SENATE FINANCE AND PUBLIC ADMINISTRATION

LEGISLATION COMMITTEE

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

SUPPLEMENTARY SUBMISSION

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Australian Government

Office of the Australian Information Commissioner

Credit Reporting

Exposure Draft and Companion Guide

Submission to the Senate Finance and Public Administration Committee

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Executive Summary

i. The Office of the Australian Information Commissioner (OAIC) welcomes the release of the exposure draft of the new credit reporting provisions (Draft Credit Bill) and explanatory companion guide (Companion Guide).[1]

ii. The OAIC's comments in this submission focus on the implementation of the Government's reforms to the credit reporting provisions[2] in a practical, privacy-enhancing way that reflects what, in the OAIC's view, are the objectives of the Privacy Act reforms:

- a streamlined, single set of principles that apply consistently
- simplified privacy rights and obligations
- maintenance of existing privacy protections
- a technology neutral approach to regulation.

Key recommendations

iii. Noting the objectives of the reforms, and the Government's recommendations for enhanced simplicity and greater privacy protections in credit reporting regulation,[3] this submission makes key recommendations grouped under four categories:

A. Simplicity

B. Privacy-enhancing regulation

C. Clarity of concepts

D. Flexibility.

A. Simplicity

iv. To simplify the Privacy Act's structure and clearly distinguish the role of the Australian Privacy Principles (APPs) and the credit provisions, the OAIC suggests that the Draft Credit Bill's provisions be contained in a Schedule to the Privacy Act (see paras 20-22).

v. To clarify the interaction between the Draft Credit Bill and the APPs, the OAIC suggests that credit providers' obligations should be 'standalone' and consistent across the industry, rather than relying on the application of selected APPs in some circumstances, and for some credit providers (see paras 23-28).

[1] Credit reporting – Exposure Draft (credit reporting provisions); Australian Government *Companion Guide, Privacy Reforms: Credit Reporting (*Jan 2011). Viewed 24 March 2011 at www.aph.gov.au/senate/committee/fapa_ctte/priv_exp_drafts/index.htm.

[2] See *Enhancing National Privacy, Australian Government First Stage Response to the Australian Law Reform Commission Report 108* (October 2009) (Government Response), Chapters 54-59, available via www.dpmc.gov.au/privacy/reforms.cfm.

[3] See, eg, Government Response (2009), Recommendations 54-1, p 99, and 55-1, p 105.

B. Privacy-enhancing regulation

vi. All credit providers, regardless of size, should have the same obligations to protect credit-related information (see 'Simplicity' above and para 27).

vii. Credit providers' disclosure obligations should also apply to 'credit information' collected from any source, not just CRAs (see paras 29-31).

viii. The correction and complaint process for inaccurate information could be streamlined to avoid unnecessary steps for the individual when lodging a complaint (see paras 32-37).

ix. Consistent with the Government Response, the OAIC suggests that CRAs and credit providers be required to substantiate the accuracy of credit-related information they hold, or delete the information (see paras 38-40).[4]

x. The OAIC suggests that debt collectors be prohibited from using and disclosing 'credit eligibility information' for secondary purposes, as are other third party recipients under the Draft Credit Bill (see paras 41-44).

xi. The potential for organisations not covered by the Draft Credit Bill to collect credit-related information may need consideration. In the OAIC's view, it could be seen as anomolous that while some organisations are not able to collect credit-related information from CRAs, they may be able to collect that information by requesting an individual to provide it in certain circumstances (see paras 45-48).

C. Clarity of concepts

xii. The term 'determination' has special regulatory connotations under the Privacy Act. For clarity, it may be appropriate to replace the use of the word 'determination' in the context of pre-screening personal information for direct marketing with a different term such as 'assessment' (see paras 50-53, 55-57).

xiii. Similarly, it may be appropriate to replace the use of the word 'determination' to describe the conclusion reached by a CRA or credit provider following investigation of a complaint with an alternative term such as 'decision' (see para 54).

xiv. The scope of 'publicly available information' proposed to be included as 'credit information' seems broad and its limits unclear. To improve clarity and certainty, and prevent information not relevant to credit assessment falling within its scope, the definition could be subject to additional limits – either in regulations or Information Commissioner's rules (see paras 58-63).

xv. The OAIC suggests that the term 'credit reporter' replace the term 'credit reporting agency', to avoid any confusion with the use of the term 'agency' in the Privacy Act when referring to Government agencies. Alternatively, the OAIC suggests that the full term 'credit reporting agency', rather than the abbreviation 'agency', be used (see paras 64-66).

[4] See Government Response (2009), p 127.

D. Flexibility

xvi. The need for an individual to give written-authorisation to a person assisting them to access their credit-related information may be problematic for some users of the National Relay Service (NRS). The access provisions in the Draft Credit Bill could consider the NRS's role (see paras 67-71).

xvii. The OAIC is concerned to ensure that regulation of de-identified information for research purposes is consistent, appropriate and sufficient (see paras 72-78).

xviii. A CRA's obligation to destroy or de-identify information if the retention period has ended, and any correction request or dispute is resolved, could be dealt with in the new Credit Reporting Code. This would provide a simple and efficient means of determining the time when destruction of that information is appropriate. Any requirements in the Code could be supplemented by the Draft Credit Bill's propsed requirement for destruction if directed by the Information Commissioner (see paras 79-81).

Introduction

Office of the Australian Information Commissioner

1. The Office of the Australian Information Commissioner (OAIC) is an independent statutory agency established by the *Australian Information Commissioner Act 2010* (AIC Act). The OAIC commenced operation on 1 November 2010 and is headed by the Information Commissioner, supported by two other statutory office holders, the Freedom of Information Commissioner and the Privacy Commissioner. Staff of the former Office of the Privacy Commissioner (OPC) are now part of the OAIC.

