



Australian Government

COMPANION GUIDE

**Privacy Reforms:
Credit Reporting**

January 2011

**Minister for Privacy and Freedom of Information
The Hon Brendan O'Connor MP**

PART 1 - OVERVIEW

As part of its 2007 election policies, the Government announced that it would consider the ALRC's recommendations on privacy reform as a matter of priority. This companion guide deals with the privacy of personal information relating to credit reporting.

REFORM IMPLEMENTATION

The release of these exposure draft provisions is the second part in the Australian Government's implementation of the first stage of announced reforms to the Privacy Act. It follows release of the exposure draft provisions relating to the proposed new Australian Privacy Principles (APPs).

These reforms are the most significant to Australia's privacy laws since the inception of the *Privacy Act 1988* (Cth), revitalising the law for the 21st century.

THE PRIVACY ACT 1988

The *Privacy Act 1988* contains provisions protecting personal information (data) of individuals from unauthorised collection, use and disclosure by Commonwealth Government agencies and certain private sector organisations (and not individuals acting in a personal capacity).

Individuals may complain to the Privacy Commissioner about acts or practices that the individual considers are interferences with the privacy of the individual.

WHAT IS INCLUDED IN THIS PART OF THE EXPOSURE DRAFT?

This part of the exposure draft contains provisions relating to collection, use and disclosure of information for credit reporting purposes, which will form part of a new Privacy Act.

Credit reporting is specifically regulated by Part IIIA of the Privacy Act, which prescribes the use of personal information for credit reporting purposes, and the activities of credit reporting agencies, credit providers, and other third parties in relation to credit reporting information. Under the existing regime, credit reporting agencies and other bodies whilst specifically regulated by Part IIIA are also required to comply with the existing National Privacy Principles (which apply to certain private sector organisations) if these principles are also applicable.

Under the exposure draft provisions, the Privacy Act will continue to specifically regulate credit reporting. The new APPs, which will apply uniformly to the public and private sector, will form the basis for specific obligations relating to the regulation of credit reporting. The other key measures in the provisions include:

- more comprehensive credit reporting provisions, including five new data sets;
- increased coverage of the credit reporting provisions to a wider range of credit reporting agencies and credit providers; and
- enhanced clarity and simplified structure and drafting of the provisions.

The new regime will be underpinned by a new industry-agreed Credit Reporting Code of Conduct which will be subject to approval by the Australian Information Commissioner. These provisions will be drafted as part of the Government's implementation of its response to Part F of the ALRC Report.

DEVELOPMENT OF THE EXPOSURE DRAFT

The exposure draft provisions substantially implement the Government's response to the ALRC report recommendations on credit reporting. The Government has also received representations from a number of key stakeholders and taken these into account in developing the exposure draft. The issues raised in these representations will continue to be considered by the Government along with those raised with the Senate Finance and Public Administration Committee (Senate Committee).

WHAT WILL HAPPEN NEXT?

Each part of the privacy reforms will be referred to the Senate Committee for consideration as the drafting of it is completed. It is anticipated that in stage one there will be a maximum of four parts referred to the Committee. The first part relating to the APPs was referred to the Senate Committee on 24 June 2010.

The other parts that will be developed and released for public consideration are:

- specific privacy protections for information relating to health services and research; and
- the functions and powers of the Australian Information Commissioner.

Once the Senate Committee has reported on all of the parts, the provisions will be consolidated and introduced into Parliament, along with any other legislation that is necessary to enact consequential or transitional provisions.

LIST OF ABBREVIATIONS AND TERMS USED IN THIS GUIDE

Expression	Meaning
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ALRC	Australian Law Reform Commission
APP	The proposed new Australian Privacy Principle
existing Privacy Act	<i>Privacy Act 1988</i>
IPP	Information Privacy Principle set out in section 14 of the existing Privacy Act
NPP	National Privacy Principle set out in Schedule 3 to the existing Privacy Act

PART 2 – GENERAL MATTERS

EXISTING PART IIIA

Part IIIA of the existing Privacy Act regulates the collection, use and disclosure of personal information by credit reporting agencies and credit providers (as defined). Part IIIA regulates personal information concerning credit that is intended to be used wholly or primarily for domestic, family or household purposes. While there are incidental references to commercial credit, the obligations in Part IIIA are not directed at commercial credit.

