The Senate

Finance and Public Administration Legislation Committee

Exposure Drafts of Australian Privacy Amendment Legislation

Part 2—Credit Reporting

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43rd Parliament

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Senator Penny Wright to replace Senator Di Natale for the inquiry.

Participating Member for this inquiry

Senator Nick Xenophon	IND, South Australia

TABLE OF CONTENTS

ABBREVIATIONS

ABA	Australian Bankers' Association
ACL	Australian Credit Licence
AFC	Australian Finance Conference
AIC	Australian Information Commissioner
AICM	Australian Institute of Credit Management
ALRC	Australian Law Reform Commission
AML/CTF Act	*Anti-Money Laundering and Counter-Terrorism Financing Act 2006*
APF	Australian Privacy Foundation
APP	Australian Privacy Principle
ARCA	Australasian Retail Credit Association
ASIC	Australian Securities and Investments Commission
CALC	Consumer Action Law Centre
CCLC	Consumer Credit Legal Centre (NSW)
CCLSWA	Consumer Credit Legal Service WA
CII	Credit Identifying Information
COAG	Council of Australian Governments
Code	*Credit Reporting Code of Conduct*
COSL	Credit Ombudsman Services Ltd
CP	credit provider
CRA	credit reporting agency
Department	Department of the Prime Minister and Cabinet
EDR	external dispute resolution
EFT	Electronic Funds Transfer
EWON	Energy & Water Ombudsman NSW
FOS	Financial Ombudsman Service
IDR	internal dispute resolution
LAQ	Legal Aid Queensland
LIV	Law Institute of Victoria
NAB	National Australia Bank
NCC	National Credit Code
NCCP Act	*National Consumer Credit Protection Act 2009*
NPII	National Personal Insolvency Index
NPP	National Privacy Principle
NRS	National Relay Service
OAIC	Office of the Australian Information Commissioner
OPC	Office of the Privacy Commissioner
Privacy Act	*Privacy Act 1988*
Regulation	*Privacy (Credit Reporting Information) Regulations*
RG 165	ASIC Regulatory Guide 165
RG 209	ASIC Regulatory Guide 209
SCI	serious credit infringement
TCP Code	Telecommunications Consumer Protection Code
TIO	Telecommunications Industry Ombudsman
UPP	Unified Privacy Principle

RECOMMENDATIONS

Chapter 3 General issues

Recommendation 1

3.21 The committee recommends that consideration be given to locating the credit reporting provisions in a schedule to the Privacy Act.

Recommendation 2

3.55 The committee recommends that the Exposure Draft be reviewed to ensure that the provisions are clear and concise.

Recommendation 3

3.56 The committee recommends that the definitions be reviewed to ensure consistency across the Privacy Act and, to the extent possible, that definitions are standalone provisions.

Recommendation 4

3.67 The committee recommends that the Exposure Draft be amended to incorporate all of the relevant requirements of the Australian Privacy Principles for both credit reporting agencies and credit providers, in addition to the more specific or different requirements for credit reporting.

Recommendation 5

3.97 The committee recommends that the Department of the Prime Minister and Cabinet undertake consultations to ensure that the needs of industry and consumers are addressed during the lead up to the implementation of the new credit reporting regime.

Recommendation 6

3.98 The committee recommends that the Office of the Australian Information Commissioner consult with industry and consumer advocates to provide guidance on any consumer education campaigns in relation to the new credit reporting system.

Recommendation 7

3.112 The committee recommends that consideration be given to including a requirement in the provisions for the powers and functions of the Australian Information Commissioner that a regular audit of a randomly selected credit reporting agency and a credit provider in Australia be conducted by the Australian Information Commissioner.

Chapter 4 Serious credit infringements, identity theft and hardship

Recommendation 8

4.23 The committee recommends that consideration be given to a change of approach in dealing with serious credit infringements to allow for those listings, not relating to intentional fraud, to be dealt with in a different manner.

Recommendation 9

4.49 The committee recommends that the Exposure Draft be reviewed to ensure that the intent of the Government's response to ALRC Recommendation 57–5, that credit reporting agencies be required to advise a credit provider that they are unable to release information due to an individual's concerns about possible fraud, is clearly provided for.

Recommendation 10

4.50 The committee recommends that the time of the initial ban period be extended from 14 days to 21 days.

Recommendation 11

4.69 The committee recommends that consideration be given to expanding the meaning of new arrangement information to include circumstances where an individual seeks new terms or conditions for their original consumer credit before they default.

Chapter 5 Complaints handling

Recommendation 12

5.37 The committee recommends that the time period for the correction of credit information be amended to 15 days.

Recommendation 13

5.39 The committee recommends that that issue of extensions of time to respond to requests for correction of records be addressed in the Credit Reporting Code of Conduct.

Recommendation 14

5.83 The committee recommends that consideration be given to implementing the recommendations of the Office of the Australian Information Commissioner in relation to the substantiation issue.

Chapter 6 Credit reporting agency provisions

Recommendation 15

6.61 The committee recommends that the opt out provisions in section 110 be reviewed to ensure consistency with other consumer credit regulatory regimes.

Recommendation 16

6.65 The committee recommends that section 115 be reviewed in light of the Office of the Australian Information Commissioner's comments relating to disclosure of de-identified information and the rules to be issued.

Recommendation 17

6.87 The committee recommends that the Credit Reporting Code of Conduct include requirements in relation to the standard of information provided to a consumer in relation to accessing free credit reports and those for which there is a charge.

Recommendation 18

6.108 The committee recommends that consideration be given to providing in subsection 126(4) a general requirement for notification of destruction of credit reporting information to all recipients of credit reporting information in cases of fraud and not only limited to when an individual makes such a request.

Chapter 7 Credit provider provisions

Recommendation 19

7.23 The committee recommends that section 132 be reviewed to ensure that the disclosure obligations on credit providers in relation to 'credit information' protect all credit information collected by credit providers.

Recommendation 20

7.26 The committee recommends that greater clarity be provided as to the timeframes for disclosure of default information pursuant to paragraph 132(2)(e) either in the Credit Reporting Code or in guidance from the Office of the Australian Information Commissioner.

Chapter 8 Division 4 and penalty provisions

Recommendation 21

8.6 The committee recommends that a definition of the term 'credit manager' be provided.

Recommendation 22

8.13 The committee recommends that further consideration be given to the regulation of credit eligibility information provided by credit providers to debt collectors that are small business operators.

Recommendation 23

8.39 The committee recommends that consideration be given to provide increased funding for the Office of the Australian Information Commissioner to effectively and efficiently investigate breaches of the credit reporting provisions.

Recommendation 24

8.43 The committee recommends that consideration be given to the inclusion of consumer remedies, similar to those that exist in the National Consumer Credit Protection Act such as compensation, for consumers adversely affected by contraventions of the credit reporting provisions.

Chapter 9 Definitions

Recommendation 25

9.10 The committee recommends that the definition of 'court proceedings information' be reconsidered to ensure that summonses cannot be listed on a consumer's credit information file.

Recommendation 26

9.15 The committee recommends that the definition of 'identification information' be reviewed to ensure that it does not restrict the ability of credit reporting agencies and credit providers from meeting other regulatory requirements.

Recommendation 27

9.19 The committee recommends that section 181 be reviewed to provide for greater clarity and certainty in the meaning of 'publicly available information' as proposed by the Office of the Australian Information Commissioner.

Recommendation 28

9.27 The committee recommends that the meaning of 'default information' be reviewed to ensure that statute barred debts are prohibited from being listed.

Recommendation 29

9.48 The committee recommends that consideration be given to the inclusion of provisions for grace periods in relation to information in repayment histories.

Recommendation 30

9.70 The committee recommends that section 192 be reviewed to ensure that onerous conditions are not placed on individuals accessing their credit reporting information via the National Relay Service, in particular the need to provide written authorisation. Further, the committee recommends the Department of the Prime Minister and Cabinet, in undertaking the review, consult the National Relay Service and the Office of the Australian Information Commissioner.

Chapter 1

Introduction

Terms of reference

1.1 On 24 June 2010, the Senate agreed to the following:

> (1) That the following matter be referred to the Finance and Public Administration Legislation Committee for inquiry and report by 1 July 2011:
>
> Exposure drafts of Australian privacy amendment legislation.
>
> (2) That, in undertaking this inquiry the committee may consider the exposure draft of the Australian Privacy Principles and the draft companion guides on the Australian privacy reforms, and any other relevant documents tabled in the Senate or presented to the President by a senator when the Senate is not sitting.

1.2 Following the commencement of the 43rd Parliament, the Senate agreed to the committee's recommendation that the inquiry be re-adopted with a reporting date of 1 July 2011. The reporting date was subsequently extended to 30 September 2011, and then further extended to 6 October 2011.

Conduct of the inquiry

1.3 On the same day that the inquiry was referred to the committee, the Australian Privacy Principles (APP) Exposure Draft and Companion Guide were tabled in the Senate. The APP Exposure Draft is one of four parts of the first stage response to the Australian Law Reform Commission's (ALRC) recommendations for the reform of Australian privacy laws. The committee reported on the APP Exposure Draft on 15 June 2011. The report is available on the committee's website.

1.4 The second part of the first stage response, the Credit Reporting Exposure Draft, was received by the President of the Senate on 1 February 2011 and was tabled in the Senate on 9 February 2011.

1.5 The committee advertised the inquiry into the Credit Reporting Exposure Draft in *The Australian* and contacted a number of organisations and individuals, inviting submissions to be lodged by 24 March 2011. The committee received 37 public submissions and three confidential submissions. The list of submissions is available at appendix 1.

1.6 The committee held a public hearing in Sydney on 16 May 2011. Details of the public hearing are at appendix 2. The submissions, Hansard transcript of evidence and answers to questions on notice may be accessed through the committee's website at http://www.aph.gov.au/Senate/committee/fapa_ctte/foi_ic/index.htm.

1.7 The committee would like to thank all those who contributed to the inquiry.

Consultation undertaken during the inquiry

1.8 During the course of the inquiry, Veda Advantage undertook further consultation with the Australasian Retail Credit Association (ARCA) and a group of consumer representatives – Consumer Credit Legal Centre, Australian Privacy Foundation and Legal Aid Queensland. The consultations considered five key matters which were highlighted during the inquiry:

- serious credit infringements;
- identity theft;
- hardship flags;
- complaints handling; and
- simplification of key definitions.

1.9 The outcomes of the consultations were provided to the committee for consideration during its deliberations on the Credit Reporting Exposure Draft. The committee also provided the outcomes to the Department of the Prime Minister and Cabinet for advice.

1.10 The committee would like to thank participants of the consultation process for their contribution to the inquiry. The reform of the credit reporting regime will have significant effects for consumers and industry stakeholders and it is important that the most effective and efficient regulatory regime is implemented.

Structure of the report

1.11 The report is structured as follows:

- chapter 2 of the report provides an overview of the ALRC's review of credit reporting;[1]
- chapter 3 canvasses general issues raised in relation to the Exposure Draft;
- chapter 4 discusses matters in relation to serious credit infringement, identity theft and hardship flags, canvassed during the consultations undertaken by industry and consumer representatives;
- chapter 5 discusses complaints handling, including the matters raised during the consultation process;
- chapters 6, 7 and 8 discuss issues raised about specific provisions in the Exposure Draft;
- chapter 9 discusses issues in relation to definitions and meanings of terms; and

1 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008.

- chapter 10 presents a summary of the committee's conclusions.

1.12 A number of issues relating to particular provisions which were raised in submissions but not addressed by the committee are listed in appendix 3.

References

1.13 On 1 November 2010 the Office of the Privacy Commissioner was integrated into the Office of the Australian Information Commissioner. The submission from the Office of the Privacy Commissioner in relation to the Australian Privacy Principles Exposure Draft was received before this change took place. While the committee's first report refers to the Office of the Privacy Commissioner, this report refers the Office of the Australian Information Commissioner.

Chapter 2

Background

Introduction

2.1 Currently, provisions relating to consumer credit reporting are contained in Part IIIA and associated provisions of the *Privacy Act 1988* (the Privacy Act). The credit reporting provisions regulate the collection, use and disclosure of personal information concerning credit that is intended to be used wholly or primarily for domestic, family or household purposes. Commercial credit information is only incidentally regulated by the Privacy Act.

2.2 Credit reporting involves providing information about an individual's credit worthiness to banks, finance companies and other credit providers, such as retail businesses that issue credit cards or allow individuals to have goods or services on credit. Credit reporting is generally conducted by specialised credit reporting agencies that collect and disclose information about potential borrowers, usually in order to assist credit providers to assess applications.[1]

2.3 Credit reporting agencies gather information from credit providers and publicly available information. This information is stored in central databases and is used to generate credit reporting information for credit providers. Credit providers use the information provided by credit reporting agencies as well as information from the individual's application form and the credit provider's own records to assess credit applications. In addition, credit reporting agencies provide information processing services that assist credit providers to assess credit applications. Credit reporting agencies also use their databases in credit scoring systems.

2.4 There are three credit reporting agencies in Australia: Veda Advantage; Dun & Bradstreet; and the Tasmanian Collection Service. A fourth credit reporting agency, Experian Australia Credit Services entered the market in August 2011.

2.5 The following discussion provides an overview of the context of the current inquiry, a synopsis of the Australian Law Reform Commission's (ALRC) review of credit reporting and privacy requirements and ensuing recommendations, and a summary of the Government's response to the ALRC recommendations.[2]

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1 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1707.

2 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice*, October 2009.

Context of the current inquiry

2.6 On 30 January 2006, the Government requested that the ALRC undertake a comprehensive review of the Privacy Act. The ALRC provided its report on the review to the Government in May 2008.[3]

2.7 In October 2009, the Government provided a 'First Stage Response' to the ALRC's recommendations. The focus of the first stage response was 'to establish the foundations for an enhanced privacy framework'.[4] The Government's response to the ALRC review addressed four areas of reform of the Privacy Act: the Privacy Principles; Office of the Privacy Commissioner;[5] credit reporting provisions; and health services and research.

2.8 The first of these four areas of proposed reform of the privacy regime – the Privacy Principles – was addressed by the Government with the release of the Australian Privacy Principles Exposure Draft provisions in June 2010. These provisions were referred to the committee on 24 June 2010. The committee tabled its report, *Exposure Drafts of Australian Privacy Amendment Legislation: Part 1 Australian Privacy Principles* in June 2011.[6] The report provided background to the Privacy Act and reviews of the Privacy Act, examined the 13 draft Australian Privacy Principles (APPs) and made 29 recommendations. The recommendations included redrafting of the principles to improve clarity, the provision of guidance on definitions and explanatory material, the inclusion of agency specific provisions, and that the Office of the Australian Information Commissioner undertake a review of agency voluntary data matching guidelines with a view to an extension of APP 9 to agencies.[7]

2.9 The Exposure Draft for the second of the four areas of proposed reform, credit reporting, was received by the President of the Senate on 1 February 2011 and was tabled in the Senate on 9 February 2011.

2.10 While the ALRC was undertaking its review of the Privacy Act, the Council of Australian Governments (COAG) agreed, in 2008, that the Commonwealth take

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3 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008.

4 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice*, October 2009, p. 9.

5 The Office of the Privacy Commissioner (OPC) was integrated into the Office of the Australian Information Commissioner (OAIC) on 1 November 2010.

6 Senate Finance and Public Administration Legislation Committee, *Exposure Drafts of Australian Privacy Amendment Legislation: Part 1 Australian Privacy Principles*, June 2011.

7 Senate Finance and Public Administration Legislation Committee, *Exposure Drafts of Australian Privacy Amendment Legislation: Part 1 Australian Privacy Principles*, June 2011, pp xi–xiv.

responsibility from the states for regulating the credit industry.[8] The *National Consumer Credit Protection Act 2009* and the *National Consumer Credit Protection Act Amendment (Home Loans and Credit Cards) Act 2011* were passed pursuant to this agreement.

The ALRC's review of credit reporting and privacy requirements

Current credit reporting provisions

2.11 The *Privacy Amendment Act 1990* extended coverage of the Privacy Act to consumer credit reporting and introduced privacy protections in relation to consumer credit records. A number of further amendments have since been made to the credit reporting provisions of the Privacy Act.[9] The Privacy Act also empowers the Privacy Commissioner to issue a binding Code of Conduct. A *Credit Reporting Code of Conduct* (the Code) came into effect on 24 September 1991.[10] Over the years a variety of amendments to the Code have been made; some of these reflect amendments to the credit reporting provisions of the Privacy Act.[11]

2.12 The main provisions relating to credit reporting provide for:[12]

- *information covered by the provisions:* the Privacy Act defines 'personal information', 'credit information file' and 'credit report'. 'Personal information' is information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion. A 'credit information file' means any record that contains information about a person and is kept by a credit reporting agency in the course of carrying on a credit reporting business. A 'credit report' may be created from a credit information file and passed from the credit reporting agency to a credit provider;
- *persons within the ambit of the provisions:* the provisions apply to individuals whose personal information is contained in a credit information file; credit reporting agencies; credit providers which include banks, corporations or entities providing loans or issuing credit cards; and persons providing third-party personal information to credit reporting agencies;

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8 Council of Australian Governments, 'Financial Regulation and Consumer Protection', *Communiqué*, 2 October 2008.

9 A summary of amendments to the credit reporting provisions is available in *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1716–1718.

10 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 19–20.

11 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1716.

12 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1721–1737.

- *content of credit information files:* a credit information file can contain information that is 'reasonably necessary' to identify the individual.[13] The Privacy Act stipulates an exhaustive list of information that may be included in a credit information file as well as a list of information that must not be included. There is no requirement for verification of information prior to it being included in a credit information file;
- *accuracy and security of personal information:* the provisions require credit reporting agencies and credit providers to take reasonable steps to ensure that personal information is 'accurate, up-to-date, complete and not misleading', to protect against misuse, to prevent unauthorised use or disclosure of personal information in a file or report. Credit reporting agencies and credit providers are prohibited from disclosing false or misleading credit reports;
- *disclosure of personal information:* disclosure of personal information in credit information files and credit reports by credit reporting agencies, credit providers and others is regulated, as well as unauthorised access to that information or obtaining that information by a false pretence;[14]
- *use of personal information:* restrictions are placed on the use of an individual's credit report (or personal information derived from that report) by credit providers, mortgage and trade insurers, and other users;[15]
- *consent and credit reporting:* provided that notification has been given, agreement to the use or disclosure of credit reporting information about individuals is generally not required. Exceptions apply in relation to assessing applications for commercial credit, acceptance of guarantors, or collecting payments overdue in respect of commercial credit. Exceptions also apply to trade insurers for the purpose of assessing insurance risks in relation to commercial credit;
- *individuals must also specifically agree to the use of their information in certain circumstances:* these circumstances include where a credit provider assesses an application for consumer credit. Consent from an individual for the disclosure of information by a credit provider to a credit reporting agency is not required but consent is required in limited circumstances such as if the National Privacy Principles or common law duties of confidence require disclosure, or in some circumstances where a bank owes a duty of confidence under the Australian Bankers' Association's Code of Banking Practice;

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13 In 1991 the Privacy Commissioner determined that full name (including aliases), sex, date of birth, a maximum of three addresses, name of current or last employer, and drivers licence number were 'reasonably necessary'.

14 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1733–1734.

15 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1800–1801.

- *rights of access, correction and notification:* credit reporting agencies and credit providers must take reasonable steps to allow individuals access to information held on them and ensure personal information on a file is accurate, up-to-date, complete and not misleading. Obligations for notification are provided for when a credit report is used to refuse an application for credit, and certain obligations to guarantors and other applicants on joint applications; and
- *responsibilities of the Office of the Privacy Commissioner (OPC):* provisions give the OPC a range of responsibilities and powers including issuing a code of conduct relating to credit information files and credit reports, making certain determinations under the credit reporting provisions of the Privacy Act, auditing credit information files and credit reports held by credit reporting agencies and credit providers, and investigating, and making determinations on credit reporting infringements.

The ALRC recommendations and the Government Response

2.13 The ALRC made a total of 46 recommendations relating to the credit reporting. These recommendations addressed approaches to reform, more comprehensive credit reporting, collection and permitted content of credit reporting information, use and disclosure of credit reporting information, data quality and security, access to and correction of information, complaint handling and penalties.

Approach to reform

2.14 The ALRC report recommended (Recommendation 54–1) that the credit reporting provisions (Part IIIA) of the Privacy Act be repealed. The ALRC recommended that, instead, credit reporting should be regulated under the general provisions of the Privacy Act, the model Unified Privacy Principles (UPPs)[16] and new regulations under the Privacy Act. It was anticipated that the regulations would 'impose obligations on credit reporting agencies and credit providers with respect to the handling of credit reporting information'. The ALRC was of the view that the new regulations should only address requirements that are different or more specific than those provided for in the model UPPs[17] (Recommendation 54–2).[18]

16 The ALRC's recommendation for one set of privacy principles was referred to as the Unified Privacy Principles (UPPs). Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice,* ALRC 108, May 2008, pp 653 and 651.

17 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1941.

18 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1706.

2.15 'Credit reporting information' was defined in Recommendation 54–3 and a simplified definition of 'credit provider' was also recommended (Recommendation 54–4).[19]

2.16 The ALRC recommended that the reporting of personal information about foreign credit and the disclosure of credit reporting information to foreign credit providers be excluded (Recommendation 54–5), subject to the Privacy Commissioner being empowered to approve reporting of personal information about foreign credit, and the disclosure of credit reporting information to foreign credit providers in defined circumstances (Recommendation 54–7).[20]

2.17 The ALRC report also recommended 'that a credit reporting code providing detailed guidance within the framework provided by the Act and the regulations be developed by credit reporting agencies and credit providers, in consultation with consumer groups and regulators, including the OPC' (Recommendation 54–9).[21]

2.18 The Government accepted ALRC Recommendations 54–2, 54–3, 54–4 and 54–5. Recommendation 54–9 was accepted with amendment while Recommendations 54–6 and 54–8 were accepted in principle. Recommendation 54–1 and 54–7 were not accepted.

2.19 In relation to Recommendation 54–1, the Government was of the view that regulation of credit reporting should primarily continue under the Privacy Act, rather than in regulations. The Government recognised the need to address the complexities of Part IIIA of the Privacy Act through redrafting.[22] The Government did not accept the ALRC's recommendation that, in defined circumstances, the Privacy Commissioner should be able to approve the reporting of personal information about foreign credit, believing that any exceptions should be adopted by legislative amendment (Recommendation 54–7). In addition, the Government signalled its intention to define circumstances, under the Privacy Act, in which credit information could be shared with New Zealand.[23]

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19 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1768.

20 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1786–1787.

21 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1706.

22 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice*, October 2009, p. 99.

23 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice*, October 2009, pp 101–103.

2.20 The Government accepted, with amendment, the ALRC recommendation to develop a credit reporting code (Recommendation 54–9). The Government added that the Privacy Act will outline the matters to be addressed by the code, that the code will replace the current Credit Reporting Code of Conduct, that the code will not override or have lesser provisions than the Privacy Act, that the code will be binding on any organisation or agency wishing to be involved in credit reporting, and that the code will be approved by the Privacy Commissioner.[24]

More comprehensive credit reporting

2.21 The current Privacy Act restricts the kinds of information that can be collected and disclosed in the course of credit reporting.[25] Principally, although not exclusively, this information is restricted to that which detracts from an individual's credit worthiness, such as defaulting on a loan.

2.22 The ALRC gave consideration to extending the kinds of personal information that may be collected and disclosed under the Privacy Act, in particular an individual's current credit commitments and/or repayment performance. Although many people use the terms 'negative' and 'positive' credit reporting to distinguish between the current system and an expanded collecting provision, the ALRC eschewed these terms as being too confusing. The ALRC argued that the terms wrongly imply that one system would advantage, and one would disadvantage, a creditor when this is not necessarily the case. The ALRC opted the term 'more comprehensive' credit reporting as it more accurately conveys two matters: that the expanded information will not necessarily assist, or hamper, an individual's application for credit; and that the information is not exhaustive but merely 'more comprehensive'.[26]

2.23 The ALRC made it clear that 'more comprehensive' credit reporting must be considered at the same time as other regulatory issues including 'data quality of credit reporting information, dispute resolution and penalties for the unauthorised use or disclosure of such information'.[27]

2.24 The ALRC consulted extensively with stakeholders, received advice from a Credit Reporting Advisory Sub-committee and examined a variety of models of more

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24 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, pp 103–104.

25 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1810.

26 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1800–1801.

27 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1800.

comprehensive credit reporting.[28] Those consulted argued that a number of benefits may accrue from a more comprehensive credit reporting regime, including improved risk assessment, increased competition and efficiency in credit markets, decreased levels of over-indebtedness and default, and more responsible lending. Some organisations consulted by the ALRC challenged some of these claimed benefits, arguing that the benefits that may accrue as a result of more comprehensive credit reporting would be outweighed by information privacy and security concerns.[29]

2.25 The ALRC concluded that there should be an extension of the types of personal information that may be collected for credit reporting purposes. It was anticipated that this would be regulated under new *Privacy (Credit Reporting Information) Regulations* (the regulations*)*.[30] Five related recommendations were made by the ALRC on this issue. In summary, these included:

- an extension of currently permitted categories of personal information to include the type of each credit account opened, the date on which each credit account was opened, the current limit of each open credit account, and the date on which each credit account was closed (Recommendation 55–1);
- provision in the regulations for the deletion of this information two years after an account is closed (Recommendation 55–5);
- permitting credit reporting information to include an individual's repayment performance history indicating whether over the prior two years the individual was meeting their repayment obligations for each repayment cycle, or if not the number of repayment cycles the individual was in arrears (Recommendation 55–2). This recommendation was made subject to the Australian Government satisfying itself that there is an adequate framework imposing responsible lending obligations in Commonwealth, state and territory legislation (Recommendation 55–3); and
- that the credit reporting code should set out procedures for reporting payment performance history, within parameters set by the regulations (Recommendation 55–4).[31]

2.26 The Government accepted all the ALRC's recommendations except Recommendation 55–4 which was accepted in principle. The Government noted that it should be clearly set out in the Privacy Act when a 'missed repayment' will be deemed to occur. The Government indicated that it would seek further views from

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28 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1811–1812 and pp 1827–1851.

29 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1811–1820.

30 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1800.

31 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1853–1854.

stakeholders about the preferred approach to be taken in relation to when a repayment is 'missed'. In addition, 'given the significance that will be attributed to how repayment history is listed and the accompanying notices provided with this listing', the Government indicated that these matters will be set out in the regulations rather than in the binding industry code.[32]

Collection and permitted content of credit reporting information

2.27 The ALRC noted that the current provisions of the Privacy Act in relation to the collection, and notification of collection, of information in credit information files and credit reports are at odds with the 'collection' and 'notification' principles of the model UPPs.[33] The ALRC recommended that 'the new *Privacy (Credit Reporting Information) Regulations* should prescribe an exhaustive list of the categories of personal information that are permitted to be included in credit reporting information'. It was recommended that these should be based on the existing provisions of the Privacy Act, subject to specific changes (Recommendation 56–1).[34] In summary, these recommended changes include:

- an extension of currently permitted information related to the type of each credit account opened, the date on which each credit account was opened, the current limit of each open credit account and the date on which each credit account was closed, as detailed above (based on Recommendation 55–1);[35]
- permitting of credit reporting information to include an individual's repayment performance history, as detailed above (based on Recommendation 55–2);[36]
- prohibiting credit reporting agencies from listing overdue payments of less than a prescribed amount (Recommendation 56–2), or including information about presented and dishonoured cheques (Recommendation 56–3); or collecting 'sensitive information', as defined in the Privacy Act (Recommendation 56–8);[37]
- permitting credit reporting information including personal insolvency information recorded on the National Personal Insolvency Index (NPII)

32 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice*, October 2009, pp 107–108.

33 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1854.

34 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1854–1855.

35 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1853–1854 and 1856.

36 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1853–1854 and 1856.

37 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1856, 1862, 1863, and 1874.

administered under the Bankruptcy Regulations 1966 (Recommendation 56-4);[38]

- permitting the listing of a 'serious credit infringement' based on the definition in the Privacy Act, amended so that the credit provider is required to have taken reasonable steps to contact the individual before reporting a serious credit infringement (Recommendation 56–6);[39] and
- prohibiting the collection in credit reporting information of information about individuals who the credit provider or credit reporting agency knows, or reasonably should know, to be under the age of 18 (Recommendation 56–9).[40]

2.28 Additionally, the ALRC recommended:

- credit reporting agencies should ensure that credit reports adequately differentiate the forms of administration identified on the NPII, and accurately reflect the relevant information recorded on the NPII, as updated from time to time (Recommendation 56–5);[41] and
- the Office of the Privacy Commissioner should develop and publish guidance on the criteria that need to be satisfied before a serious credit infringement can be listed (Recommendation 56–7) including interpretations of 'serious', establishing whether reasonable steps to contact an individual have been taken, whether serious credit infringements should be listed if they are the subject of either a dispute or dispute resolution, and obligations on credit providers and individuals in proving or disproving serious credit infringements.[42]

2.29 The ALRC examined the 'notification' principle in the UPPs and in Part IIIA of the Privacy Act and arrived at the view that provisions dealing with notification should be incorporated in the proposed regulations, albeit in a form that is more prescriptive regarding the timing of notification than existing provisions.

2.30 The ALRC recommended (Recommendation 56–10) that notification should occur 'at or before the time personal information to be disclosed to a credit reporting agency is collected about an individual' with an onus on credit providers to take steps to ensure the individual is aware of the:

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38 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1856 and 1866.

39 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1856 and 1870.

40 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1856 and 1877.

41 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1866.

42 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1870.

- identity and contact details of the credit reporting agency;
- rights of access to, and correction of, credit reporting information provided by the regulations; and
- actual or types of organisations, agencies, entities or persons to whom the credit reporting agency usually discloses credit reporting information.[43]

2.31 Similarly, in relation to notification of disclosure of overdue payment information, it was recommended (Recommendation 56–11) that:

> ...a credit provider, before disclosing overdue payment information to a credit reporting agency, must have taken reasonable steps to ensure that the individual concerned is aware of the intention to report the information.[44]

2.32 The Government accepted Recommendations 56–1, 56–2, 56–3, 56–5, 56–6, 56–8, 56–9, 56–10), accepted in principle Recommendations 56–4 and 56–7 and accepted Recommendation 56–11 with amendment.

2.33 The Government accepted in principle the ALRC recommendation (Recommendation 56–4) that credit reporting information be permitted to include personal insolvency information recorded on the NPII, further specifying four categories of allowable information. The Government noted that there is a need to clarify what can currently be listed as credit reporting information from the NPII. It agreed that proposals to include information about debt agreement proposals may be included in credit reporting information, but that this should be removed if the proposal is unsuccessful.[45]

2.34 In relation to serious credit infringements, the Government accepted that these can be reported, providing reasonable steps to contact the individual are taken beforehand (Recommendation 56–6). However, rather than accepting the ALRC recommendation that the Privacy Commissioner develop and publish guidance to be satisfied prior to listing (Recommendation 56–7), the Government was of the view that this should regulated by the binding industry code.[46]

2.35 The Government accepted, with amendment, the ALRC recommendation that credit reporting agencies take reasonable steps, prior to disclosing overdue payments,

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43 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1885.

44 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1886.

45 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice*, October 2009, p. 110.

46 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice*, October 2009, pp 111–112.

to ensure an individual is aware of the intention to report the information (Recommendation 56–11). However, the Government was of the view, subject to further consultation with stakeholders, that the notification obligation should also be extended to 'missed' payments.[47]

Use and disclosure of credit reporting information

2.36 The ALRC observed that Part IIIA of the Privacy Act exhaustively prescribes more than 50 different circumstances in which the use or disclosure of personal information is authorised. The ALRC was of the view that this could be significantly simplified and consolidated in the new regulations. The ALRC recommended (Recommendation 57–1) that the new regulations 'provide a simplified list of circumstances in which a credit reporting agency or credit provider may use or disclose credit reporting information'.[48]

2.37 The ALRC noted that 'the use and disclosure of credit reporting information is potentially useful for a wide range of secondary purposes'. However, they were of the view that a general allowance of use and disclosure of credit reporting information for secondary purposes was overly broad. The ALRC recommended (Recommendation 57–2) that such use or disclosure should be:

> ...for a secondary purpose related to the assessment of an application for credit or the management of an existing credit account, where the individual concerned would reasonably expect such use or disclosure.[49]

2.38 The ALRC considered whether 'pre-screening' of credit reports by credit providers for the purpose of excluding individuals from direct marketing offers (such as an offer to increase credit limits) contravenes a prohibition in the Privacy Act against direct marketing.[50] The ALRC noted that the current legal position under the Privacy Act was complex and that whereas pre-screening could be used to assist responsible lending practices it could also be used to market credit more aggressively. The ALRC recommended (Recommendation 57–3) that the new regulations 'should prohibit the use or disclosure of credit reporting information for the purposes of direct marketing, including the pre-screening of direct marketing lists'.[51]

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47 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, pp 113–114.

48 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1895–1896.

49 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1896–1897.

50 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1905.

51 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1917.

2.39 The ALRC deliberated whether statutory obligations imposed upon credit providers and others to verify customer identity, including under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act), could or should be fulfilled through credit reporting information held by credit reporting agencies.[52] The Privacy Act places detailed limits on the disclosure of personal information by credit reporting agencies and the use of personal information by credit providers, and there is no express provision for identity verification. The ALRC recommended (Recommendation 57–4) that rather than introducing unnecessary complexity into the new regulations, the issue could be dealt with by express authorisation under the AML/CTF Act.[53]

2.40 The ALRC examined whether credit reporting regulation should address the increasingly prevalent problem of identity theft, and what kind of action would provide most effective protection for an individual who claimed they had experienced theft of their identity. They recommended (Recommendation 57–5) that the new regulations 'should provide individuals with a right to prohibit for a specified period the disclosure by a credit reporting agency of credit reporting information about them without their express authorisation'.[54]

2.41 The Government accepted Recommendation 57–1 but did not accept Recommendation 57–2 regarding the use or disclosure of information for a secondary purpose. The Government was of the view that this recommendation would 'significantly reduce the value of the credit reporting provisions to promote transparency and consistency', and would be contrary to the requirement to have defined uses and disclosures as outlined in ALRC recommendation 57–1. However, additional uses and disclosures will be permitted in the public interest, for the benefit of the individuals concerned, or for research in the public interest using de-identified information under rules developed by the Privacy Commissioner.[55]

2.42 The Government accepted in part the ALRC's recommendation prohibiting the use or disclosure of credit reporting information for direct marketing (Recommendation 57–3). The Government did not agree with the prohibition on pre-screening of direct marketing lists; rather, the Government was of the view that pre-screening should be expressly permitted, but only for the purpose of excluding

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52 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1917.