2. Together the Commissioners of the OAIC exercise three broad functions:

    - the Information Commissioner functions set out in s 7 of the AIC Act
    - the freedom of information functions set out in s 8 of the AIC Act
    - the privacy functions set out in s 9 of the AIC Act. These include functions outlined in the *Privacy Act 1988* (Cth) (Privacy Act) itself. Section 28A of the Privacy Act confers functions in relation to credit reporting such as investigations of credit infringements by credit providers and credit reporting agencies (CRAs); audits of credit information files and reports; and advice and guidance to relevant parties.

Credit reporting regulation under the Privacy Act

3. The OAIC welcomes the release of the Draft Credit Bill. The Bill is the second part of the Government's privacy law reform agenda, based on recommendations of the Australian Law Reform Commission's (ALRC) 2008 report, *For Your Information: Australian Privacy Law and Practice* (Report 108).[5] The Government's proposed reform approach was outlined in its October 2009 policy document, *Enhancing National Privacy – Australian Government First Stage Response to the Australian Law Reform Commission Report 108* (Government Response).[6] The Draft Credit Bill follows the June 2010 release of the exposure draft: Australian Privacy Principles (draft APPs),[7] which will be the foundation for personal information handling practices by private sector organisations and Government agencies under a revised Privacy Act.

[5] ALRC Report 108 (2008), see www.alrc.gov.au/inquiries/privacy.

[6] Government Response (2009), see www.dpmc.gov.au/privacy/reforms.cfm.

[7] Australian Privacy Principles – Exposure Draft (APPs) at www.aph.gov.au/senate/committee/fapa_ctte/priv_exp_drafts/index.htm; see also Australian Government, *Companion Guide, Australian Privacy Principles (* 2010) at www.aph.gov.au/senate/committee/fapa_ctte/priv_exp_drafts/index.htm.

4. The protection of personal credit information remains an important privacy concern for many individuals,[8] most commonly due to the serious consequences that may arise through the mishandling of credit information. These consequences could include unfair denial of credit, distress caused by improper disclosure of personal information, decision making based on inappropriate information, or identity theft. It is therefore crucial that the credit reporting regulatory framework protects information appropriately, and clearly sets out individual rights and industry obligations.

5. Under the existing regime, credit reporting is regulated by Part IIIA of the Privacy Act. Part IIIA contains detailed and prescriptive requirements that CRAs, credit providers and certain other parties must comply with when handling individuals' credit information. In addition, when handling that information, those entities must comply with:

   - the Privacy Commissioner's Credit Reporting Code of Conduct (Current Credit Reporting Code), which deals with practical Part IIIA compliance matters[9]
   - the existing National Privacy Principles (NPPs), where those principles are applicable.

6. The provisions of the Draft Credit Bill would replace Part IIIA of the Privacy Act. As currently drafted, for some entities, the APPs may apply in addition to those provisions. Industry will also be required to develop a new binding code (new Credit Reporting Code).

Privacy law reform and its objectives

7. Noting the significant review of privacy law that has occurred to date, [10] the OAIC believes the Draft Credit Bill should be evaluated against the various objectives that underpin the need for reform. In doing so, the OAIC recognises that the need for additional, prescriptive limitations on the credit reporting system may require a balancing between some of the general objectives.

[8] Community attitude research conducted in 2001, 2004 and 2007 on behalf of the then OPC have consistently found that the information that respondents are most reluctant to disclose, when providing personal information to organisations, is information about income and other financial details. See www.privacy.gov.au/materials/types/research?sortby=64

[9] The Current Credit Reporting Code was issued by the Privacy Commissioner under s 18A of the Privacy Act in 1991 (amended 1996) following consultation with industry. It is available at www.privacy.gov.au/materials/types/codesofconduct/view/6787.

[10] The OAIC (as the former OPC) has been actively involved in the privacy law reform process. The OPC made extensive submissions to ALRC Issues Papers 31 and 32 (Submission to IP 31 and Submission to IP 32 respectively), and Discussion Paper 72 (Submission to DP 72); seconded staff to the Department of the Prime Minister and Cabinet (DPMC) to assist in preparing the Government Response; has had informal input during the development of the draft APPs and the Draft Credit Bill; and made a submission to the Senate Committee's Inquiry into the draft APPs. Submissions are available via www.oaic.gov.au.

8. In the OAIC's view, the reform process has sought to ensure that: [11]

   - there is a streamlined, single set of principles for the public and private sectors, which promote national consistency[12]
   - privacy rights and obligations are simplified and therefore easy to understand and apply[13]
   - existing privacy protections are maintained, not diminished[14]
   - a high-level, principles-based, technology-neutral approach is adopted that is capable of protecting and promoting individuals' privacy into the future.[15]

9. This submission draws on two decades of experience as the national privacy regulator (as the former OPC), including active involvement in privacy law reform. Further, in writing this submission, the OAIC has considered the Draft Credit Bill with regard to its future role in investigating complaints, conducting audits, advising individuals of their privacy rights and assisting CRAs, credit providers and others to meet their new obligations.

Improvements in the Draft Credit Bill, and further areas for consideration

10. The OAIC understands that in general, the Draft Credit Bill is intended to implement the policies set out in the Government Response. The Government Response noted that 'Part IIIA of the Privacy Act is overly complex and prescriptive and 'should be redrafted to provide more user-friendly regulation of credit…'.[16] The OAIC strongly supports this aim and welcomes efforts to simplify the credit reporting provisions in the Draft Credit Bill.

11. The OAIC also welcomes the additional privacy protections for credit-related information[17] to accompany the shift to more comprehensive credit reporting, as outlined in the Government Response.[18] Such additional measures are important given the greater amount of personal information handling under a more comprehensive credit reporting regime.