INTERACTION WITH AUSTRALIAN PRIVACY PRINCIPLES

The Australian Privacy Principles form the basis of the new specific obligations for the regulation of credit reporting. The provisions in this exposure draft build upon the APPs with appropriate modification to address the particular privacy issues raised by the collection, use and disclosure of personal information in the credit reporting system.

The obligations contained in the exposure draft provisions are, in many respects, more onerous than those that will apply to organisations under the APPs. That reflects the need to ensure that higher standards of privacy protection should apply where personal information is collected, used and disclosed for credit reporting purposes.

The interaction between the APPs and the exposure draft provisions differs depending on the entity involved and the information being regulated.

For credit reporting agencies that are entities subject to the APPs, the rules in Division 2 of the exposure draft will apply instead of the APPs to the information

covered by the rules. This will ensure that more onerous privacy obligations will apply to the types of defined information collected, used and disclosed by credit reporting agencies.

For credit providers that are entities subject to the APPs, rules in Division 3 of the exposure draft will apply in addition to, or instead of, the APPs. This will ensure that the APPs continue to apply to certain types of personal information (eg identification information) while more onerous privacy obligations will apply to other types of personal information collected, used and disclosed by credit providers in the credit reporting system.

CREDIT REPORTING CODE

The Act currently empowers the Australian Information Commissioner to issue a binding Code of Conduct that must address, amongst other things, issues relating to collection, storage, security, correction and disclosure of personal information in credit information files and reports. A *Credit Reporting Code of Conduct* has been in effect since 24 September 1991.

The exposure draft provisions contain only minor references to the proposed new Credit Reporting Code of Conduct. The Code will be developed separately by industry and key stakeholders using the Government's response to the ALRC's recommendation 54-9 as the basis for its development.

However, the exposure draft does expressly envisage some matters to be dealt with in the Code. These include:

- the implementation of practices, procedures and systems relating to the credit reporting business of a credit reporting agency that will, amongst other things, ensure that it complies with the Code;

- requirements set out in the Code relating to the disclosure of direct marketing;
- the means of access given by a credit reporting agency to an access seeker relating to credit reporting information;
- matters to be notified to an individual at, or before, the time a credit provider collects personal information about that individual that the provider is likely to disclose to a credit reporting agency; and
- matters specified in the Code to be notified to an individual by a credit provider when an application for consumer credit is refused.

KEY FEATURES

MORE COMPREHENSIVE CREDIT REPORTING PROVISIONS

Under the exposure draft provisions, five new positive data sets will be included in the credit reporting system. The five new data sets will be: the type of each active credit account, date of opening *and* closure of account, account credit limits and credit repayment history.

This will benefit business and consumers by enabling improved assessment of the credit worthiness of an individual and increased competition between large and small lenders.

In the Government's response to the ALRC recommendations, it was stated that the inclusion of repayment history would be subject to conditions, including the introduction of responsible lending conduct requirements. This was achieved with the enactment of the *National Consumer Credit Protection Act 2009* which came into operation on 1 April 2010.

WHO IS REGULATED BY THE PROVISIONS?

As with the existing Part IIIA, the new regime will regulate the collection, use and disclosure of personal information by credit reporting agencies and credit providers.

Credit reporting agencies generally collect information about individuals from credit providers and publicly available information such as bankruptcy information. This information is used to generate credit reporting information for credit providers.

Credit reporting agency

Under the new provisions, a credit reporting agency is defined as an organisation, small business operator, or prescribed agency that carries on a credit reporting business. Such a business must be carried on in Australia and involve the collecting, holding, using or disclosing of personal information about individuals for the purpose of, or for purposes including the purpose of, providing an entity with information about the credit worthiness of an individual.

The concept of credit reporting agencies has been broadened to apply to credit reporting agencies that are organisations, small business operators and prescribed agencies.

Division 2 of the exposure draft sets out the rules for credit reporting agencies. These rules relate to the handling of credit reporting information, de-identified information and to other specified kinds of personal information.

Credit reporting agencies will be required to manage credit reporting information in an open and transparent way. Such agencies must take such steps as are reasonable in the circumstances to implement practices, procedures and

systems relating to the credit reporting business of the agency that:

- ensures compliance with various obligations in Division 2 and the Credit Reporting Code; and
- enables the agency to deal with inquiries or complaints from individuals about the agency's compliances with Division 2 or the Credit Reporting Code.

Credit reporting agencies must also have a clearly expressed and up-to-date policy about the management of credit reporting information by the agency.