53 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1928–1929.

54 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1929 and 1932.

55 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice*, October 2009, pp 115–116.

adverse credit risks from marketing lists, and subject to a list of specific requirements.[56]

2.43 The Government accepted in principle Recommendation 57–4 that credit reporting agencies be allowed to use and disclose credit reporting information for electronic identity verification under the AML/CTF Act. However, the Government stipulated this should be subject to adequate privacy protections being put in place.[57]

2.44 The Government did not accept Recommendation 57–6 that there should be no provision limiting disclosure of personal information in 'reports' related to credit worthiness. The Government stated that this provision should be maintained in order that credit providers should continue to be restricted from disclosing 'credit worthiness' information. The Government, however, acknowledged that the current definition of a 'report' about an individual's credit worthiness is too broad and will be 'revised to only apply to information that is *similar* to information maintained about a credit reporting agency...or information that is about an individual's credit accounts'.[58]

Data quality and security

2.45 The ALRC was of the view that there was no necessity to include general data quality obligations in the new regulations as this is adequately addressed by the 'Data Quality' principle in the model UPPs. In the case of specific, serious and well-defined data quality concerns the ALRC argued that there may be a case for inclusion of obligations in the new regulations or in the credit reporting code.[59]

2.46 In relation to overdue payments, the ALRC recommended that in the case of expiry of a relevant statutory limitation period, or where a credit provider is prevented by law from bringing proceedings for recovery of an overdue payment, there should be an express prohibition on listing any overdue payment.[60] However, the ALRC recommended (Recommendation 58–2) that where an individual has entered into a new arrangement with a credit provider to repay an existing debt that this may be

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56 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, pp 116–117.

57 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, p. 117.

58 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, p. 119.

59 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1941.

60 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1943.

listed and remain part of the individual's credit reporting information for the full five years permissible under the regulations.[61]

2.47 The ALRC was of the view that, in general, detailed data quality requirements are better dealt with under the recommended credit reporting code than by regulation. The ALRC recommended (Recommendation 58–3) that the credit reporting code should promote data quality through procedures dealing with timeliness and calculation of overdue payments for credit reporting purposes, obligations to prevent multiple listings of the same debt, updating of credit reporting information and the linking of credit reporting information relating to individuals who may or may not be the same individual.[62]

2.48 The ALRC considered the issue of data quality obligations of credit reporting agencies, concluding that the agencies 'should take more responsibility for ensuring data quality'. The report noted that:

> Consumer groups have expressed concerns that there are no adequate incentives for credit reporting agencies or credit providers to correct systemic flaws in the credit reporting system, in part because the cost of dealing with a small number of complaints is less than the cost of ensuring the data is accurate in the first place.[63]

2.49 The ALRC recommended (Recommendation 58–4) that the new regulations 'impose obligations on credit reporting agencies to monitor the data quality of information provided to them by credit providers, including through audit' and 'that credit reporting agencies must enter into agreements with credit providers that contain obligations to ensure the security of credit reporting information', as well as that possible breaches of the agreements and controls should be identified and investigated.[64]

2.50 The ALRC also recommended that the new regulations should provide for the deletion by credit reporting agencies of certain information after specified periods of time: different categories of credit reporting information after the expiry of 'maximum permissible periods', based on those currently provided for in the Privacy Act (Recommendation 58–5); and, certain information about voluntary arrangements with

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61 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1946.

62 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1954–1955.

63 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1957.

64 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1958.

creditors under provisions of the *Bankruptcy Act 1966* five years from the date of the arrangement as recorded on the NPII (Recommendation 58–6).[65]

2.51 The Government accepted all recommendations except Recommendation 58-6. While the Government agreed that a five year retention period for information about voluntary arrangements was sufficient, it was of the mind that all bankruptcy information should be treated equally, and therefore proposed that all bankruptcy information be listed for the same period of five years, even where a bankruptcy order is longer. Additionally, if an individual completes a voluntary arrangement early they should be able to request a note to the listing of the arrangement to that effect.[66]

Access and correction, complaint handling and penalties

2.52 The ALRC was of the view that 'individuals should have unfettered rights of access to their credit reporting information'. They were also keen to ensure that in the future the current situation where major credit reporting agencies provide credit reporting information free of charge to the individuals concerned was guaranteed. Consequently they recommended (Recommendation 59–1) that the new regulations should provide individuals with the right to access their credit reporting information, based upon current provisions in the Privacy Act, and 'that credit reporting agencies must provide individuals, on request, with one free copy of their credit reporting information annually' (Recommendation 59–2).[67]

2.53 The ALRC also recommended (Recommendation 59–3) that an individual's rights of access to credit reporting information may be exercised for a credit-related purpose by a person authorised in writing.[68]

2.54 The ALRC recommended (Recommendation 59–4) that where a credit provider refuses an application for credit based wholly or partly on credit reporting, it must notify the individual,[69] and that in these circumstances information must be provided on the avenues of complaint available to the individual if they have a complaint about the content of their credit reporting information (Recommendation 59–6). Further, the ALRC recommended (Recommendation 59–5) that credit reporting agencies and credit providers establish procedures to deal with credit

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65 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1968.

66 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, pp 122–123.

67 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1977–1978.

68 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1982.

69 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1982.

reporting complaints, and where unable to resolve complaints inform the individual of that fact and that the individual may complain to an external dispute resolution scheme or the Privacy Commissioner.[70]

2.55 The ALRC also recommended (Recommendation 59–8) that within 30 days, evidence to substantiate disputed credit reporting information must be provided to the individual, or the matter referred to a Privacy Commissioner-recognised external dispute resolution scheme. If these requirements are not met, the credit reporting agency must delete or correct the information on request of the individual.[71] Further, the ALRC recommended (Recommendation 59–7) that only credit providers who were members of a Privacy Commissioner-recognised external dispute resolution be able to list overdue payments or repayment performance history.[72]

2.56 The Government accepted Recommendations 59–1, 59–3, 59–4, 59–6, 59–8, and 59–9. While the Government accepted in principle Recommendation 59–2 regarding the provision of one free copy of an individual's credit reporting information annually, it stated that details on timeframes and the form of access should be addressed by the binding industry code.[73]

2.57 The Government accepted, in part, Recommendation 59–5 and stated that the Privacy Act should outline the overarching requirements and be supported by the binding industry code for details of procedures required between credit reporting agencies and credit providers. The onus to resolve a dispute should be on the first contacted party in order for there to be clear responsibilities, and to avoid the complainant having to go back and forth between parties. The first contacted party would have the responsibility to liaise with all other parties.[74]

2.58 Recommendation 59–7 was accepted with amendment. The Government noted that there was significant justification to extend the requirement to be a member of such a scheme to all credit reporting agencies and credit providers.[75]

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70 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1997–1998.

71 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 2006.

72 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 2003.

73 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, pp 124–125.

74 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, pp 126–127.

75 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, pp 127–128.

Chapter 3

General issues

Introduction

3.1 The reforms proposed under the Exposure Draft will provide for a more comprehensive credit reporting regime while at the same time protecting the extensive credit information about individuals that will be collected, used and disclosed. This is a significant change to the credit regime contained in the *Privacy Act 1988* (Privacy Act). As Credit Ombudsman Services commented:

> ...these reforms will mark the introduction of a fundamentally different approach to credit reporting in Australia. The reforms will begin a process that will transform the entire credit reporting system, and every part of the credit reporting process is likely to change in some way.[1]

3.2 It was generally agreed by submitters that a more comprehensive credit reporting regime will enhance transparency and result in improved credit decision making and protect consumer interests.[2] The Australian Bankers' Association (ABA), for example, commented that it:

> ...welcomes the introduction of a more comprehensive system of credit reporting as a tool to better inform credit risk decisions that our members and other credit providers make in accordance with both prudential and consumer credit regulatory responsibilities. This will be a valuable addition to what is currently seen as an outdated and largely inadequate system of negative reporting in Part 111A.[3]

3.3 Credit reporting agency Dun & Bradstreet similarly supported the introduction of a comprehensive credit reporting regime. Mr Damian Karmelich, Director, Dun & Bradstreet, pointed to significant benefits arising from comprehensive credit reporting:

> Our support for comprehensive or positive credit reporting is premised on the belief that such a system in Australia has the capacity to reduce default rates, increase lending to poorly served sections of the community, improve pricing for risk, improve outcomes for small business and promote competition within the banking sector. These benefits have accrued to

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1 Credit Ombudsman Services, *Submission 68,* pp 2–3.

2 See for example, Australian Institute of Credit Management, *Submission 8a,* p. 1; Australian Finance Conference, *Submission 12a,* p. 1; Westpac, *Submission 13a,* p. 1; Australasian Retail Credit Association, *Submission 47,* pp 1–2; ANZ Bank, *Submission 64,* p. 1.

3 Australian Bankers' Association, *Submission 15a,* p. 1; see also Mr Carlo Cataldo, Chairman, Australasian Retail Credit Association, *Committee Hansard,* 16 May 2011, p. 6.

> consumers, lenders and the broader economy in many countries where positive credit reporting is in existence.[4]

3.4 However, consumer groups and privacy commentators noted that the availability of additional information required strict control as the mishandling of credit information may have serious consequences for consumers. The Australian Privacy Foundation (APF) went further and stated that the credit reporting system is a 'statutorily authorised intrusion into individuals' privacy and in effect a "licenced" exception to the normal operation of the National Privacy Principles in the Privacy Act'. The APF went on to comment:

> Any suggestion that lenders and utility companies have a 'right' to centrally held credit reporting information should therefore be dismissed–the credit reporting system is a privilege, and it is incumbent on industry to justify any extension, and appropriate for the system to be very tightly regulated.[5]

3.5 The Privacy Commissioner NSW also expressed concern about the risks to individuals arising from increased access to credit information and stated:

> While it is arguable that the collection of positive credit information may improve due diligence regarding the decision to provide credit to an individual, I am not convinced that the further and better particulars about such matters as an individual's credit repayment history would make the provision or the reporting of the provision of credit any more responsible. In my view the benefits to credit providers in terms of responsible lending are outweighed by the risks to the individual from the significantly extensive and intrusive collection of information about that individual.[6]

3.6 The Office of the Australian Information Commissioner (OAIC) observed that it is crucial that the credit reporting regulatory framework proposed in the Exposure Draft protects information appropriately and clearly sets out individual rights and industry obligations.[7] Mr Timothy Pilgrim, Australian Privacy Commissioner, stated:

> In the credit context, it is appropriate that credit information is available to the credit industry for the purpose of assessing creditworthiness. However, this must be balanced with the need to provide appropriate privacy protection of that information for individuals. Importantly, the protection of financial information remains a key concern for individuals, most commonly due to the potentially serious consequences that may arise through the mishandling of credit information. For these reasons we understand that it is important to have a regulatory regime that sets out clearly the rights and obligations of credit reporting agencies, credit

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4 Mr Damian Karmelich, Director, Marketing and Corporate Affairs, Dun & Bradstreet, *Committee Hansard*, 16 May 2011, p. 9.

5 Australian Privacy Foundation, *Submission 33a*, pp 1–2.

6 Office of the Privacy Commissioner NSW, *Submission 29a*, p. 2.

7 Office of the Australian Information Commissioner, *Submission 39a*, p. 7.

providers and individuals, one that strikes an appropriate balance between their different interests.[8]

3.7 In its response to the Australian Law Reform Commission's (ALRC) recommendations, the Government also recognised the need for more user-friendly and less complex and prescriptive regulation of credit reporting than is presently contained in the Part IIIA of the Privacy Act.[9]

3.8 However, as with the Exposure Draft on the Australian Privacy Principles (APPs), the committee received a range of comments about the structure and complexity of the credit reporting Exposure Draft which, it was argued, may undermine the goal of an efficient and effective regulatory regime. In addition, the prescriptive nature of some of its provisions was seen as having the potential to effect the flexibility of the system to respond to future challenges as well as imposing a greater compliance burden. The following discussion addresses these concerns.

Structure

3.9 The ALRC recommended (Recommendation 54–1) that credit reporting be regulated under the general provisions of the Privacy Act and that regulations under the Privacy Act impose obligations on credit reporting agencies and credit providers with respect to the handling of credit reporting information.[10] In addition, the ALRC also recommended that a credit reporting code, developed by industry with input from consumer groups and regulators, provide detailed guidance within the framework provided by the Privacy Act (Recommendation 54–9).

3.10 ALRC Recommendation 54–1 was not accepted by the Government which stated that it did not agree that it is appropriate to have a general regulation-making power that would allow modification of the Privacy Principles. Rather, the Government considered that credit reporting information should continue to be regulated primarily under the Privacy Act, with provision for specific regulations to be made where necessary.[11]

3.11 In its submission to the committee, the ALRC noted that the inclusion of the credit reporting provisions in the Privacy Act is one of two significant respects where the Exposure Draft differs from the approach recommended by the ALRC. In its

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8 Mr Timothy Pilgrim, Australian Privacy Commissioner, Office of the Australian Information Commissioner, *Committee Hansard*, 16 May 2011, p. 1.

9 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, p. 99.

10 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice,* ALRC 108, May 2008, p. 1763.

11 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, p. 99.

report, the ALRC commented on its preferred option of the use of regulations and stated that this was consistent with the ALRC's overall approach to reform of the Privacy Act, that is, a hybrid model. The ALRC stated:

> The model draws significantly on principles-based regulation as its foundation, but allows for a reversion to more traditional rules-based regulation where appropriate. Subordinate legislation can be introduced to provide greater specificity and certainty in regulating privacy in relation to particular activities—including credit reporting.[12]

3.12 The ALRC went on to state that regulations would be more detailed and specific than the Unified Privacy Principles (UPPs) and 'derogate from the requirements in the privacy principles, by providing different (that is, more or less stringent) requirements than are provided for in the principles'.[13]

3.13 The ALRC also commented that the current inclusion of the credit reporting provisions within the Privacy Act is 'to some extent historical in that the credit reporting industry was made subject to privacy regulation before the rest of the private sector'. As a consequence, the handling of personal information by the credit industry is the only instance of an industry or business sector that is covered by provisions within the Privacy Act. The ALRC therefore recommended that Part IIIA be repealed and that credit reporting be addressed through regulations that would supplement the Privacy Principles and other general provisions of the Privacy Act.

3.14 The ALRC indicated that it supported the implementation of the credit reporting provisions through subordinate legislation as:

- the credit reporting provisions are an unjustified anomaly within the Privacy Act;
- the Act would be significantly simplified by the repeal of Part IIIA;
- the repeal of Part IIIA is consistent with the development of one set of Privacy Principles regulating both the public and private sectors (as with the proposed new Australian Privacy Principles); and
- an equivalent level of privacy protection can be provided to individuals under the Privacy Principles and subordinate legislation.[14]

3.15 The ALRC further commented that:

> …the Privacy Act could be drafted to contain a regulation-making power specific to the handling of credit reporting information. This would recognise that credit reporting presents a suite of privacy issues that are

12 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice,* ALRC 108, May 2008, p. 1759.

13 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice,* ALRC 108, May 2008, p. 1759.

14 Australian Law Reform Commission, *Submission 1a,* p. 2.

> uniquely deserving of specific treatment, and requires regulation that both strengthens and derogates from the protection afforded by general privacy principles.[15]

3.16 Rather than the credit reporting provisions being contained in regulations, the OAIC supported shifting the provisions to a schedule to the Privacy Act. The OAIC stated that this would simplify the Privacy Act's structure and clearly distinguish the role of the APPs and credit provisions.[16] Mr Pilgrim also commented that as the credit reporting provisions are focussed:

> ...purely on one area of business activity, it should sit separately to the act, perhaps as a schedule. And we believe that this would not make it easier just for us as an organisation regulating, but also for industry when they are looking at a discrete piece of legislation, so that they do not need to work through pages and pages and reams. It sounds like it might be a minor issue, but all of us understand what it is like when we have to start wading through pieces of legislation to find different provisions.[17]

3.17 The OAIC concluded that the Privacy Act should enable individuals, organisations and agencies to easily understand their rights and obligations. As currently drafted, the provisions may be difficult for individuals to use and understand.[18]

3.18 The APF also commented more generally on the use of regulations. The APF argued that key provisions should be 'locked in' in the legislation itself rather than provided for under regulations or a code of conduct to be approved by the Information Commissioner. The APF stated:

> However widely the Information Commissioner consults in the preparation of a Code, there is a clear 'democratic deficit' in this process. Experience with the similar role of the Privacy Commissioner under Part IIIA is that industry pressure can lead to Code provisions which undermine the effect of the Act. An example is the Privacy Commissioner's interpretation of the permissible timing of notice of default listings. While we accept the role of a Code in fleshing out some of the operational details, we do not believe it is the place for any significant threshold provisions.[19]

Committee comment

3.19 The committee notes the advice of the Senate Standing Committee on Regulations and Ordinances that '[i]t is a breach of parliamentary propriety for

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15 Australian Law Reform Commission, *Submission 1a*, p. 2.

16 Office of the Australian Information Commissioner, *Submission 39a*, p. 11.

17 Mr Timothy Pilgrim, Australian Privacy Commissioner, Office of the Australian Information Commissioner, *Committee Hansard*, 16 May 2011, p. 4.

18 Office of the Australian Information Commissioner, *Submission 39a*, p. 11.

19 Australian Privacy Foundation, *Submission 33a*, p. 3.

delegated legislation to deal with matters more appropriately included in a Bill'. These matters include legislation that fundamentally changes the law, being intended to alter and redefine rights, obligations and liabilities, or which significantly alters pre-existing legal, social or financial concepts.[20] The committee considers that the credit reporting provisions fall within the categories of matters that are more appropriately included in primary legislation. The credit reporting provisions contain significant regulatory obligations to ensure that the credit information pertaining to individuals is collected, used and disclosed in an appropriate way. The provisions also contain offences for which the penalty is 200 penalty units. The committee notes that it is Commonwealth criminal law policy that in general the penalty attached to offences in regulations should not exceed 50 penalty units.[21] The committee therefore does not consider that it is appropriate that these provisions are contained in regulations.

3.20 However, the committee is mindful of concerns put forward by the OAIC and considers, on balance, that to ensure the new Privacy Act is not overly complex, that the credit reporting provisions are easily accessible for consumers and the credit industry, and that the prominence of the APPs is not diminished, consideration should be given to locating the credit reporting provisions in a schedule to the Privacy Act. On this point, the committee notes that schedules are taken to form part of the Act, and therefore have the same force and effect as the main provisions of the Act.[22] The committee is therefore of the view that there is merit in considering whether the complexity of the consumer credit provisions can be reduced, and the provisions can be more readily accessible and understood, if the provisions were contained in a schedule to the Privacy Act.

Recommendation 1

3.21 The committee recommends that consideration be given to locating the credit reporting provisions in a schedule to the Privacy Act.

Level of prescription and complexity

3.22 Submitters noted that the current credit reporting provisions in Part IIIA of the Privacy Act are very complex and cumbersome. The OAIC welcomed the Government's efforts to simplify these provisions in the Exposure Draft. The OAIC also stated that is was particularly useful that the provisions have been reordered to systematically set out the obligations on different recipients of credit information and

20 Senate Standing Committee on Regulations and Ordinances, *40th Parliament Report*, June 2005, p. 59.

21 Attorney-General's Department, *A guide to framing Commonwealth offences, civil penalties and enforcement powers*, p. 14.

22 *Acts Interpretation Act 1901*, s. 13.

that the ordering of obligations better reflect the stages of personal information flows consistent with the draft APPs.[23]

3.23 However, generally the Exposure Draft was seen as not improving clarity or providing greater simplicity. Submitters commented that the Exposure Draft is overly long and complex and therefore does not clearly set out the protections provided to consumers and the obligations of industry. The APF stated that 'it is quite difficult to comprehend the detailed changes and effect of the proposed new regime from the draft clauses, and the short Companion Guide offers only limited assistance'.[24]

3.24 In particular, concerns were raised about the definitions used and the level of prescription in detailing how some matters will be regulated. This was seen as neither being in step with the principles-based approach supported by the Government, nor assisting in the understanding or use of the provisions and thus not improving privacy protections.[25] Experian for example, stated that:

> ...these shortcomings in the drafting and structure of the Exposure Draft detract from the 'clear and simple' objectives of the Exposure Draft provisions. This is of particular concern given that the focus of the provisions is upon enhancing the protection of consumers from misuse of their personal information. Consumers and non-lawyers are unlikely to understand or engage with such a lengthy and complex document and this diminishes its potential usefulness and effectiveness in educating consumers about their rights under the credit reporting regime, and encouraging them to engage with and periodically check the information on their credit files.[26]

3.25 The Law Institute Victoria (LIV) also commented that the focus of the Exposure Draft is on business practices in the credit reporting sector 'with little thought or provision for the rights and interests of individuals and fundamental principles of privacy'. The LIV further stated:

> There are minimal protections of individual people's privacy in the Exposure Draft. These minimal protections are likely to be underused or unenforced while they are embedded in such a technical and complex framework, and while they are so severely compromised by burdensome and costly requirements (eg requirements to opt out, instead of opt in

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23 Mr Timothy Pilgrim, Australian Privacy Commissioner, Office of the Australian Information Commissioner, *Committee Hansard*, 16 May 2011, p. 1.

24 Australian Privacy Foundation, *Submission 33a*, p. 2.

25 National Australia Bank, *Submission 2a*, p. 2; Australian Institute of Credit Management, *Submission 8a*, p. 1; Australian Finance Conference, *Submission 12a*, p. 1; Australian Bankers' Association, *Submission 15a*, p. 1; Australasian Retail Credit Association, *Submission 47*, p. 6; Veda Advantage, *Submission 65*, p. 3; Consumer Credit Legal Centre (NSW), *Submission 66*, p. 2; Law Institute Victoria, *Submission 36a*, p. 1.

26 Experian, *Submission 46*, pp 14–15.

> (eg cl 110(5)); requirement to renew banning period every 14 days (cl 113), and 'not excessive' charges for access (cl 120(6))).[27]

3.26 Although the LIV recommended amendments to the Exposure Draft, it remained concerned that it would 'still be inaccessible to the individuals whose interests are greatly impacted by its provisions and, in implementation, it would represent a missed opportunity to engage people and give them more genuine control over their information'.[28]

3.27 Other submitters, including the Australian Institute of Credit Management (AICM), supported a principles-based approach as such an approach would assist to reduce the level of complexity and prescription of the Exposure Draft.[29] In addition, it was argued that a principles-based approach would assist in keeping the Privacy Act relevant, support innovation and provide sufficient flexibility to deal with unforeseen situations.[30] Mr David Fodor, Chief Credit Officer, National Australia Bank (NAB), commented:

> Following a review of the credit-reporting exposure draft, NAB is concerned that some provisions may be overly prescriptive and complex, particularly regarding the way it is proposed to regulate some aspects of data usage. The legislation as drafted includes a high focus on how outcomes are to be achieved, which may run the risk that the acts may become quickly outdated, hampering innovation and being insufficiently flexible to deal with unforeseen circumstances. NAB acknowledges the need to strike a balance between the protection of privacy, the benefits available to consumers from more responsible lending decisions, and the commercial practicalities of enablement.[31]

3.28 The NAB also stated that by using principles to drive outcomes, 'adequate controls can be implemented with a greatly reduced risk of creating "practicality" issues from prescribing how those outcomes are to be achieved'.[32] However, the Exposure Draft is seen as being prescriptive. Veda Advantage, for example, commented:

> As drafted, there are instances where the proposed legislation sets out a policy objective and then prescribes very detailed steps CRAs must take to achieve the outcome.[33]

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27 Law Institute Victoria, *Submission 36a*, p. 1.

28 Law Institute Victoria, *Submission 36a*, p. 1.

29 Australian Institute of Credit Management, *Submission 8a*, p. 3.

30 National Australia Bank, *Submission 2a*, p. 2; see also Australian Institute of Credit Management, *Submission 8a*, p. 3; Australian Bankers' Association, *Submission 15a*, p. 5.

31 Mr David Fodor, Chief Credit Officer, Personal Banking Risk, National Australia Bank, *Committee Hansard*, 16 May 2011, p. 8.

32 National Australia Bank, *Submission 2a*, p. 2.

33 Veda Advantage, *Submission 65*, p. 16.

3.29 The Australian Finance Conference (AFC) also submitted that the Exposure Draft, unlike recently implemented regulation such as the anti-money laundering and consumer credit regimes, is a 'reversion to a more-prescriptive method of regulation, which in our view, detracts from achievement of the underlying objectives of improved clarity and understanding'.[34]

3.30 Submitters argued that regulations and/or a code of practice would be the more appropriate place to contain the detailed measures regarding the implementation and on-going management of the new credit reporting regime.[35]

3.31 The Australasian Retail Credit Association (ARCA) also commented that the complexity of the Exposure Draft would require further training of staff to ensure that they understand the credit reporting regime and thus comply with the legislation. ARCA commented that the complexity of the legislation 'is likely to result in potentially large numbers of unintentional human error breaches, and it could be exceptionally difficult for staff to know clearly what they are and are not allowed to do with a specific element of information'. ARCA saw potential for staff choosing to be cautious and, as a consequence, not providing information to consumers that they may be permitted to provide. ARCA argued that this may result in consumers becoming frustrated, and the benefits associated with the introduction of more comprehensive credit reporting may not be fully realised.[36]

Definitions

3.32 The Exposure Draft contains 60 new definitions compared with seven key credit reporting definitions contained in the current Privacy Act. The need for these new definitions was seen by the AFC as being a result of the prescriptive nature of the Exposure Draft as extensive and complex definitions are required to support the central provisions of the proposed credit reporting regime. The AFC went on to state that 'it is therefore critical that the definitions are clear, easily understood and reflect Government policy'.[37]

3.33 However, many submitters commented that the definitions are complex and difficult to understand and therefore credit reporting provisions will be less accessible than they should be.[38] Veda Advantage commented that the definitions create a 'web of complexity'.[39] Ms Helen Gordon, AFC, stated:

> In looking at the definitions, you see that each definition effectively builds on another definition. So you spend your time working your way through—

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34 Australia Finance Conference, *Submission 12a*, p. 2.

35 Australian Institute of Credit Management, *Submission 8a*, p. 3.

36 Australasian Retail Credit Association, *Submission 48*, p. 6.

37 Australia Finance Conference, *Submission 12a*, p. 4.

38 See for example, Consumer Action Law Centre, *Submission 63*, p. 3.

39 Veda Advantage, *Submission 65*, p. 35.

> it is a circular, tortuous route—to find that you are back to square one and perhaps still a little unclear as to exactly what is regulated and exactly how it is regulated. It is the definitions that go into that: who is regulated, how it is regulated and what you can do in relation to it. Our point is that, if we do not understand what we are talking about because the definitions are so complex, it is very hard to then overlay the actual functional provisions and know how they are meant to work.[40]

3.34 Other submitters pointed to a range of similar concerns:

- some definitions build on and overlap a number of other definitions;[41]
- the Exposure Draft relies on definitions contained in other legislation;[42]
- the Exposure Draft does not include key definitions, for example, there is no definition of 'credit manager', or 'derived' for credit derived information;[43]
- some definitions are unnecessary as they define terms that are well understood;[44]
- the parameters of the concepts defined appear to extend beyond what was intended to be regulated (for example the definition of 'credit reporting business'); and
- definitions are not consistent with definitions in other regulations, for example, the definition of 'consumer credit' is different from that contained in the National Credit Code.[45]

3.35 The NAB and AFC pointed to the definition of 'credit eligibility information' as an example of a complex definition. The NAB stated that this definition 'leads to unnecessary complications and duplication and makes comprehension difficult'.[46] The AFC noted that the definition of credit eligibility information is pivotal to the compliance framework for information handling by a credit provider. Thus, it is critical for a credit provider to be able to identify what information it handles that meets this definition as this will dictate the parameters of compliance with the draft credit reporting provisions. However, the AFC commented that the definition of credit eligibility information builds on a significant number of other definitions, all of which need to be considered by the credit provider to determine what information it handles

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40 Ms Helen Gordon, Regional Director and Corporate Lawyer, Australian Finance Conference, *Committee Hansard*, 16 May 2011, p. 26.

41 Consumer Action Law Centre, *Submission 63*, p. 3; Veda Advantage, *Submission 65*, p. 35.

42 See for example, Veda Advantage, *Submission 65*, p. 16.

43 National Australia Bank, *Submission 2a*, p. 4; Australia Finance Conference, *Submission 12a*, p. 4; Australian Privacy Foundation, *Submission 33a*, p. 4.

44 Veda Advantage, *Submission 65*, p. 35.

45 Australian Privacy Foundation, *Submission 33a*, p. 4.

46 National Australia Bank, *Submission 2a*, p. 4.

needs to meet the compliance framework in the draft provisions. The AFC concluded that this approach 'challenges understanding'.[47]

3.36 The AFC also pointed to the variation between terms used and defined in the Exposure Draft and other laws, for example, 'credit' is defined in the Australian Securities and Investment Commission Act. The AFC commented that these variations have occurred 'where either it would appear the terms were intended to have the same meaning or they should have the same meaning to assist understanding and compliance with consumer credit regulation generally'. The AFC went on to state that:

> ...even a slight variation in definition of a term from one Act to another potentially creates a need for each regulated entity to consider the compliance outcomes of the variation. Where the variation is for reasons of format rather than substance, we submit it should not occur to avoid this eventuality.[48]

3.37 Veda Advantage submitted that the Exposure Draft should only include a single definition for regulated information – 'credit reporting information' – applying to credit providers and credit reporting agencies. Veda Advantage argued that this would allow simplification or deletion of various use and disclosure provisions throughout the Exposure Draft.[49] Veda Advantage also proposed that the Government undertake a roundtable process to agree the terms of simplification of the Exposure Draft.

3.38 The Department of the Prime Minister and Cabinet (the Department) noted that Veda's proposals for significant and comprehensive change to the definitions used in the Exposure Draft have been analysed by a barrister to determine the implications of the proposals for consumers. The barrister commented that the proposed changes would need to be carefully considered to ensure that underlying policy positions are not changed. The Department considered that:

> ...the proposal for the complete redrafting of the credit reporting provisions and the definitions would be a significant and time consuming exercise which would also need to ensure that all the Government's policy directions were implemented. The Department's view is that the exposure draft accurately implements the Government's policy on the regulation of credit reporting as set out in the Government's first stage response to the Australian Law Reform Commission (ALRC) report.[50]

3.39 The NAB suggested that readability could be improved if all definitions were located in a single dictionary or for those more specific definitions applicable to credit

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47 Australia Finance Conference, *Submission 12a*, p. 4.

48 Australia Finance Conference, *Submission 12a*, p. 4.

49 Veda Advantage, *Submission 65*, p. 17.

50 Department of the Prime Minister and Cabinet, *Additional Information*, (received 2 September 2011), p. 1.

reporting agencies and credit providers, to relocate them to the relevant divisions to which they primarily relate.[51]

Credit Reporting Code of Conduct

3.40 A number of submitters suggested that moving some matters into the Credit Reporting Code of Conduct (the Code) would assist in reducing the complexity of the Exposure Draft. For example, Mr Chris Gration, Veda Advantage, commented that the Code should have the capacity to deal with some of the operational complexity of the Exposure Draft.[52] Ms Nerida Caesar, Chief Executive Officer, Veda Advantage also commented that 'operational detail is typically best left to regulation or code of conduct'. Ms Caesar further stated:

> Prescribing operational matters—for example, detailing each step required to implement a ban or a freeze on a credit report—is, we believe, unnecessary and counterproductive.[53]

3.41 Veda Advantage also submitted that having certain matters in the Code allowed for flexibility to respond to changing circumstances, for example, matters emerging in relation to identity fraud can be responded to in the Code.[54] Optus was also of the view that some matters in the Exposure Draft could be moved into the Code. This would allow sufficient flexibility for different sectoral requirements and take into account existing obligations, whilst still maintaining minimum and consistent standards of consumer protection for credit reporting information.[55]

3.42 Discussion on the development of the Code is provided below, see paragraphs 3.70–3.89.

Other suggestions for simplification and clarification

3.43 Submitters also provided other suggestions to aid with simplification and clarification of the Exposure Draft.

3.44 Veda Advantage suggested that permitted disclosures and uses between credit reporting agencies and credit providers be aligned and provided in a single table. It

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51 National Australia Bank, *Submission 2a*, p. 4; see also Australasian Retail Credit Association, *Submission 47*, p. 13.

52 Mr Chris Gration, Head of External Relations, Veda Advantage, *Committee Hansard*, 16 May 2011, p. 39.

53 Ms Nerida Caesar, Chief Executive Officer, Veda Advantage, *Committee Hansard*, 16 May 2011, pp 39–40.

54 Mr Chris Gration, Head of External Relations, Veda Advantage, *Committee Hansard*, 16 May 2011, p. 43.

55 Optus, *Submission 58*, p. 4.

stated that this will allow for further simplification, including merging of a range of sections in the Exposure Draft (sections 108, 109, 135 and 136).[56]

3.45 The AFC and the OAIC noted that the word 'agency' is used throughout Division 2 (credit reporting agencies) as a short-form term for credit reporting agency. However, the word agency is defined as a government sector entity in section 16 of the Australian Privacy Principles Exposure Draft. The AFC also noted that the Government has indicated that Commonwealth agencies that carry on a credit reporting business will be regulated as credit reporting agencies. The AFC therefore submitted that in order to avoid confusion and assist with understanding, a word or term other than 'agency' should be used as the short-form reference for credit reporting agency in Division 2.[57] The OAIC recommended use of the full term or using 'CRA' after the provision refers to 'credit reporting agency'.[58]

3.46 The OAIC also noted that a range of new concepts have been introduced into the credit reporting regime. The OAIC stated that 'to ensure a smooth transition to the new regime, it is important that new concepts and terminology are clearly defined, well explained and understood'. The OAIC provided comment on two terms used in the Exposure Draft:

- 'pre-screening determination': this term should be replaced by 'pre-screening assessment' as this would avoid confusion with other uses of the term 'determination' and better reflect the nature of the decision being made by a credit reporting agency. Further if this term is adopted, its meaning should be made clear and consistent including that it is not included in the term 'credit reporting information'; and
- complaints determination: 'determination' in relation to the conclusion reached by a credit reporting agency or a credit provider following investigation of a complaint should be replaced with the term 'decision'.[59]

3.47 The committee received a range of comments regarding provisions relating to notification which contained the requirement that the notification be provided within a 'reasonable period'. Submitters commented that a specified timeframe would be preferable in most circumstances. These provisions include:

- subsection 122(2) – notice of correction by a credit reporting agency. The Consumer Credit Legal Centre (NSW) (CCLC) suggested that this period be set as a maximum of 14 days;[60]

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56 Veda Advantage, *Submission 65*, p. 17.