12. The enhancements to credit reporting regulation in the Draft Credit Bill include:

[11] These key reform objectives were also set out in the OAIC's (as the former OPC) submission to the Senate Committee's Inquiry into Exposure Drafts of Australian Privacy Amendment Legislation (APPs) (August 2010) available at www.privacy.gov.au/materials/types/submissions/view/7125.

[12] See, eg, Government Response (2009), 'Executive Summary', pp 11 and 13.

[13] ALRC Report 108 (2008), Recommendation 5-2; accepted in the Government Response (2009), p 22.

[14] Submission to DP72, 'Submission summary', paras 78-81, see also Government Response (2009), p 5.

[15] See eg, ALRC Report 108 (2008), Recommendation 18-1; accepted in the Government Response (2009), p 37.

[16] Government Response (2009), Recommendation 54-1, p 99.

[17] This term is used to include the various categories of information to be regulated in the Draft Credit Bill, including 'credit reporting information' and 'credit eligibility information' (it is understood that the new categories would replace terms like 'credit report' and 'credit file').

[18] See, eg, Government Response (2009), Chapter 55, p 55.

- systematically setting out the obligations on different recipients of credit-related information (CRAs, credit providers and others)
- ordering obligations to better reflect the stages of personal information flows, consistent with the draft APPs
- broadening the scope of the Privacy Act to apply to all personal information handled by CRAs that are small business operators (SBOs)
- allowing victims of identity fraud to prevent further disclosure of their credit information
- improving data quality and security by requiring CRAs to monitor credit providers' practices
- clearer dispute resolution procedures that place responsibility for resolving a complaint on the entity to which the individual first complains
- additional notification to consumers about the handling of their credit-related information, and their rights to information access and dispute resolution
- the imposition of civil penalties for a breach of the provisions in the Draft Credit Bill.

13. Acknowledging these areas of improvement, this submission:

- discusses, under 'The role of the OAIC and a new Credit Reporting Code' below, the interaction between the Draft Credit Bill and other regulatory provisions for credit reporting
- makes suggestions, under 'Achieving the reform objectives' at para 19 and following, to help achieve the identified reform objectives, under four categories:
    A. Simplicity
    B. Sufficient and privacy-enhancing regulation
    C. Clarity of concepts
    D. Flexibility.

14. Further, this submission focuses on:

- implementing the Government Response in a practical, privacy-enhancing way that reflects the general reform objectives outlined at para 8 above
- parts of the Draft Credit Bill which in the OAIC's view merit further consideration and improvement.

The role of the OAIC and a new Credit Reporting Code

Industry will be required to develop a new binding code

15. If the Credit Bill is enacted, industry will be required to develop a new Credit Reporting Code, in consultation with consumer groups and subject to final approval by the Information Commissioner. The new Credit Reporting Code would replace the Current Credit Reporting Code, and would similarly deal with operational matters relevant to compliance.[19]

16. The Government Response indicated some specific matters that the new Credit Reporting Code might deal with. The Draft Credit Bill refers to some, but not all, of those matters.[20]

17. The Draft Credit Bill does not outline the Information Commissioner's powers to approve the new Credit Reporting Code, or the precise scope of matters that the Code may deal with.[21] These matters will significantly affect the final content of the new Code and the Information Commissioner's approval process. The OAIC therefore looks forward to making a further assessment of the credit reporting regulatory regime after the release of an exposure draft dealing with the OAIC's powers, and the development of any relevant regulations.

Regulations may supplement or modify obligations

18. The Government has indicated that it may, where necessary, use its general regulation making power in the Privacy Act to make specific regulations that supplement or modify the obligations in the Draft Credit Bill.[22] The Bill outlines some specific matters that those regulations may address.[23] However, like the new Credit Reporting Code, their precise content is yet to be confirmed.

Achieving the reform objectives

19. Below, the OAIC makes specific suggestions for improvements to the Draft Credit Bill, in line with the OAIC's key reform objectives outlined above (para 8).

[19] Government Response (2009), Recommendation 54-9, p 103.

[20] Further information about the the new Credit Reporting Code is in the Companion Guide, pp 5-6. For the former OPC's October 2009 summary of credit code-related matters in the Government Response, see www.privacy.gov.au/materials/types/other/view/6959.

[21] These will be developed separately and contained in an exposure draft Privacy Bill that deals with the functions and powers of the Information Commissioner, to be subsequently released.

[22] Government Response (2009), Recommendation 54-1, p 99.

[23] See, eg, s 132(2)(d)(iii) of the Draft Credit Bill.

A. Simplicity

The Draft Credit Bill's provisions could be contained in a Schedule to the Privacy Act

20. In order to simplify the Privacy Act's structure, and clearly distinguish the role of the APPs and the credit provisions, the OAIC recommends that the provisions of the Draft Credit Bill be located in a Schedule to the Privacy Act.

21. The Privacy Act should enable individuals, organisations and agencies to easily understand their rights and obligations. As the Draft Credit Bill's detailed provisions apply only to specific entities, locating those provisions in the body of the Privacy Act may:

    - add complexity and length to the body of the Act
    - diminish the prominence of the single set of principles that apply to all agencies and organisations – the APPs.

    This could make the Act difficult for individual's to use and understand.

22. Acknowledging that there may be drafting conventions as to when schedules are adopted, the OAIC suggests that consideration be given to whether there is the ability to utilise such a mechanism in this instance. The OAIC notes that the NPPs are currently contained in a schedule to the Privacy Act. Alternatively, there may be a more appropriate mechanism for creating stand alone credit provisions.