In summary, credit reporting agencies will have obligations under Division 2 relating to:

- collection of 'credit information';
- use or disclosure of 'credit reporting information';
- use, disclosure and destruction of 'pre-screening determinations';
- use and disclosure of 'de-identified information';
- rules about integrity of 'credit reporting information';
- access to, and correction of, different types of information; and
- destruction of credit reporting information after certain retention periods or in cases of fraud.

Credit providers

The definition of 'credit provider' includes banks, certain agencies, organisations or small business operators. As with credit reporting agencies, the concept of credit providers has been broadened under the

new regime beyond credit providers to small business operators.

For example, organisations or small business operators will be credit providers where they carry on a business or undertaking where a substantial part of that business or undertaking involves the provision of credit. Other organisations or small business operators may also be credit providers if they provide credit in connection with the sale of goods, the supply of services, or the hiring, leasing or renting of goods.

Division 3 of the exposure draft sets out various rules for credit providers that relate to the handling by these providers of 'credit information' or 'credit eligibility information'. The remaining rules relate to the handling of other specified kinds of personal information.

As noted above, the rules in Division 3 apply to credit providers that are APP entities in addition to, or instead of, the APPs.

In summary, credit providers will have obligations under Division 3 relating to:

- notifying individuals of certain matters at or before the time of collecting personal information likely to be disclosed to a credit reporting agency;
- disclosure of other information to a credit reporting agency;
- use or disclosure of 'credit eligibility information', including between credit providers and to debt collectors, mortgage insurers and other recipients;
- notification of a refusal of an application for consumer credit;
- rules about integrity of 'credit eligibility information';

- criminal offences and civil penalties for certain uses or disclosures of false or misleading information; and
- access to, and correction of, different types of information.

Division 4 contains rules for certain recipients of information that has been disclosed by credit reporting agencies or credit providers. These rules apply to recipients that are APP entities instead of any relevant APPs. These rules ensure that information used for credit reporting purposes continues to attract appropriate privacy protections after it has been disclosed by credit reporting agencies or credit providers.

Under Division 4, such entities include mortgage insurers, trade insurers, credit managers, legal/financial advisers and related body corporates of a credit provider.

TYPES OF INFORMATION REGULATED

The exposure draft uses a number of core definitions to better identify information flows in the credit reporting system, rather than basing the regulatory framework on the single definition of ‘credit reporting information’.

The creation of a number of definitions is intended to improve the clarity and operation of the provisions.

The exposure draft uses the following terminology to describe key types of information that is regulated:

- a definition of ‘credit information’ that captures all the types of personal information collected by credit reporting agencies into the credit reporting system, ensuring that all these types of information are regulated. This definition includes the five new positive data sets; and

- definitions of ‘credit reporting information’ and ‘credit eligibility information’. These both include any information *derived* from that credit information by a credit reporting agency or credit provider. This will capture credit ‘scorecards’ that are used by credit reporting agencies and credit providers to determine an individual’s credit worthiness so that this information is protected as it directly relates to the individual’s credit worthiness.

‘DE-IDENTIFIED’ INFORMATION

In the Government response to ALRC recommendation 57-2, it was noted that a key concern for both credit reporting agencies and credit providers in supporting that recommendation was that it would provide an ability to conduct research (including statistical modelling and data analysis) in relation to credit reporting information where it related to the assessment or management of credit and was for the benefit of the public.

The Government decided that, in addition to the permitted uses and disclosures under recommendation 57-1, credit reporting agencies or credit providers should also be permitted to use and disclose de-identified credit reporting information for research purposes where it is in the public interest and where there is a sufficient connection to the credit reporting system. The Government decided that such research would also be required to be conducted in accordance with rules developed by the Australian Information Commissioner.

Under section 180, de-identified information means ‘credit reporting information that is no longer personal information’.

Section 115 provides that a credit reporting agency that possesses or controls de-identified information, must not use or disclose the information. There is an

exception if the use is for the purposes of conducting research in relation to the assessment of the credit worthiness of individuals, and the credit reporting agency complies with any Australian Privacy Rules made by the Australian Information Commissioner.

The rules must relate to the use by a credit reporting agency of de-identified information for the purposes of conducting research in relation to the assessment of the credit worthiness of individuals.

The specific kinds of matters the rules may relate to include:

- the kinds of de-identified information that may or may not be used for the purposes of conducting the research;
- whether or not the research is research in relation to the assessment of the credit worthiness of individuals;
- the purposes of conducting the research;
- consultation about the research; and
- how the research is conducted.