57 Australian Finance Conference, *Submission 12a, Attachment 2*, p. vi; Office of the Australian Information Commissioner, *Submission 39a*, p. 7.

58 Office of the Australian Information Commissioner, *Submission 39a*, p. 20.

59 Office of the Australian Information Commissioner, *Submission 39a*, pp 17–18.

60 Consumer Credit Legal Centre (NSW), *Submission 66*, p. 2.

- section 142 – notification of a refusal of an application for consumer credit by a credit provider. The Telecommunications Industry Ombudsman (TIO) suggested a seven day period as timely notification of a refusal of credit is important, particularly as it is often related to a house purchase and the applicant may only become aware of a default listing when an application for finance is rejected;[61] and
- section 150 – notice of correction etc must be given. CCLC stated that this period should be set as a maximum of 14 days.[62]

Committee comment

3.48 The committee considers that many of the concerns regarding complexity and lack of clarity may have been overcome if the Exposure Draft had been accompanied by a detailed explanatory document. The Companion Guide offers only limited assistance in understanding the Exposure Draft. Indeed, the committee notes that the Companion Guide is short and relies heavily on the Government Response. The committee does not consider that the Companion Guide provides sufficient detail or assistance in interpreting the provisions of the Exposure Draft, many of which are detailed and complex. In addition, the committee notes that some issues will be addressed through guidance from the OAIC or through the Code of Conduct, for example, the interpretation of 'reasonableness' regarding notification periods.

3.49 As with the Exposure Draft of the Australian Privacy Principles, the task of drafting the credit reporting provisions to achieve the Government's aims has been complex and difficult. The move to a more comprehensive credit reporting regime, and the addition of five new data sets, has required the implementation of a significant regulatory framework. The committee acknowledges that the Credit Reporting Exposure Draft has sought to impose this regime through the regulation of the flow of information in the credit reporting sector. The Exposure Draft assumes what is being undertaken at each stage of the process and systematically sets out the obligations on different recipients of credit information at each stage. It recognises that both credit reporting agencies and credit providers value add to the information that they receive. Given the complexity of the information flows for credit reporting, and the need to ensure adequate information protection, it is understandable that the Exposure Draft is long and detailed.

3.50 However, the committee is concerned that the adoption of this approach may have undermined the goal of simplifying and clarifying the credit reporting regime and therefore lead to uncertainty as to obligations and rights. In particular, the committee is concerned that the many complex provisions contained in the Exposure Draft may not assist individuals to understand their rights and may hinder consumers, for example, in enforcing their rights if a complaint or dispute arises. For

61 Telecommunications Industry Ombudsman, *Submission 69*, p. 8.

62 Consumer Credit Legal Centre (NSW), *Submission 66*, p. 2.

organisations, it is crucial that they understand their obligations in order to comply with the legislation and ensure that consumers can be confident that the greater amount of their personal information that is being kept is adequately protected. A complex legislative regime does not assist with this goal.

3.51 One of the particular areas of concern for submitters was the increase in the number, and complexity, of definitions used: some 60 new definitions are included in the Exposure Draft. In relation to definitions, the committee notes that the Companion Guide states that:

> 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.[63]

3.52 The committee acknowledges again that the new definitions are required as the regulatory regime is based on the information flows in the credit reporting system. However, it appears to the committee that the result has been a very complex and detailed Exposure Draft. Veda Advantage put the suggestion that a single definition of 'credit reporting information' should be used to simplify the credit reporting system. The committee does not support this suggestion as it would involve major re-drafting of the Exposure Draft and does not reflect the complexity of the current business model of the credit reporting sector.

3.53 The committee has also considered suggestions that 'operational' matters be moved to the proposed Credit Reporting Code of Conduct. While this would lead to a simplification of the Exposure Draft, such a move would have to be weighed against the benefit of having the major provisions of the credit reporting regime in one place. The committee considers, on balance, that no matters currently contained in the Exposure Draft should be moved into the Code.

3.54 However, the committee considers that there is room for further refinement of the Exposure Draft to improve clarity and simplicity. The committee therefore recommends that the Exposure Draft be reviewed in light of the comments received during the inquiry. These suggestions include clarity in the use of the terms 'agency', 'pre-screening determination' and complaints 'determination'.

Recommendation 2

3.55 The committee recommends that the Exposure Draft be reviewed to ensure that the provisions are clear and concise.

63 Australian Government, *Companion Guide, Privacy Reforms: Credit Reporting*, January 2011, p. 8.

Recommendation 3

3.56 The committee recommends that the definitions be reviewed to ensure consistency across the Privacy Act and, to the extent possible, that definitions are standalone provisions.

Interaction between the credit reporting provisions and the Australian Privacy Principles

3.57 The interaction between the APPs and credit reporting provisions differs depending on the entity involved and the information being regulated. The credit reporting agency provisions in the Exposure Draft incorporate all the relevant general requirements of the APPs and replace the APPs for credit reporting. Section 104 provides that if a credit reporting agency is an APP entity, the APPs do not apply to the agency in relation to credit information, CRA derived information and CP derived information. The APPs apply to the credit reporting agency in relation to other kinds of personal information. In relation to separate credit reporting provisions, the Companion Guide states:

> This will ensure that more onerous privacy obligations will apply to the types of defined information collected, used and disclosed by credit reporting agencies.[64]

3.58 For credit providers that are not small business operators, pursuant to section 130, the Exposure Draft provisions 'may apply' to a credit provider 'in addition to, or instead of,' the APPs. If the credit provider is a small business operator only the credit reporting provisions apply. The Companion Guide states:

> 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.[65]

3.59 The Exposure Draft reflects ALRC Recommendation 54–2 that the credit reporting provisions should be drafted to contain only those requirements that are different or more specific than provided for in the Unified Privacy Principles (now the APPs). The ALRC commented in its report that credit reporting agencies and credit providers should have to comply with both the model UPPs (APPs) and the credit reporting requirements and noted that 'this approach is consistent with the existing relationship between the credit reporting provisions and general privacy principles contained in the Privacy Act, and with the approach to be taken to the new 'Privacy (Health Information) Regulations'. The credit reporting provisions should contain only those requirements that are different or more specific than provided for in the UPPs.

64 Australian Government, *Companion Guide, Privacy Reforms: Credit Reporting*, January 2011, p. 5.

65 Australian Government, *Companion Guide, Privacy Reforms: Credit Reporting*, January 2011, p. 5.

The ALRC commented that any problems of inconsistency would be limited because conduct that complies with the credit reporting provisions 'required or authorised by law' under the model UPPs.[66]

3.60 The Government accepted this recommendation and stated that:

> ...to the extent possible, the Privacy Principles should set out the foundation for protecting credit reporting information. Regulation of credit reporting information in the Privacy Act will only set out further requirements where it is necessary for different or more specific protections to apply.
>
> Relevant organisations will have to comply with both the Privacy Principles and the proposed credit reporting provisions. However, as the credit reporting provisions will only apply where it is necessary to have either greater or lesser privacy protection, it is intended that these provisions would set the new privacy standard for credit reporting. If there is inconsistency between the protections in the principles and the credit reporting provisions, organisations would be expected to comply with the more specific or different standards in the credit reporting provisions.[67]

3.61 The OAIC submitted that it did not support the approach taken in the Exposure Draft. The OAIC commented that this approach to the interaction between the APPs and credit reporting provisions 'may create challenges for individuals, organisations, dispute resolution bodies and the OAIC as regulator' as the obligations for credit reporting agencies and credit providers are not easily ascertained nor clearly stated. The OAIC suggested that clarity would be improved if the credit reporting provisions were a self-contained and complete set of provisions. That is, in place of the APPs, the credit reporting provisions should incorporate all of the relevant requirements of the APPs, in addition to the more specific or different requirements for credit reporting.[68]

3.62 The OAIC noted that the Exposure Draft already adopts this preferred approach for credit reporting agencies, but not for credit providers. The OAIC went on to comment that 'it is not apparent why a different approach has been followed for credit providers'. However, the OAIC saw several benefits arising from the incorporation of all of the relevant APP requirements into the Exposure Draft for credit providers:

- clarifying whether the APPs or the credit reporting provisions apply to credit providers' credit reporting activities

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66 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice,* ALRC 108, May 2008, p. 1761.

67 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, p. 99.

68 Office of the Australian Information Commissioner, *Submission 39a,* p. 12.

    - for example, currently under the Exposure Draft, a credit provider may be required to correct 'identification information' under either the provisions in the Exposure Draft 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 Privacy Act;
- providing 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 small business operators would be subject to the additional obligations imposed by the APPs in relation to credit reporting;
- reducing complexity and increasing efficiency in the OAIC's investigations and enforcement of the provisions, since all credit providers would be subject to identical obligations.[69]

3.63 However, if this approach was not adopted, the OAIC recommended two complementary measures to reduce the complexity of the current provisions. First, the Exposure Draft 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 Exposure Draft identify only those APPs that do not apply to credit providers in relation to credit reporting.

3.64 Secondly, the Exposure Draft should be amended to ensure that the APPs, which apply to credit providers' credit reporting activities (in addition to the Exposure Draft), apply to all credit providers, including small business operators. At present, credit providers' obligations will vary depending on whether they are subject to the APPs, or are small business operators. The OAIC was of the view that 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.[70]

3.65 The AFC also commented on the need to clarify the interaction between the APPs and the credit reporting provisions. In particular, the AFC recommended that an additional paragraph be considered for inclusion in section 130 (application of the Division to credit providers) to reflect the Government's intention that if there is inconsistency between the draft credit reporting provisions and the APPs, that a credit

69 Office of the Australian Information Commissioner, *Submission 39a*, p. 12.

70 Office of the Australian Information Commissioner, *Submission 39a*, p. 12.

provider must comply with the more specific or different standards in the credit reporting provision.[71]

Committee comment

3.66 The committee considers that the interaction between the Australian Privacy Principles and the credit reporting provisions should be further clarified in the Exposure Draft. The committee has reviewed the options proposed by the Office of the Australian Information Commissioner and considers that it is desirable for the credit reporting provisions to incorporate all of the relevant requirements of the APPs, in addition to the more specific or different requirements for credit reporting. The committee further considers that this would be a crucial requirement should the credit reporting provisions be moved to a schedule of the Privacy Act.

Recommendation 4

3.67 The committee recommends that the Exposure Draft be amended to incorporate all of the relevant requirements of the Australian Privacy Principles for both credit reporting agencies and credit providers, in addition to the more specific or different requirements for credit reporting.

Other components of the reform framework

3.68 The credit reporting Exposure Draft is one part of the new credit reporting framework. Submitters noted that significant components of the framework are yet to be released by the Government: the regulations dealing with issues such as permitted uses and disclosures, detail on the repayment history and consumer liability information; the Credit Reporting Code which will cover a range of operational matters; the powers and functions of the Australian Information Commission in relation to codes; and transitional arrangements.[72]

3.69 There was concern that the Exposure Draft was being reviewed without the other components of the regulatory framework. Consumer Action Law Centre (Consumer Action), for example, stated that 'without access to the regulations, it is impossible to gain a proper understanding of the operation of these amendments or their impact on consumers'.[73] The APF also noted that regulations are proposed for some 'very significant determinants of the scope and effect of the regulatory regime' including additional credit reporting agency use and disclosure criteria (paragraphs 108(2)(c) and (3)(f)); definitions of credit provider and credit reporting business and additional requirements for uses and disclosures for credit eligibility information by

71 Australian Finance Conference, *Submission 12a, Attachment 2*, p. viii.

72 Australia Finance Conference, *Submission 12a*, p. 2; Mr Damian Karmelich, Director, Dun & Bradstreet, *Committee Hansard*, 16 May 2011, p. 15.

73 Consumer Action Law Centre, *Submission 63*, p. 3.

credit providers (paragraphs 135(2)(e) and (3)(g)). The APF commented that without the regulations, it is difficult to assess the overall regulatory package.[74]

Credit Reporting Code of Conduct

3.70 The Credit Reporting Code of Conduct will play a significant role in the credit reporting regime. The Exposure Draft contains only references to the proposed new Credit Reporting Code of Conduct and the Government has indicated that the Code will be developed by industry and key stakeholders. The Government's response to the ALRC's Recommendation 54–9 will provide the basis for its development.[75] The Government Response stated that:

> The Government notes that it is necessary to have a clear and transparent code of practice, which is agreed to across the credit reporting industry, about how the credit reporting provisions and related issues will operate in practice. The code will ensure consistency across the industry in relation to matters such as access to information, data accuracy and complaint handling.[76]

3.71 The Government also stated that it considered that the Code should be developed 'subject to satisfactory consultation requirements between the credit reporting industry, advocates and the Privacy Commissioner'. Any Code that is developed is to be approved by the Privacy Commissioner. The Government Response also stated that:

> Any organisation or agency (including credit providers and credit reporting agencies) that wants to participate in the credit reporting system will be required to be a member of this binding code. This will ensure consistency across the sector.
>
> A breach of the code will be deemed to be a breach of the Privacy Act to the extent that the code provision is interpreting the application of a credit reporting provision in the Act.[77]

3.72 The Code will operate in addition to the credit reporting provisions and not override or apply lesser standards than are outlined in the Privacy Act. The Government stated that the Code would set out how credit reporting agencies and

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74 Australian Privacy Foundation, *Submission 33a*, pp 3–4.

75 Australian Government, *Companion Guide, Privacy Reforms: Credit Reporting*, January 2011, p. 5.

76 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice*, October 2009, p. 103.

77 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice*, October 2009, p. 104.

credit providers can practically apply the credit reporting provisions.[78] The Companion Guide notes that Exposure Draft expressly envisages 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.[79]

3.73 The Government Response also stated that:

> The Government will consult further with industry and advocates in drafting the appropriate provisions to the power to make a binding industry code in the Privacy Act.[80]

3.74 The development of the Code was supported by submitters. Optus, for example, commented that the Department of the Prime Minister and Cabinet has given the advice that the Code could allow for different obligations on different sectors, to take into account the existing legal and regulatory obligations that apply to those sectors. In addition, a code was seen as more easily future-proofed than legislation, and can be quickly and easily amended over time when needed.[81]

3.75 The ABA and ARCA supported a single, mandatory and binding code and stated that this would ensure competitive neutrality and certainty for consumers. In addition, a code be consistent with the ALRC's approach to the objective of consolidating privacy regulation as much as feasible. ARCA and the ABA noted that

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78 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, p. 103.

79 Australian Government, *Companion Guide, Privacy Reforms: Credit Reporting,* January 2011, pp 5–6.

80 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, p. 104.

81 Optus, *Submission 58,* p. 4.

references in the Exposure Draft to the Code are limited. ARCA was of the view that the Code should be mandated by the Act.[82]

3.76 The ABA noted that the references in the Exposure Draft do not define the Code's scope but provide for certain aspects, some of which must be included in the Code and others that are optional. The Code must cover at least:

- compliance with complaints handling;
- a credit reporting agency's manner of giving access; and
- a credit provider's manner of giving access.[83]

3.77 The ABA proposed a comprehensive Code be developed that was not confined only to the matters referred to in the primary legislation and regulations. Rather, the Code should incorporate all relevant operational aspects of the credit reporting regime including the on-going commitment to data quality.

3.78 ARCA also noted that data quality is essential to ensure an effective and accessible credit reporting system. ARCA submitted that in order to ensure data quality, the Code should have 'specifically built-in arrangements to facilitate an ongoing commitment to data quality'.[84] Mr Carlo Cataldo, Chairman, ARCA, commented:

> To ensure that data quality is at the heart of credit reporting, ARCA proposes that the update to the credit reporting code of conduct has specifically built-in arrangements to facilitate an ongoing commitment to data quality. ARCA proposes that data quality be addressed in the code via a three-pillar approach consisting of a single data standard for credit reporting, the requirement of reciprocity, and an effective and adequately resourced means of independent oversight. A single data standard will ensure transparency through the credit reporting system and will give a clear understanding of what data is there in credit reports. Consumers will understand exactly what the information on their personal credit report means irrespective of the credit bureau, which credit provider provided it and what the information is that they are receiving.[85]

3.79 The ABA indicated its support for ARCA's proposals.[86]

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82 Australasian Retail Credit Association, *Submission 48*, p. 3.

83 Australian Bankers' Association, *Submission 15a*, p. 2; Australasian Retail Credit Association, *Submission 48*, p. 3.

84 Australian Bankers' Association, *Submission 15a*, p. 3.

85 Mr Carlo Cataldo, Chairman, Australasian Retail Credit Association, *Committee Hansard*, 16 May 2011, p. 7.

86 Australian Bankers' Association, *Submission 15a*, p. 2.

3.80 ARCA also proposed that an independent committee be established to 'drive compliance with the Code'. Such a committee would comprise representation from both industry and consumer advocates. ARCA concluded:

> While we would expect to finalise arrangements in consultation with industry and the regulator, ARCA proposes that this committee would support the work of the regulator, maintain industry focus on compliance with the Code, and to undertake compliance tasks associated with the Code.[87]

3.81 ARCA informed the committee that it was working with other stakeholders to develop the Code. An independent reviewer has been employed to review not only the process of development but also the update of the Code. ARCA indicated that it had consulted widely, and will continue to do so, as the current credit reporting system is used substantially beyond financial services. Consumers are included in the development process and Mr Cataldo concluded:

> Our intent is to build a code that all stakeholders are very involved with and that has strong compliance so that it is absolutely delivered and can move Australia, particularly in data quality, up to global practice more than is often occurring.[88]

3.82 Legal Aid Queensland (LAQ) argued that 'it is not in consumers' best interests for industry to drive the development of a credit reporting code which is not purely directed to intra industry issues unless there are adequate consumer safeguards' and supported the establishment of a mechanism to ensure compliance with the Code. The LAQ submitted that codes do not offer adequate consumer protection and noted that in some sectors with existing codes there are consistently large numbers of complaints and or widespread non-compliance with the code. In order to ensure compliance with the Code, the LAQ stated that an independent code monitoring and compliance body, funded by industry members that have access to credit reporting information, needs to be established.[89]

3.83 In response to suggestions that the telecommunications industry should develop its own code, the LAQ stated:

> We strongly reject any proposal to have more than one credit reporting code. We have particular concerns about any suggestion that the telecommunications industry could develop its own code, or rely on the current telecommunication codes. Consumer experience suggests that telecommunications industry codes have been ineffectual in delivering an appropriate 'baseline' in consumer protection and compliance culture.[90]

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87 Australasian Retail Credit Association, *Submission 48*, p. 4.

88 Mr Carlo Cataldo, Chairman, Australasian Retail Credit Association, *Committee Hansard*, 16 May 2011, p. 12.

89 Legal Aid Queensland, *Submission 60*, p. 7.

90 Legal Aid Queensland, *Submission 60*, p. 8.

3.84 The LAQ also noted that telecommunications codes have taken significant time and resources to develop, and even when finalised have very few signatories, for example, the Telecommunications Consumer Protection Code (TCP Code), has only two signatories while other codes have no signatories.[91] In addition, the TCP Code places no obligation on the industry body, the Communications Alliance, to monitor complaints, monitor compliance, undertake routine compliance with signatories or identify systemic code issues and breaches. While the TCP Code requires the Communications Alliance to handle complaints about code signatories in accordance with the Communications Alliance Code Administration and Compliance Scheme and to report on the Scheme, the LAQ commented that the Communications Alliance has not reported publicly on compliance with the TCP Code. This is despite the scheme being in existence for more than 10 years.

3.85 The LAQ concluded that the inability of the telecommunications industry to develop adequate consumer safeguards is reflected in the level of complaints: the Telecommunications Industry Ombudsman reported receiving 87,264 new complaints in the last six months of 2010. This represents an increase of 9 per cent on the previous six months. This included 19,000 issues relating to the failure of companies to follow through with promises they had already made to resolve complaints.[92]

Committee comment

3.86 The Credit Reporting Code of Conduct is a significant component of the credit reporting regime. The committee has noted that the development of the Code is underway and that industry has engaged with stakeholders and employed an independent reviewer to assist the development process. However, the committee is mindful of the concerns raised by consumer and advocacy groups about an industry led development process.

3.87 In its response to the ALRC recommendations, the Government acknowledged that the credit reporting industry will be the main driver behind the Code. The Privacy Commissioner will have final approval of the Code. The committee considers that this is an appropriate mechanism for approval and, as the Government stated, will balance the needs of industry to have efficient and effective credit reporting with the privacy needs of individuals.

3.88 The requirement for entities that wish to participate in the credit reporting system to be members of the binding Code is a further safeguard. Breaches of the Code will be deemed breaches of the Privacy Act 'to the extent that the Code provision is interpreting the application of a credit reporting provision in the Act'.[93]

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91 Legal Aid Queensland, *Submission 60*, p. 8.

92 Legal Aid Queensland, *Submission 60*, pp 7–8.

93 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice*, October 2009, p. 104.

3.89 The committee considers that the suggestion from the Australasian Credit Retail Association that an independent committee be established to drive compliance with the Code has merit. With a membership representing both industry and consumer advocates, the committee considers that such a committee would greatly assist in ensuring that the Code balanced the interests of industry and consumers. It would also assist in ensuring a timely response to emerging issues. The committee also considers that the committee may provide valuable support to the Australian Information Commissioner in the Commissioner's role as regulator and provide timely access to a dedicated forum which monitors developments in the credit reporting system.

Transitional arrangements

3.90 While not dealt with in the Exposure Draft, the need for transitional arrangements was raised by submitters. Westpac commented that it was important for transitional arrangements to be put in place to allow for, and encourage industry to, transition to the new credit reporting regime in a timely manner while maintaining appropriate consumer safeguards. Westpac suggested a 12 month transition period.[94]

3.91 Experian also submitted that, from its experience in other jurisdictions, careful management of transitional arrangements will be required to ensure that no tightening in credit practices occurs that can have an adverse impact on the economy. Experian pointed to three main issues:

- positive data sets will need to be made available to credit reporting agencies in advance of the expected commencement date of the new provisions, to enable sufficient lead time for the agencies to conduct meaningful data testing and to properly manage and implement changes to internal systems, controls and procedures;
- credit providers need to be permitted to provide initial data loads of two year repayment histories to credit reporting agencies immediately upon the commencement date of the new provisions. This will ensure that the credit reporting system can benefit from the availability of the new positive data sets as soon as possible after commencement; and
- it would be appropriate for the Australian Information Commissioner to temporarily adopt a more relaxed approach to inadvertent non-compliance by entities that are genuinely making efforts to modify their systems and controls to comply with the new requirements, both during the transitional period and for an appropriate period following commencement of the new regime.[95]

3.92 In addition, the committee received evidence that consumers will need to be informed of the new credit reporting system. Mr Timothy Pilgrim, OAIC, noted that this will be a difficult task and that a number of approaches may be needed. Mr Pilgrim stated:

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94 Westpac, *Submission 13a*, pp 1–2.

95 Experian, *Submission 46*, p. 12.

> The approaches will have to come from government, obviously, in advising people on what these changes are. Clearly, our office has a role in education and educating the community, but in doing that we would want to be working very closely with industry, because industry at the end of the day do have the immediate contact with the community, with the people who are utilising the system, and whose credit information they are collecting as part of those processes. So we would see the need to work closely with industry and hope that we would get assistance from them to provide relevant and timely information out to people who are accessing credit through the particular organisations.[96]

3.93 Veda Advantage also noted that education of consumers will be very important. Ms Nerida Caesar, Veda, commented that industry should fund an education campaign:

> ...we do believe there should be an education campaign funded by the broad industry, they being the lenders and credit reference associations. We do believe that is [a] very important aspect.[97]

3.94 Telecommunications providers also commented that some matters, for example, the need to provide the type of credit account opened (consumer credit liability information), will require changes to IT systems, retraining staff or amending internal processes. The Communications Alliance submitted that IT systems changes may take some years to implement as businesses need to seek funding, identify and build the needed changes and retrain users of the systems.[98]

Committee comment

3.95 The committee considers that adequate transitional arrangements will be required to ensure that the changes to the credit reporting system are implemented in an efficient manner. The committee considers that the Department of the Prime Minister and Cabinet should undertake consultations to ensure that the concerns of industry are addressed during the lead up to the implementation of the new credit reporting regime. However, the committee does not support making data sets available before the expected commencement date of the new provisions as only once the legislation is passed will full rights and obligations be in place.

3.96 In addition, the committee considers that consumer education will be an important factor in ensuring that the new credit reporting system is understood by consumers, particularly the way in which the new data sets are used and disclosed and consumer rights in relation to access and complaints.

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96 Mr Timothy Pilgrim, Australian Privacy Commissioner, Office of the Australian Information Commissioner, *Committee Hansard*, 16 May 2011, p. 2.

97 Ms Nerida Caesar, Chief Executive Officer, Veda Advantage, *Committee Hansard*, 16 May 2011, p. 40.

98 Communications Alliance, *Submission 56*, pp 7–8.

Recommendation 5

3.97 The committee recommends that the Department of the Prime Minister and Cabinet undertake consultations to ensure that the needs of industry and consumers are addressed during the lead up to the implementation of the new credit reporting regime.

Recommendation 6

3.98 The committee recommends that the Office of the Australian Information Commissioner consult with industry and consumer advocates to provide guidance on any consumer education campaigns in relation to the new credit reporting system.

Section 101 – cross border disclosure

3.99 The Government accepted the ALRC's recommendation to exclude the reporting of personal information about foreign credit and the disclosure of credit reporting information to foreign credit providers. The Government stated that:

> This restriction is necessary as any benefit that would be obtained in creating greater transparency about an individual's credit risk would be outweighed by the inability of the Privacy Commissioner to enforce effectively the credit reporting provisions against foreign entities.[99]

3.100 This restriction was welcomed by the Consumer Credit Legal Service (WA) (CCLSWA) which noted that 'this restriction on cross border data flow reduces the prospect of privacy breaches'. CCLSWA also stated that cross border data flow contains inherent risks of compromised data integrity and security, for example, where disputes occur, it is very difficult to resolve when dealing with another country. However, CCLSWA) noted that the Government is still to release 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.

3.101 CCLSWA commented that sharing credit reporting information with New Zealand seems to be contrary to section 101 of the Exposure Draft and it is unclear what benefit this would be to Australian consumers. The Legal Service further commented that information sharing may increase the risk of data inaccuracies and cause problems for Australian and New Zealand consumers residing in Australia who dispute content from a listing originating in New Zealand. It concluded:

> It is unclear on what basis the Australian Government thinks it would be beneficial to share this information with New Zealand. At the very least, it would be desirable for there to be dispute resolution mechanisms within

99 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, p. 101.

> Australia for disputes relating to credit reporting by New Zealand institutions.[100]

3.102 The APF stated that the explanation provided on page 10 of the Companion Guide regarding cross border disclosure is unclear and unsatisfactory. If the intention is to prohibit overseas transfer of credit reporting information (subject to future exceptions for New Zealand), then this prohibition needs to be in the legislation.[101]

3.103 The committee only received one other comment in relation to cross border disclosure. The AFC commented that there may be difficulties of interpretation for Australian residents temporarily overseas that apply for credit. If the application is mailed from overseas, the AFC questioned whether this would it be regarded as having been applied for in Australia. The AFC argued that better approach may to expand the provision to cover an application that is made or received in Australia.[102]

Committee comment

3.104 In relation to cross border disclosure with New Zealand, the committee notes that the ALRC recommended (Recommendation 54–7) that the Privacy Commissioner approve cross border disclosure in defined circumstances. The ALRC indicated that the main motivation for making this recommendation was to allow recognition of the close relationship between the Australian and New Zealand credit reporting market. The Government did not accept this recommendation and considered that the recommendation should be tailored to allow trans-Tasman use and disclosure of credit reporting information, where necessary and appropriate. These provisions have not been included in the Exposure Draft but will be drafted following further inter-governmental negotiations with the relevant New Zealand authorities.[103] The Government also indicated that any further exceptions to the prohibition in Recommendation 54–5 should be adopted by legislative amendments rather than by a determination of the Privacy Commissioner. Further exceptions to the prohibition to allow sharing of credit reporting information with other foreign jurisdictions would only be considered where a clear need arises.

3.105 The committee acknowledges concerns with cross border disclosure of an individual's credit information and the need for adequate protections for consumers in these circumstances. However, the close relationship between the Australian and New Zealand credit reporting markets must be recognised. The Government has indicated that it will be working with New Zealand authorities so that adequate protections can be put in place to ensure that there is no inappropriate secondary use of the information outside the jurisdiction where the information was originally held. In

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100 Consumer Credit Legal Service (WA), *Submission 49*, p. 4.

101 Australian Privacy Foundation, *Submission 33a*, p. 8.

102 Australian Finance Conference, *Submission 12a, Attachment 2*, p. vi.

103 The Hon. Brendan O'Connor, MP, Minister for Privacy and Freedom of Information, letter to the Chair, dated 31 January 2011.

addition, effective enforcement mechanisms will be needed to ensure that misuse can be appropriately rectified.

3.106 In relation to the AFC's concerns about an Australian resident temporarily overseas applying for credit, the committee considers that the questions as to whether this was credit applied for in Australia should be addressed by guidance from the Australian Information Commissioner.

Powers of the Australian Information Commissioner

3.107 The Privacy Commissioner NSW and Ms Katherine Lane, CCLC, expressed concern about access to the additional credit information provided for under the proposed credit reporting regime and the risks to the individual's privacy. Ms Lane commented that accuracy of information will be important and that the OAIC needs to have reasonable powers and exercise them to make sure that the accuracy is maintained.[104] The Privacy Commissioner NSW was of the view that the inclusion of extra data sets should be accompanied by an increase in the level of scrutiny by the Office of the Australian Information Commissioner.

3.108 The Privacy Commissioner NSW noted that section 28A of the Privacy Act currently allows the Federal Privacy Commissioner to 'conduct audits' of credit information files and credit reports', to 'monitor the security and accuracy of personal information contained in credit files' and to 'examine the records of credit reporting agencies and credit providers'. The Privacy Commissioner NSW went on to state that the Federal Privacy Commissioner's website indicates that there have been no audits of credit providers or credit reporting agencies to date. Evidently, 'oversight of the conduct of credit providers and credit reporting agencies in terms of their obligations under the Privacy Act appears to have been limited to the investigation of complaints'.[105]

3.109 The Privacy Commissioner NSW concluded that:

> Comprehensive credit reporting will involve a vast increase in the amount and type of information which may be collected. This significantly heightens the risk that credit information (positive and negative) may be improperly collected, not stored securely or misused. To meet this risk I suggest that Parliament should consider including a provision which requires that Privacy Commissioner conduct one regular (at least yearly) audit of a randomly selected credit reporting agency and a credit provider in Australia. This will serve as a conscious-raising exercise for credit providers and credit reporting agencies, and it will go some way to balancing the potentially invasive effect of comprehensive credit reporting

104 Ms Katherine Lane, Principal Solicitor, Consumer Credit Legal Centre (NSW), *Committee Hansard,* 16 May 2011, p. 33.

105 Office of the Privacy Commissioner NSW, *Submission 29a,* p. 2.

> by increasing accountability, transparency and, hopefully compliance with the credit reporting provisions.[106]

3.110 Dun & Bradstreet noted that sections 116 and 118 require that a regular audit be conducted for data quality and security by an independent auditor. Dun & Bradstreet recommended that the audits be conducted by the Office of the Australian Information Commissioner. This would reflect the provisions of the current Privacy Act.[107]

Committee comment

3.111 The committee agrees with the Privacy Commissioner NSW that with access to greatly expanded credit data, the collection, use and disclosure of that information will require appropriate levels of oversight and scrutiny. The committee considers that a requirement for the Office of the Australian Information Commissioner to conduct a regular audit of a randomly selected credit reporting agency and a credit provider in Australia is worthy of further consideration. However, the committee is mindful that additional resources may be required by the Information Commissioner to meet such a requirement.

Recommendation 7

3.112 The committee recommends that consideration be given to including a requirement in the provisions for the powers and functions of the Australian Information Commissioner that a regular audit of a randomly selected credit reporting agency and a credit provider in Australia be conducted by the Australian Information Commissioner.

106 Office of the Privacy Commissioner NSW, *Submission 29a*, p. 2.

107 Dun & Bradstreet, *Submission 47*, p. 12.

Chapter 4

Serious credit infringements, identity theft and hardship

Introduction

4.1 During the course of the inquiry, Veda Advantage instituted consultations with the Australasian Retail Credit Association (ARCA) and a group of consumer representatives – Consumer Credit Legal Centre NSW (CCLC), Australian Privacy Foundation (APF) and Legal Aid Queensland (LAQ) – in relation to matters of concern in the Exposure Draft. The consultations considered five key matters which were highlighted during the inquiry:

- serious credit infringements;
- identity theft;
- hardship flags;
- complaints handling; and
- simplification of key definitions.

4.2 This chapter discusses the first three matters raised. Complaints handling is discussed in chapter 5 and the simplification of definitions is discussed in chapters 3 and 9.

