arrangement is in place.

ANZ also notes that the definition of repayment history information in section 187 only relates to monthly payment arrangements. Many credit arrangements are based on different repayment periods, such as weekly or fortnightly. ANZ notes that there is provision for Regulations to further define monthly payments.

RECOMMENDATION

The meaning of new arrangement information should be amended to allow a credit provider to disclose to a credit reporting agency a new arrangement that is agreed to prior to default. Similarly, the definition of repayment history information should be amended to allow for hardship arrangements to be reported. ANZ believes this will benefit both credit providers and consumers.

Section 187 should be amended to allow for repayment arrangements that are not monthly rather than this being dealt with by the Regulations.

COMPLAINTS HANDLING

ISSUE

Complaints Handling Provisions are Inconsistent with Relevant Standards

The complaints handling requirements, as set out in Division 5, differ from the requirements of Australian Credit Licence (ACL) holders under ASIC Regulatory Guide 165 (RG 165). Given that a complaint under section 157 is likely to also be a complaint for the purposes of RG 165 it will be difficult for credit providers who are licensees to comply with both sets of requirements. For example, subsection 158(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.

RG 165 is based on the Australian Standard AS ISO 10002-2006 Customer satisfaction-guidelines for complaints handling in organisations.

Anomalies in Disclosures Relating to Complaints

As currently drafted, the complaint provisions will be practically difficult to comply with for both credit providers and credit reporting agencies. For example, under section 159 a credit provider (recipient) who receives a complaint regarding incorrect credit information is required to notify all credit reporting agencies 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 credit reporting agency from whom they obtained the information and the credit provider who initially disclosed the information.

Similarly, a credit provider who discloses incorrect information and is required to correct that information under either subsections 159(5), 147(2) or 150(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 credit reporting agency the credit provider will not be able to identify who the credit reporting agency disclosed the information to. However as the EDB is currently drafted the credit provider may be required to notify these indirect recipients.

Paragraph 1.14 of the current Credit Reporting Code of Conduct requires the correction of credit information to be provided to entities that received the incorrect information within the last three months and are nominated by the individual to receive the correction notification. 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 in relation to the individual and therefore unlikely to benefit the individual.

RECOMMENDATION

The EDB should be amended so that credit providers who are licensees are under the same obligations for handling customer complaints as they are under their ACLs.

ANZ also recommends that:

- subsection 159(3) be amended so that the receiving credit provider is only required to notify the credit reporting agency from which it received the information and the credit provider who initially disclosed the information
- subsections 147(2), 150(2) and 159(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 they provided the information to, and

- the EDB 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.

UNLICENSED CREDIT PROVIDERS

ISSUE

Section 108(4) provides that a credit reporting agency may only disclose repayment history information to a credit provider who is a licensee. This would mean entities that do not hold an ACL because they are acting under an exemption would not be able to receive repayment history information from credit reporting agencies.

For example, the NCCP Act permits certain credit providers (known as special purpose fundraising entities) to be exempt from holding an ACL where a licensed credit provider takes responsibility for the exempt entity's compliance with the NCCP Act. Likewise, credit providers of carried over instruments are exempted from holding an ACL subject to certain conditions.

As the EDB is currently drafted these credit providers will be prohibited from accessing repayment history information when assessing a credit application or undertaking account maintenance. In the case of special purpose fundraising entities, the licensed credit provider would also be unable to access the information as the credit application is not made to that entity and therefore the use of the information would not satisfy the definition of a consumer credit related purpose. This could adversely affect consumers as credit decisions will be based on incomplete information.

RECOMMENDATION

The EDB should be amended so that entities that are operating under a valid exemption from holding an ACL have the same access rights to repayment history information as licensed credit providers.

OPPORTUNITIES TO CLARIFY LEGISLATION

USE OF DE-IDENTIFIED INFORMATION

ISSUE

Section 115 permits a credit reporting agency to use "de-identified information" for the purposes of conducting research in relation to the assessment of the credit worthiness of individuals. Taking into account the definition of de-identified information in section 180, where information is de-identified and therefore no longer about an individual, it is not "credit information" and therefore cannot be classified as "credit reporting information" or "de-identified information" as those terms are currently defined.