Research by credit providers will be regulated by the APPs.

COMPLAINTS

Division 5 of the exposure draft contains provisions dealing with complaint handling in relation to credit reporting agencies or credit providers.

Individuals may complain to a credit reporting agency or credit provider if access to, or correction of, certain information is refused. They may also complain about an act or practice engaged in by a credit reporting agency or credit provider that may be a 'credit reporting infringement', which is an infringement involving a contravention of Part A (which contains all the key provisions except definitions) or of the Credit Reporting Code.

Division 5 contains detailed provisions about how a credit reporting agency or

credit provider must respond to the complaint, including rules about determination of the complaint.

If a complaint cannot be resolved to the satisfaction of the individual, there are safeguards that facilitate access to an external dispute resolution scheme or a complaint to the Information Commissioner.

RETENTION PERIODS

The exposure draft largely follows the existing requirements in the Privacy Act relating to deletion by credit reporting agencies of different categories of credit reporting information after the expiry of maximum permissible periods.

However, the retention period for personal insolvency information has been changed. New rules have been made for the retention of information about personal insolvency agreements, debt agreement proposals and property retention orders due to the special nature of these situations.

PRE-SCREENING DETERMINATIONS

The exposure draft permits a credit reporting agency to use credit information about an individual for the purposes of direct marketing by, or on behalf of, a credit provider if it is used to determine whether or not the individual is eligible to receive direct marketing communication of the provider (ie a 'pre-screening determination').

However, there are strict rules preventing disclosure of the determination except in limited circumstances on both the credit reporting agency that makes the determination, and any other entity that receives the determination.

CROSS BORDER DISCLOSURE

The issue of prohibiting foreign credit reporting as outlined in the Government response to recommendation 54-5, is addressed by scoping the operation of the credit reporting provisions so that they only apply to credit that is provided or applied for in Australia (section 101).

Australia is defined in section 180 to refer to geographical limits include external territories. These provisions are designed to ensure that credit reporting agencies and credit providers cannot include any information about an individual's credit activity in another jurisdiction in the credit reporting system nor disclose any information about an individual's credit activity in Australia to another jurisdiction.

The draft provisions do not include provisions dealing with cross-border disclosures of credit reporting information or a proposed exception to allow credit reporting information to be shared with New Zealand. These provisions will be drafted following further inter-governmental negotiations with the relevant New Zealand authorities.

PART 3 - DEFINITIONS

The following table sets out some of the key definitions that appear in the draft and notes specific information that may assist in using the definitions for the purposes of

interpreting the provisions in the exposure draft.

It is important to note that this is not an exhaustive list of definitions that will appear in the new Privacy Act.

Definition	Comments
<i>ban period</i>	This definition refers to the period during which a credit reporting agency is prevented from using or disclosing credit reporting information about an individual. This will be where an individual has requested the 'ban' on use and disclosure because they believe on reasonable grounds that they have been, or likely to be, a victim of fraud.
<i>consumer credit</i>	This definition has been extended in line with the <i>National Consumer Credit Protection Act 2009</i> to include credit provided to acquire, maintain, renovate or improve residential investment properties. It is appropriate to ensure that credit transactions that are afforded protection under that Act are also adequately protected under the credit reporting provisions.
<i>consumer credit liability information</i>	This definition refers to certain information where a credit provider provides consumer credit to an individual. Amongst other things, the information includes the name of the provider, the type of consumer credit, the terms or conditions of the consumer credit etc. There are use and disclosure restrictions on such information.
<i>credit information</i>	This definition is relevant to section 181. The definition will replace existing definitions of 'credit information file', 'credit report' and 'report'. The new definition will shift the focus of regulation from the particular kinds of records used in the credit reporting system to the type of information that will be protected by the credit reporting systems. Consistent with the ALRC's recommendation for more comprehensive credit reporting (55-1), it will include a wider range of information ('data sets') to assist credit providers in establishing an individual's credit worthiness. This occurs through inclusion of the definition of 'consumer credit liability information' in addition to the separate 'repayment history information'.
<i>CP derived information</i>	This definition has been included to refer to information that a credit provider may derive from credit reporting information disclosed to it from a credit reporting agency. This is intended to capture credit 'scorecards' used by credit reporting agencies and credit providers to determine an individual's credit worthiness.
<i>CRA derived information</i>	This definition has been included to refer to information that a credit reporting agency may derive from credit reporting information that is held by that agency. This is intended to capture credit 'scorecards' used by both credit reporting agencies and credit providers to determine an individual's credit worthiness.
<i>credit eligibility information</i>	This definition refers to credit reporting information held by a credit provider about an individual that was disclosed to it by a credit