Serious credit infringements

4.3 The definition of serious credit infringement in the Exposure Draft is based on the existing definition in the *Privacy Act 1988* (Privacy Act) with the addition of a new element in relation to a credit provider contacting the individual:

- 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; and
- the provider has, after taking such steps as are reasonable in the circumstances, been unable to contact the individual about the act.

The Companion Guide states that this is consistent with the Government Response to the Australian Law Reform Commission's (ALRC) Recommendation 56–6.[1]

4.4 In coming to its recommendation, the ALRC was of the view that the concept of serious credit infringement should not be limited to conduct that is fraudulent, as

1 Australian Government, *Companion Guide, Privacy Reforms: Credit Reporting*, January 2011, p. 13.

some conduct may fall short of fraud but still be of significant concern, such as where an individual deliberately avoids contact. The ALRC, however, noted concerns that the breadth of the current definition of serious credit infringement leaves the definition open to different interpretations. The ALRC did not think that more detailed drafting was called for, rather that guidance be provided for credit providers by the Office of the Privacy Commissioner (Recommendation 56–7).[2]

4.5 The Government Response accepted Recommendation 56–6 and stated that a credit provider should be required to demonstrate that it has taken reasonable steps to contact the individual where it intends to list a serious credit infringement on a reasonable suspicion of non-compliance. The Government Response concluded:

> This will ensure that a serious credit infringement can only be listed where there is a clear intent by the individual to avoid credit obligations, which would be demonstrated by the credit provider being unable to contact the individual after taking reasonable steps.[3]

4.6 The Government accepted in principle the ALRC's recommendation in relation to guidance but considered it preferable, given the level of concern, that this be addressed in the binding industry code. The Government Response stated:

> This will allow for the guidance to be binding on all those parties subject to the code and would provide a greater opportunity for industry, privacy and consumer advocates, and the Privacy Commissioner to work together to develop appropriate standards for the listing of serious credit infringements.[4]

Issues

4.7 The addition of the requirement that the credit provider must have taken reasonable steps to contact the individual was welcomed by the Australian Privacy Foundation (APF).[5]

4.8 Submitters however, raised serious concerns about the use of serious credit infringements. Of particular concern was that the credit reporting regime will not be limited to banks, credit unions and hire-purchase companies. The new credit reporting system will also include electricity and telecommunication providers. Submitters commented that the failure to make repayments on a car loan or credit card, and

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2 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1869–1870.

3 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, p. 111.

4 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, p. 112.

5 Australian Privacy Foundation, *Submission 33a*, pp 5–6.

moving address without informing the credit provider, should be legitimately regarded as a serious breach. However, submitters argued that a serious credit infringement is being listed for less serious, but more common events. The examples provided included a telephone or electricity account being left in a person's name after they had moved on from a share-house or failing to provide a forwarding address. It was noted that the listing of a serious credit infringement may have significant adverse outcomes for a consumer. Ms Karen Cox, CCLC, stated:

> Serious credit infringement is a big deal. It is something that has serious implications for people's ability to get credit and, possibly, the price they pay for credit, and we think that the system that looks only at the credit provider's view of what happened at the time and does not take into account facts that later emerge treats a lot of consumers very harshly.[6]

4.9 It was also noted that even if the oversight is rectified in a relatively short period of time, the serious credit infringement remains on the credit report for seven years.[7] The seven year retention of a serious credit infringement is longer than bankruptcy information or any other type of default information. In addition, the Consumer Action Law Centre (Consumer Action) commented that a serious credit infringement is the only information that can be included in a credit report that is based on the credit provider's opinion regarding the individual's conduct.[8] Ms Carolyn Bond, Consumer Action, stated:

> ...if you say, 'I have been overseas for three months, I thought I had paid that credit card off. I did not realise there was $100 owing on it'—sorry, serious credit infringement: that is there now for seven years. 'Sorry, that is it.' You cannot do a thing. So it is based on what the credit provider thinks at the time, even if later on the credit provider might think, 'Oh well, if I had known they were only overseas and they were coming back, or if I had known the person was in hospital,' or something like that, and there was a reasonable excuse, 'I wouldn't have listed it.' But at the moment, once it is listed, it is there for that entire period of time, and it sends out a pretty scary flag to anyone who is likely to lend you money.[9]

4.10 Submitters, including the APF, noted that while the Exposure Draft appears to focus on the 'fraud' aspect of a serious credit infringement, it appears that this is rarely a cause for a serious credit infringement. It was believed that, in most cases, serious credit infringements are listed because an individual has failed to respond to correspondence from the lender. The CCLC stated that there should be some mechanism to allow a serious credit infringement to be downgraded or removed

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6 Ms Karen Cox, Coordinator, Consumer Credit Legal Centre NSW, *Committee Hansard*, 16 May 2011, p. 29.

7 Australian Privacy Foundation, *Submission 33a*, pp 5–6; Consumer Credit Legal Centre NSW, *Submission 66*, p. 10.

8 Consumer Action Law Centre, *Submission 63*, pp 1–2.

9 Ms Carolyn Bond, Co-Chief Executive Officer, Consumer Action Law Centre, *Committee Hansard*, 16 May 2011, p. 37.

completely if it is subsequently demonstrated that the debtor has not attempted to defraud the credit provider, or to permanently evade his or her obligations. While a credit provider should not be penalised if they formed the requisite opinion on reasonable grounds, the consumer should not be unfairly penalised if that opinion is shown to be unfounded once all the requisite facts are known.[10]

4.11 Some submitters were of the view that there should be a separate category for suspected fraud rather than combining the two distinct scenarios: the individual or group acting fraudulently (parts (a) and (b) of the definition); and other individuals who have left an address or changed phone numbers without advising the lender (part (c)). There was agreement that a serious credit infringement should be listed for fraudulent activity. Submitters, however, argued that listing a serious credit infringement in the second scenario was very harsh, particularly where the consumer did not know of the debt or the consumer makes contact soon after the listing is made and pays the outstanding amount.[11] Legal Aid Queensland (LAQ) added that telephone companies can back bill for a period of up to 180 days and it is thus not surprising that individuals may legitimately believe that they have paid a final account with a provider.[12]

4.12 Consumer Action stated that the Exposure Draft provides for serious credit infringements to be listed immediately without waiting for 60 days arrears. This is a benefit to credit providers, as they are able to act quickly if a borrower is committing fraud, the provider may be able to avoid suffering losses. However, Consumer Action argued that the ability to list a serious credit infringement so quickly can mean that consumers have little time to show there is a reasonable excuse for failing to respond to correspondence. Consumer Action argued that the benefit to creditors must be balanced with appropriate protections for consumers.[13]

4.13 Consumer Action suggested that the interests of industry and consumers could be met by allowing a credit provider to list a serious credit infringement in the circumstances outlined in the Exposure Draft, but requiring the credit provider to confirm the serious credit infringement listing after six months has elapsed. If the serious credit infringement is not confirmed by the credit provider, it should be removed. Consumer Action concluded that this would meet the industry's desire to have access to information about potential fraud (or genuinely serious conduct) as soon as possible, but treat consumers more fairly.[14]

4.14 In addition, Consumer Action and the CCLC suggested:

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10 Consumer Credit Legal Centre NSW, *Submission 66*, p. 10.

11 Australian Privacy Foundation, *Submission 33a*, pp 5–6; Legal Aid Queensland, *Submission 60*, pp 4–5; Consumer Action Law Centre, *Submission 63*, pp 1–2.

12 Legal Aid Queensland, *Submission 60*, pp 4–5.

13 Consumer Action Law Centre, *Submission 63*, pp 1–2.

14 Consumer Action Law Centre, *Submission 63*, pp 1–2.

- debts for utilities which are provided to a particular address (that is, excluding mobile phones) should not be able to be listed as serious credit infringements. Alternatively, the Privacy Act could allow such debts to be listed if they are over a threshold amount, for example, $1 000;
- a serious credit infringement should not be able to be listed by a credit provider that holds any security over the debtor's home; and
- a serious credit infringement should be removed if it is later determined that had all the facts been known, it would not have been reasonable for the credit provider to form the view that it was the individual's intention to no longer comply with his/her obligations.[15]

4.15 Other submitters also suggested changes to the serious credit infringement provisions. LAQ suggested that:

- those credit providers which are not subject to the responsible lending criteria under the National Consumer Credit Code (generally utilities or other service providers), should not list a serious credit infringement unless they can establish fraud;
- in relation to those credit providers subject to the *National Consumer Credit Protection Act 2009* (NCCP Act), the legislation could provide that they may list a serious credit infringement that meets the criteria contained in part (c) of the definition if the following additional criteria are met:
  - the amount overdue is more than $500; and
  - the amount is overdue for more than 60 days; and
- the legislation could provide that the credit provider must remove the listing if the basis on which they formed the view that the person indicated an intention not to pay was not reasonable if all the facts were known to the credit provider at the relevant time.[16]

4.16 The APF was of the view that, given the serious impact of the recording of a serious credit infringement, the provisions relating to correction should provide further clarification in relation to correction of a serious credit infringement. Given that a serious credit infringement is based on an 'opinion', the APF also argued that it is unclear when a serious credit infringement might be 'inaccurate' (subsection 149(2) –correction of information that is inaccurate, out-of-date, incomplete or irrelevant).[17]

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15 Consumer Action Law Centre, *Submission 63*, pp 6–8; Consumer Credit Legal Centre NSW, *Submission 66*, pp 11–12.

16 Legal Aid Queensland, *Submission 60*, pp 4–5.

17 Australian Privacy Foundation, *Submission 33a*, pp 5–6.

Outcome of consultations

4.17 As a result of the Veda Advantage consultations, an agreed position on serious credit infringements was provided to the committee. It was suggested that the definition of serious credit infringement be deleted and two new definitions be added:

- un-contactable default:
  - a default that is listed where the debtor has not responded and cannot be contacted throughout the default period;
  - the default would remain listed for seven years; and
  - if at any point the debtor contacts the credit provider/default lister, the default is re-categorised as a standard default which remains listed for five years from the date of original listing; and
- never paid flag:
  - can only be listed by a telecommunications or utility credit provider after 60 days when the credit provider has:
    - never received any payment on the account;
    - has reasonable grounds to believe that the consumer never had any intention to make a payment on the account;
  - the flag is removed at the end of six months and may be converted to an un-contactable default;
  - guidance to be provided in the Code of Conduct on what 'reasonable grounds' might be, including evidence that the consumer is un-contactable, and/or evidence of a pattern of dishonesty; and
  - guidance to be provided in the Code of Conduct on how to deal with compassionate reasons why some consumers might be un-contactable (for example, ill-health, mental health issues, language difficulties).[18]

Response from the Department of the Prime Minister and Cabinet

4.18 The Department of the Prime Minister and Cabinet (the department) provided a response to the outcomes of the consultation process. The department noted that the definition of a serious credit infringement is contained in section 180, with a new requirement in subparagraph (c)(ii) to require a credit provider to take reasonable steps to contact the individual. Regarding the proposal to replace the definition of serious credit infringement with two new definitions, 'un-contactable default' and 'never paid flag', the department considered that the proposal combines the current regulation of serious credit infringements with the regulation of default listings. The department stated that:

18 Veda Advantage, *Additional Information*, (received 9 August 2011), p. 1.

> The ALRC recommended that serious credit infringements should be retained to deal with fraudulent activity or situations in which a reasonable person would consider that the individual does not intend to comply with their consumer credit obligations. The Veda proposal appears to remove any element of fraudulent activity from consideration, apparently reclassifying serious credit infringements into a default that occurs when a person cannot be contacted.
>
> The Department considers that the exposure draft effectively implements the Government's response to ALRC recommendation 56–6.[19]

Committee comment

4.19 The committee notes that the ALRC considered that the definition of serious credit infringement should not be limited to fraud and did not recommend a change to the definition in the current Privacy Act. The Government accepted the ALRC's recommendation making it clear that the Government also did not support limiting a serious credit infringement to cases of fraud. The only change from the current Privacy Act is the additional requirement for credit providers to take reasonable steps to contact the individual.

4.20 The listing of a serious credit infringement has a significant adverse impact on a consumer, as it should in relation to acts of credit fraud. However, the committee acknowledges the concerns of privacy and consumer advocates in the listing of a serious credit infringement where there has been an 'inadvertent' loss of contact with the credit provider such as moving without passing on a change of address to a telecommunications or utilities provider. In addition, a serious credit infringement remains listed for seven years and there is no avenue for removal of the listing if it is found subsequently that the consumer did not have an intent to defraud.

4.21 The committee considers that some of the concerns identified will be addressed through the addition of the requirement that a credit provider take reasonable steps to contact the individual. Guidance on the meaning of taking 'reasonable steps' and 'reasonable grounds', will be addressed in the binding industry code as indicated in the Government Response and will assist in ensuring a consistent approach by credit providers.

4.22 In relation to the approach proposed as a result of consultations between industry stakeholders and advocates, the committee considers that there is some merit in this approach. It appears that the concerns of consumer advocates will be addressed in relation to listings by telecommunications and utilities providers as well as providing some flexibility where a debtor contacts the credit provider/default lister. In addition, this approach has the advantage of providing a more appropriate response to the vast majority of matters which are currently dealt with as serious credit infringements that arise from telecommunications and utilities debts. However, the

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19 Department of the Prime Minister and Cabinet, *Additional Information,* (received 2 September 2011), p. 3.

committee is concerned that the approach proposed does not reflect the serious nature of intentional credit fraud as is provided for in the current credit reporting system. The committee therefore considers that further consideration will need to be given to the approach proposed before such a significant change to the serious credit infringement provisions can be recommended.

Recommendation 8

4.23 The committee recommends that consideration be given to a change of approach in dealing with serious credit infringements to allow for those listings, not relating to intentional fraud, to be dealt with in a different manner.

Identity theft

4.24 Pursuant to section 113 of the Exposure Draft, an individual may, if they believe on reasonable grounds that they have been or are likely to be the victim of fraud, request a credit reporting agency not to use or disclose credit reporting information held by that agency. Section 113 also provides:

- an exception if the individual expressly consents, in writing, to the use or disclosure of the credit reporting information or the use or disclosure is required by or under Australian law or an order of a court or tribunal;
- commencement of the ban period when the individual makes a request;
- an initial ban period of 14 days;
- an extension of the ban period 'by such period as the agency considers reasonable in the circumstances' if the individual so requests before the ban period ends and the agency believes on reasonable grounds that the individual has been, or is likely to be, a victim of fraud; and
- that credit reporting agencies cannot charge an individual for making or giving effect to a request for a ban period.

4.25 Section 134 requires credit providers to withhold information from credit reporting agencies where credit is provided 'during' a ban period.

4.26 The provisions in the Exposure Draft reflect ALRC Recommendation 57–5. The ALRC supported the right of individuals to prohibit the disclosure by a credit reporting agency of credit reporting information about them without their express authorisation (that is, to 'freeze' disclosure). The ALRC also supported that during this time, should a credit provider advance credit, no information should be listed, in particular, default information, concerning that credit, except with the consent of the individual.[20] In accepting the ALRC's recommendation, the Government stated:

> The Government strongly agrees that there should be measures in place to allow individuals to highlight to potential credit providers in their credit

20 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1932.

reporting information that they are a victim of fraud, including identity theft. These measures could assist in preventing credit reporting information from being used to perpetuate fraud.[21]

4.27 The ability to request a ban period was welcomed by the APF. However, the APF raised the following matters:

- there should also be provision for action by credit reporting agencies which become aware of fraud by other means;
- the 'reasonable grounds' provision may lead to disputes, therefore consideration should be given to placing a ban on a report if there is any doubt;
- the use or disclosure of credit reporting information where an individual expressly consents in writing is too broad; and
- the extension period 'by such period as the agency considers is reasonable in the circumstances' provides too much discretion to the credit reporting agency and an appeal mechanism should be provided to individuals.[22]

4.28 The APF commented that, in relation to fraud and the destruction of credit reporting information in cases of fraud, the credit reporting agency must be 'satisfied' that the individual has been a victim of fraud (paragraph 126(1)(c)). However, there is no obligation for the credit reporting agency to take steps to satisfy itself of the fact, often leaving the consumer to prove that s/he didn't apply for credit. The APF argued that it may be necessary to place obligations on credit providers and credit reporting agencies to assist in the investigation of a fraud allegation.[23]

4.29 Other submitters also noted that there is no provision for a notification requirement so that a credit provider can be advised that a ban period is in place and when it ends.[24] The ANZ Bank commented that if the ban period is disclosed to the credit provider, it will 'trigger' the credit provider to obtain consent from the individual to obtain credit reporting information. Further, disclosure of the ban period will alert the credit provider that they may be dealing with a fraudster and therefore need to take additional steps to protect the individual from further fraud.[25]

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21 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, p. 118.

22 Australian Privacy Foundation, *Submission 33a*, p. 10; see also Consumer Action Law Centre, *Submission 63*, p. 13.

23 Australian Privacy Foundation, *Submission 33a*, p. 11.

24 National Australia Bank, *Submission 2a*, p. 5; Telstra, *Submission 19a*, p. 1; ANZ Bank, *Submission 64*, p. 16.

25 ANZ Bank, *Submission 64*, p. 16; see also Australasian Retail Credit Association, *Submission 48*, p. 17.

4.30 In relation to the length of the initial ban period, the Law Institute of Victoria, (LIV) submitted that it was onerous for individuals to apply for an extension to the ban period every 14 days. Rather, the ban should apply until after appropriate investigations have been conducted and concluded.[26] The Telecommunications Industry Ombudsman (TIO) also noted that, in the TIO's experience, 14 days is not an adequate period of time for a consumer's complaint to be considered and resolved. The TIO pointed to a number of matters for further consideration including whether provision could be made for an external dispute resolution (EDR) scheme to request a ban period and/or extension to a ban period when a matter had been referred to an EDR scheme. The TIO went on to suggest that where an individual believes that they are a victim of fraud, it may be reasonable for a ban period which:

- is consistent with complaint handling guidelines pertinent to the credit provider responsible for investigating the matter, for example, 30 days in the telecommunications industry; and
- where the matter is referred to an EDR scheme, lasts until the case is closed.[27]

4.31 Experian did not support the ban provision and stated that it preferred a system that allowed an individual to require a credit reporting agency to put a 'flag' on the individual's file that notifies recipients of the credit information that the individual may be a victim of fraud or identity theft. Experian added that such 'flagging' systems are used successfully in other jurisdictions.[28]

4.32 Experian went on to state that it considered that the ban mechanism would not prevent fraud nor would it satisfactorily alert credit providers to potential identity fraud associated with the individual. It appears that credit providers would simply receive a 'nil' result from any searches performed on the individual. As a consequence, Experian argued that there was a danger that individuals, who are genuine adverse credit risks, to use the system to deliberately conceal poor credit histories from prospective credit providers.[29]

4.33 In addition, Experian pointed to a number of aspects of the proposed provisions which it considered would be unworkable in practice:

- it is unclear what evidence is required for the credit reporting agency to put a ban in place. The time taken to examine the details of the alleged or suspected fraud may be to the consumer's disadvantage. A flag on a file would provide a more timely indication to a credit provider that there may be a problem with fraud;

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26 Law Institute of Victoria, *Submission 36a*, p. 2.

27 Telecommunications Industry Ombudsman, *Submission 69*, p. 5.

28 Experian, *Submission 46*, pp 16–17.

29 Experian, *Submission 46*, pp 16–17; see also Veda Advantage, *Submission 65*, p. 30.

- it may be difficult for a credit reporting agency to ensure that the correct person is providing the written consent to use, or disclose, their information;
- there is a need for a maximum period of ban, as it appears that under the proposed provisions it may continue indefinitely or require the credit reporting agency to repeatedly consider requests for an extension; and
- the interaction of section 134 and the ban provisions would mean that a credit reporting agency would not receive updated information from a credit provider. This would result in degraded information on a credit file if a ban was in place for an extended period of time. Experian commented that this would not be consistent with the need to ensure that credit files are accurate, up-to-date, complete and relevant. This could be addressed by allowing information to be added to files but to be marked private or restricted until the ban period has expired. The new information would then be available, subject to any corrections sought by the consumer under section 121. Experian noted this system is in place in other jurisdictions in which it operated.[30]

4.34 Veda Advantage stated that, while it understood the intended purpose, 'bans are not without challenges'. For example, if a consumer genuinely applies for credit during the ban period, automated systems commonly used by lenders are likely to decline the application or 'people may deliberately keep shut their file to avoid negative information appearing'. Veda went on to comment that an alternative solution could include a fraud flag, allowing the victim of identity theft to apply for credit, but alerting the credit provider of the necessity for higher vigilance regarding identity.[31]

4.35 In addition, Veda commented that the legislation is too prescriptive concerning the steps a credit reporting agency must take, thus preventing the flexibility required to adapt as fraudster's techniques change. Instead, Veda Advantage recommended:

> ...the legislation should mandate the outcome – 'the CRA shall take all reasonable steps to enable a consumer to ban use or disclosure of credit reporting information' – and leave operational details to an industry Code of Conduct and, where appropriate, regulation.[32]

Outcome of consultations

4.36 The agreed position arising from the Veda Advantage consultations between stakeholders was that:

- rather than prescribing bans, the credit reporting system should provide for:
  - obligations on credit reporting agencies and credit providers to take reasonable steps to:

30 Experian, *Submission 46*, pp 17–18.

31 Veda Advantage, *Submission 65*, pp 29–30.

32 Veda Advantage, *Submission 65*, p. 18, see also p. 30.

  - help correct victims of identity theft from further consequences of theft;
  - correct any inaccurate listing due to identity theft;
- obligations on credit reporting agencies to provide a flag on the file noting the consumer alleges they have been a victim of identity theft (this information must be made available to all credit providers accessing the affected information file);
- more detailed provision to be included in the Code of Conduct;

- the data exchange standard to provide technical specification for the flag;
- statute to oblige credit providers to have appropriate policies and procedures in place to act on the flag and to appropriately assess credit applications in the name of a consumer that has such an entry.[33]

Response from the Department of the Prime Minister and Cabinet

4.37 The department commented on the proposal to implement a 'flag' system rather than a 'freeze'. Under the 'flag' proposal, use and disclosure of an individual's credit reporting information would be permitted. The department noted that the proposal does not include a provision based on section 134, which states that a credit provider cannot list credit as part of an individual's credit information if the credit provider extended the credit to an individual whose information is subject to a ban period without having taken sufficient steps to verify the identity of the individual. Rather, it is proposed that credit providers would be required to have appropriate policies and procedures in place to appropriately assess credit applications.

4.38 The department noted that there is extensive discussion in chapter 57 of the ALRC report on the issue of identity theft and credit reporting. The ALRC considered both 'flag' and 'freeze' models before recommending the 'freeze' model (Recommendation 57–5). The department noted that 'the Government strongly agreed with the need for protective measures for individuals against identify theft, and the Government also specifically agreed with the elements of the ALRC's recommendation'. The department concluded that the Exposure Draft effectively implements the Government's clear policy directions to establish a 'freeze' model for use by individuals in the event of fraud and identity theft.[34]

Committee comment

4.39 As noted by submitters, the incidence of identity theft has increased substantially. Submitters also noted that credit reporting assists in the reduction of fraud, particularly identity theft. Credit reporting allows monitoring of activity on

33 Veda Advantage, *Additional Information*, (received 9 August 2011), p. 2.

34 Department of the Prime Minister and Cabinet, *Additional Information*, (received 2 September 2011), p. 3.

credit accounts such as whether any unusual credit behaviour is occurring. Comprehensive reporting is also generally accompanied by increased levels of automation that improves identity verification and data quality and matching.

4.40 In addition to the monitoring undertaken by credit providers and credit reporting agencies, consumers must also have access to an efficient system that allows them to notify their credit provider when they suspect that they may have been the victim of identity theft. Once notification has been given by a consumer, a mechanism within the credit reporting system should highlight that an instance of identity theft may have occurred. As noted by the department, the ALRC considered both flags and freezes as means of highlighting that fraud may have occurred. Submitters to the ALRC inquiry including Veda, ARCA, Consumer Action and National Legal Aid supported a freeze on credit reporting information.[35] Flags were not supported as it was argued that they may have no effect where credit reporting information is processed electronically.

4.41 The alternative approach now being put to the committee supports the use of flags, as it was argued that a flag would notify credit providers to proceed with caution when assessing credit applications. It was also stated that this approach provides a simpler model to deal with possible fraud and does not affect provision of data updates to credit providers, while putting the credit provider on notice of suspected fraudulent activity. Support for this approach seems to be based on concerns that:

- the ban approach could be used by people with flawed credit reports to restrict access; and
- the process will require credit providers to implement complex management systems.

4.42 In relation to people using the system to restrict access, the committee notes that paragraph 113(2)(a) of the Exposure Draft expressly permits disclosure where the person expressly consents. A credit provider could simply seek approval from the individual, after making reasonable efforts to identify the person (consistent with section 134). As to the need to implement management systems, the committee notes that credit providers obtain significant benefits from increased information flows in the credit reporting system. In addition, the committee considers that ensuring effective protection for potential victims of identity fraud is part of the responsibility of accessing more comprehensive credit reporting system.

4.43 The committee also notes the department's comments in relation to section 134.

4.44 Having considered the above matters, the committee is not persuaded that the use of flags is a significant improvement on the use of bans. As noted by Veda, both

35 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1931.

systems have challenges, however, the provisions of the Exposure Draft reflect the ALRC's recommendations.

4.45 In addition, the committee notes three aspects regarding the ban provisions in the Exposure Draft. First, there appears to be some concern that there is no provision for a credit provider to be notified that a ban period is in place or when it ends. The committee notes that the Government Response states that:

> Where credit providers seek access to credit reporting information that has been restricted, credit reporting agencies would be required to advise the credit provider that they are unable to release information due to the individual's concerns about fraud.[36]

4.46 The committee understands that there appears to be nothing in section 113 to stop a credit reporting agency informing a credit provider that there is a ban period in place. However, the committee considers that the intent of the Government's response should be made clearer. In addition, this will assist with concerns that ban periods may not be an effective mechanism for dealing with identity fraud.

4.47 Secondly, the committee has noted comments in relation to the need to extend the ban period every 14 days. The committee considers that this is an onerous obligation on consumers already facing the challenge of dealing with potential identity theft. The committee has noted concerns that long ban periods may result in degraded credit information. However, the committee considers that identity theft is a difficult matter and may take some time to resolve. The committee thus considers that the initial ban period of 14 days is too short and a more realistic period is 20 to 30 days. In relation to concerns about credit information degradation, the committee again reiterates that credit reporting agencies and credit providers obtain significant benefits from increased information flows in the credit reporting system and therefore the obligation to ensure that accurate information is recorded must rest with them.

4.48 Thirdly, the committee is concerned as to whether the provisions will provide enough flexibility to respond to the ever changing ways in which fraud is perpetrated. This is a difficult issue to address: legislation must be clear to allow consumers and industry to meet their obligations and understand their rights, but not allow fraudsters to identify the means to get around systems developed in response to statutory obligations.

Recommendation 9

4.49 The committee recommends that the Exposure Draft be reviewed to ensure that the intent of the Government's response to ALRC Recommendation 57–5, that credit reporting agencies be required to advise a credit provider that

36 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, p. 118.

they are unable to release information due to an individual's concerns about possible fraud, is clearly provided for.

Recommendation 10

4.50 The committee recommends that the time of the initial ban period be extended from 14 days to 21 days.

Hardship flags

4.51 While the term 'hardship' is not used in the Exposure Draft, it is used in the National Consumer Credit Protection regime. In that context, a consumer may request a change to the terms of their credit contract on the grounds of hardship. Hardship only applies when the consumer changes the terms of their contract. If the consumer refinances, a new contract is entered into and it is not regarded as hardship.

4.52 The Government Response to Recommendation 58–2 stated that 'where a default or serious credit infringement has been listed in an individual's credit reporting information and the individual enters a new scheme of arrangement relating to that listing, any future default under that arrangement may be listed separately'. Accordingly, section 181 of the Exposure Draft defines credit information to include 'new arrangement information', which is then defined in section 184. The definition covers new arrangements entered into as a result of default or serious credit infringement, and includes as a new arrangement either a variation of the original credit contract or new consumer credit that relates to the original lending.[37]

4.53 The committee received evidence about how hardship is treated in repayment history information. On the one hand, consumer advocates argued that consumers have a right to hardship variations under the NCCP Act and, if they have not already defaulted or listed for a serious credit infringement, consumers should not be subject to a hardship flag when they are only exercising a legal right. Credit providers, on the other hand, supported a 'flag' system arguing that hardship information is required for them to fulfil their responsible lending obligations.

4.54 Consumer and privacy advocates provided the committee with examples of where they believed it would not be appropriate for a hardship flag to be included in repayment history information. The CCLC noted that, as a result of the Queensland floods, lenders provided agreed moratoriums. Consumers accepted these moratoriums to assist them in coping with costs associated with the floods. The CCLC commented that in such circumstances it did not follow that the consumer could not meet the loan repayments. Rather, consumers took up an offer from the credit provider, and therefore hardship flags or recording a negative payment history would be inappropriate. Further, the lender offered the new arrangements unbidden. The credit

37 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, p. 120.

report, if no agreed variation is recorded, would thus be misleading.[38] The LAQ supported the CCLC's view.[39]

4.55 Ms Carolyn Bond, Consumer Action, commented further:

> I think that one key thing we want to get out of this is that we want to make sure that somebody who approaches their lender about a variation or even a hardship is not worse off in relation to what is on their credit report than someone who does not do that. We tell people to talk to their credit provider early. What we do not want to see is someone ringing up a credit provider and saying, 'Look, I am not in default at the moment. Things are getting a little bit tough. Can I pay a lower payments for six months?' If that were flagged as hardship automatically, I think that you would find that people just would not do it unless they absolutely had no choice. I think we need to encourage people even before they are in hardship to say, 'Just in case,' or, 'Talk to your credit provider early.' Clearly, if people default and then they ask for hardship later, there will be a default on their record. But I just have concerns about noting hardship where perhaps somebody is wondering whether they should talk to their credit provider or not. We do not want people to say that they had better not because they might be worse off if they speak to them.[40]

4.56 Credit Ombudsman Services Limited (COSL) also argued that an individual's repayment history should take into account any variations to the terms of the contract between the credit provider and the individual. These variations may arise due to temporary financial hardship or any number of other circumstances. The COSL observed that:

> If the parties have agreed to vary the contract so that the times at which repayments are due and/or the amounts of the repayments have changed, it would be nonsensical to report repayment history against the repayment obligations as they stood before they were varied, or against any other repayment schedule.[41]

4.57 Similarly, CCLC did not agree that a hardship variation should be recorded in a repayment history, rather it should be treated as an agreed variation and should not result in a negative repayment history. The CCLC noted borrowers have the right under the National Credit Code to apply to vary their contract on the grounds of hardship where they are unable to pay as a result of illness, unemployment or other reasonable cause. If this occurs before a default and the lender agrees and the consumer adheres to the arrangement, the CCLC argued that the credit report should still reveal an unimpaired repayment record. The CCLC went on to state:

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38 Consumer Credit Legal Centre NSW, *Submission 66,* pp 8–9.

39 Legal Aid Queensland, *Submission 60,* p. 6.

40 Ms Carolyn Bond, Co-Chief Executive Officer, Consumer Action Law Centre, *Committee Hansard,* 16 May 2011, p. 36.

41 Credit Ombudsman Services Limited, *Submission 68,* p. 5.

> This is consistent with the concept of a contract variation under the law and with contractual principles. It is also consistent with the right to a hardship variation under the law.[42]

4.58 The CCLC saw potential harm to consumers if a hardship variation is recorded as:

- the consumer may not seek early assistance from their credit provider for fear of impacting on their credit report, greatly reducing their chances of getting a workable arrangement in place;
- there will be no incentive for consumers to seek early assistance, or to get an arrangement in place after defaulting, because the result for their credit report will be the same whether they make an official arrangement with their credit provider or not;
- the consumer may seek to refinance on less favourable terms (that is turn to predatory loans) in order to avoid unfavourable information being listed on their credit report, ultimately reducing their capacity to recover from financial hardship in the longer term; and
- the consumer may be charged a higher interest rate on credit in future as a result of a period of temporary hardship, despite the fact that the loan was ultimately repaid within a reasonable time - this is undesirable from a social equity perspective, and may create otherwise avoidable financial difficulty in the future as a result of the higher cost of credit. It also defeats the purpose of government initiatives aimed at improving access to temporary hardship arrangements and promoting financial rehabilitation.[43]

4.59 Credit providers argued that hardship should be able to be listed on credit repayment histories. The ANZ Bank, for example, commented that the definition of repayment history information needs to be defined more broadly so that it can include an indication of when an individual is in hardship. The ANZ Bank noted that 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. The ANZ Bank recommended that the definition of repayment history information be amended so that hardship arrangements can be reported thus ensuring that consumers are protected from a default listing or payment history deterioration.[44]

4.60 ARCA also stated that the credit reporting regime should allow for the disclosure of hardship 'pre-default'. If not, the consumer's credit report would start to

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42 Consumer Credit Legal Centre NSW, *Submission 66,* p. 9; see also Ms Karen Cox, Coordinator, Consumer Credit Legal Centre NSW, *Committee Hansard,* 16 May 2011, p. 29.

43 Consumer Credit Legal Centre NSW, *Submission 66,* pp 9–10; see also Legal Aid Queensland, *Submission 60*, p. 6.

44 ANZ Bank, *Submission 64*, p. 12.

show delinquency issues that are indistinguishable from situations where this is not the case. ARCA submitted that the consumer may then find it very difficult to get credit when they both need it and it would responsible to grant it.[45] Mr Carlo Cataldo, ARCA, commented:

> One option is to disallow reporting of hardship altogether and protect those who are victims of these circumstances beyond their control, but leave creditors or credit providers blind to the circumstances where a consumer has recognised that they are in difficulty and seek assistance—the exact circumstances that credit providers and ARCA members do not want—and are obligated not to further extend credit. This would seem to be just as unfair, possibly even more so, to those who did contribute to their difficulty in some manner, but may need greater protection.[46]

4.61 If hardship was included in repayment histories, industry also supported that the listing should allow for the distinction between circumstances where a debtor is a victim of circumstances beyond their control, such as a natural disaster, and where a person is facing financial difficulty and seeks assistance because they are overcommitted. Dr David Grafton, Commonwealth Bank, commented:

> But the issue for us, particularly if you think about the requirements under the new legislation that we are considering here today, is that it is very difficult for us to distinguish in our reporting between those customers...we are dealing with on the basis of difficulties that are outside of their control and those customers who have actually got themselves overcommitted, and therefore we would have a very different set of concerns in relation to those customers.[47]

4.62 ARCA supported amending the provisions of the Exposure Draft to allow for flagging compassionate action in difficult circumstances.[48] Mr Cataldo, ARCA, suggested a data standard to allow the identification of consumers who are victims of circumstances beyond their control versus those who had a part in their financial matters and are not meeting their obligations. Mr Cataldo went on to state:

> This could be simply done by a standard allowing hardship to be reported under different codes: (1), for instance, where the hardship is clearly due to circumstances beyond their control such as a natural disaster and (2) where it is not. That will enable groups to be treated appropriately, which would seem a better outcome than having to choose who gets fair treatment.