Clarify the interaction between the Draft Credit Bill and the APPs

23. The scope of CRAs' and credit providers' privacy obligations should be easily ascertained and clearly stated. At present:

    - for CRAs, the Draft Credit Bill's provisions incorporate all of the relevant general requirements of the APPs and replace the APPs for credit reporting[24]
    - for credit providers that are not SBOs, some APPs apply to credit reporting in addition to the Draft Credit Bill.[25] For credit providers that are SBOs, only the provisions of the Draft Credit Bill apply.

24. In the OAIC's view, this approach may create challenges for individuals, organisations, dispute resolution bodies and the OAIC as regulator.

25. To address this issue, the OAIC suggests the provisions in the Draft Credit Bill should be a self-contained and complete set of provisions in relation to credit reporting. [26] That is, in

[24] Sections 103 and 104 of the Draft Credit Bill.

[25] Section 130 of the Draft Credit Bill, which notes that Division 3 (credit providers) 'may apply' to credit providers that are APP entities 'in addition to, or instead of' the APPs.

place of the APPs, the Draft Credit Bill should incorporate all of the relevant requirements of the APPs, in addition to the more specific or different requirements for credit reporting.

26. The Draft Credit Bill already adopts this preferred approach for CRAs, but not for credit providers. It is not apparent why a different approach has been followed for credit providers.

27. In the OAIC's view, incorporating all of the relevant APP requirements into the Draft Credit Bill (for credit providers) would have several benefits:

- clarify whether the APPs or the Draft Credit Bill apply to credit providers' credit reporting activities
    - for example, currently under the Draft Credit Bill,[27] a credit provider may be required to correct 'identification information' under either the provisions in the Bill or APP 13 (if the APPs apply to them). As these processes are not identical, this introduces avoidable complexity and confusion
- self-contained provisions are easier to use and understand – because obligations and rights can be determined without reference to multiple parts of the Act
- consistent obligations for all credit providers (regardless of size) in relation to credit reporting, and consistent privacy protections for individuals' credit-related information
    - this may better reflect the intent of the Government Response, which indicated that credit providers that are SBOs would be subject to the additional obligations imposed by the APPs in relation to credit reporting[28]
- reduce complexity and increase efficiency in the OAIC's investigations and enforcement of the provisions, since all credit providers would be subject to identical obligations.

28. If the OAIC's preferred approach above (paras 25-27) is not adopted, the OAIC recommends two complementary measures to reduce the complexity of the current provisions. The Draft Credit Bill could:

- clarify which APPs apply to credit providers by positively identifying, in a single provision, the APPs that do and do not apply to credit reporting
    - at present, provisions throughout the Draft Credit Bill identify only those APPs that do not apply to credit providers in relation to credit reporting[29]

[26] Having reviewed the Draft Credit Bill, the OAIC supports this approach as opposed to that proposed in the Government Response (ALRC Recommendation 54-2, pg 99), and the Office's 2007 submissions to the ALRC (Submission to IP 32, Chapter 7, para 20, p 90; Submission to DP 72, Chapter 50, paras 19-24, pp 525-526).

[27] As a result of ss 147(4), 148(4) and 149(6).

[28] Government Response (2009), Recommendation 54-4, pp 100-101.

- ensure that the APPs which apply to credit providers' credit reporting activities (in addition to the Draft Credit Bill) apply to all credit providers, including SBOs[30]
    - at present, credit providers' obligations will vary depending on whether they are subject to the APPs, or are SBOs
    - in the OAIC's view, the protection afforded to individuals' credit-related information should apply regardless of the size of the credit provider (as in the preferred option above), as the same serious consequences may arise if information is mishandled.

B. Privacy-enhancing regulation

Credit providers' disclosure obligations could also apply to 'credit information' collected from any source

29. The OAIC is concerned about the gap in regulation of credit providers' disclosure of 'credit information' collected from sources other than a CRA (for example, collected from an individual in a credit application). A credit provider's disclosure obligations in the Draft Credit Bill apply to 'credit eligibility information'.[31] 'Credit eligibility information' includes 'credit information' that a credit provider collects from a CRA, but not from other sources.[32]

30. 'Credit information' is a central concept in the revised credit reporting system. It includes information about an individual's current and applied for credit accounts, their personal solvency, and certain court judgments against them.[33] The circumstances in which 'credit information' may be disclosed is very significant to an individual. Serious consequences may arise if it is disclosed to some third parties, such as insurers, employers or real estate agents. Accordingly, it is important that a credit provider's disclosure of all 'credit information' be subject to the same limitations, regardless of source.

31. The OAIC therefore recommends that credit providers' disclosure obligations in the Draft Credit Bill apply, at a minimum, to all 'credit information' in addition to 'credit

[29] See, eg, ss 132(6), 135(7)-(8), 143(3) of the Draft Credit Bill.

[30] As an example of the Privacy Act applying to SBOs for limited purposes, 'reporting entities' under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AML/CTF Act), whether SBOs or not, must comply with the Privacy Act in relation to their activities under the AML/CTF Act (see s 6E of the Privacy Act).

[31] Those obligations are set out in Part A, Division 3, Subdivision C (Dealing with credit eligibility information etc.) of the Draft Credit Bill.

[32] Section 180 ('credit eligibility information') of the Draft Credit Bill.

[33] Section 181 of the Draft Credit Bill.

eligibility information' (which only includes 'credit information' collected from a CRA). This may also better reflect the protection proposed in the Government Response.[34]

The complaint process for inaccurate information could be streamlined

32. Inaccurate information held in the credit reporting system may have serious consequences for an individual's ability to obtain credit. It is important that individuals' are able to resolve disputes about inaccurate information simply and efficiently.

33. Under the Draft Credit Bill, it appears that an individual may have to follow a two-step complaint process when complaining to a CRA or credit provider about inaccurate information.