	reporting agency under a permitted disclosure in Division 2. Division 3 contains detailed rules relating to the handling of or credit eligibility information by credit providers.
<i>credit provider</i>	This definition is relevant to section 188 to 191. The definition includes banks, certain agencies, organisations or small business operators. As with credit reporting agencies, the concept of credit providers has been broadened under the new regime to include small business operators.
<i>credit reporting agency</i>	This definition has been broadened to refer to an organisation, small business operator, or prescribed agency that carries on a credit reporting business.
<i>credit reporting information</i>	This definition includes credit information or CRA derived information, ie information that a credit reporting agency may derive from that information. Most of the rules in Division 2 relate to the handling of credit reporting information by credit reporting agencies.
<i>credit worthiness</i>	This definition picks up the Government's response to the ALRC's recommendation 57-6 by narrowing the current definition of a report about an individual's 'credit worthiness'. The new definition covers eligibility to be provided with consumer credit, consumer credit history, and capacity to repay consumer credit.
<i>default information</i>	This definition is contained in section 182 and refers to circumstances where an individual is overdue in making a payment relating to consumer credit or under a guarantee.
<i>entity</i>	This definition differs from the APPs exposure draft. A broader range of entities come within the scope of the credit reporting provisions, eg a small business operator.
<i>identification information</i>	This definition is based on the existing Privacy Commissioner <i>Determination under the Privacy Act 1988: 1991 No 2 (s.18E(3))</i> concerning identifying particulars permitted to be included in a credit information file.
<i>organisation</i>	This definition is similar to that used in the existing Privacy Act.
<i>payment information</i>	This definition is relevant to section 185 which provides that payment information is a statement that an amount of an overdue payment has been paid on a particular day. The payment occurs after a credit provider has disclosed default information about an individual to a credit reporting agency.
<i>permitted CP disclosure</i>	This definition is relevant to sections 137 to 141 which outline the permitted disclosures by a credit provider of credit eligibility information.
<i>permitted CP use</i>	This definition is relevant to section 136 which outlines the permitted uses by a credit provider of credit eligibility information.
<i>permitted CRA disclosure</i>	This definition is relevant to section 109 which outlines the permitted disclosures by a credit reporting agency of credit reporting information.
<i>personal information</i>	This definition is the same as that used in the APP provisions.
<i>pre-screening</i>	This definition is relevant to paragraph 110(2)(d) which permits a

<i>determination</i>	credit reporting agency to use credit information about an individual for the purposes of direct marketing by, or on behalf of, a credit provider if it is used to determine whether or not the individual is eligible to receive direct marketing communication of the provider.
<i>recognised external dispute resolution scheme</i>	This definition is relevant to section 195 which outlines where a credit reporting agency and credit provider are members of one or more external dispute resolution schemes. In both cases, they will be members where one or more of the schemes is, or are, recognised by the Information Commissioner under the Privacy Act.
<i>record</i>	This definition is similar to that used in the existing Privacy Act, however, as with the new APP provisions, it has been updated to reflect new technologies.
<i>repayment history information</i>	This definition is relevant to section 187 which provides that, if a credit provider provides consumer credit to an individual, certain information about the consumer credit is repayment history information. That information relates to whether or not an individual has met a monthly payment that is due and payable in relation to the consumer credit; the day on which the monthly payment is due and payable; and if the individual makes the monthly payment after the day on which the individual makes the payment — the day on which the individual makes that payment.
<i>retention period</i>	This definition is relevant to sections 124 and 125 which contain rules about retention periods for general credit information and personal insolvency information.
<i>serious credit infringement</i>	This is based on the existing definition used in the Privacy Act except where it is defined as an act done by an individual if a reasonable person would consider that the act indicates an intention on the part of the individual, to no longer comply with the individual's obligation in relation to consumer credit provided by a credit provider. Consistent with the Government's response to ALRC recommendation 56-6, that is amended to include an additional element that the credit provider has, after taking such steps as are reasonable in the circumstances, been unable to contact the individual about the act.