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45 Australasian Retail Credit Association, *Submission 48,* p. 15.

46 Mr Carlo Cataldo, Chairman, Australasian Retail Credit Association, *Committee Hansard*, 16 May 2011, p. 7.

47 Dr David Grafton, Chief Risk Officer, Retain Banking Services, Commonwealth Bank, *Committee Hansard*, 16 May 2011, p. 11.

48 Australasian Retail Credit Association, *Submission 48,* p. 15.

> ...ARCA advocates an approach that better enables fairer treatment of consumers dependant on their circumstances, something that the NCCP Act on responsible lending obligations already requires.[49]

Outcome of consultations

4.63 During the consultations, the position of credit providers and consumer advocates were identified. No agreed response was provided to the committee.

Committee comment

4.64 The committee notes the different views in relation to hardship flags put forward by credit providers and consumer advocates. The suggestion from credit providers that a 'flag' system be implemented without first listing a default was considered by the ALRC but not agreed to. The ALRC commented:

> The ALRC is not convinced that allowing the reporting of schemes of arrangement without a default report being listed first is desirable—especially in the absence of any significant support from consumer groups for such a reform.[50]

4.65 The ALRC recommendation, accepted by the Government, is to basically maintain the current arrangement in the new legislation.

4.66 The committee notes the arguments from industry that hardship information is essential to fulfil their responsible lending obligations, as without it a complete picture of an individual's credit worthiness cannot be obtained. However, the committee is mindful of the concerns of consumer advocates. Consumer advocates pointed out that people have a right to hardship variations under the NCCP Act and, if they haven't already defaulted or been listed for a serious credit infringement, they should not be subject to a hardship flag for exercising a legal right to seek a variation of their obligations.

4.67 On balance, the committee supports the views of consumer advocates: that if a person has not defaulted and enters a new arrangement for existing credit, no hardship variation should be recorded. There are a wide range of legitimate reasons for consumers to seek a hardship variation and to apply for more credit, including natural disasters and personal issues such as loss of employment. If a person, who has not defaulted and is up-to-date on their repayments, seeks a hardship variation on a ground accepted by the credit provider, and then applies for further credit, it is for the credit provider to consider the application. That credit provider will have information about the existing credit, and can make inquiries of their own about the person's reasons for seeking credit, as required by responsible lending obligations. The

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49 Mr Carlo Cataldo, Chairman, Australasian Retail Credit Association, *Committee Hansard*, 16 May 2011, p. 7.

50 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1869–1870.

committee therefore does not consider that the addition of provisions to the Exposure Draft for hardship flags is warranted.

4.68 The committee notes, however, that the meaning of new arrangement information (section 184) only applies where a consumer has already defaulted. The committee supports expansion of new arrangement information to include circumstances where a person seeks a new arrangement before they default. As a consequence, new arrangement information will be held as credit information about the individual.

Recommendation 11

4.69 The committee recommends that consideration be given to expanding the meaning of new arrangement information to include circumstances where an individual seeks new terms or conditions for their original consumer credit before they default.

Chapter 5

Complaints handling

Introduction

5.1 A major area of concern with submitters was the proposed complaints handling process. Submitters noted that effective complaints handling allowed individuals to enforce their rights, regulators to access valuable data to identify breaches or systemic issues and the public to have trust in the system. However, there was concern that the process contained in the Exposure Draft would not assist consumers and would impose onerous conditions on credit reporting agencies and credit providers. In addition, the prescriptiveness of the operational processes contained in the Exposure Draft was seen as removing the focus on the outcomes being sought, resulting in a complex process.[1]

5.2 The following discussion canvasses the general concerns with the complaints handling provisions contained in the Exposure Draft as well the outcome of the consultation process undertaken between industry stakeholders and consumer advocates.

The proposed complaints handling process

5.3 The Exposure Draft provides for an individual to request access to, or correction of, certain information. Access must be granted within a reasonable period, but not longer than 10 days, while a correction must be made within 30 days (or a longer period as agreed by the individual in writing). If the credit reporting agency or the credit provider refuses access to, or correction of, the information, they must within a reasonable period, provide the individual with a written notice giving reasons for that decision, and setting out the complaints provisions. Individuals 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'. A credit reporting infringement involves a contravention of Part A (which contains all the key provisions except definitions) or of the Credit Reporting Code.

5.4 Division 5 of the Exposure Draft contains detailed provisions about how a credit reporting agency or credit provider (the respondent) must respond to the complaint, including:

- the respondent for the complaint must provide a written notice to the individual making the complaint within seven days after the complaint is made and must investigate the complaint;

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1 National Australia Bank, *Submission 2a*, p. 3.

- the respondent may consult with other credit reporting agencies or credit providers in the investigation of the complaint; and
- a determination about the complaint must be made within 30 days and the respondent must provide the individual with a written notice setting out the determination and explaining to the individual that, if they are not satisfied, they may make a complaint to the Information Commissioner or access the respondent's external dispute resolution (EDR) scheme.

5.5 Division 5 also contains notification requirements in relation to complaints concerning corrections of information or a credit reporting infringement. Notification requirements include notification of recipients of disclosed information. Exceptions to the notification requirements are provided for in two circumstances:

- if it is impracticable for the credit reporting agency or credit provider to give notification; or
- where an Australian law, or an order of a court or tribunal, requires that notification not be given.

5.6 If a complaint cannot be resolved to the satisfaction of the individual, the matter may be referred to an external dispute resolution (EDR) scheme or the Australian Information Commissioner.

Issues raised in submissions

Complexity, lack of flexibility and timing issues

Complexity

5.7 Submitters noted that the consumer must first apply to have information corrected, then lodge a written complaint if the information is not corrected and wait for an outcome to this process and then lodge in an external dispute resolution (EDR) scheme. While ARCA supported separate procedures for complaint handling and correction, other submitters did not.[2] The Office of the Australian Information Commissioner (OAIC), Consumer Action Law Centre (Consumer Action) and Consumer Credit Legal Centre NSW (CCLC) voiced concern that the two stop approach resulted in a complex complaints handling process.[3]

5.8 The OAIC commented that the current regime in the Privacy Act requires only a single step for a correction request, followed by refusal before an individual may complain to the Information Commissioner. The OAIC stated that the additional step 'may create complexity and delay for individuals' while CCLC argued that the

2 Australasian Retail Credit Association, *Submission 48*, p. 11.

3 Office of the Australian Information Commissioner, *Submission 39a*, p. 14; Consumer Action Law Centre, *Submission 63*, p. 11; Consumer Credit Legal Centre NSW, *Submission 66*, p. 3.

process provided for in the Exposure Draft 'is needlessly cumbersome and set up to fail'.[4]

5.9 CCLC and Consumer Action argued that a request to correct information should be considered to be a complaint.[5] Consumer Action commented that most consumers were likely to believe that, in requesting that information be changed, they are lodging a complaint. Ms Carolyn Bond, Consumer Action, stated:

> It is actually an additional step if you compare it to complaints that people currently make under the legislation that relates to complaints about insurance companies, banks and everything else. I think that will be a real problem for consumers, who will not understand why they have to lodge a complaint twice. The simple way to deal with that is to regard the consumer saying, 'I think there is an error in my credit report,' as a complaint for the purposes of them being able to go to external dispute resolution if it is not fixed.[6]

5.10 Consumer Action and the Australian Privacy Foundation (APF) also commented that the meaning of complaint may be inconsistent with Australian Standard ISO 10002–2006 and therefore the meaning adopted by the Australian Securities and Investment Commission (ASIC), ASIC licensees, financial services licensees and others.[7] Consumer Action noted that according to the Australian Complaint Handling Standard, a complaint is an 'expression of dissatisfaction made to an organisation, related to its products, or the complaints handling process itself, where a response or resolution is explicitly or implicitly expected'. It was argued that 'under this definition, once someone has requested a correction, they had made a complaint and they should not be required to make a further complaint before they are advised about their option to take the matter to an industry dispute resolution scheme'.[8]

5.11 Consumer Action concluded that the mechanism as envisaged leads to a high proportion of consumers 'dropping out' of the process:

> In practice, our experience shows that the effect of this would be that many consumers who are unsuccessful in seeking a change in their credit information would take no further action – in part because they will be

4 Office of the Australian Information Commissioner, *Submission 39a*, p. 14; Consumer Credit Legal Centre NSW, *Submission 66*, p. 3.

5 Consumer Credit Legal Centre NSW, *Submission 66*, p. 3; Consumer Action Law Centre, *Submission 63*, p. 2.

6 Ms Carolyn Bond, Co-Chief Executive Officer, Consumer Action Law Centre, *Committee Hansard*, 16 May 2011, p. 34.

7 Australian Privacy Foundation, *Submission 33a*, p. 6; Consumer Action Law Centre, *Submission 63*, p. 11.

8 Consumer Action Law Centre, *Submission 63*, p. 11.

unaware they can complain further, or that there are independent bodies that can deal with their complaint.[9]

5.12 Consumer Action and the CCLC supported amending the provisions in the Exposure Draft so that a request for a correction to information is taken as a complaint.[10]

5.13 The Energy & Water Ombudsman NSW (EWON) also raised concerns that the complaints handling process may result in a matter relating to the accuracy of credit information not being referred to an EDR or the Information Commissioner for 60 days. EWON suggested that this is an unreasonable length of time given the potential detrimental impact on a consumer.[11]

5.14 In addition, EWON, Consumer Action and the CCLC supported an amendment requiring the respondent to provide information to the complainant on the EDR schemes and the Australian Information Commissioner when the respondent first writes to the complainant and not after the complaint is determined.[12]

Lack of flexibility

5.15 The National Australia Bank (NAB), Australian Bankers' Association (ABA) and the APF noted that complaints had to be in writing.[13] Submitters commented that many consumers do not always lodge written complaints; rather, they interact with providers through shopfronts, or by telephone, mail, email, website, SMS, Twitter or Facebook. Optus stated that 'it is therefore disappointing to see obligations in the Exposure Draft that require providers to give written notice to their customers on several occasions during a complaint investigation'. Optus concluded that 'this lack of flexibility does not provide a good customer experience and generally adds to lengthen and complicate the complaint handling process' and recommended that the Exposure Draft be reviewed to more thoroughly consider the impacts on credit providers outside the banking and financial services sector.[14] The Communications Alliance voiced similar concerns and added that 'it would appear that a reliance on such a formal process actually makes it more difficult for consumers to receive a prompt response to their complaints'.[15]

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9 Consumer Action Law Centre, *Submission 63,* p. 11.

10 Consumer Action Law Centre, *Submission 63,* p. 11; Consumer Credit Legal Centre NSW, *Submission 66*, pp 3–4.

11 Energy & Water Ombudsman NSW, *Submission 51*, p. 3.

12 Energy & Water Ombudsman NSW, *Submission 51,* p. 5; Consumer Action Law Centre, *Submission 63,* p. 11; Consumer Credit Legal Centre NSW, *Submission 66*, pp 3–4.

13 National Australia Bank, *Submission 2a*, p. 3; Australian Bankers' Association, *Submission 17a*, p. 4; Australian Privacy Foundation, *Submission 33a*, p. 7.

14 Optus, *Submission 58*, pp 3–4.

15 Communications Alliance, *Submission 56,* p. 5.

5.16 The APF commented that 'the law should not prevent consumers from taking advantage of more accessible processes' while the ABA commented that this did not provide flexibility for technological advances.[16]

5.17 The NAB and ARCA also voiced concern about the obligation on the respondent to provide a written notice to the complainant within seven days which acknowledges the complaint and sets out how the respondent will deal with the complaint. As a reasonable number of complaints are resolved within 48 hours of receipt, this requirement was seen as unnecessary, wasteful and potentially irritating for the consumer. The NAB supported an approach whereby the notification requirement is dependent on whether a complaint has already been resolved.[17]

5.18 The Telecommunications Industry Ombudsman (TIO) also queried the need for a written acknowledgment for a complaint that has been made informally over the telephone, particularly when the matter is simple and can be dealt with quickly. The TIO commented that the requirement to go through a formal process of acknowledgment may present an obstacle to speedy and effective dispute resolution.[18] The EWON was of a similar view and stated that such a requirement 'may be an unnecessary burden for those credit providers who are able to resolve a consumer's complaint in less than 7 days'.[19]

Timeframes

5.19 Both the TIO and EWON commented on the timeframes for dealing with complaints (section 158). The EWON submitted that when a customer makes a complaint of inaccuracy about any aspect of the utility debt listed with a credit reporting agency, 'we consider it is fair and reasonable to the customer who has been adversely affected by this that their complaint is investigated as soon as possible'. In most circumstances, it would be expected that any such investigation take no more than 10 business days, and that a 30 day limit should be an absolute maximum for a complex case.[20] The TIO also commented that where the complaint outcome is unfavourable to the consumer, the notification should be made as soon as possible in order that the individual may consider approaching alternative dispute resolution forums.[21]

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16 Australian Bankers' Association, *Submission 17a,* p. 4; Australian Privacy Foundation, *Submission 33a,* p. 7; see also National Australia Bank, *Submission 2a,* p. 3; Australasian Retail Credit Association, *Submission 48,* p. 12.

17 National Australia Bank, *Submission 2a,* p. 3; Australasian Retail Credit Association, *Submission 48,* p. 12.

18 Telecommunications Industry Ombudsman, *Submission 69,* p. 9.

19 Energy & Water Ombudsman NSW, *Submission 51,* p. 5.

20 Energy & Water Ombudsman NSW, *Submission 51,* p. 5; see also Telecommunications Industry Ombudsman, *Submission 69,* p. 9.

21 Telecommunications Industry Ombudsman, *Submission 69,* p. 10.

5.20 ARCA suggested that the 30 day timeframe for providing the consumer with a determination should not start until the relevant party has received the complaint. ARCA noted that recent industry discussions with EDR schemes (including the Financial Ombudsman Service (FOS), the TIO, and the EWON) supported this position.[22]

5.21 In exceptional circumstances such as in a complex complaint involving multiple parties, it may be necessary to extend the period for resolving such a complaint (paragraph 158(5)(b)). The CCLC commented that it was concerned that this requirement was contrary to the ALRC's recommendation to produce evidence to substantiate a complaint within 30 days. The CCLC argued that individual complainants may feel pressured into accepting a longer dispute resolution period without any knowledge of their rights under the Privacy Act. In addition, 'the spirit of the recommendation is that listing should not remain without substantiation' and concluded that 'this provision creates a loop-hole which potentially defeats this requirement'.[23]

5.22 The committee also received comments, that the timeframes included in the Exposure Draft are at variance with the timeframes in other regulatory regimes such as ASIC Regulatory Guide 165 (RG165), Australian Standard ISO 10002-2006 and telecommunications sector obligations. In particular, it was noted that:

- subsection 158(5) provides for a maximum timeframe of 30 days for resolution, or longer if the complainant agrees in writing, while RG165.9 provides for a maximum timeframe of 45 days with no possibility of extension;
- RG165.100 provides for 21 days to respond to a complaint concerning a default notice; and
- the 30 days in the Exposure Draft begins from the date a complaint is made, rather than when the complaint is received as provided for in RG165.[24]

Inconsistency with other standards and obligations

5.23 A further matter raised in relation to complexity was that the obligations in the complaints handling process differ from existing industry standards. A number of submitters commented that financial service providers and others, such as those which provide lenders' mortgage insurance, already comply with ASIC RG165.[25] RG165

22 Australasian Retail Credit Association, *Submission 48*, p. 11; see also National Australia Bank, *Submission 2a*, p. 3.

23 Consumer Credit Legal Centre NSW, *Submission 66*, p. 5.

24 Australian Bankers' Association, *Submission 17a*, p. 4; ANZ Bank, *Submission 64*, p. 12.

25 National Australia Bank, *Submission 2a*, p. 3; Westpac, *Submission 13a*, p. 3; Australian Bankers' Association, *Submission 15a*, p. 4; Insurance Council of Australia, *Submission 17a*, p. 2; Australasian Retail Credit Association, *Submission 48*, p. 11.

applies to all credit licensees and contains specific timelines and procedures for complaints processes. The ANZ Bank submitted that the complaints handling requirements in the Exposure Draft differ from the requirements of Australian Credit Licence (ACL) holders under RG165. The ANZ Bank went on to state that:

> 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.[26]

5.24 The ANZ Bank recommended that the provisions be amended so that credit providers, who are licensees under the National Consumer Credit Protection Act, are under the same obligations for handling customer complaints as they are under their ACLs.[27] The Insurance Council of Australia added that it was not aware of any policy reasons for such differences and suggested that the timeframes in the Exposure Draft to acknowledge and respond to complaints be removed.[28]

5.25 ARCA also commented that Australian Standard ISO 10002-2006 is 'widely recognised as best practice for managing consumer complaints, and it is widely applied across sectors and scalable to suit a range of organisations'. ARCA recommended aligning the timeframes in the Exposure Draft with existing obligations for complaints handling. For example, the consultation Draft of the Electronic Funds Transfer (EFT) Code of Conduct directs subscribers to comply with AS ISO 10002-2006 and RG165 instead of establishing its own timeframes and standards.[29]

5.26 Both the Communications Alliance and Optus commented that the proposed provisions do not appear to take into account existing legislative and regulatory obligations in the telecommunications sector.[30] It was argued that if the proposed complaints handling regime applied to the telecommunications industry, different obligations would be imposed depending the type of complaint received: credit reporting matters under the Privacy Act; and other types of telecommunications complaints in accordance with the timeframes and requirements under the Telecommunications Consumer Protections (TCP) Code and obligations under the TIO Scheme. Optus concluded that:

> This will lead to difficulties for providers having to follow different processes for different types of complaints, and confusion for telecommunications customers, who should be able to have a consistent experience with their telecommunications provider regardless of the nature of their complaint.[31]

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26 ANZ Bank, *Submission 64*, p. 12.

27 ANZ Bank, *Submission 64*, p. 13.

28 Insurance Council of Australia, *Submission 17a*, p. 2.

29 Australasian Retail Credit Association, *Submission 48*, p. 11.

30 Communications Alliance, *Submission 56*, p. 5; Optus, *Submission 58*, p. 3.

31 Optus, *Submission 58*, p. 3.

5.27 The Communications Alliance added that the rules in the TCP Code are more far-reaching than those proposed in the Exposure Draft including how telecommunications providers must handle complaints and how they must interact with the TIO.[32] Mr John Stanton, Communications Alliance, commented:

> One concern is that, if the credit related complaints that telcos receive need to be dealt with differently to all other complaints, then there is an additional burden on the industry, of course, but there may in fact be no consumer benefit to doing it that way or, potentially, consumer detriment. That is an area of major concern for us.[33]

5.28 The Communications Alliance concluded that the Exposure Draft 'seeks to impose new obligations which conflict with standard practice in those industries and will lead to consumer confusion and inconsistent approaches'.[34] The Communications Alliance recommended that:

- matters already dealt with under pre-existing schemes should be removed from the legislation and instead be dealt with under the Credit Code, which will allow flexibility for different sectors, in keeping with their existing obligations; or
- exemptions should be included in the credit reporting legislation for those classes of credit providers who already have pre-existing industry requirements.[35]

5.29 The Communications Alliance argued that the implementation of these recommendations would allow different industries to manage complaints within their existing regulatory frameworks and in a manner that is more realistic and reflective of how customers communicate with their providers.[36]

5.30 In response to the Communications Alliance concerns, Mr Timothy Pilgrim, OAIC, commented:

> One of the main aims that we would want to see out of the entire process to reform the Privacy Act is to reduce complexity. We have been talking about that in terms of the actual provisions, but that complexity also extends to how an individual can seek to enforce their rights if they do have an issue. What we want to see is that, to the greatest extent possible, there is one place in which both the individual and organisations that need to comply with the act will go to understand what their obligations are. Our starting point would be that, under the provisions, the provisions themselves set out

32 Communications Alliance, *Submission 56*, p. 5.

33 Mr John Stanton, Chief Executive Officer, Communications Alliance, *Committee Hansard*, 16 May 2011, p. 21.

34 Communications Alliance, *Submission 56*, p. 4.

35 Communications Alliance, *Submission 56*, p. 4.

36 Communications Alliance, *Submission 56*, p. 5.

> the basic complaint handling requirements and then those can be extrapolated on within the credit code that will be developed by industry. I can understand that there are some issues that might come up in the telecommunications area; however, I think there are more similarities than differences in the processes we are talking about in resolving complaints. For everyone working within the sector itself, it would probably be preferable to see those requirements all located in the one place—the provisions and the code that sits under them.[37]

Committee comment

5.31 The complaints handling process is an important element of the credit reporting system. Consumers must be provided with a clear process for seeking a correction to credit information held and for complaining when a correction is not made. Submitters commented that the complaints handling process contained in the Exposure Draft is complex, lacks flexibility and will result in an increased burden on those entities which must comply with other complaints handling obligations, particular in the telecommunications and utilities sector.

5.32 The committee sought advice from the Department of the Prime Minister and Cabinet (the department) in relation to concerns about the '2 step' process. The department did not support an approach which combined the correction and complaints process as it did not satisfactorily address all the elements of the Government's existing policy on correction and complaints as set out in the Exposure Draft. The department went on to state that the proposal put forward appears to eliminate the '2 step' approach in the Exposure Draft and to combine the correction provisions and the complaint provisions. As a consequence, there is no longer a process for correction; rather an individual will be required to lodge a complaint to seek a correction of their personal information.

5.33 The department stated that the Government:

> ...clearly intended that individuals should, consistent with the current credit reporting provisions in the Privacy Act, have the opportunity to seek a correction to their personal information without lodging a complaint. In addition, the proposed definition of complaint is limited to complaints about an organisation's products. Section 156 of the Exposure Draft provides a guide to the complaints provisions and makes clear they apply to both failures to provide access to, or to correct, personal information, as well as to complaints about acts or practices that may be a credit reporting infringement. The Department does not consider that a narrow definition of complaint which focuses on the products of an organisation is useful in the context of the credit reporting provisions.[38]

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37 Mr Timothy Pilgrim, Australian Privacy Commissioner, Office of the Australian Information Commissioner, *Committee Hansard,* 16 May 2011, p. 3.

38 Department of the Prime Minister and Cabinet, *Additional Information,* (received 2 September 2011), p. 4.

5.34 The committee also supports the approach taken in the Exposure Draft as it provides a correction mechanism and then, if a correction is not made, the consumer may make a complaint. The advantage of this model is that it places obligations on industry to take action *before* a consumer lodges a complaint. The committee believes that this is an effective process and also places the obligation appropriately on industry which will gain great advantage from the new credit reporting regime.

5.35 A further benefit of the proposed complaints handling system is that it addresses the issue raised by the NAB and ARCA concerning the large number of 'complaints' which are resolved within 48 hours of receipt and the notification requirements for complaints. The committee considers that these would generally not be complaints, rather they would be requests for correction. As such, there is no requirement for written notice to be provided to the individual.

5.36 In relation to comments regarding timeframes, the committee notes that the timeframe of 30 days for a credit reporting agency or credit provider to correct information reflects the timeframe in APP 13 and the existing Privacy Act and credit reporting code of conduct. Although many credit providers will be subject to other regulatory requirements, this will not always be the case. While the inclusion of a 30 day timeframe for both correction request and complaint determination provides for consistent timeframes across the Privacy Act, the committee has noted the concerns of consumer advocates about delay in the finalisation of a complaint arising after a correction request. When a correction request proceeds to a complaint, the timeframe for determination may be up to 60 days (and longer if the individual agrees to an extension). The committee considers that, if the complaints handling regime as provided for in the Exposure Draft is maintained, then consideration should be given to a shorter time period for a correction to be made.

Recommendation 12

5.37 The committee recommends that the time period for the correction of credit information be amended to 15 days.

5.38 In relation to extensions of time to respond to a request to correct records, the committee is mindful of consumer advocate concerns that individuals may be pressured to agree to an extension. The committee notes that any extension requires the consent of the individual. However, the committee considers that any pressuring of consumers is not acceptable and that the Credit Reporting Code of Conduct should address these matters, for example, obtaining consent, industry practice etc.

Recommendation 13

5.39 The committee recommends that that issue of extensions of time to respond to requests for correction of records be addressed in the Credit Reporting Code of Conduct.

5.40 The committee notes the comments concerning the lack of flexibility in responding to consumers. There were two issues raised. First, that 'written' notification is required. The committee notes that under the Acts Interpretation Act and the

Electronic Transactions Act the 'writing' requirement would permit electronic communications.

5.41 The second issue raised related to the need for a written notice when a 'complaint' can be handled quickly. As noted above, these comments appear to combine both the correction and complaint provisions. If an individual contacts a credit provider or credit reporting agency requesting a correction, there is no requirement for a written notification to the individual. The written notification requirements, when the complaint process is instigated, reflects the seriousness of the matter. In addition, the requirement for a complaint to be in writing is consistent with the existing obligation set out in subsection 36(3) of the current Privacy Act.

5.42 The committee therefore does not consider that any amendment of these provisions is required.

Notification requirements relating to certain complaints

5.43 Section 159 requires notification of the complaint and the determination about the complaint. Notification must also be provided to recipients of the information. Exceptions are provided if it is impracticable for the credit reporting agency or the credit provider to give the notification or if they are required by or under Australian law, or an order of a court or tribunal, not to give notification.

5.44 ARCA commented that 'what seems to be a simple requirement under the Exposure Draft provisions becomes complex because of the degree of prescription of how an operational process must work rather than the outcome that it seeks to deliver'.[39]

5.45 The ANZ Bank also commented that these requirements 'will be practically difficult to comply with for both credit providers and credit reporting agencies'. For example, 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 ANZ Bank commented that the recipient will not be able to identify all holders of the information. Rather, 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. The ANZ Bank also argued that the situation was similar for a credit provider which discloses incorrect information: the credit provider will not be able to identify every recipient, only those to which it disclosed the information directly. However, as currently drafted, the credit provider may be required to notify any indirect recipients.[40]

39 Australasian Retail Credit Association, *Submission 48,* p. 12.

40 ANZ Bank, *Submission 64*, p. 13.

5.46 The ANZ Bank went on to draw a comparison with the current Credit Reporting Code of Conduct which requires the correction of credit information to be provided to entities that received the incorrect information within the previous three months and are nominated by the individual to receive the correction notification. The ANZ Bank concluded:

> 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.[41]

5.47 The ANZ Bank recommended 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 Exposure Draft be 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.[42]

Committee comment

5.48 The committee notes concerns about the burden placed on credit providers in responding to a correction or complaint to also have to notify other parties if the correction is made. The ALRC considered the notification principle in relation to correction of credit reporting information. The ALRC commented that it saw no reason why the general notification requirement contained in the 'Access and Correction' principle should not apply to credit reporting information 'where it is generally practicable for a credit reporting agency to send correcting information to credit providers to whom inaccurate information previously has been sent'.[43]

5.49 The Government Response makes it clear that, where it is decided that a correction is necessary, the credit reporting agency or credit provider should be

41 ANZ Bank, *Submission 64*, p. 13.

42 ANZ Bank, *Submission 64*, p. 13.

43 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1977.

required to take steps to advise others of the correction. The Government Response stated:

> The Government notes that where a credit reporting agency or credit provider determines that corrections need to be made to the individual's credit reporting information, they should take steps to advise the other party, along with other relevant credit reporting agencies who may have listed the information, of the corrections. This will be in accordance with the general 'access and correction' principle.[44]

5.50 The correction and complaints handling provisions reflect APP 13. However, the notification requirement of APP 13 is limited to notifying other entities to which the information has previously been disclosed only where the individual requests notification of the other entity. In the credit reporting system the notification requirement is broader and the committee considers that this appropriately reflects the nature of the information used in the credit reporting system and the use of the information in determining an individual's credit worthiness.

5.51 The committee also notes that exceptions are provided for in the complaints handling provisions (subsection 159(6)) and the corrections notification provisions (subsection 122(4) and subsection 147(3)) so that notification need not be given if it is 'impracticable to do so'. The committee considers that this provides considerable flexibility to credit reporting agencies and credit providers. The committee anticipates that guidance will be provided in relation to the exemption either by the OAIC or in the Credit Reporting Code of Conduct.

First point of contact

5.52 The ALRC recommended (Recommendation 59–5) that 'a credit reporting agency should refer to a credit provider for resolution complaints about the content of credit reporting information provided to the agency by that credit provider'. The Government responded that the ALRC had 'reversed the obligation for resolving disputes and placed the onus on the relevant credit provider who is likely to have sufficient access to information in order to deal with the dispute'. The Government commented that there should be clear requirements about who should take responsibility to attempt to resolve the dispute. The Government was concerned that the approach adopted by the ALRC would result in an individual having to take several steps before ownership of the dispute settles with the credit provider. The Government stated that:

> ..a more balanced approach is that the obligation for attempting to resolve the dispute should lie with whichever party the individual first makes a

44 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, p. 128.

> complaint (whether it be the credit provider to which the listing relates or the credit reporting agency).[45]

5.53 The Exposure Draft provides for the respondent to the complaint to investigate the complaint and make a determination about it. 'Respondent' is defined as the credit reporting agency or credit provider to which the complaint is made (section 180).

5.54 The Government's approach was supported by EWON, however, it suggested that section 156 should include the wording in the Government Response ('the obligation for attempting to resolve the dispute should lie with whichever party the individual first makes a complaint (whether it be the credit provider to which the listing relates or the credit reporting agency)'). EWON commented that this would ensure that it is clear who should accept, and attempt to resolve, the complaint and avoid the consumer having to liaise between the parties.[46]

5.55 Other submitters, however, did not support this approach. It was argued that the first point of contact may not be the most appropriate entity to deal with the complaint.[47] Westpac, for example, commented that 'the provision that the first party contracted must investigate the complaint could result in an adverse customer outcome in instances where the complaint is unrelated to the first party'.[48]

5.56 Submitters provided examples of where the first point of contact would not be the most appropriate. The NAB, for example, stated:

> ...a consumer may complain to a credit provider who is not responsible for the credit reporting information that is in dispute. Operational complexities would make it difficult for the first point of contact to effectively manage the complaint and this would adversely impact the consumer.[49]

5.57 ARCA provided the following example:

> If a consumer walks into the NAB to get a credit card and the NAB does a credit check they may find—having received the report from the bureau—that there is, for example, a default listed by Telstra, and the consumer then complains to the NAB: 'I have never had a Telstra relationship. I work with Optus. I think this is incorrect.' There is no way that the NAB can check that and manage that complaint. It needs to go to the relevant party, which

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45 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, p. 126.

46 Energy & Water Ombudsman, *Submission 51*, p. 4.

47 Australasian Retail Credit Association, *Submission 48,* p. 11.

48 Westpac, *Submission 13a*, p. 3.

49 National Australia Bank, *Submission 2a*, p. 3; see also Mr David Fodor, Chief Credit Officer, Personal Banking Risk, National Australia Bank, *Committee Hansard*, 16 May 2011, p. 9.

would either be the credit reference agency that supplied the information or Telstra, which had listed the default.[50]

5.58 Both the NAB and ARCA suggested that industry should take responsibility for an effective referral process for complaints. This would, it was argued, ensure that the complaint is acknowledged, managed and resolved by the relevant supplier of the disputed credit reporting information.[51] The ABA took the view that the Credit Reporting Code of Conduct could develop an effective referral process to manage and resolve the complaint with the respondent to be the responsible party.[52]

5.59 ARCA also commented that the first party contacted must undertake to notify 'everyone' who has received the incorrect information, collate the necessary information to respond to the complaint, and then respond on behalf of all relevant parties. ARCA submitted that 'what seems to be a simple requirement under the Exposure Draft provisions becomes complex because of the degree of prescription of how an operational process must work rather than the outcome that it seeks to deliver'.[53]

Committee comment

5.60 The committee notes that the Government Response to the ALRC's recommendation makes it clear that responsibility for dispute resolution should lie with whichever credit reporting agency or credit provider to whom the individual first complains. The committee supports this approach as consumers will only have to contact one entity to instigate the complaints process. The committee further considers that there is a benefit to good consumer relations for entities to ensure disputes raised by their customers are dealt with efficiently.

External dispute resolution

5.61 If a complainant is not satisfied with the outcome of a complaint they may seek access to an EDR scheme. Recognised EDR schemes, within the meaning of the Privacy Act, are those to which credit providers and credit reporting agencies are members and are one or more EDR schemes that is, or are, recognised by the Information Commissioner (section 195).