    1) The individual must request the CRA or credit provider to correct information under the correction provisions.[35]

    2) If the CRA or credit provider refuses to correct the information, the individual may complain to the CRA or credit provider about the refusal.[36]

34. In each instance, the CRA or credit provider has 30 days to deal with the individual's request or complaint.[37] It appears that only after the conclusion of this two-step process and 60 day period may an individual access external dispute resolution (EDR) or complain to the Information Commissioner.[38]

35. The current regime in the Privacy Act only requires a single step (ie correction request, followed by refusal) before an individual may complain to the Information Commissioner.[39] The additional step required by the new provisions may create complexity and delay for individuals.

36. The OAIC recommends that consideration be given to streamlining the request and complaint process in relation to inaccurate information. The OAIC notes that the new Credit Reporting Code may also assist in clarifying the practical operation of this process.

[34] The Government Response (2009) suggested that a credit provider's disclosure obligations should apply to information 'similar' to that maintained by a CRA, but not the broad category of information encompassed by the current term 'reports' (Recommendation 57-6, p 119). ('Reports' is a broad category of information that includes 'credit reports' and any other credit worthiness information – see s 18N(9) of the Privacy Act.) The Draft Credit Bill expressly permits CRA to collect (ie maintain) 'credit information' (s 106). Therefore, in the OAIC's view, 'credit information' collected by a credit provider from any source is similar to information maintained by a CRA, and consistently with the Government Response, credit providers' disclosure obligations should apply to it.

[35] Sections 121(1) (in relation to CRAs) and 149(1) (in relation to credit providers) of the Draft Credit Bill.

[36] Sections 157(1)(b) (in relation to CRAs) and 157(2)(b) (in relation to credit providers) of the Draft Credit Bill.

[37] Sections 121(2) (in relation to correction by a CRA), s149(2) (in relation to correction by a credit provider) and 158(4)-(5) (in relation to a complaint to a CRA or credit provider) of the Draft Credit Bill.

[38] Section 159(4),(6) of the Draft Credit Bill.

[39] Sections 18J and 36 of the Privacy Act; Paragraph 3.10(c) of the Current Credit Reporting Code.

Notes could link to complaint provisions

37. Also, as the provisions relating to access and correction[40] are located quite separately from the complaint provisions, notes could be inserted under access and correction obligations that refer to s 157 on complaints.

Require CRAs and credit providers to substantiate accuracy or delete information

38. The OAIC supports the position in the Government Response that CRAs and credit providers should bear the onus of proving the accuracy of credit-related information they hold.[41] This is consistent with those entities' obligation to take reasonable steps to ensure that the information is accurate, up-to-date and complete.[42] It may also assist with the quick and efficient resolution of disputes. At present, the Draft Credit Bill omits this requirement.

39. The Government Response indicated that it would implement this requirement by requiring a CRA or credit provider to delete or correct credit-related information they hold, if they can't prove within 30 days that the information is eligible to be listed. However, if the matter is referred to EDR, instead of deletion or correction, a note would be required to be included with the information, noting it is subject to a dispute.[43]

40. To remedy the omission, the OAIC recommends that:

- the Bill set out CRAs' and credit providers' obligations, and individuals' rights, relevant to the onus to prove the accuracy of information as outlined above
- the new Credit Reporting Code deal with practical compliance matters relevant to those requirements.[44]

Prohibit debt collectors from using and disclosing credit eligibility information for secondary purposes

41. The OAIC is concerned that debt collectors may be permitted to use and disclose 'credit eligibility information' for secondary purposes, in contrast to others who receive credit eligibility information from credit providers.[45] In particular, where the debt

[40] See ss 119(2) and 121(2) for CRAs; and ss 146(2) and 149(2) for credit providers.

[41] Government Response (2009), Recommendation 59-8, p 128.

[42] Sections 116(1) (in relation to CRAs) and 143(1) (in relation to credit providers) of the Draft Credit Bill.

[43] Government Response (2009), Recommendation 59-8, p 128.

[44] The Government Response (2009) (Recommendation 59-8, p 128) indicated that matters such as what point in time a complaint will be deemed to have been made should be dealt with in the new Credit Reporting Code. The Privacy Act and the Current Credit Reporting Code demonstrate the distinction between legislated rights and practical compliance matters. Currently, where a CRA or credit provider has refused to correct information, an individual is able to have a statement of the correction sought included with that information (Privacy Act, s 18J(2)). The Current Credit Reporting Code sets out further requirements about practical compliance with that matter (para 1.13; Explanatory Notes, paras 18-19).

[45] Credit providers may disclose credit eligibility information to debt collectors in certain circumstances under s 140 of the Draft Credit Bill.

collector is an SBO the Draft Credit Bill appears to leave such secondary use and disclosure unregulated by the Privacy Act.[46]

42. The Draft Credit Bill sets out use and disclosure obligations for all entities to whom credit providers may disclose credit eligibility information, other than debt collectors.[47] The use and disclosure obligations that apply to entities other than debt collectors:

- prohibit use and disclosure of the credit eligibility information, other than for the primary purpose it was collected
- apply to those entities instead of the relevant APPs
- apply whether the entity is a SBO or not.

43. The omission of similar obligations for debt collectors means that:

- the APPs will regulate the use and disclosure of that information by debt collectors, other than SBOs. The APPs permit the use and disclosure of information for secondary purposes in certain circumstances[48]
- the use and disclosure of credit eligibility information by debt collectors that are SBOs is unregulated.[49]

44. The disclosure of financial information to third parties may have serious consequences for an individual.[50] The OAIC therefore recommends that the Draft Credit Bill should prohibit all debt collectors (regardless of size) from using and disclosing credit eligibility information, other than for the primary purpose it is collected. This would be consistent with the Bill's obligations for other recipients in Division 4.