ANZ questions whether section 115 is required given that once de-identified, the information will fall outside the ambit of the Privacy Act (in that it is no longer personal information). If the information is not about an individual there is no apparent role for the Privacy Act as there is no possibility of the information being used to the detriment of an individual.

ANZ notes that section 115 does not permit disclosure of de-identified information by credit reporting agencies under any circumstances - it only permits use of the information. Subsection 115(3) permits the Information Commissioner to make rules relating to use of the information by credit reporting agencies but not disclosure.

Credit providers currently use and will continue to require de-identified information to develop and maintain credit scorecards. These scorecards are vital tools in assessing credit applications, identifying high risk credit exposures and help ensure that a credit provider lends responsibly. Limiting the use of de-identified information in the way section 115 intends will result in credit providers being unable to refine and improve their credit risk assessments.

RECOMMENDATION

Section 115 should be removed. Alternatively, the EDB should be amended to include an explicit right for credit reporting agencies to disclose, and credit providers to collect and use, de-identified information for internal credit modelling and portfolio management purposes.

DISCLOSURE OF BAN PERIOD

ISSUE

Under section 113, if an individual believes he or she has been the victim of fraud or identity theft they can request a credit reporting agency to establish a ban period. During the ban period a credit reporting agency is restricted in disclosing credit reporting

information. ANZ understands that the purpose of the ban period is to prevent the individual from becoming the victim of further fraud.

It is unclear whether the credit reporting agency is permitted to disclose the existence of the ban period to an enquiring credit provider. If the ban period is disclosed to the credit provider it will trigger the credit provider to obtain consent from the individual as required in subsection 113(2)(a). Disclosure of the ban period will also be an alert for the credit provider that they may be dealing with a fraudster and therefore help to protect the individual from further fraud.

RECOMMENDATION

The EDB should be amended to require credit reporting agencies to disclose the existence of a ban period to enquiring credit providers.

NOTIFICATION REQUIREMENTS REGARDING DEFAULT

ANZ notes that borrowers must be at least 60 days overdue before a credit provider can report default information to a credit reporting agency. ANZ notes that credit reporting agencies are able to disclose this information to enquiring credit providers without delay. ANZ believes the proposed timeframes balance the needs of credit providers and consumers and help ensure credit providers' ability to satisfy responsible lending obligations under the NCCP Act. More generally, the proposed timeframes ensure credit information is accurate, up-to-date and complete.

ISSUE

It is unclear whether credit providers are required to provide multiple written notices under subsection 182(1)(b) if an individual is overdue in making consecutive payments. For example, if a credit provider has issued a notice under 182(1)(b), the customer is at least 60 days overdue and the customer does not make their next payment, it is not clear whether the credit provider needs to issue another notice under subsection 182(1)(b) for that subsequent missed payment. It is also unclear whether the subsequent missed payment can be disclosed as default information once it is at least 60 days overdue if the second notice has not been issued.[7]

[7] Assuming subsections 182(1)(c)-(d) are also satisfied.

RECOMMENDATION

The EDB should be amended to make it clear that subsection 182(1)(b) does not require a fresh notice to be issued on each occasion consecutive payments are missed.

CREDIT MANAGERS

ISSUE

Section 154 places restrictions on the use and disclosure of credit eligibility information by credit managers. “Credit manager” is not a defined term although after reviewing section 135 and the definition of “managing credit”, ANZ believes a credit manager is a person who:

- manages credit provided by the credit provider
- is not acting as an agent of the credit provider
- is not involved in the collection of overdue payments, and
- cannot receive repayment history information.

It is not clear which entities within the credit industry section 154 is intended to capture.

RECOMMENDATION

To simplify the EDB a definition of “credit manager” should be inserted into section 180.

CONCLUSION

ANZ believes comprehensive credit reporting will provide significant benefits to both credit providers and consumers and it complements recent consumer protection reforms. As outlined in this submission, ANZ believes that to realise the maximum benefits from comprehensive credit reporting whilst ensuring there are no unintended consequences, some important refinements to the EDB are required.