5.62 The ALRC noted that many credit providers are members of EDR schemes, including financial services providers which are required by the *Corporations Act*

50 Mr Stephen Balme, General Manager, Australasian Retail Credit Association, *Committee Hansard*, 16 May 2011, p. 9.

51 Australasian Retail Credit Association, *Submission 48*, p. 11.

52 Australian Bankers' Association, *Submission 17a*, p. 4; see also National Australia Bank, *Submission 2a*, p. 3.

53 Australasian Retail Credit Association, *Submission 48*, p. 11.

2001 to belong to EDR schemes approved by ASIC. The ALRC went on to comment that:

> In the resolution of credit reporting complaints, it is appropriate that EDR schemes provide the first line of dispute resolution beyond the credit provider or credit reporting agency. Such schemes are funded by industry and have expertise in the commercial environment in which their members operate.[54]

5.63 The ALRC commented that, as the privacy regulator, it is appropriate for the Privacy Commissioner to have oversight of EDR schemes that handle credit reporting complaints. However, the ALRC did not envisage that the Privacy Commissioner would implement an approval system for EDR schemes; rather, the Privacy Commissioner would recognise EDR schemes already approved by ASIC under the Corporations Act and those with another statutory basis such as the TIO.[55] The Government accepted this approach.[56]

Membership of EDR schemes

5.64 Some submitters argued that a failure of the Exposure Draft is the lack of an explicit requirement for credit providers or credit reporting agencies to belong to an EDR scheme.[57] Veda Advantage, Consumer Action, CCLC and Legal Aid Queensland recommended that credit reporting agencies be required to belong to an EDR scheme.[58] The CCLC commented that 'access to EDR is one of the key consumer protections introduced by this legislation and it should not be left to implication'.[59]

5.65 A further matter raised was the requirement for all credit providers and credit agencies to be members of an EDR scheme. The ALRC considered whether membership of an EDR scheme should be a pre-condition to any participation in the credit reporting system, rather than only when credit providers list overdue payments. The ALRC commented that:

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54 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 2001.

55 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 2002.

56 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, pp 127–128.

57 Ms Nerida Caesar, Chief Executive Officer, Veda Advantage, *Committee Hansard,* 16 May 2011; Consumer Credit Legal Centre NSW, *Submission 66,* p. 3; Legal Aid Queensland, *Submission 60,* p. 3.

58 Legal Aid Queensland, *Submission 60,* p. 3; Consumer Action Law Centre, *Submission 63,* p. 11; Consumer Credit Legal Centre NSW, *Submission 66,* p. 3.

59 Consumer Credit Legal Centre NSW, *Submission 66,* p. 3.

> Dispute resolution is needed most in relation to credit reporting information that is adverse to, and may have serious consequences for, the individuals concerned. Membership of an EDR scheme can be expensive. The compliance burden may not justify imposing EDR obligations on credit providers who may, for example, wish to provide goods or services on credit, but do not list defaults.[60]

5.66 The ALRC recommended that 'credit providers only may list overdue payment or repayment performance history where the credit provider is a member of an external dispute resolution scheme recognised by the Privacy Commissioner' (Recommendation 59–7).[61] The Government accepted this recommendation with amendment and stated that 'there is significant justification to extend the requirement to be a member of a recognised external dispute resolution (EDR) scheme to all credit reporting agencies and credit providers that list any information about an individual in credit reporting information'.[62]

5.67 The Tasmanian Collection Service commented that it had 'serious objections' to the requirement that participating credit providers need to be a member of a recognised EDR scheme. The Service submitted that this requirement is of limited use, costly, and overly bureaucratic and will 'effectively provide a significant barrier to many thousands of smaller credit providers to their continued participation in the credit reporting industry'. The Service recommended that this requirement is removed.[63]

5.68 The Australian Finance Conference (AFC) commented that the extension of the requirement of membership of a recognised EDR scheme to all credit providers and credit reporting agencies may affect commercial financiers adversely. Currently, a commercial financier is able to access the consumer component of a commercial customer's file. They do not list information on the file and access is merely required to facilitate a credit assessment of the commercial customer. The AFC argued that commercial financiers should not be required to be a member of an EDR scheme to access the consumer component of a file. In addition, the AFC commented that mandatory membership of EDR schemes for providers of small business credit remains a matter of policy consideration under the Council of Australian Governments (COAG) Phase 2 national credit reforms. The AFC concluded:

> The outcome of section 132 would appear to be at odds with the Government's commitment to that consultative process and commitment to

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60 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 2003.

61 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 2003.

62 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, p. 127.

63 Tasmanian Collection Service, *Submission 50,* pp 1–2.

best practice regulation (eg targeted regulation to address an evidence-based market failure or consumer protection risk).[64]

Recognition of EDR schemes

5.69 The Insurance Council of Australia stated that it strongly supported recognition by the Information Commissioner of EDR schemes approved by ASIC, particularly where those schemes are already adequately equipped to deal with complaints relating to privacy in the context of credit reporting. The Insurance Council commented that 'this will provide a clear process for potential complainants, especially where a credit reporting complaint may be connected to other aspects of a dispute such as debt recovery'. In addition, the Insurance Council stated that it will ensure that the compliance obligations for lenders' mortgage insurance providers, which are only credit providers by virtue of acquiring a debt, are commensurate with the level the credit reporting activity being undertaken.[65]

5.70 EWON commented that electricity and gas retailers are required by their licence conditions to be a member of an approved ombudsman scheme, and they are bound by, and must comply with, any decision of the electricity or gas industry ombudsman relating to a dispute or complaint involving the licence holder and a small retail customer. EWON sought confirmation that it will be recognised by the Information Commissioner as the Exposure Draft does not set out how EDR schemes will be recognised.[66]

Committee comment

5.71 Some submitters called for a more explicit requirement regarding membership of an EDR scheme. The committee notes that section 132 provides that a credit provider may not disclose credit information about an individual to a credit reporting agency unless, amongst other matters, the credit provider is a member of a recognised EDR scheme (paragraph 132(2)(a)). The same conditions apply for the disclosure of credit eligibility information (paragraph 135(3)(e)). Section 108 prohibits credit reporting agencies from disclosing credit reporting information unless, amongst other things, the disclosure is permitted for the purpose of a recognised EDR scheme and both the credit reporting agency and credit provider are members of the scheme (paragraph 108(3(c)).

5.72 The committee also sought advice from the department which noted that the Government has decided that external dispute resolution should only be compulsory for those credit providers that wish to access repayment history information. The department noted that this implements the Government's response to ALRC Recommendation 55–3 but does not preclude other credit providers and credit

64 Australian Finance Conference, *Submission 12a*, p. 6.

65 Insurance Council of Australia, *Submission 17a*, p. 2.

66 Energy & Water Ombudsman NSW, *Submission 51*, p. 8.

reporting agencies from taking part in external dispute resolution schemes, even if they do not wish to access repayment history information. The department added:

> The Veda proposal for compulsory participation of credit providers in external dispute resolution appears to be intended to facilitate the handling of all complaint resolution under external dispute resolution schemes or mechanisms under other existing industry codes or statutory schemes. The Department notes that this would create a situation where the handling of complaints is dealt with under a wide variety of other mechanisms that may not be consistent in either the timing that is applied, the rights given to individuals, or the remedies that can be obtained. The Department notes that the complaints handling provisions in the exposure draft establish common timeframes and procedures.[67]

5.73 The committee does not consider more explicit provisions regarding EDR scheme membership are required.

Substantiation

5.74 The ALRC recommended (Recommendation 59–8) that, within 30 days, if evidence to substantiate a disputed credit listing cannot be provided, or the complaint is not referred to a recognised EDR scheme, then the credit reporting agency must delete or correct the information. The Government accepted this recommendation and stated that:

> This recommendation will ensure that the onus of proving the accuracy or appropriateness of a listing in an individual's credit reporting information lies with credit providers and credit reporting agencies. It is also likely to assist in encouraging the credit reporting industry to resolve disputes as quickly and efficiently as possible.[68]

5.75 While noting that this recommendation was accepted by the Government, the OIAC, CCLC and the EWON commented that at present, the Exposure Draft omits the substantiation requirement.[69] The OAIC commented that it supported the position in the Government Response that credit reporting agencies and credit providers should bear the onus of proving the accuracy of credit-related information they hold. It was noted that this is consistent with those entities' obligation to take reasonable steps to

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67 Department of the Prime Minister and Cabinet, *Additional Information*, (received 2 September 2011), p. 4.

68 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice*, October 2009, p. 128.

69 Office of the Australian Information Commissioner, *Submission 39a,* p. 15; Energy & Water Ombudsman NSW, *Submission 51*, p. 6; Consumer Credit Legal Centre NSW, *Submission 66*, p. 4.

ensure that the information is accurate, up-to-date and complete. In addition, such an obligation may assist with the quick and efficient resolution of disputes.[70]

5.76 EWON also stated that 'this important provision should be included to strengthen consumer protections and encourage efficient resolution of complaints'.[71] CCLC commented that 'this recommendation is inextricably related to the complaints process and the individual's right to request a correction to their credit reporting information'.[72] Ms Karen Cox, CCLC, added:

> We are not sure that has been well reflected in the legislation and we think that is a hugely important thing. Again, a default or some sort of adverse listing on a credit report has serious consequences for people. The very least that credit providers should have to do is be able to keep and produce adequate evidence if they are going to make a move to mar someone's credit rating.[73]

5.77 Consumer Action noted that the provisions of section 149, rather than requiring the provision of substantiating evidence, 'merely requires that credit providers consider whether or not they are satisfied that the information is incorrect, without any effort to investigate or substantiate their decision'. If the credit provider is satisfied the information is correct, they need not provide any evidence to substantiate that position. In relation to the second part of the recommendation, Consumer Action stated that this does not seem to have been addressed at all. The Consumer Action concluded that the provisions, if enacted will result in poor outcomes for consumers and stated:

> Individuals often challenge inaccurate listings when they are informed as part of an application for credit that their application was rejected on the basis of information contained in a credit report. An inaccurate listing can prevent, or delay, the individual obtaining credit, for example, a housing loan to complete the purchase of a home. In those circumstances it is critical that evidence substantiating the listing is provided in a timely manner or the listing is corrected as there is often some urgency.[74]

5.78 The OAIC recommended that to reflect the ALRC's recommendation:

- the Exposure Draft set out credit reporting agencies' and credit providers' obligations, and individuals' rights, relevant to the onus to prove the accuracy of information; and

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70 Office of the Australian Information Commissioner, *Submission 39a*, p. 15.

71 Energy & Water Ombudsman NSW, *Submission 51*, p. 6; see also Australian Privacy Foundation, *Submission 33a*, p. 12.

72 Consumer Credit Legal Centre NSW, *Submission 66*, p. 3.

73 Ms Karen Cox, Coordinator, Consumer Credit Legal Centre NSW, *Committee Hansard*, 16 May 2011, p. 29.

74 Consumer Action Law Centre, *Submission 63*, pp 9–10.

- the new Credit Reporting Code deal with practical compliance matters relevant to those requirements.[75]

5.79 The CCLC also noted that the Government response had indicated that, where a listing is in dispute has been referred to an EDR scheme, a note to that effect was to be associated with the disputed listing. This has also not been included in the Exposure Draft.[76]

Committee comment

5.80 The Government accepted ALRC Recommendation 59–8 in relation to substantiation of evidence of disputed credit reporting information.[77] The committee notes that this obligation is not expressly provided for in the Exposure Draft. However, both credit reporting agencies (section 116) and credit providers (section 143) are under a positive obligation to take reasonable steps to ensure that credit information they collect, use or disclose is accurate, up-to-date and complete. Subsection 116(3) provides for additional obligations on credit reporting agencies to enter agreements with credit providers to ensure the information they obtain from credit providers is accurate, up-to-date and complete as well as to conduct regular audits and identify and deal with any suspected breaches of the agreements. Credit providers are required to take such steps, if any, as are reasonable.

5.81 The department noted that there are general rules to ensure the integrity of credit reporting information. In addition, the department indicated to the committee that to insert a substantiation requirement could make matters more confusing, potentially leading to a situation where someone could argue that they were not required to correct inaccurate information (under the general quality requirement) until it was challenged by an individual. It would also be difficult to reconcile with the obligations on credit reporting agencies to have agreements in place to ensure accurate information enters the system. Further, if a person disputes a listing, either through the correction process or as a complaint, and the credit reporting agency has no evidence to substantiate the listing, then the general quality obligation to ensure accuracy of the information would require the information to be corrected.

5.82 The committee however, notes the concerns of the Office of the Australian Information Commissioner that substantiation was part of the privacy-enhancing regulation of the credit reporting system. The committee agrees with the OAIC's view but is mindful of the difficulties that may be faced in including such a requirement in the Exposure Draft.

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75 Office of the Australian Information Commissioner, *Submission 39a*, p. 15.

76 Consumer Credit Legal Centre NSW, *Submission 66*, p. 5.

77 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice*, October 2009, p. 128.

Recommendation 14

5.83 The committee recommends that consideration be given to implementing the recommendations of the Office of the Australian Information Commissioner in relation to the substantiation issue.

Outcome of consultations

5.84 The committee was provided with the following outcomes from the industry stakeholder and consumer advocates consultations:

- Definition of complaint:
    - the statute should contain a single definition of 'complaint' based on the ISO 10002:2004 and RG165:
        - *Expression of dissatisfaction made to an organisation, related to its products, or the complaints-handling process itself, where a response or resolution is explicitly or implicitly expected.*
    - this should eliminate the '2 step' approach in the Exposure Draft Bill, and lead to a common approach to IDR and EDR that meets international standards across credit reporting in Australia.
- EDR should be clearly made compulsory for all credit reporting participants;
- Codes and timing:
    - the basic principle should be that where a credit reporting participant is already subject to a complaints-handling requirement in a sectoral Code and EDR, or a statutory scheme, those requirements should apply in credit reporting.
        - the Privacy Commissioner should maintain a list of recognised industry codes and standards for complaints handling purposes;
        - for those with a sectoral Code or other complaints-handling requirement, a breach of that requirement would be an interference with privacy under the Privacy Act;
        - for CRAs and others without a sectoral scheme, the statute should provide for a 30 day requirement for the handling of a non-data correction complaint; and
        - a data correction complaint would have a 45 day time limit for resolution; should the credit provider not provide substantiation, the disputed information is resolved in the consumer's favour;
- Evidence requirements:
    - detail to be included in Code of Conduct
        - onus of proof lies with the party that listed the information – standard is reasonable proof

    - reasonable proof explained in Code to include concrete examples eg a copy of a default notice, proof that the debt owed was 60 days past due, and evidence of notice to consumer listing (specific material evidence–including record of date sent, and or that the system performed as intended to provide notice in the specific instance)
    - the development of the Code will draw upon other Code guidelines on evidence, such as FOS guidelines, as well as seeking input from the Privacy Commissioner
    - reasons for decision to be provided to the consumer
    - statutory obligation on parties to respond appropriately to a complaint;
- Credit providers in liquidation:
    - include in the Code a provision requiring EDR schemes to deal with consumer complaints even when a Credit Provider is in liquidation and no longer a member of an EDR scheme, if necessary charging the costs to the CRA(s) who are also party to the dispute;
- Notification of other parties:
    - Code to provide that when a CRA makes a correction to a consumer's information, they:
    - give notice of the correction to other CRAs; and
    - advise the consumer that they may ask the CRA to inform any credit provider who has accessed their file since the erroneous inclusion of the correction;
    - if the consumer requests, advise those credit providers;
- EDR Scheme co-ordination:
    - achieving some consistency in credit reporting dispute outcomes across EDR schemes is important. To that end, ARCA should hold a regular forum of EDR schemes and consumer advocates to report trends, and agree on guidelines for resolving complaints.

Response from the Department of the Prime Minister and Cabinet

5.85 The department responded to the outcome of the consultation and noted that the Veda submission proposes a complete reformulation of the complaint handling provisions in the Exposure Draft which also appears to encompass the correction provisions. Concerns with the '2 step' approach to complaints handling is discussed at paragraph 5.53–5.55 and matters relating to the EDR are discussed at paragraph 5.72.

5.86 In relation to matters to be dealt with in the Code of Conduct, the department indicated that Veda could propose matters it wished to be included in the Code of Conduct during the process for the development of the code.

Committee comment

5.87 The proposal provided by Veda following consultations with consumer advocates provides for an alternative approach to complaints handling. A number of these issues have been addressed by the committee in the discussion above.

5.88 In addition, the committee notes the proposal concerning codes and timing. The committee does not agree that where a credit reporting participant is already subject to a sectoral code dealing with complaint handling, that code should continue to apply instead of the requirements of the credit reporting regime. The committee does not consider that this would be a beneficial outcome for consumers as this would result in a range of complaint handling models, depending on what other regulatory regime applies to credit providers. The committee considers that this would add complexity to complaints handling. However, there may be some issues which could be addressed in the Credit Reporting Code of Conduct thus providing clear guidance in relation to application of complaint handling under different sectoral codes.

5.89 It was also proposed to make EDR compulsory for all credit reporting participants. The committee notes the comments of the Department of the Prime Minister and Cabinet in this regard and does not support this approach.

5.90 The committee has addressed the issue of substantiation of evidence in the discussion above.

5.91 The proposal for notification of other parties following a correction by a credit reporting agency includes that the credit reporting agency will advise the consumer that they may ask the agency to inform any credit provider who has accessed their file since the erroneous inclusion of the correction; and if requested by the consumer, advise those credit providers of the correction. The committee does not support this approach. Subsection 120(2) does not provide for a requirement that the individual must request that credit providers be informed of the correction. The committee considers that this is a lessening of the obligations on credit reporting agencies. Given the significance of credit reporting information to an individual, the committee believes that the notification provisions contained in the Exposure Draft are appropriate. The committee further notes that the provisions of subsection 120(3) provide for an exception if it is impracticable for the credit reporting agency to give the notice. The committee considers that this provides a credit reporting agency with sufficient flexibility in this matter.

5.92 The final point of the proposal relates to EDR scheme coordination. The committee notes that the OAIC can approve EDR schemes. The committee considers that this is the appropriate mechanism for approval of EDR schemes. It also allows credit providers to use the EDR scheme that they already belong to for other purposes, for example, responsible lending purposes. The committee considers that this is a simple approach and detailed obligations in relation to EDR schemes for the credit reporting scheme will not be required.

Chapter 6

Credit reporting agency provisions

Introduction

6.1 This chapter looks at comments relating to Division 2 of the Exposure Draft which regulates credit reporting agencies. The matters regulated include handling of credit reporting information, de-identified information and access to, and correction of, information.

6.2 Credit reporting agencies are defined in section 180 as an organisation or a small business operator or an agency prescribed by regulation that carries on a credit reporting business. The meaning of credit reporting business is provided for in section 194 of the Exposure Draft and means a business carried on in Australia and involves the collection, 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. Comments received in relation to the definition of credit reporting agency are discussed in chapter 9.

6.3 If a credit reporting agency is an entity to which the Australian Privacy Principles (APPs) apply, the APPs do not apply to credit information, credit reporting agency derived information or credit provider derived information. The APPs will apply to all other information held by a credit reporting agency.

6.4 The following discussion focuses on the major matters raised in relation to Division 2. Other issues raised in relation to specific provisions are listed in appendix 3.

Subdivision B – Consideration of information privacy

6.5 Pursuant to Subdivision B, credit reporting agencies must ensure that they manage credit reporting information in an open and transparent way. The subdivision requires credit reporting agencies to 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 will:

- ensure compliance with the obligations of Division 2 and the Credit Reporting Code; and
- enable the agency to deal with inquiries or complaints from individuals about the agency's compliance with Division 2 or the Credit Reporting Code.

6.6 In addition, credit reporting agencies must have a clearly expressed and up-to-date policy about the management of credit reporting information by the agency. These provisions are the equivalent to APP 1 although, as noted by the Australian

Privacy Foundation (APF), there is no equivalent to APP 1(4)(f) and (g), and no equivalent at all to APP 8, both concerning overseas transfers.[1] The committee has discussed cross border disclosure in chapter 3 of this report.

6.7 Experian submitted that the Subdivision places a number of excessively onerous standards on credit reporting agencies. For example, the obligation in subsection 105(2) for the agency to have in place policies, procedures and systems that 'will ensure' that the agency complies with Division 2 of the Exposure Draft and the Credit Reporting Code. Experian commented that 'this drafting suggests that if there were an isolated incident of non-compliance with either Division 2 or the Code, there may be an argument that the agency's entire systems have not met this standard, given that these systems did not ensure such compliance in relation to the isolated incident'. Experian submitted that a credit reporting agency should be obliged to maintain policies, procedures and systems that 'are designed/intended to ensure' compliance with Division 2 and the Code.[2]

6.8 Subsections 105(3) and (4) provide for the policy about the management of credit reporting information held by a credit reporting agency. The AFC stated that the prescriptive approach taken to mandating the contents of a privacy policy under subsection 105(4) appear to be at odds with the objective of high-level principles. The AFC recommended that subsection 105(4) be omitted and that the Australian Information Commissioner provide guidance on the content of privacy policies.[3]

Committee comment

6.9 In relation to Experian's comments that onerous standards are being placed on credit reporting agencies, the committee considers that this is not the case. The obligations to ensure that that credit reporting information is managed appropriately must reflect the wider range of information being collected, used and disclosed and the potential damage to individuals that may be caused through mismanagement of that information. The committee notes the concerns with subsection 105(2) in regard to the obligation that the agency have in place policies, procedures and systems that 'will ensure' that it complies with Division 2. This provision reflects the 'will ensure' formula in APP 1. In its first report on the Exposure Draft of Australian Privacy Amendment Legislation, the committee noted the comments of the Department of the Prime Minister and Cabinet (the department) which stated, in relation to APP 1, that:

> It was the Government's intention for the compliance standards on agencies and organisations to be sufficiently high to enhance privacy protections.

1 Australian Privacy Foundation, *Submission 33a*, p. 8.

2 Experian, *Submission 46*, p. 14.

3 Australian Privacy Foundation, *Submission 33a*, p. 8.

> The 'will ensure' obligation was included so that privacy protections are built into the design of an entity's system and not 'bolted on' afterwards.[4]

6.10 The committee supports this approach.

6.11 The committee received comments during the first part of its inquiry into the Exposure Draft of Australian Privacy Amendment Legislation regarding the prescriptive approach taken regarding privacy policies in APP 1.[5] The committee concluded that the benefits to transparency and overall compliance with the privacy principles outweighed concerns about compromising the aim of high-level principles. The committee maintains this view and supports the inclusion of matters to be addressed by privacy policies regarding credit reporting information in the new Privacy Act.

Subdivision C – Collection of credit information

6.12 Subdivision C prohibits credit reporting agencies from collecting credit reporting information about an individual except in certain circumstances including that the information is collected from a credit provider which is permitted by the Act to disclose the information or is collected from an entity other than a credit provider in the course of carrying on a credit reporting business and the information relates to an individual who is at least 18 years old. The subdivision also implements obligations in dealing with unsolicited credit information.

6.13 The provisions of paragraphs 106(4)(c) and (d) concern persons under 18 years of age, that is, collection is prohibited unless:

- the credit reporting agency knows, or believes on reasonable grounds, that the individual is at least 18 years of age; and
- the information does not relate to an act, omission, matter or thing that occurred or existed before the individual turned 18. (See also subsection 132.)

6.14 The Law Institute Victoria (LIV) submitted that subsection 106(6) relating to the exception for credit liability information attained prior to an individual turning 18 years of age, should be clarified so that it is apparent whether this concerns only details of contracts or if it extends also to defaults or payments prior to turning 18.[6]

6.15 Experian commented on the requirement in subsection 106(7) that credit reporting agencies only collect credit information 'by lawful and fair means'. Experian

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4 Senate Finance and Public Administration Legislation Committee, *Exposure Draft of Australian Privacy Policy Amendment Legislation: Part 1 – Australian Privacy Principles*, June 2011, pp 46–47.

5 Senate Finance and Public Administration Legislation Committee, *Exposure Draft of Australian Privacy Policy Amendment Legislation: Part 1 – Australian Privacy Principles*, June 2011, pp 47–51.

6 Law Institute of Victoria, *Submission 36a*, p. 2.

commented that it is not clear what the addition of a standard of fairness is intended to achieve in this context, or how the means of collecting information by a credit agency would be assessed as fair or unfair. As credit reporting agencies generally collect credit information from credit providers and do not have relationships with the individuals to whom the data relates, 'it is unclear whether the standard of fairness under section 106(7) should be measured as between the agency and the credit provider, or as between the agency and individual data subjects'. Experian went on to state that in relation to credit providers, it is difficult to see why the contractual arrangements between commercial parties (many of whom are large and sophisticated) would need to be subject to a legislative standard of fairness. In relation to individual consumers, Experian considered that the existing consumer access, correction and dispute resolution rights under the Exposure Draft provisions achieve a fair outcome for consumers in relation to how credit reporting agencies handle, use and disclose their credit information. Experian concluded:

> ...that no additional policy objectives would be served by the additional imposition of a vague legislative standard of fairness relating to data collection.[7]

Committee comment

6.16 In relation to comments about subsection 106(7) that credit reporting agencies only collect credit information 'by lawful and fair means', the committee notes that this provision directly reflects APP 3(4). The 'by lawful and fair means' provisions are included in both Information Privacy Principle 1 and National Privacy Principle 1. The Privacy Commissioner has provided guidance in relation to this obligation and the committee would expect that similar guidance will be provided in relation to the credit reporting provisions.

Subdivision D – Dealing with credit reporting information etc

6.17 Subdivision D provides for permitted uses and disclosures of credit reporting information. The use or disclosure of credit reporting information for direct marketing is expressly prohibited except for pre-screening in certain circumstances. The subdivision also provides for:

- the use, disclosure and destruction of pre-screening determinations;
- the implementation of a ban on use or disclosure of credit reporting information where an individual believes on reasonable grounds that they have been, or are likely to be, a victim of fraud;
- prohibition on the adoption of government identifiers as the identifier of an individual; and
- the use and disclosure of de-identified information.

7 Experian, *Submission 46*, p. 14.

Section 108 – Use and disclosure of credit reporting information

6.18 Section 108 provides for the permitted uses and disclosures of credit reporting information held by a credit reporting agency. It expressly prohibits use or disclosure of credit reporting information for direct marketing.

6.19 The APF supported the additional restrictions on disclosure contained in subsections 108(3) to (5), compared to the equivalent APP 8, as these are justified for the 'privileged' credit reporting regime. However, the APF noted that paragraphs 108(2)(c) and (3)(f) provide for additional uses and disclosures if prescribed by the regulations. The APF questioned why these two provisions have been included as the necessary uses and disclosures have been thoroughly canvassed during the ALRC and subsequent consultation processes and it should be possible for the legislation to contain a definitive list.[8] In addition, the APF noted that paragraph 108(3)(d) provides for the right to disclose information to an enforcement body if that body believes that the individual has committed a serious credit infringement. The APF commented that this 'illustrates the problem...of merging the lender's opinion in relation to fraud with an opinion about the borrower's intentions based on failure to respond to correspondence etc'. The APF stated that paragraph 108(3)(d)(ii) should refer to the enforcement body being satisfied that the individual has committed 'fraud'.[9]

6.20 Subsection 108(5) requires that the credit reporting agency make a written note of a disclosure made under section 108. Subsection 110(7) provides for the same requirement in relation to use of credit reporting information for pre-screening. The APF submitted that it is unclear as to how this would be implemented in electronic records and/or automated systems and questioned the value of such a requirement as it is unclear who will access the notes. However, the APF considered that these notes/records should be included in an individual's credit report so that the individual can access them, and if necessary challenge them. The APF saw this as being particularly important in relation to disclosure for pre-screening.[10]

6.21 The LIV also commented on the use of written notes and stated that credit reporting agencies should be required to notify the individual when a written note is made of a disclosure under subsections 108(5) and 110 (7) as:

- the requirement of documenting uses and disclosures is of little consequence unless the individual knows that these uses and disclosures are occurring. Individuals should be provided with more knowledge, and therefore control, over the use and disclosure of their information
- without knowledge of disclosures, it would be difficult if not impossible to enforce. For example, the prohibition on use and

8 Australian Privacy Foundation, *Submission 33a*, p. 9.

9 Australian Privacy Foundation, *Submission 33a*, p. 9.

10 Australian Privacy Foundation, *Submission 33a*, p. 9.

> disclosure of false or misleading credit reporting information in clause 117 or the ability to make requests under sub-clause 110(5).[11]

6.22 Experian submitted that an additional use and disclosure of credit reporting information should be allowed. Experian stated that the Combating the Financing of People Smuggling and Other Measures Bill 2011 had been introduced to reform anti-money laundering and privacy legislation. The reforms will allow businesses regulated under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the AML/CTF Act) to more effectively and efficiently verify the identity of their customers. The reforms enable reporting entities under the AML/CTF Act to use credit reporting data to verify the identity of their customers, and introduces a number of privacy safeguards to ensure information is only used for the purpose of verifying identity.

6.23 Experian noted that the Legal and Constitutional Affairs Legislation Committee in its report on the Bill recommended that the Bill be passed subject to further investigation of options for introducing 'an appropriate oversight mechanism to monitor the handling of credit information for the electronic verification of identity pursuant to the Bill'.[12] Experian stated that it is supportive of the principle that credit reporting agencies should be allowed to use and disclose credit reporting information for the purposes of identity verification under the AML/CTF Act and awaits the introduction of this legislation.[13]

Section 109 – Permitted CRA disclosures in relation to individuals

6.24 Section 109 lists permitted credit reporting agency disclosures with related conditions. Section 136 similarly provides for permitted credit provider uses in relation to individuals.

6.25 The AFC commented that the intention of these two sections is to permit a credit provider to request disclosure, or a credit reporting agency to disclose credit reporting information to a credit provider, for internal management purposes of the credit provider that are directly related to the provision or management of consumer credit by the credit report. However, the disclosure by the credit reporting agency is on the basis of assessing an application for consumer credit – as covered by the first limb of the definition of consumer credit related purpose. The AFC submitted that it was concerned that 'these two components do not align given the first, namely the management of account, could occur at any time including after an application has been assessed and before the consumer credit is terminated yet the permitted disclosure arguably is limited to the initial assessment process'. The AFC commented that this may reflect a similar anomaly in the current Privacy Act credit reporting

11 Law Institute of Victoria, *Submission 36a*, p. 2.

12 Senate Legal and Constitutional Affairs Legislation Committee, *Combating the Financing of People Smuggling and Other Measures Bill 2011*, March 2011.

13 Experian, *Submission 46*, p. 13.

provisions and suggested that the revision may provide an appropriate opportunity to resolve this anomaly.[14]

6.26 The Consumer Credit Law Centre NSW (CCLC) comment on Item 5 of the permitted CRA disclosures which provides for credit reporting agencies to give any current credit providers default and payment information they have held for at least 30 days. The CCLC submitted that this information should not be disclosed at all as the potential harm that could arise from this disclosure outweighs the potential benefit. While section 136, Item 5 limits credit providers to using the information for 'the purpose of assisting the individual to avoid defaulting on his or her obligations in relation to consumer credit provided by the provider to the individual', the CCLC submitted that 'this could be interpreted very broadly, and once the disclosure is permitted, then its use may be difficult to monitor in practice'. The CCLC concluded:

> As a general rule, a person who is not in default on a contract should be permitted to continue with that contract until such time as it is paid, or they initiate an application for a hardship variation or otherwise seek to vary the contract. While some CPs have attempted to identify consumers at risk of hardship and take pro-active steps to work with those consumers, such measures should be offered and accepted on a voluntary basis. CCLC submits that default information should not be available to existing creditors unless it is for the purpose of credit assessment as a result of an application to increase the limit on an existing facility, or open additional facility with the same CP (in other words as already covered under item 1 of the Table in Section 109).[15]

Sections 110, 111, 112 – Credit reporting information for direct marketing including pre-screening

6.27 The ALRC recommended that the use or disclosure of credit reporting information for the purpose of direct marketing, including the pre-screening of direct marketing lists, should be prohibited (Recommendation 57–3). The Government did not accept the recommendation in full and indicated that the use or disclosure of credit reporting information for the purposes of pre-screening should be expressly permitted, but only for the purpose of excluding adverse credit risks from marketing lists.[16]

6.28 The ALRC noted that this was one of two significant aspects in which the Exposure Draft differed from the approach recommended in its review. The ALRC commented that while encouraging responsible lending may be one rationale for permitting pre-screening, there was a risk that pre-screening may be used as a 'half-measure' in assessing capacity to pay rather than a fuller inquiry. The ALRC also

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14 Australian Finance Conference, *Submission 12a, Attachment 2*, p. vii.

15 Consumer Credit Law Centre, *Submission 66*, p. 15.

16 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice*, October 2009, pp 116–117.

noted the concerns of consumer groups that pre-screening, by facilitating direct marketing of credit to individuals who have not applied for or expressed an interest in obtaining credit, will result in the granting of excessive amounts of credit. It was suggested, for example, that pre-screening may encourage the offering of 'pre-approved' loans or increased credit limits.[17]

6.29 The ALRC was of the view that pre-screening has the potential to facilitate more aggressive marketing of credit and, as it is a tool that may be used by credit providers in different ways, it will not automatically result in more responsible lending practices. The ALRC added that 'to ensure that pre-screening does promote responsible lending would require the enforcement of detailed rules relating to the criteria on which pre-screening may take place'.

6.30 The ALRC also pointed to the views of stakeholders that using credit reporting information in direct marketing more generally should be prohibited and commented that it is artificial to distinguish between 'selecting in' direct marketing prospects (that is, by using credit reporting information to generate a list) and 'selecting out' (that is, by pre-screening an existing list, in the way anticipated by the Exposure Draft). The ALRC concluded:

> ...that while pre-screening provides clear commercial advantages for credit providers through the better targeting of marketing. such commercial advantages do not outweigh the privacy and consumer protection concerns raised by pre-screening, and it should not be permitted.[18]

6.31 Consumer advocates did not support the inclusion of pre-screening in the credit reporting system. The LIV commented that credit reporting allows entities the use of credit information they would not otherwise have access to. Credit providers could 'pool' the information they collect through a credit reporting agency and use this to help identify potential customers. The LIV did not consider that the pool information should be used by credit reporting agencies for profit: information for one legitimate purpose should not then be sold and used for purposes which are beneficial to companies without the consent of individuals.[19]

6.32 The Consumer Action Law Centre (Consumer Action) was also of the view that pre-screening has no benefit, 'except that it allows credit providers to market their products more aggressively'.[20] Consumer Action commented:

> We understand why industry wants to use credit reporting information to pre-screen marketing offers. With direct marketing costing billions of dollars each year, all types of businesses would like to be able to better

17 Australian Law Reform Commission, *Submission 1a,* p. 2.

18 Australian Law Reform Commission, *Submission 1a,* p. 3.

19 Law Institute of Victoria, *Submission 36a,* p. 2.

20 Consumer Action Law Centre, *Submission 63,* pp 4–5; see also Financial Counsellors' Association of Queensland, *Submission 67,* p. 2.