Access by organisations to credit-related information via an individual

45. Like existing Part IIIA, the Draft Credit Bill imposes a regime of strict regulations and penalties that apply in relation to the handling of credit-related information. It generally only permits use and disclosure of credit-related information for puposes related to credit assessment. The Bill therefore focuses on those entities primarily involved in that system (particularly CRAs and credit providers).

46. Under the Draft Credit Bill, real estate agents, insurers and employers are explicitly prohibited from accessing credit-related information from CRAs.[51] The OAIC believes that there may nevertheless be situations where those entities (and potentially other

[46] The OAIC understands that while some debt collectors are likely to be SBOs, some may not be where they are trading in personal information without consent – see s 6D of the Privacy Act.

[47] Sections 151-155 of the Draft Credit Bill.

[48] Draft APP 6 ('use or disclosure of personal information').

[49] The OAIC (as the former OPC) raised this concern in its 2007 submissions to the ALRC (Submission to IP 32, Chapter 5, Question 5-13, paras 123-125; Submission to DP 72, Chapter 50, Proposal 50-5, paras 59-62, p 534; Submission to DP 72, Proposal 53-1, paras 16-20, p 591; ALRC Report 108 noted this concern, para 57.18).

[50] As mentioned at para 30 above.

[51] Section 188(5) of the Draft Credit Bill deems that real estate agents, insurers and employers are not credit providers.

organisations) could be able to access credit-related information for purposes unrelated to credit assessment by requesting (or requiring) an individual to provide that information. For example, it is conceivable that real estate agents may consider that the collection of credit-related information from a rental applicant is authorised under the APPs because it is necessary for the purpose of assessing the applicant's suitability for rental accommodation.[52]

47. In such circumstances, the handling of credit-related information collected by organisations directly from the individual may be regulated under the APPs. However, this could allow for credit-related information to be used and disclosed in ways in which it couldn't if it were subject to the Draft Credit Bill's provisions.[53] Moreover, in circumstances where those organisations are SBOs, or private sector employers (in the latter case the employee records exemption may apply[54]), their handling of credit-related information may be unregulated.

48. Given the explicit prohibition on real estate agents, insurers and employers from accessing credit-related information from CRAs, this situation could be seen as anomalous. Having said that, at the same time, the OAIC does not wish to prevent individuals from dealing with their credit-related information in ways they wish. Therefore, the OAIC suggests that the Senate Committee consider seeking stakeholders' views on the issue.

C. Clarity of concepts

49. The Draft Credit Bill introduces a range of new concepts into the credit reporting regime. To ensure a smooth transition to the new regime, it is important that new concepts and terminology are clearly defined, well explained and understood.

Rename and clarify 'pre-screening determinations'

50. The OAIC recommends taking the measures below to clarify the proposed concept of a 'pre-screening determination'.[55]

The term 'pre-screening assessment' could be used instead of 'pre-screening determination'

51. The OAIC recommends using the term 'pre-screening assessment' instead of 'pre-screening determination'. This would avoid confusion with other uses of the term 'determination' and better reflect the nature of the decision being made by a CRA.

[52] See draft APP3(1).

[53] See, for example, draft APP6(2)(a) which permits use and disclosure of personal information for secondary purposes, if the individual would reasonably expect the entity to do so, and the secondary purpose is related to the primary purpose of collection.

[54] See s 7B(3) of the Privacy Act.

[55] Defined in s 180 of the Draft Credit Bill as 'a determination made under paragraph 110(2)(d)'.

52. Presently, 'determination' is used in the Privacy Act to refer to a range of formal decisions and legislative instruments made by the Information Commissioner.[56] On the other hand, a 'pre-screening determination' under the Draft Credit Bill is a conclusion reached by a CRA about an individual's eligibility to receive direct marketing communications.[57] These are very different concepts, and confusion between them should be avoided.

53. If the term 'pre-screening assessment' is adopted, all uses of the word 'determine' in the pre-screening provisions[58] should be replaced by the word 'assess' or 'assessment'.

Use of the word 'determination' in the context of complaints

54. Similarly, the OAIC recommends using an alternative term such as 'decision' to replace the Draft Credit Bill's use of the term 'determination' to describe the conclusion reached by a CRA or credit provider following investigation of a complaint.[59]

Use of the term 'pre-screening assessment' should be clear and consistent

55. The term 'pre-screening determination' is rarely used in the draft pre-screening provisions. A 'pre-screening determination' is defined in s 180 of the Draft Credit Bill as 'a determination made under paragraph 110(2)(d)'. Paragraph 110(2)(d) describes the use of information to 'determine' whether direct marketing is permissible, but does not use the term 'pre-screening determination' itself.

56. In addition to adopting 'assessment' rather than 'determination', the OAIC recommends that para 110(2)(d) include a reference to the full term 'pre-screening assessment' to improve clarity. Two options include:

- moving the description in para 110(2)(d) to the definition of 'pre-screening [assessment]' in s 180. Para 110(2)(d) could then simply state 'the credit reporting agency uses the information to make a pre-screening assessment'[60]
- alternatively, referring to a 'pre-screening assessment' in brackets at the end of para 110(2)(d),[61] or in a note to the paragraph.

57. Additionally, para 110(4) provides that a 'determination under paragraph (2)(d) is not credit reporting information about the individual'. The OAIC recommends:

[56] See, eg, ss 52 ('Determination of the Commissioner') and 72 ('Power to make, and effect of, determinations') of the Privacy Act.

[57] Sections 180 ('pre-screening determination') and 110(2)(d) of the Draft Credit Bill.

[58] Sections 110-112 of the Draft Credit Bill.