> target their direct marketing campaigns to consumers who are more likely to take up the offers and be profitable to the business. In most cases the Government doesn't allow access to otherwise protected personal information for this purpose.
>
> However, the credit industry has argued that pre-screening is an aid to responsible lending, but the argument is nonsense...
>
> We don't accept that sending marketing material to some individuals who may later be rejected for credit is a risk to responsible lending – although we accept that it may reduce the effectiveness of a marketing campaign.
>
> In fact, we believe that being able to better target consumers for direct marketing (where there is a greater chance that applicants will be approved) can enable credit providers to be more aggressive with their marketing message.[21]

6.33 Ms Karen Cox, Consumer Credit Legal Centre NSW (CCLC), also did not support the inclusion of pre-screening and stated:

> We would rather that they did not do pre-screening at all. The reason for that is simply that it makes them feel safer about using that as a marketing strategy, whereas we would rather that people applied for credit than having been selectively marketed to. Therefore we oppose any tool that allows them to better direct that marketing, because we do not think it is an appropriate way of approaching people. We think that people are well aware of the availability of credit, that most credit providers have a lot of general marketing out there and that you do not need the personalised marketing that that sort of tool [facilitates]. We have seen a lot of people over the years who have been lured into borrowing far more than they can through that type of personalised marketing.[22]

6.34 While Consumer Action recommended that pre-screening be prohibited, in the event that this did not occur, Consumer Action sought tighter restrictions on pre-screening so that credit providers cannot choose information to profile the customers to be used in each specific marketing campaign. Consumer Action recommended that pre-screening be limited to only exclude consumers where their credit file contains bankruptcy, court judgments, serious credit infringements and/or defaults. In addition, Consumer Action recommended that:

- either subsections 110(2) and 110(3) be amended to prevent pre-screening being used to select individuals on the basis that those individuals have defaults; and

21 Consumer Action Law Centre, *Submission 63,* pp 4–5.

22 Ms Karen Cox, Coordinator, Consumer Credit Legal Centre NSW, *Committee Hansard,* 16 May 2011, p. 32.

- subsection 110(2) be amended to be clear that certain identifying information cannot be used for the purposes of selecting who will receive marketing information.[23]

6.35 The APF described section 110 as 'oddly constructed' and commented that it needed to be carefully reviewed to ensure that it did not allow too wide a use. The APF went on to state that pre-screening could easily be 'reverse engineered' to have the practical effect of targeted marketing of credit, which was not supported by the Government. The APF commented:

> As worded, s.110(2) actually confirms that pre-screening is a form of direct marketing – the opposite of the policy intention. We note that pre-screening can't use repayment history or liability information. We assume that identifying information – gender, date of birth, prior addresses – can be accessed for pre-screening in order to identify the individuals to be removed from the list. However, it should be clear that this information can't be used for the pre-screening process itself.[24]

6.36 The APF went on to state that given the limited amount of data that can be used in pre-screening, it appears that in allowing credit providers to determine the eligibility requirements, some credit providers may only choose to exclude people with no defaults; more than one default etc. The APF stated that if pre-screening is to allow offers to be made to consumers who have defaults, it questioned the benefits (if any) of pre-screening in contributing to responsible lending.[25]

6.37 CCLC also commented on the information to be used for pre-screening purposes and submitted that rather than the legislation excluding the types of information that can be used, it would be preferable for the legislation to carefully define the pieces of information that can be used for pre-screening. That information should be limited to default information, court proceedings information and personal insolvency information.[26] The CCLC concluded that identifying information should be used only for the purpose of identifying the person, not for setting pre-screening criteria. CCLC also stated that pre-screening should only be permitted for screening people out as some fringe players target those with negative indicators 'with a view to extracting exorbitant fees and charges from borrowers in desperate situations'.[27]

6.38 Finance industry stakeholders supposed the inclusion of the pre-screening provisions to exclude credit risks from marketing lists. The Australian Finance Conference (AFC) stated that 'the formal acknowledgement of this process should provide compliance comfort. The ability to utilise the process will continue to enhance

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23 Consumer Action Law Centre, *Submission 63*, pp 5–6.

24 Australian Privacy Foundation, *Submission 33a*, p. 9.

25 Australian Privacy Foundation, *Submission 33a*, p. 10.

26 Consumer Credit Legal Centre NSW, *Submission 66*, p. 14.

27 Consumer Credit Legal Centre NSW, *Submission 66*, p. 14.

the responsible lending practices of our Members.'[28] Experian also supported the inclusion of this provision as it argued that it will allow credit providers to 'reduce the volume of their direct marking campaigns and reduce the likelihood that persons to whom additional credit should not be extended will not be targeted with further offers of credit'.[29]

6.39 Mr Carlo Cataldo, ARCA, noted that ARCA members supported pre-screening and stated:

> There is one area that pretty much all stakeholders agree on, including ARCA members and others, and that is that this information is not to be used for marketing purposes, and only for credit-related purposes, whether that be fraud or responsible lending or avoiding over-commitment. We would refer to the UK example, where there is no direct marketing allowed, but in the circumstances where credit providers would be accessing marketing lists, they would have the ability to wash that, or ensure that consumers who would not meet their credit, or not be likely meet their credit obligations, that is passed by the bureau. That is commonly known as 'pre-screening', and as part of our submission we would certainly support pre-screening to be part of the allowable uses going forward.[30]

Opt out provisions

6.40 Subsection 110(5) provides an option for individuals to opt out of pre-screening activities. The ABA commented that this provision was inconsistent with proposed credit card reforms which provide for an express opt in to receive credit limit increase invitations as defined in the *National Consumer Credit Protection (Home Loans and Credit Cards) Act 2011*. The ABA went on to comment that:

> From best practice regulation and compliance systems perspectives it is undesirable to have a different approach and compliance practice for one form of credit product (i.e. credit cards) with respect to direct marketing and another for other credit products. A customer might opt out of the pre-screening process but opt in to receive credit limit increase invitations only to be disregarded in a credit card marketing exercise on the very aspect the customer has sought to be included. This could include a customer with a questionable credit history seeing an opportunity to stay on a credit marketing list and avoid a pre-screening process by opting out of pre-screening but opting in to receive credit card limit increase invitations.
>
> Of course, by the consumer not opting out of pre-screening it would be necessary for the customer to opt in to receive credit limit increase invitations.[31]

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28 Australian Finance Conference, *Submission 12a, Attachment 2,* p. vii.

29 Experian, *Submission 46*, p. 16.

30 Mr Carlo Cataldo, Chairman, Australasian Retail Credit Association, *Committee Hansard*, 16 May 2011, p. 13.

31 Australian Bankers' Association, *Submission 15a*, p. 6.

6.41 The ABA concluded that it would be better, in the interests of consistency in the law and customer experience, for the customer who has not opted out of pre-screening to be treated as willing to receive credit card limit increase invitations (as ultimately defined in the National Consumer Credit Protection (Home Loans and Credit Cards) Act).[32]

6.42 The APF also commented on the opt out provision and stated that it will not work well as there is no direct relationship/contact between the individual and a credit reporting agency. The APF argued that it is 'unrealistic' to rely on individuals 'finding' a credit reporting agency to opt out. Rather, individuals must be given the opportunity via their direct relationship with a credit provider. The APF submitted that as subsection 110(2) purports to regulate pre-screening by a credit reporting agency on behalf of a credit provider, an obligation to offer an opt out from pre-screening should therefore be included in Part A Division 3 (Credit providers).[33]

6.43 The LIV commented that, while it did not support the pre-screening provisions, if they were retained it should reflect the APPs by requiring credit reporting agencies to provide a 'simple means' by which an individual can request to opt out. The LIV suggested that when a 'pre-approval' letter is sent under the branding of a credit provider, it should clearly identify the credit reporting agency to which a request not to use the information should be sent and explain the process for making such a request.[34]

6.44 ARCA noted that section 112 provides for the destruction of pre-screening determinations while pursuant to section 111(3) a credit reporting agency must make a written note of any disclosure of a pre-screening determination. This requires keeping a record of pre-screening determinations. ARCA recommended that to avoid contradiction, and in order to facilitate auditing of the pre-screening process, the records should be kept for at least some period of time, even if they are legally deemed no longer useable for any other purpose.[35]

Section 115 – Use and disclosure of de-identified information

6.45 A number of submitters raised concerns with the provisions relating to de-identified information. Section 115 of the Exposure Draft prohibits the use of de-identified information possessed or controlled by a credit reporting agency except if the use is for research purposes 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. Subsection 115(4) lists some of the specific matters the rules may relate to including:

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32 Australian Bankers' Association, *Submission 15a*, p. 7.

33 Australian Privacy Foundation, *Submission 33a*, p. 9.

34 Law Institute of Victoria, *Submission 36a*, p. 2.

35 Australasian Retail Credit Association, *Submission 48*, p. 17.

- the kinds of de-identified information that may or may not be used for the purposes of conducting 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; and
- how the research is conducted.

6.46 Section 180 defines de-identified information as 'credit information that is no longer personal information'.

6.47 The APF considered that there is too much discretion in the wording of this section as the Information Commissioner 'may make' Rules and suggested that there should be an obligation on the Information Commissioner.[36]

6.48 The LIV considered that credit reporting agencies should not be able to charge for de-identified information. While allowing information to be used for the purpose of research provides a public benefit, credit reporting agencies should not use information for their financial benefit.[37]

6.49 However, industry submitters did not support the regulation of de-identified information.[38] ARCA, for example, commented:

> The approach taken to the regulation of de-identified data is an example of this attempt to so prescriptively regulate one aspect of Australia's information economy, without considering the principles for which it is being regulated. Restricting the uses of de-identified data through the Privacy Act is an unusual approach to information management, particularly as this data is no longer 'private' information.[39]

6.50 The ANZ Bank similarly stated that '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'.[40]

6.51 Submitters also considered that restrictions on de-identified information would restrict research and development of innovative, new risk assessment tools, as any use of such data to develop these new tools would need to be approved in advance by the regulator on the basis of the research being in the public good.[41] The NAB

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36 Australian Privacy Foundation, *Submission 33a*, p. 11.

37 Law Institute of Victoria, *Submission 36a*, p. 3.

38 See for example, National Australia Bank, *Submission 2a*, p. 4; ANZ Bank, *Submission 64*, p. 15.

39 Australasian Retail Credit Association, *Submission 48*, p. 10.

40 ANZ Bank, *Submission 64*, p. 15.

41 National Australia Bank, *Submission 2a*, p. 4; Australasian Retail Credit Association, *Submission 48*, p. 10.

argued that this requirement would impose 'a challenge to build the case before the analysis is actually undertaken'.[42]

6.52 The NAB and ARCA concluded that the inclusion of these provisions would place new, complex obligations on credit reporting agencies and involve significant administrative costs. The NAB also commented that there would be no discernable consumer benefit and opportunities for product innovation and better and more targeted risk assessment to promote responsible lending would be lost. The NAB and ARCA called for these provisions to be removed.[43]

6.53 The ANZ Bank noted that credit providers currently use de-identified information to develop and maintain credit scorecards. The ANZ Bank stated that scorecards are vital tools in assessing credit applications, identifying high risk credit exposures and helping ensure that a credit provider lends responsibly. Thus limiting use of de-identified information will result in credit providers being unable to refine and improve their credit risk assessments.[44]

6.54 Experian was also of the view that de-identified information should not be regulated under the Privacy Act or that any consumer protection policies would be served by the imposition of the restrictions proposed under section 115. Experian went on to state that the 'imposition of such restrictions would potentially impair the ability of CRAs and credit providers to undertake appropriate statistical analysis in order to develop better credit information services and better risk assessment tools that enhance responsible lending practices'.[45]

6.55 Dun & Bradstreet commented that section 115 appears to allow the use of data for research related purposes 'but is ambiguous about the permissible outcome or purpose of that research'. Dun & Bradstreet were therefore concerned that there may be some uncertainty about the lawfulness of what is regular practice by credit reporting agencies. Dun & Bradstreet concluded:

> Given the centrality of CRAs to the removal of information asymmetries in the credit assessment and management process any ambiguity about the lawfulness of such practices should be removed. Accordingly, Dun & Bradstreet believes section 115 should be removed from the *Exposure Draft Bill.*[46]

6.56 The OAIC noted that 'this approach is the first time that the Privacy Act would regulate the use of de-identified information' as such information ordinarily

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42 National Australia Bank, *Submission 2a*, p. 4.

43 National Australia Bank, *Submission 2a*, p. 4; Australasian Retail Credit Association, *Submission 48*, p. 10.

44 ANZ Bank, *Submission 64*, p. 15.

45 Experian, *Submission 46*, p. 13.

46 Dun & Bradstreet, *Submission 47*, p. 11.

falls outside the Privacy Act's coverage. The OAIC went on to note that, generally, using de-identified information for research is potentially less privacy-invasive than using identified information provided that it is adequately protected from being used to re-indentify individuals and that individuals are informed, when practicable, that their information may be de-identified and used for research purposes.

6.57 The OAIC pointed to a number of matters in relation to section 115:

- use of de-identified information is permitted but not disclosure, this may require credit reporting agencies to conduct research in-house, rather than using research firms or specialists, and may also prevent disclosing de-identified information to other parties, such as consumer groups or legal centres which do their own research or to the OAIC itself; and
- paragraph 115(2)(b) should clarify whether the rules to be issued by the OAIC must be in place before any research is permitted as the term 'any Australian Privacy Rules' would not prevent research occurring prior to rules being developed. The use of the word 'any' is not used in existing research provisions in the Privacy Act, rather research can proceed 'in accordance with binding' guidelines is used.[47]

Committee comment

6.58 The Government accepted in part the ALRC's recommendation in relation to direct marketing. The Government stated that pre-screening should be allowed:

> The Government acknowledges the ALRC's views on the use or disclosure of credit reporting information for the purpose of pre-screening direct marketing lists. However, the Government considers that, on balance, the use or disclosure of credit reporting information for the purposes of pre-screening should be expressly permitted, but only for the purpose of excluding adverse credit risks from marketing lists.[48]

6.59 The Government Response indicated that specific requirements would be put in place for pre-screening and that adequate evidence must be maintained to show compliance with the requirements.[49]

6.60 The committee has considered the comments provided by consumer advocates and acknowledges their concerns about the use of pre-screening. The committee considers that some of these concerns will be addressed through the Credit Reporting Code of Conduct or by guidance from the Information Commissioner. However, the

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47 Office of the Australian Information Commissioner, *Submission 39a*, p. 23.

48 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice*, October 2009, p. 116.

49 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice*, October 2009, p. 117.

committee considers that consideration be given to opt in provisions rather than opt out provisions in relation to pre-screening activities. In this regard, the committee has noted the comments of the ABA concerning consistency with the *National Consumer Credit Protection (Home Loans and Credit Cards) Act 2011*. The committee considers that the opt out should be reviewed to ensure consistency of approach across the credit regulatory regime.

Recommendation 15

6.61 The committee recommends that the opt out provisions in section 110 be reviewed to ensure consistency with other consumer credit regulatory regimes.

6.62 In relation to de-identified information, the committee considers that it is appropriate that this information is regulated. The ALRC noted that credit information is used by credit reporting agencies for research purposes.[50] The use of this information for research or other purposes is a secondary use of the credit reporting information. The ALRC also recommended (Recommendation 57–2) that there should be a general provision permitting secondary uses of credit reporting information. The Government did not accept this recommendation. The Government's view was that permitted secondary uses should be expressly prescribed in the legislation, and no other secondary uses should be permitted. The Government stated:

> The Government does not support the ALRC's recommendation as it would allow credit reporting information to be used and disclosed for a number of unknown purposes. This in turn would significantly reduce the value of the credit reporting provisions to promote transparency and consistency for individuals concerning appropriate uses and disclosures of credit reporting information. In effect, the ALRC's recommendation would be contrary to the requirement to have defined uses and disclosures as outlined in recommendation 57–1 and would undermine the purpose of having specific provisions which operate in addition to the general 'use and disclosure' principle. While the ALRC proposed to limit the discretion in relation to secondary uses and disclosures by specifically defining the primary purpose, the Government is not convinced that greater use or disclosure of credit reporting information should be subject to a broad discretion exercised by credit providers or credit reporting agencies.[51]

6.63 However, the Government recognised that research was a legitimate secondary use. It was further considered that research should only be conducted on de-identified information.

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50 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1965.

51 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice*, October 2009, p. 115.

6.64 While some submissions have argued that the de-identified information is no longer personal information and so should not be regulated, the committee does not support this view. The committee considers that it is appropriate that secondary uses of credit reporting information should be identified and regulated, not left to a general test. However, the committee has noted the comments of the OAIC and considers that these two matters should be addressed.

Recommendation 16

6.65 The committee recommends that section 115 be reviewed in light of the Office of the Australian Information Commissioner's comments relating to disclosure of de-identified information and the rules to be issued.

Subdivision E – Integrity of credit reporting information

6.66 Subdivision E provides that credit reporting agencies must take such steps as are reasonable in the circumstances to ensure that the credit information it collects, uses and discloses is accurate, up-to-date and complete as well as relevant when used or disclosed. Credit reporting agencies must also take steps to ensure the security of credit reporting information.

Section 116 – Quality of credit reporting information

6.67 Section 116 provides, in part, for credit reporting agencies to enter into agreements with credit providers that require the provider to ensure that information disclosed is accurate up-to-date and complete. Section 118 similarly provides for security of information. Dun & Bradstreet noted that data quality is integral to the operations of a credit reporting agency and they 'have a direct commercial interest in maintaining the highest levels of data quality and therefore are an appropriate entity to ensure the required standards are understood and adhered to through its contractual agreements with customers'. Thus the provisions requiring credit reporting agencies to ensure data quality will enhance the capacity of credit reporting agencies to ensure credit providers maintain high standards of quality and security.[52]

6.68 Westpac however, did not support the requirements of section 116 and 118 and commented:

> We think it is very unusual for legislation to prescribe the specific steps that an entity must take to ensure compliance with such a broad obligation.[53]

6.69 Westpac went on to state that paragraphs 116(3)(a) and 118(2)(a) require higher standards than APP 10. In relation to paragraph 116(3)(a), the contract between credit reporting agencies and credit providers must 'ensure credit information is…' rather than reflecting APP 10 ('take such steps (if any) as are reasonable in the circumstances to ensure the personal information is…'). Similarly, paragraph

52 Dun & Bradstreet, *Submission 47*, p. 12.

53 Westpac, *Submission 13a*, p. 2.

118(2)(a) requires the contract to 'protect credit reporting information' rather than reflecting APP 10 ('take such steps as are reasonable in the circumstances to protect the information'). Westpac argued that:

> A credit provider should only be required to meet the standards set out in the APPs. It is unable to warrant to third parties that all information is accurate, up-to-date, and complete as it can only make best endeavours to ensure this is the case. Furthermore to audit the agreements an independent person would need access to the credit reporting agency information. For completeness this should be captured as a 'Permitted CRA disclosure'.[54]

6.70 ARCA commented that it did not consider that sections 116 and 118 'alone are adequate to properly ensure compliance with quality and security requirements desired for credit information'. ARCA argued that data quality and data security are fundamental components of the credit reporting system but that compliance is placed within the context of a contractual matter between credit reporting agencies and credit providers. ARCA was of the view that this required credit reporting agencies to police their own customers which ARCA considered not to be in the interests of either credit reporting agencies or credit providers for credit reporting agencies to be held solely responsible for this compliance function. Rather, ARCA recommended that:

> Compliance with data quality and data security measures be included in the proposed Code of Conduct, rather than solely relying on contracts between CRAs and Credit Providers.[55]

6.71 Veda Advantage submitted that it would be desirable, for compliance purposes, to expressly state (as part of section 116) that a credit reporting business is responsible for compliance with the applicable data standards and must have systems or arrangements in place to facilitate such compliance. Express obligations are provided for credit providers in respect of accuracy of credit eligibility information (sections 143 and 144) however Veda noted that there are no corresponding credit provider obligations in respect of credit information. Veda submitted that it would be desirable to mirror these obligations that would potentially apply to similar types of personal information and thus avoid confusion, assist with compliance and align the responsibilities as proposed in section 116. Veda concluded that:

- the scope of section 116 be expanded to include the additional responsibilities or powers; and
- responsibility for accuracy of credit information and credit eligibility information is aligned.[56]

6.72 Dun & Bradstreet also submitted that independent audits and reviews are appropriate as access to large volumes of personal information impose a higher

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54 Westpac, *Submission 13a*, p. 2.

55 Australasian Retail Credit Association, *Submission 48*, p. 12; see also Westpac, *Submission 13a*, p. 2.

56 Veda Advantage, *Submission 65*, pp 40–41.

standard of responsibility upon commercial entities than may normally be the case. Dun & Bradstreet noted that under the current Privacy Act audits are to be conducted by the Office of the Privacy Commissioner. Dun & Bradstreet suggested that this should remain with the Office of the Australian Information Commissioner under both paragraphs 116(3)(b) and 118(2)(b) of the new Privacy Act.[57]

6.73 However, Experian submitted that the imposition of specific obligations on credit reporting agencies to obtain regular audits of agreements would be an excessive and costly compliance burden on credit reporting agencies. In addition, there are obligations already embodied in a non-prescriptive form in the general obligation imposed under subsection 116(1), which requires credit reporting agencies to take reasonable steps to ensure that the information collected is 'accurate, up-to-date and complete'.

6.74 Experian suggested that it was not appropriate for particular controls to be prescribed in the provisions. Rather, credit reporting agencies should only be required to have reasonable systems and controls in place, and to undertake reasonable monitoring and audit of those systems in a manner that is consistent with their general obligations under section 116(1). Guidance notes issued by the Australian Information Commissioner could outline specific regulatory expectations regarding the auditing of these systems.[58]

6.75 If subsection 116(3) were to be retained, Experian submitted that the formulation of these obligations requires further clarification:

- the meaning of 'regular' independent audits should be made clear; and
- materiality thresholds should be imposed upon the scope of the auditor's role and the responsibility of a credit reporting agency to identify and deal with suspected breaches. For example, the auditor's role should be confined to considering significant instances of non-compliance or unusual credit provider activity identified by the credit reporting agencies internal systems and controls, and whether there is evidence of any material systemic weaknesses in those controls.[59]

Committee comment

6.76 The committee considers that the requirement for credit reporting agencies to enter into agreements to be an appropriate mechanism to ensure quality and security of credit reporting information. Given the access to five new data sets, the committee considers that a higher standard should be provided for in the credit reporting regime. In relation to independent audits of agreements, the committee considers that the responsibility and cost should be borne by the industry as industry reaps the benefit of

57 Dun & Bradstreet, *Submission 47*, p. 12.

58 Experian, *Submission 46*, pp 18–19.

59 Experian, *Submission 46*, pp 18–19.

quality data and should ensure appropriate security of data. Matters where clarity is required, such as the meaning of 'regular', should be addressed either by the OAIC or in the Credit Reporting Code of Conduct.

Subdivision F – Access to, and correction of, information

6.77 Subdivision F provides for access to, and correction of, credit reporting information. The subdivision provides for the manner of dealing with requests, means of access, charges for access and refusals to give access. A credit reporting agency is obliged to correct information if the agency is satisfied that it is not accurate, up-to-date, complete and relevant. Individuals may request corrections to certain types of information held by a credit reporting agency.

Section 119 – Access to credit reporting information

6.78 Section 119 provides for access to credit reporting information. Subsection 119(1) introduces the new concept of 'access seeker'. The APF commented that this is a valuable new concept. The APF also noted that there are very limited exceptions (subsection 119(2)), compared to APP 12. This, the APF stated, is appropriate in a credit reporting context.[60]

6.79 The joint submission from privacy and consumer organisations commented on the importance of ensuring that consumers have access to their credit reports as more information will be collected, including repayment histories. Subsection 119(5) proposes that an access seeker be provided with credit reporting information with no charge once every 12 months. A credit provider may charge for all other instances of access, but the charge must not be excessive (subsection 119(6)). Submitters argued that only one free request per year is too restrictive, particularly in the case when requests are associated with dispute resolution etc.[61] The NAB also commented that the provision appears to reduce an individual's access rights as under the current Privacy Act an individual can pay to receive a copy of their credit report within 24 hours. However, subsection 119(3) only refers to a reasonable period, but not longer than 10 days.[62]

6.80 The joint submission went further and stated that:

> The starting point should be that consumers have the right to access one free copy of their credit report at least once a year, with a 24 hour

60 Australian Privacy Foundation, *Submission 33a*, p. 11.

61 Australian Privacy Foundation, *Submission 33a*, p. 11; Legal Aid Queensland, *Submission 60*, p. 2; Consumer Credit Legal Centre NSW, Consumer Action Law Centre, Financial Counselling Australia, Australian Privacy Foundation, Financial and Consumer Rights Council Inc, Consumer Law Centre of the ACT, *Submission 70*, p. 3.

62 National Australia Bank, *Submission 2a*, p. 6.

> turnaround or when involved in a dispute. Consumers should be able to apply for such a report online, by mail or fax.[63]

6.81 Dun & Bradstreet considered that the provisions make it more difficult and cumbersome for a consumer to obtain a copy of their credit report, particularly if more than one copy is sought per year. Dun & Bradstreet noted that the current provisions allow for multiple requests during a twelve month period without a fee if that request is fulfilled within a ten day period. Dun & Bradstreet concluded:

> The new provisions would limit an individual's access to their personal credit report without incurring a fee to just one occasion per year. Such an outcome is likely to limit consumers' ongoing interaction with their personal credit report and would seem contrary to efforts to improve consumer literacy about credit reports and their role in the credit process.[64]

6.82 The joint submission noted that while the current Privacy Act provides for free access to credit reports, credit reporting agencies are currently charging fees for fast turnaround copies and do not provide consumers with the same level of information about accessing free reports. In the case of Veda Advantage, information about free reports is provided 'in the fine print at the bottom of the web page' and applications must be made by mail. The submission stated that the processes for Dun & Bradstreet are more straightforward for consumers who want to get a free report. The joint submission concluded:

> In short, neither the current legislative framework [nor] that proposed in the Exposure Draft Bill builds in an incentive for credit reporting agencies to reduce barriers to consumers accessing free copy of their credit report. Instead there are incentives to make it both difficult to find out about the free report and then difficult to apply for it.[65]

6.83 The joint submission also recommended that the Exposure Draft include an obligation to promote the right of access to a free credit report (at least at the same level as any service incurring a fee) and impose an obligation to make the process as simple as possible for consumers.[66]

6.84 The joint submission submitted that, rather than the term 'not excessive', credit providers should only be able to charge a 'reasonable fee'. The joint submission noted

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63 Consumer Credit Legal Centre NSW, Consumer Action Law Centre, Financial Counselling Australia, Australian Privacy Foundation, Financial and Consumer Rights Council Inc. and Consumer Law Centre of the ACT, *Submission 70,* p. 2.

64 Dun & Bradstreet, *Submission 47,* p. 15.

65 Consumer Credit Legal Centre NSW, Consumer Action Law Centre, Financial Counselling Australia, Australian Privacy Foundation, Financial and Consumer Rights Council Inc. and Consumer Law Centre of the ACT, *Submission 70,* p. 3.

66 Consumer Credit Legal Centre NSW, Consumer Action Law Centre, Financial Counselling Australia, Australian Privacy Foundation, Financial and Consumer Rights Council Inc. and Consumer Law Centre of the ACT, *Submission 70,* p. 3.

that the fees currently charged for fast turnaround reports were $41.95 (Veda Advantage) and $30 (Dun & Bradstreet). The joint submission viewed these as excessive 'for what appears to be an electronic process'. It was noted that as a third credit reporting agency has entered the market, if a consumer needs a report urgently, they may have to pay a fee to all three.[67]

6.85 Other submitters suggested that the charge be levelled at no more than the actual cost incurred by the credit reporting agency in providing the information.[68] The LIV went further and stated that charging for access should be prohibited. The LIV noted that credit reporting agencies rely on individuals' credit information for their business. As the ultimate 'suppliers' of that information, individuals should have access to that information whenever they want without charge. Further, greater access by consumers is one way of ensuring compliance with the requirements on credit reporting agencies under the credit reporting system.[69]

Committee comment

6.86 The committee notes that the Exposure Draft now provides for a clear right for individuals to access one free credit report per year. While the Exposure Draft provides for only one free credit report, the committee considers that this is a minimum requirement. If credit reporting agencies decided to provide more than one free credit report per year, the committee considers this is a business decision for the agency to make. However, the committee is concerned that the same level of information is not provided for accessing free reports and those reports that attract a charge. The committee considers that the same level of information and prominence should apply to both.

Recommendation 17

6.87 The committee recommends that the Credit Reporting Code of Conduct include requirements in relation to the standard of information provided to a consumer in relation to accessing free credit reports and those for which there is a charge.

Section 120 – Correction of credit reporting information

6.88 Section 120 provides for the correction of credit reporting information. Veda Advantage commented that if information is corrected, the credit reporting agency

67 Consumer Credit Legal Centre NSW, Consumer Action Law Centre, Financial Counselling Australia, Australian Privacy Foundation, Financial and Consumer Rights Council Inc. and Consumer Law Centre of the ACT, *Submission 70,* p. 2.

68 Law Institute of Victoria, *Submission 36a,* p. 3; Legal Aid Queensland, *Submission 60,* p. 2; Consumer Credit Legal Centre NSW, Consumer Action Law Centre, Financial Counselling Australia, Australian Privacy Foundation, Financial and Consumer Rights Council Inc. and Consumer Law Centre of the ACT, *Submission 70,* p. 3.

69 Law Institute of Victoria, *Submission 36a,* p. 3.

must then notify any previous recipients in writing of the correction when it is made. No subsequent obligations exist for the recipients. Veda noted that corrections, of varying significance, can occur for credit information up to five years old. Veda submitted that the provision as drafted would create a substantial compliance regime for credit reporting agencies with no clear benefit for consumers. Veda supported a requirement for credit reporting agencies to notify, as requested by the consumer, credit providers whom have been recipients of the information.[70]

Section 121 – Individual may request the correction of credit information etc

6.89 The Energy & Water Ombudsman NSW (EWON) commented on the 30 day requirement for a credit reporting agency to make a correction. EWON stated that if inaccurate information is listed, 'it is fair and reasonable to the customer who has been adversely affected by this, that the incorrect credit information is corrected as soon as possible'. Thus EWON saw the 30 day period as 'excessive in these circumstances, particularly if this is 30 business days (ie equivalent to six weeks)'. If there is a valid reason for the delay, it was suggested that the credit reporting agency make an annotation to the file to note that a correction is pending. EWON also noted that this is not a penalty section and there appears to be no incentive for this correction to be carried out in a timely manner. EWON suggested that if the issue is not addressed in the Act, it should be addressed in the Credit Reporting Code.[71]

6.90 The TIO commented that the Exposure Draft confers a general responsibility on credit reporting agencies to correct information they find to be incorrect but no specific timeframe in which the correction is to be made. The TIO pointed to the *Telecommunications Consumer Protection (TCP) Code* which requires that where a telephone or internet company becomes aware that a customer has been default listed in error, they must inform the credit reporting agency within one working day. The TIO was of the view that the one day requirement in the TCP Code appears to recognise the significant detriment that can be caused by incorrect information on a person's credit file.[72]

6.91 Veda Advantage also commented on the fees charged by 'credit repair' organisations including fees to consumers for services such as obtaining a copy of their credit file. Veda Advantage submitted that fees are often substantial and a success fee, up to $1,000, may be imposed for each piece of derogatory information that a credit reporting agency investigates and removes from a credit report. As a consequence, vulnerable consumers may pay substantial fees for 'normal, regulated, credit reporting activities that would otherwise be free'. Veda Advantage went on to state:

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70 Veda Advantage, *Submission 65*, p. 18.

71 Energy & Water Ombudsman NSW, *Submission 51*, p. 3.

72 Telecommunications Industry Ombudsman, *Submission 69*, pp 6–7.

> Typically, the consumer would be exercising their legal rights of access and correction as provided for under the Act. It is unfair to charge the consumer for the mere exercise of their rights and detracts from the quality of legal protections that the Act specifically provides for.[73]

6.92 Veda Advantage recommended that only credit reporting agencies be permitted to impose a fee on provision of credit reports (in addition to the obligation to providing free reports) and that no entity be permitted to charge for investigation or amendment of a credit report. However, if third party organisations were permitted to provide such services, Veda Advantage recommended that rules prescribe fee disclosure to consumers by those organisations and expressly include that such organisations disclosure to the consumer that access to, and correction of credit information, when conducted by a credit reporting agency, is conducted for no fee to the consumer.[74]

Committee comment

6.93 The committee has discussed the timeframes for correction as part of its examination of complaints handling. See chapter 5 for the committee's conclusion and recommendation.

6.94 In relation to the matter raised by Veda Advantage, although the committee supports mechanisms to protect vulnerable consumers, the charging of fees by credit repair organisations is outside the scope of the Privacy Act and would more rightly be addressed through the National Consumer Credit Protection Act.

Section 122 – Notification of correction etc must be given

6.95 Section 122 provides for notification of corrections and when a correction is not made. The APF suggested that in instances where a notification is made not to correct information (subsection 122(3)), the credit reporting agency should have to notify rights and external dispute resolution scheme contact details with any notice of decision. In addition, the APF argued that subsection 122(4) provides too great a discretion for notice not to be given on grounds of impracticability, and there is no provision for an associated statement if a correction request is disputed.[75]

6.96 Experian commented on the requirement that notification of the correction must be provided to previous recipients of the information. Although subsection 122(4) provides an exception on the grounds of the impracticality of notifying previous recipients, Experian considered that a further exception should apply based on the 'likely relevance' of the corrected information to previous recipients. For example, if a significant period of time has elapsed since the receipt of the original

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73 Veda Advantage, *Submission 65*, p. 16.