[59] See section 158(4) of the Draft Credit Bill.

[60] A possible revised definition of 'pre-screening [assessment]' in s 180 could be 'an assessment made by a credit reporting agency that the individual is eligible to receive the direct marketing communications of the credit provider'.

[61] The revised wording of paragraph 110(2)(d) could be 'the credit reporting agency uses the information to assess whether or not the individual is eligible to receive the direct marketing communications of the credit provider (a *pre-screening assessment*)' (changes underlined).

- replacing the words 'determination under paragraph (2)(d)' with the term 'pre-screening assessment'
- in the definitions in s 180, including a reference (or a note) that 'credit reporting information' does not include a 'pre-screening assessment'.

Limit 'publicly available information' collected and shared in the credit reporting system

58. The scope of 'publicly available information' proposed to be included as 'credit information' under the Draft Credit Bill should be subject to further limits – either in regulations, the new Credit Reporting Code, or Information Commissioner's rules.

59. The definition of 'credit information' (which replaces the concept of a credit file/report) in s 181 of the Draft Credit Bill introduces a new category, 'publicly available information', at subsection (k). The Government Response foreshadowed that the credit provisions would regulate publicly available information that CRAs collect for credit-related purposes (but not other purposes).[62]

60. The OAIC understands that the intent of referring to publicly available information is to ensure that the public information that CRAs may be collecting (not currently captured under Part IIIA of the Privacy Act) is given adequate privacy protections. It is not clear what information is envisaged under subsection (k) given that court records and insolvency information are excluded (as they are listed separately). The Senate Committee may wish to explore this question with other stakeholders.

61. A key privacy issue in credit reporting is the need to limit collection and sharing of personal information to that what is necessary and relevant. There needs to be a clear distinction between what is relevant to assessing eligibility for credit (and subject to additional regulation) and other information. The definition of 'credit information' may be intended to classify the limits of personal information that is relevant for CRAs to provide to credit providers to assess individuals' creditworthiness.

62. With that in mind, the OAIC believes the current scope of 'publicly available information' that may be included as 'credit information' seems broad, and its limits unclear. In particular, an increasing amount of personal information is publicly available online, including from social networking sites. The relevance and accuracy of some such information may be doubtful (and give rise to an increasing number of complaints), yet it may fall within scope of subsection (k).

63. To avoid this scenario, and to improve clarity and certainty, the OAIC recommends additional limitations be placed on subsection (k) of the 'credit information' definition. Amendments could allow regulations, the new Credit Reporting Code, or rules issued by the Information Commissioner, to further limit its scope or specifically prescribe what publicly available information can or cannot be included as 'credit information'.

[62] Government Response (2009), Recommendation 54-3.

Adopt the term 'credit reporter' to replace the term 'credit reporting agency'

64. The OAIC suggests that measures should be taken to minimise any confusion between a 'credit reporting agency' and the term 'agency'. The term 'agency' is separately defined under the Privacy Act and mainly refers to Australian Government agencies.[63]

65. This could be achieved by adopting a new term that does not use the word 'agency'. For example, the term 'credit reporter' is used in New Zealand.[64]

66. Other alternatives include:

- using the full term 'credit reporting agency' throughout the relevant provisions - the Draft Credit Bill often uses the abbreviated term 'agency' to refer to a CRA where a provision previously refers to a 'credit reporting agency'[65]
- using the abbreviation 'CRA'[66] after a provision refers to a 'credit reporting agency'.

D. Flexibility

Requirements for written authorisation should consider the National Relay Service's role

67. The OAIC is concerned that the provisions of the Draft Credit Bill that provide individuals with rights of access to their credit-related information may not sufficiently take account of situations where an individual obtains access using the National Relay Service (NRS).[67]

68. The Draft Credit Bill requires CRAs and credit providers to give an 'access-seeker' access to an individual's credit-related information.[68] An 'access seeker' is defined as the individual, or a person assisting the individual that is authorised in writing by the individual.[69] The need for an individual to give written authorisation may be

[63] Section 6 ('agency') of the Privacy Act; Section 16 of the draft APPs.

[64] Section 5 ('credit reporter') of the Credit Reporting Privacy Code 2004 (NZ) available at http://privacy.org.nz/credit-reporting-privacy-code/ .

[65] See, eg, s 104(1) of the Draft Credit Bill.

[66] If 'CRA' is used, the OAIC suggests it appear in brackets after the first use of 'credit reporting agency' in a provision. 'CRA' could also be defined in s 180 of the Draft Credit Bill as a 'credit reporting agency'.

[67] The NRS, under contract to the Australian Government, provides a phone service for people who are deaf, hearing-impaired or have complex communication needs. The NRS relay officer provides a link for the parties to the call and relays exactly what is said or typed. The NRS relay officer is present for the duration of the call to ensure smooth communication between the parties but does not change or interfere with what the parties say. See www.relayservice.com.au.

[68] Sections 119 and 146 of the Draft Credit Bill. The requirement to give access is subject to limited exceptions.

[69] Section 192(1) of the Draft Credit Bill.

problematic in some situations where an individual uses the NRS to 'access' their credit-related information.[70]

69. In Report 108, the ALRC's view was that the NRS involves persons assisting individuals to access their information.[71] Currently, the Privacy Act only requires written authorisation for third parties that access information on behalf of an individual.[72] The ALRC took the view that the NRS does not involve a person accessing information on behalf of an individual and so written authorisation was not required under the current provisions.

70. Partly for this reason, the ALRC did not recommend an express exception from the requirement to give written authorisation for users of the NRS. The ALRC did not believe that an equivalent of the current provisions would be problematic for NRS users. However, since the Draft Credit Bill uses the term assists rather than on behalf of, it may require users of the NRS to provide written authorisation.

Options to accommodate NRS calls

71. The OAIC suggests that the views of the NRS and its customers be sought to assist in achieving the best outcome. Subject to those considerations, and the need for supplementary safeguards, the OAIC recommends that either:

- an express exception from the requirement for written authorisation be included in the Draft Credit Bill for persons assisting an individual using the NRS to access their credit-related information, or
- the language used in the definition of 'access-seeker' be modified to take into account situations where an individual uses the NRS.

Consistent and appropriate regulation of information used for credit research purposes

72. The Draft Credit Bill allows CRAs to use de-identified information for research purposes in certain circumstances, in compliance with any rules made by the Information Commissioner.[73] CRAs are otherwise prohibited from using de-identified information.

73. Significantly, this approach would be the first time that the Privacy Act would regulate the use of de-identified information. Ordinarily, such information falls outside the Privacy Act's coverage as it is does not meet the definition of 'personal information'.

[70] The OAIC understands that whether the NRS relay officer can obtain a customer's written authorisation via the phone will depend on the call type. In 'Speak and Read', and 'Speak and Listen' calls, customers use their own speech. As the individual does not write during these calls, they cannot give written consent via the NRS relay officer. For these types of calls, the Draft Credit Bill would seem to require written consent before using an NRS service for credit information purposes. (See also Submission to IP 32, Chapter 5, paras 123-125; Submission to DP72, Chapter 55, paras 28-29, pp 634-635.)

[71] ALRC Report 108 (2008), paragraph 59.56 and Recommendation 59-3, accepted in the Government Response, p 125.

[72] Section 18(H)(3) of the Privacy Act.

[73] Section 115 of the Draft Credit Bill.

74. In general, using de-identified information for research is potentially less privacy-invasive than using identified information, provided that:

    - where practicable, individuals are informed that information may be de-identified and used for research purposes (and that this aligns with individuals' reasonable expectations of use by the relevant sector), and
    - the information is appropriately de-identified, used and otherwise handled in a way that minimises any potential for re-identification of individuals.[74]

75. If the handling of de-identified information for research purposes is to be regulated under the Draft Credit Bill, it is important that such regulation is consistent and appropriate. That is:

    - in a way that is consistent with or complementary to research regulation in other areas of the new Privacy Act (noting draft health and research provisions are yet to be released)[75]
    - with appropriate consideration of the types of information involved in the credit reporting system, its current usage by CRAs, and community sensitivities and expectations.

Should CRAs be permitted to disclose de-identified information in some circumstances?

76. The Draft Credit Bill prohibits CRAs from disclosing de-identified information, including for research purposes.[76] As the OAIC understands it, this may require CRAs to conduct research in-house, rather than using research firms or specialists. It may also prevent CRAs from disclosing de-identified information to other parties, such as consumer groups or legal centres for their own research (or indeed, to the OAIC as regulator).

77. These potential consequences should be considered further, as it is not clear whether they are part of the policy intent behind the Draft Credit Bill's provisions.

Should relevant rules be in place before use of de-identified information for research?

78. If it is deemed appropriate and in the public interest that the Information Commissioner issue rules to regulate research using de-identified, credit-related information,[77] then the OAIC suggests that the Draft Credit Bill clarify whether those rules must be in place before any such research is permitted. The reference to 'any Australian Privacy Rules' in subsection 115(2)(b) would not prevent research occurring prior to rules being

[74] The then OPC issued guidance on avoiding re-identification of individuals from de-identified information in another context. See Private Sector Information Sheet 9 – *2001: Handling Health Information for Research and Management*, pp 3-4 available at http://www.privacy.gov.au/materials/types/infosheets/view/6568 .

[75] The general content of those provisions are outlined in the Government Response (2009), Chapter 65, p 139.

[76] Section 115(1) of the Draft Credit Bill. Section 115(2) creates an exception allowing the 'use' (but not disclosure) of de-identified information for research purposes.

[77] As in s 115(3) of the Draft Credit Bill. Section 115(4) sets out a non-exhaustive and non-binding list of matters to which the rules may relate.

developed. Existing research provisions in the Privacy Act do not use the word 'any' – they say research can proceed 'in accordance with' binding guidelines.

The new Credit Reporting Code could deal with CRAs' obligations to destroy information if the retention period has ended, and any dispute is resolved

79. In the OAIC's view, it is important that the Draft Credit Bill provides a simple and efficient requirement for CRAs to destroy or de-identify information once a correction request or dispute is resolved.[78] Under the Draft Credit Bill, it appears that a CRA would only be required to destroy or de-identify information retained while a dispute was ongoing if the Information Commissioner issues a legislative instrument directing the CRA to do so.[79] In the OAIC's view, this is insufficient and could also have significant and unnecessary resourcing impacts on the OAIC.

80. The question of when a dispute is resolved (and so destruction is appropriate) may be complex. It may depend on the avenues of complaint an individual chooses to pursue. In the OAIC's view, the new Credit Reporting Code may be an appropriate place to deal with this question. The Information Commissioner's power to direct destruction or de-identification could supplement any destruction requirements set out in that Code.

81. The OAIC therefore recommends that the Draft Credit Bill provide that, where a CRA has retained information beyond the retention period, due to a correction request or dispute, it must destroy or de-identify that information in the manner set out in the new Credit Reporting Code (supplemented by the Bill's proposed requirement to destroy information if directed by the Information Commissioner).

[78] Section 123(3),(6) of the Draft Credit Bill exempt CRAs from the usual requirement to destroy or de-identify information after certain time periods (ie the 'retention period') if there is a pending correction request or dispute in relation to the information at the end of the period.

[79] See generally, s 127 of the Draft Credit Bill, and s 127(6) in particular.