74 Veda Advantage, *Submission 65*, p. 16.

75 Australian Privacy Foundation, *Submission 33a*, p. 11.

information, the corrected information will have little relevance to the recipient unless it needs to specifically reconsider the individual's credit arrangements, in which case an updated credit report would be sought. Experian therefore submitted that the obligation provide for an express time limit, for example, three to six months. An alternative approach would be to notify previous recipients of the corrected information only at the request of the individual, based on their views as to which previous recipients are relevant. Experian suggested that the imposition of limits based on relevance is consistent with the Government's response to the ALRC Recommendation 59–5.[76]

Committee comment

6.97 The committee considers that the provisions of subsection 122(4), that notice is not required to be provided to recipients 'if it is impracticable' for the credit reporting agency to do so, provides flexibility to agencies in complying with the notification obligation. The introduction of a further exception based on 'likely relevance' would introduce a subjective element to the obligation which the committee considers is not desirable.

Subdivision G – Dealing with credit reporting information after the retention period ends etc

6.98 Subdivision G provides for the destruction of credit reporting information after certain retention periods. Credit reporting information can also be destroyed in cases of fraud. In such an event, credit reporting agencies must notify third parties which had received that information.

6.99 Section 123 provides for the destruction of credit reporting information after the retention period ends. Submitters' comments related to the provisions of subsection 123(3) which requires a credit reporting agency not to destroy credit reporting information nor ensure that the information is not longer personal information if, immediately before the retention period ends, there is a pending correction request or a pending dispute. Dun & Bradstreet, for example, commented that this requirement seems unnecessary and potentially onerous from a systems development perspective in light of the fact that the information would otherwise qualify for destruction and no longer impact the consumer's credit profile. Accordingly, Dun & Bradstreet recommended that this sub-section should be removed from the Exposure Draft.[77] Veda Advantage commented that it is unclear how this provision will benefit consumers 'who presumably would rather see disputed/incorrect information drop off the credit file sooner as scheduled'.[78]

76 Experian, *Submission 46*, pp 21–22.

77 Dun & Bradstreet, *Submission 47*, pp 16–17.

78 Veda Advantage, *Submission 65*, p. 19; see also National Australia Bank, *Submission 2a*, p. 6.

6.100 Section 124 provides for the retention period for credit information except for personal insolvency information. The retention periods of two, five and seven years are provided for depending on the type of information retained by the credit reporting agency. Comments in relation to retention periods were received from Experian which stated that the two year retention period for positive data is very short by international standards. Experian considered that an extended retention period of five to seven years would be more appropriate and consistent with international standards. Experian concluded that:

> ...a retention period of five to seven years strikes an appropriate balance between the value and usefulness of the data for risk assessment purposes, whilst also ensuring that CRA credit reporting databases only contain data of appropriate quality and predictive value. Extending the retention period for positive data would also allow for robust modelling by CRAs.[79]

6.101 Dun & Bradstreet's comments went to the retention period of default information. The retention period of five years for default information starts on the day on which the credit reporting agency collects the information. However, Dun & Bradstreet stated that the day on which the credit reporting agency collects the default information is unlikely to be the day on which the default occurs. Dun & Bradstreet considered that the five year period should begin from the date of default, thus ensuring fairer outcomes for consumers.[80] ARCA provided similar comments and suggested that the provision could represent 'unfair' treatment of consumers and a lack of consistency in the underlying meaning of an item of data. ARCA recommended that retention periods commence within a specified period of the default actually occurring.[81]

6.102 The ABA also commented on the maximum permissible retention periods for credit information in relation to disputes. It was noted that consumers may lodge disputes with the Financial Ombudsman Service (FOS) up to six years after the disputant became, or ought to have become, aware of the incurring of a loss or within two years after an independent dispute resolution final response by the financial institution. Thus, retention periods of two and five years are insufficient and it would be preferable for the FOS periods to be aligned with the Exposure Draft from a privacy perspective.[82] The NAB and ARCA also raised a similar concern in relation to section 164 which allows the Information Commission to apply to the Court for an order within six years of an entity contravening a civil penalty provision.[83]

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79 Experian, *Submission 46*, p. 12.

80 Dun & Bradstreet, *Submission 47*, pp 16–17.

81 Australasian Retail Credit Association, *Submission 48*, pp 17–18.

82 Australian Bankers' Association, *Submission 15a*, p. 7.

83 Australasian Retail Credit Association, *Submission 48*, p. 19; National Australia Bank, *Submission 2a*, p. 9.

6.103 Section 126 requires the destruction of credit reporting information in cases of fraud. This provision was not supported by Veda Advantage which argued that destroying such information prevents credit reporting agencies from gaining insight into patterns of fraud behaviours. Veda supported the removal of the information from the credit report.[84]

6.104 Paragraph 126(4)(c) allows an individual to request the credit reporting agency to notify third parties to which the fraudulent information was disclosed that it has been destroyed. ARCA argued that this imposes impractical notification requirements as more than one credit reporting agency may be involved and consumers may not remember which credit reporting agencies a credit provider shares data with, even if they have been told when they applied for the credit. ARCA recommended that an alternative would be to allow the credit reporting agency to 'assign' responsibility to the credit provider who provided the credit to the fraudster to notify all of the credit reporting agencies they have shared the data with. The credit reporting agencies would then be required to report back to the credit provider that they have done so. The legislation could specify a time frame in which this should occur and then the credit provider could confirm to the consumer that the destruction has taken place.[85]

6.105 The NAB was of a different view, and suggested the credit reporting agency's obligation to notify a recipient that information has been destroyed should be automatic not just when an individual requests the credit reporting agency to do so.[86]

Committee comment

6.106 The ALRC canvassed issues relating to retention periods and came to the view that the retention periods prescribed in the current Privacy Act 'provide an important protection for consumers'. The ALRC did not see any compelling case for changing the existing retention periods. The ALRC's recommendation (Recommendation 58–5) was accepted by the Government and the committee supports the retention provisions in the Exposure Draft.

6.107 The committee has noted the comments concerning the provisions for the destruction of credit reporting information in cases of fraud. The committee does not support the retention of this information for research purposes as it may undermine consumer protections. In relation to the notification requirements, the committee does not consider these to be impractical or onerous. There are only four credit reporting agencies in Australia and the notification requirements reflect the serious consequences to consumers in cases of fraud. However, the committee has noted the views of the NAB in relation to the automatic notification of recipients of the destruction of credit reporting information in cases of fraud. The committee also notes

84 Veda Advantage, *Submission 65*, p. 19.

85 Australasian Retail Credit Association, *Submission 48,* pp 17–18.

86 National Australia Bank, *Submission 2a*, p. 6.

that a requirement to notify recipients of a correction of personal information is contained in subsection 122(2). The committee considers that, given the serious consequences of fraud, automatic notification of destruction of information may have merit.

Recommendation 18

6.108 The committee recommends that consideration be given to providing in subsection 126(4) a general requirement for notification of destruction of credit reporting information to all recipients of credit reporting information in cases of fraud and not only limited to when an individual makes such a request.

Chapter 7

Credit provider provisions

Introduction

7.1 Division 3 sets out the rules for credit providers. The rules mainly apply to the handling of credit information or credit eligibility information as well as rules in relation to specific types of personal information. The rules apply to credit providers that are subject to the Australian Privacy Principles (APPs) in addition to, or instead of the APPs. The following discussion focuses on the major matters raised in relation to Division 3. Other issues raised in relation to specific provisions are listed in appendix 3.

Subdivision B – Dealing with credit information

7.2 Subdivision B provides for the collection of personal information and the disclosure of credit information to credit reporting agencies. Disclosure to a credit reporting agency is prohibited unless certain obligations are met including that the credit provider is a member of a recognised external dispute resolution (EDR) scheme and that the information relates to someone aged at least 18 years. This subdivision, at section 134, also provides for a limitation on the disclosure of credit information during a ban period. This matter was raised during the committee's hearings and discussed during the consultations between Veda Advantage and stakeholders. The issues in relation to ban periods are canvassed in chapter 4 of this report.

Section 131 – Additional notification requirements for the collection of personal information

7.3 Section 131 provides that a credit provider, at or before the time of collecting personal information about an individual, which is likely to be disclosed to a credit reporting agency, must notify the individual of the details of the credit reporting agency as well as notifying the individual of any matters specified in the Credit Reporting Code or ensure the individual is aware of those matters. These requirements are in addition to APP 5 for APP entities.

7.4 The Australian Finance Conference (AFC) commented that the notification requirement was a 'challenge' for credit providers, while Westpac added that it would result in high compliance costs for credit providers.[1] Westpac stated that at the time of collection, credit providers may not know which credit reporting agency or agencies will be used. Credit providers would have to include all credit reporting agencies which, Westpac argued, would involve significant costs 'when compared to the limited

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1 Australian Finance Conference, *Submission 12a, Attachment 2*, p. viii; Westpac, *Submission 13a*, p. 2.

benefit to the individual (insofar as CRAs are permitted to share this information)'. Westpac recommended that the requirement be removed.[2]

7.5 The National Australia Bank (NAB) noted that ALRC's recommendation on notification included a 'reasonableness' test in relation to the provision of notification by a credit provider to an individual. However, this has not been included in section 131. The NAB commented that a reasonableness test is required for phone applications to ensure that full notification disclosure can be provided as reasonably practicable after the verbal application is received.[3] The AFC also raised this point and stated that a reasonableness test would minimise compliance risk. The AFC submitted that a better approach may be to continue the current practice of requiring a customer to be informed at, or before, the time of collection in a general way about information exchanges between the credit provider and credit reporting agencies. The requirement for the provision of more specific details could then be at a later, more relevant point, for example, when a query is raised about accuracy of data following an access request.[4]

7.6 The Australian Privacy Foundation (APF) commented that the section leaves the detail of content of the required notice to the proposed Credit Reporting Code. The APF submitted that the detailed content requirements, as well as more specific requirements as to the timing of notice, should be included in the Act.[5]

Committee comment

7.7 The committee notes that the ALRC commented that it is important that there is a requirement that credit providers inform individuals about information handling by credit reporting agencies. Recommendation 56–10 included that 'a credit provider must take such steps as are reasonable, if any, to ensure the individual is aware of' certain matters.[6] The Government in accepting this recommendation stated that:

> The Government agrees that more specific 'notification' requirements should be placed on credit providers to provide notice to individuals about not only the credit providers own information handling practices but also about specific practices of a credit reporting agency. The Government considers it is appropriate that this notification should occur at or before the time of the collection of the personal information to be disclosed to the credit reporting agency (ie at the time of applying for credit) rather than at any other time.

2 Westpac, *Submission 13a*, p. 2.

3 National Australia Bank, *Submission 2a*, p. 7.

4 Australian Finance Conference, *Submission 12a, Attachment 2*, p. viii.

5 Australian Privacy Foundation, *Submission 33a*, p. 12.

6 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1885.

> These 'notification' requirements will ensure that individuals are fully aware of how their information will be utilised in the credit reporting system. Notice of credit reporting agencies' practices is important given that individuals will most often not receive this information directly from credit reporting agencies.[7]

7.8 The committee notes comments about the lack of a 'reasonable test'. Informing individuals about information handling practices is an important aspect of the credit reporting regime. The committee considers that the notification provisions of section 131 reflect this importance and it is appropriate that credit providers have a clear obligation to inform individuals. Thus a provision in relation to 'reasonableness' is not warranted. In addition, credit providers have a direct relationship with individuals accessing credit and therefore should ensure that their customers are fully informed of all aspects of obtaining credit and doing business with the credit provider.

Section 132 – Disclosure of credit information to a credit reporting agency

7.9 Section 132 prohibits the disclosure by a credit provider of credit information about an individual to a credit reporting agency except where certain obligations are met:

- the credit provider is a member of a recognised external dispute resolution (EDR) scheme; and
- the provider knows, or believes on reasonable grounds, that the individual is at least 18 years old; and
- the credit information does not relate to an act, omission, matter or thing that occurred or existed before the person turned 18; and
- if repayment history information is disclosed, the credit provider is a licensee under the *National Consumer Credit Protection Act 2009* (NCCP Act)*;* and the information relates to consumer credit for which the provider also discloses, or has previously disclosed, consumer credit liability information to the credit reporting agency; and the provider complies with any requirements relating to disclosure prescribed by regulations; and
- if default information is disclosed the credit provider notifies the individual in writing about the intention to disclose the information and a reasonable period has elapsed since the giving of the notice.

7.10 A number of substantial matters were raised in relation to the EDR scheme requirements. These matters are canvassed in the discussion on complaints handling in chapter 5 of the report. Comments regarding the requirement that the credit information does not relate to an act, omission, matter or thing that occurred or existed

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7 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, p. 113.

before the person turned 18 were also raised in relation to section 106. These matters are discussed in chapter 6.

7.11 The Office of the Australian Information Commissioner (OAIC) raised concern about the 'gap' in regulation of credit providers' disclosure of 'credit information' collected from sources other than a credit reporting agency, for example, collected from an individual in a credit application. The OAIC commented:

> '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. 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.[8]

7.12 The OAIC recommended that credit providers' disclosure obligations apply, at a minimum, to all 'credit information' in addition to 'credit eligibility information' (which only includes 'credit information' collected from a credit reporting agency). The OAIC argued that this may also better reflect the protection proposed in the Government Response.[9]

Requirement for credit provider to be a licensee

7.13 A credit provider must be a licensee under the *National Credit and Consumer Protection Act 2009* (NCCP Act) for credit information to be disclosed to a credit reporting agency. Dun & Bradstreet submitted that this has the effect of excluding a large number of organisations, such as telecommunication companies and energy utilities, from fully participating in the credit reporting system. Dun & Bradstreet argued that non-bank data is extremely valuable in the credit assessment process so that the unavailability of this data limits the capacity of the credit reporting system to meet the Government's aim of improving lending decisions. Dun & Bradstreet also pointed out that non-bank data has been included in the credit reporting regimes of overseas jurisdictions as it:

- is highly predictive of bank credit performance and therefore critical for effective responsible lending practices, for example, consumers who default on non-bank, low value debts (below $500) are 5.3 times more likely to default again on any other type of debt, including financial services debt;
- plays a critical role in establishing credit worthiness, thereby increasing the capacity for under-served consumers to access mainstream credit. In particular, access to fringe markets only may impede an individual's ability to

8 Office of the Australian Information Commissioner, *Submission 39a*, p. 13.

9 Office of the Australian Information Commissioner, *Submission 39a*, pp 13–14..

overcome financial difficulties as they may only have access to credit products at higher rates of interest than is available to the average consumer; and

- has an impact on collection practices – organisations prohibited from reporting the data will be at a distinct disadvantage in the payment process.[10]

7.14 While there are arguments that the inclusion of non-bank repayment data will prevent some people from accessing mainstream banking products, Dun & Bradstreet commented that there are greater benefits from better identification of consumers experiencing financial difficulties and allowing other consumers to access mainstream credit. In addition, Dun & Bradstreet pointed to research which showed that entities that are able to report repayment information acquire a distinct advantage when consumers prioritise their bills. Consumers will pay the bills of those credit providers who report default and repayment history to a credit reporting agency first. Those organisations that are prohibited from reporting this data will be at a significant disadvantage when seeking payment for services.

7.15 Dun & Bradstreet concluded that reporting of repayment information by all credit providers should be permitted. It stated that, while permitting non-bank credit providers to report repayment information to credit reporting agencies presents challenges for the Government:

> ...research clearly demonstrates that non-bank data is highly predictive of financial services credit performance and provides important insight in the credit assessment process. As with bank data, the reporting of repayment non-bank data provides even deeper insight. Accordingly, permitting the reporting of this data can ensure the spirit, and not just the letter, of responsible lending obligations are met while also improving access to mainstream credit for currently under-served consumers. The reporting of this data would also ensure non-bank credit providers are not disadvantaged in the payment cycle.[11]

7.16 ARCA also supported making full comprehensive credit reporting available to all credit providers, not just licensees as this would provide a fuller picture of an individual's financial obligations.[12]

Disclosure of default information

7.17 Paragraph 132(2)(e) permits the disclosure of default information if the credit provider has given the individual a written notice of the intended disclosure and a reasonable period has passed since the giving of the notice. Both the

10 Dun & Bradstreet, *Submission 47*, pp 18–23.

11 Dun & Bradstreet, *Submission 47*, pp 18–23; see also Mr Damian Karmelich, Director, Marketing and Corporate Affairs, Dun & Bradstreet, *Committee Hansard*, 16 May 2011, p. 16.

12 Mr Carlo Cataldo, Chairman, Australasian Retail Credit Association, *Committee Hansard*, 16 May 2011, pp 12–13.

Telecommunications Industry Ombudsman (TIO) and the APF commented on the lack of a specific timeframe in the section.

7.18 The TIO noted that many of the complaints received from consumers related to not receiving information about a default or that their credit information was to be provided to a credit reporting agency. The TIO submitted that it would perhaps be preferable for a credit provider to give a defined period of notice to the individual as this would allow any potential grievances to be identified and resolved early. In addition, the TIO supported a specific timeframe after which a credit provider can disclose information to a credit reporting agency. The TIO went on to state:

> The provision that credit providers must wait 'a reasonable period' after having notified the individual could cause confusion for providers, individuals and EDR schemes tasked with assessing complaints. Also, given that credit defaults are noted against a person's credit file for a fixed period, it would seem fair that the listing be placed within a short period of time so as not to disadvantage that person for a longer period of time.[13]

7.19 Similarly, the APF stated that a 'reasonable period' is too subjective and leaves the judgement to the credit provider. The APF suggested that a minimum time period, such as 14 days, be specified. In addition, the APF commented that there should be a fairness provision that requires credit providers to consider any special hardship circumstances, such as hospitalisation, natural disaster, bank error, etc. that they are aware of, before listing defaults or adverse repayment history.[14]

7.20 In relation to notification, the APF commented that 'there appears to be a major gap in the scheme in terms of notification of individuals close to the time that a CP lists default or SCI information with a CRA – the legislation appears to allow a CP to rely on the initial notice given at the time the loan was taken out, to warn borrowers of the risk of listing'. The APF stated that the Act should require that consumers are notified at the time their personal information is collected (at the time they apply for credit) as well as within a reasonably short time period before any listing is made, irrespective of what notice has been provided earlier.[15]

7.21 Experian stated a different view. It noted that by the time the written notice is provided to the individual, the payment will already be at least 60 days overdue and payment would already have been sought by the credit provider. Experian submitted that credit providers should be able to provide the default information to a credit reporting agency promptly after having notified the individual of its intention to do so. In addition, a specific timeframe for provision of the information should be prescribed under the Credit Reporting Code of Conduct. Experian argued that a prescribed timeframe will achieve greater certainty both for credit reporting agencies for receiving default information, and for consumers in understanding when default

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13 Telecommunications Industry Ombudsman, *Submission 69*, p. 7.

14 Australian Privacy Foundation, *Submission 33a*, p. 12.

15 Australian Privacy Foundation, *Submission 33a*, p. 12.

information will be passed to a credit reporting agency for the purpose of the individual making any access and correction application. Experian also saw a timeframe prescribed by the Code as being consistent with the overarching data quality obligations imposed on credit reporting agencies and, in particular, ensuring that the credit reporting information used and disclosed by the credit reporting agency is accurate, up-to-date, complete and relevant.[16]

Committee comment

7.22 The OAIC's submission highlighted concerns with credit providers' disclosure obligations in relation to 'credit information' collected from sources other than a credit reporting agency. The committee has noted these concerns and considers that section 132 should be reviewed to ensure that there is no 'gap' in the regulation of credit providers' disclosure of credit information to a credit reporting agency.

Recommendation 19

7.23 The committee recommends that section 132 be reviewed to ensure that the disclosure obligations on credit providers in relation to 'credit information' protect all credit information collected by credit providers.

7.24 The committee has noted the arguments for allowing credit providers which are not licensees under the NCCP Act to fully participate in the credit reporting system. The committee was provided with information by Dun & Bradstreet pointing to the benefits of non-bank data being disclosed to a credit reporting agency. However, the committee notes that the Government's position is clear in this regard. Moreover, the committee understands that it was never envisaged that a fully 'positive' reporting system would be implemented, rather a more comprehensive regime.

7.25 In relation to the timeframes for notification to an individual of the disclosure of default information, the committee supports the need for greater certainty. Individuals also need to be aware of the timeframe in which the default information will be provided to a credit reporting agency.

Recommendation 20

7.26 The committee recommends that greater clarity be provided as to the timeframes for disclosure of default information pursuant to paragraph 132(2)(e) either in the Credit Reporting Code or in guidance from the Office of the Australian Information Commissioner.

Subdivision C – Dealing with credit eligibility information etc

7.27 Subdivision C provides for the permitted uses and disclosures of credit eligibility information. The subdivision also provides, in part:

16 Experian, *Submission 46*, p. 20.

- that APP 6 and 7 do not apply to a credit provider which is an APP entity in relation to credit eligibility information and APP 9 does not apply if the credit eligibility information is a government related identifier of the individual;
- permitted CP uses in relation to credit reporting information disclosed to the credit provider in certain specified circumstances;
- permitted CP disclosures between credit providers including if an individual has given consent, in relation to guarantees, to mortgage insurers, debt collectors, and to other recipients; and
- notification provisions where an application for consumer credit has been refused.

Section 135 – Use or disclosure of credit eligibility information

7.28 Section 135 prohibits the disclosure and use of credit eligibility information except in the circumstances provided. Westpac noted that section 135 does not contain an equivalent to section 18N(1)(gb) of Part IIIA of the current Privacy Act which permits disclosure of the credit report or information to 'another person who is authorised by the individual to operate the account'. Westpac recommended that such a permitted disclosure be included.[17]

7.29 The AFC and ANZ Bank noted that subsection 135(4) prohibits disclosure if the credit eligibility information is, or was derived from, repayment history information. The AFC stated that as there is a broad interpretation of repayment history, the provision may result in limiting the information that can be exchanged between credit providers under current credit reference exchanges. The AFC suggested that this would be avoided if the repayment history information in subsection 135(4) is limited to CRA derived information.[18]

7.30 The ANZ Bank also stated that there are inconsistencies in permitted disclosures provisions. It noted that the disclosure of credit eligibility information, which includes repayment history information, to mortgage insurers is permitted 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 ANZ Bank went on to state that 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'. In addition, access to repayment history information is required by mortgage insurers, debt collectors and assignees so that they can manage their portfolios and have accurate conversations with the consumer about the debt due. The ANZ Bank recommended that section 135 be amended so that

17 Westpac, *Submission 13a*, p. 2.

18 Australian Finance Conference, *Submission 12a, Attachment 2*, p. ix.

repayment history information can be disclosed to entities such as mortgage insurers, debt collectors and assignees as a permitted credit provider disclosure.[19]

7.31 The APF commented on paragraph 135(3)(b) which permits disclosure to a related body corporate of the credit provider. The APF commented that ownership should not override the purpose limitations. Rather, uses and disclosures by, and to, 'related bodies corporate' should be subject to the same rules as for other third parties. While section 153 (use or disclosure by a related body) places some limits on related bodies corporate, the APF submitted that it does not adequately address this concern. The APF concluded that 'this is a more general criticism of the Privacy Act but has particular significance in the context of credit reporting'.[20]

Committee comment

7.32 The committee does not consider that section 135 requires amendment to allow for the disclosure of credit eligibility information derived from repayment history information. The Government was clear in its intention to limit access to repayment history. As to problems with embedded data, the committee considers this to be a data management issue and not one which should impact on the credit reporting system. Similarly, the committee does not consider that management of their portfolios by mortgage insurers or debt collectors is a matter for the credit reporting system.

Section 136 – Permitted CP uses in relation to individuals

7.33 Section 136 provides the permitted credit provider uses in relation to individuals. Two of the permitted uses are for 'the internal management purposes of the provider that are directly related to the provision or management of consumer credit by the provider' and 'the purpose of assisting the individual to avoid defaulting on his or her obligations'.

7.34 Consumer Action Law Centre (Consumer Action) commented that while 'internal management purposes of the provider that are directly related to the provision or management of any credit by the provider' reflects the current legislation, it is unclear what the 'internal management' purposes are. The current Privacy Code provides the example of the building of scorecards. However, Consumer Action noted that more information will be provided to credit providers which 'would be of significant value to them in relation to marketing to current customers' and the lack of clarity in defining 'internal management purposes' could enable credit providers to use credit information to market credit to individuals.

7.35 Consumer Action recommended that 'internal management purposes' be more closely defined in the Credit Reporting Code. At the very least, Consumer Action

19 ANZ Bank, *Submission 64*, p. 11.

20 Australian Privacy Foundation, *Submission 33a*, p. 13.

stated that the Act should state that as well as excluding debt collection, the term 'internal management purposes' excluding adding information to customer relationship databases and offering or suggesting to the customer an increase in credit limit or other credit products.[21]

7.36 Consumer Action commented that the provisions relating to assisting individuals to avoid defaults should be more tightly defined as it appeared that the provision allowed the credit provider on-going access to a consumer's credit report and it could allow inappropriate marketing of additional credit. While Consumer Action acknowledged the benefits of this provision, for example, allowing the credit provider to reduce a credit limit, it could also be used in ways to exacerbate hardship such as offering a credit limit increase, a different type of credit card or debt consolidation. Consumer Action recommended that item 5 be amended to specify that offers of further credit or additional credit products, including debt consolidation, as it is not considered to be 'assisting the individual to avoid defaulting'.[22]

Committee comment

7.37 The committee considers that the Credit Reporting Code of Conduct should provide guidance in relation to the meaning of 'the internal management purposes of the provider that are directly related to the provision or management of consumer credit by the provider' and 'the purpose of assisting the individual to avoid defaulting on his or her obligations'.

Section 137 – Permitted CP disclosures between credit providers

7.38 Section 137 provides for permitted disclosures of credit eligibility information between credit providers including:

- the individual expressly consents in writing;
- where a credit provider acts as an agent of another credit provider;
- where there is a securitisation arrangement; and
- where both credit providers have provided mortgage credit to the individual for the same real property.

7.39 Westpac commented that the reference to 'credit eligibility information' in section 137 does not reflect business practices. Westpac stated that lenders currently operate a 'Banker's Opinion'/reference service, based on consent obtained from applicants, completely outside of the credit reporting environment. This service discloses information sourced directly from internal systems and does not rely on interaction with a credit reporting agencies. Westpac stated that, 'as such, it is important to clarify that this service would not be limited to "credit eligibility

21 Consumer Action Law Centre, *Submission 63*, p. 12.

22 Consumer Action Law Centre, *Submission 63*, pp 12–13; see also Australian Privacy Foundation, *Submission 33a*, p. 12.

information" which brings in a requirement to source information from a CRA'. If this was the case, Westpac considered that it would introduce additional cost and complexity to what is a relatively straight-forward and transparent process in the current operating environment.[23]

7.40 The APF commented that the use of 'a' particular purpose in paragraph 137(1)(a) is 'too loose/permissive, as it could be read, in conjunction with (b), as "any" particular purpose to which the individual has consented'. The APF further stated that given the common practice of requiring consent as a condition of financial transactions, this provision 'opens the door for disclosures to other credit providers which are wholly unrelated to either the particular transaction the individual has entered or the limited exchange of credit reporting information allowed under this regime'.

7.41 The APF also commented that paragraph 137(2)(a)(i) appears to mean that no consent is required for credit assessments. The APF viewed this as having very significant implications and noted that under the current Act (Part IIIA), consent is required. The APF commented:

> We have been critical of this as consent is effectively mandatory as a condition of a loan application – it is not freely given and cannot be revoked. In such circumstances we have argued for 'notice and acknowledgement' in place of consent, as a more accurate reflection of what is actually happening. If the effect of s137(2)(a)(i) is to remove the requirement for written consent then we submit that it needs to substitute an express requirement for notice and acknowledgement.[24]

Committee comment

7.42 In relation to the matters raised by Westpac, the committee notes that consent is obtained for the Banker's Opinion/reference service. Further, if this disclosure is outside the credit reporting system, it would appear that the APPs would apply. The committee considers that this matter, and the matter raised by the APF in the wording of paragraph 137(1)(a), should be further addressed in either the Explanatory Memorandum or the Credit Reporting Code of Conduct.

7.43 The committee also considers that the section should be reviewed to ensure that the consent provisions are clear and that there has been no lessening of the consent requirements for credit assessments as submitted by the APF.

Section 142 –Notification of a refusal of an application for consumer credit

7.44 Pursuant to section 142, a consumer must be given written notification, within a reasonable period, that an application for consumer credit has been refused. The

23 Westpac, *Submission 13a*, p. 2.

24 Australian Privacy Foundation, *Submission 33a*, p. 12.

ABA questioned the provision of notification in relation to applications where there is more than one individual. The ABA suggested that this matter needs to be clarified and noted that subsection 18M(2) of the current Privacy Act makes a clear distinction between the positions of an individual applicant and joint applicants, and to whom, in the case of joint applicants, such a notice is given. Alternatively, the use of 'individual' throughout could include the other applicants. The ABA also commented that clarity is required regarding whether the notice is given only to the individual (or individuals) whose information resulted in the application being declined or to the other applicants whose information would not have resulted in the application being declined. The ABA commented that there would seem to be a privacy protection issue if this is not made clear.[25]

7.45 The TIO also considered that a notification under section 142 should, where applicable, include details of relevant credit default listing(s), including the name and contact details for the credit provider that requested the listing(s). The TIO commented that this may be relevant where the individual subsequently seeks to dispute the information upon which their application has been refused, particularly as section 121 currently specifies that it may take a credit reporting agency up to 30 days to correct an inaccurate listing.[26]

Committee comment

7.46 In relation to joint applications, the committee considers that this is a matter for the Credit Reporting Code of Conduct or guidance from the OAIC.

Subdivision E–Access to, and correction of, information

7.47 Subdivision E provides for access to, and correction of, eligibility information. The access provisions provide for exceptions to access, dealing with requests, access charges and notification when access is refused. The correction of credit information and credit eligibility information go to notices of correction to recipients of the information, requests for corrections and notices of corrections to individuals.

Section 146 – Access to credit eligibility information

7.48 Submitters noted that section 146 requires credit providers to provide credit eligibility information to access seekers on request. The ANZ Bank, ARCA and the NAB argued that given the definition of credit eligibility information, credit providers may be required to disclose commercially sensitive credit assessment methodologies such as internal assessment scorecards and other evaluative information that may be

25 Australian Bankers' Association, *Submission 15a*, p. 7.

26 Telecommunications Industry Ombudsman, *Submission 69*, p. 8.

derived from credit reporting information as there appear to be very limited circumstances in which access can be refused.[27]

7.49 The ANZ Bank went on to note that the current credit reporting regime does not require access to personal information where that access would reveal evaluative information that was disclosed by a credit reporting agency. Further, the ANZ Bank pointed to both the draft APPs and the NCCP Act and ASIC Regulatory Guide 209 (RG 290) which provide for a limit to the disclosure of commercially sensitive information. APP 12 provides that in the case of commercially sensitive information, the entity may give an explanation for the commercially sensitive decision rather than direct access to the information. RG 209 requires a credit provider to ensure that the assessment given to a consumer is 'concise and easy to understand' and includes reference to the relevant factual information. However, ASIC has stated that is does not expect the credit provider to disclose commercially sensitive information on which the provider has based its decision.[28]

7.50 The ANZ Bank and ARCA concluded that credit providers should not be required to disclose commercially sensitive information as this may allow individuals to 'artificially structure applications for credit to enhance their chances of fraudulently obtaining credit' and could severely compromise the intellectual property of the organisation.[29]

Committee comment

7.51 The ALRC considered arguments about access to credit scores or other rankings used by a credit provider, if an individual's application for credit has been refused wholly or partly on credit reporting information. The ALRC noted some practical difficulties, including the range of methodologies used by credit providers, in detailed obligations to provide prescribed information to individuals about the use of credit scoring. The ALRC concluded that in light of these difficulties, it would not be appropriate to mandate the provision of prescribed information about credit scoring. Rather, the provision of information, including about credit scoring, on refusal of credit is an appropriate subject for guidance from the OAIC.[30]

7.52 The committee agrees that these matters should be the subject of guidance from the OAIC.

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27 National Australia Bank, *Submission 2a*, p. 7; Australasian Retail Credit Association, *Submission 48*, p. 19; ANZ Bank, *Submission 64*, p. 6.

28 ANZ Bank, *Submission 64*, p. 6.

29 ANZ Bank, *Submission 64*, p. 6.

30 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 1989.

Section 149 – Individual may request the correction of credit information etc

7.53 An individual may request a credit provider to correct credit information, CRA derived information or CP derived information. The credit provider must take such steps (if any) as are reasonable in the circumstances to correct the information within 30 days from the day on which the request has been made or within a longer period if the individual has agreed in writing. The committee has commented on the timeframe for correction of information as well as evidence to substantiate a disputed listing in chapter 5.

Section 150 – Notice of correction etc must be given

7.54 Pursuant to section 150, credit providers must, within a reasonable period, give the individual, any interested parties or recipients a written notice of the correction. If the credit provider does not correct the information within a reasonable period, the individual must be provided with a written notice as to why the correction has not been made and sets out the complaints provisions. An exception is provided when it is impracticable for the credit provider to give notice to recipients or if the credit provider is required by or under an Australian law, or an order of a court or tribunal, not to give notice.

7.55 Legal Aid Queensland (LAQ) commented that a time limit should apply to disputes referred to external dispute resolution schemes. The LAQ commented that in some instances consumers have to wait many months to have matters addressed through the external dispute resolution scheme and as a result incorrect listings are not removed for considerable periods of time. In such cases, this results in significant harm to the consumer.[31]

7.56 The LAQ went on to suggest that the legislation could incorporate a mechanism for consumers to receive compensation for loss as a result of delays in correcting information on their credit file. The LAQ stated that 'this would ensure that credit providers are more careful before they list, the credit reporting agency is more careful in identifying the right party when recording default listing and the external dispute resolution scheme prioritises those cases where time is of the essence'.[32]

Committee comment

7.57 The committee has made comments in relation to the notification requirements when a correction is made in chapter 5 of this report.

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31 Legal Aid Queensland, *Submission 60*, p. 3.

32 Legal Aid Queensland, *Submission 60*, p. 3.

Chapter 8

Division 4 and penalty provisions

Introduction

8.1 This chapter discusses issues raised in relation to Division 4 and penalty provisions contained in the Exposure Draft.

Division 4 – Other recipients of information

8.2 Division 4 sets out the rules for certain recipients of information that has been disclosed by credit reporting agencies or credit providers. The recipients to which these provisions apply are mortgage insurers and trade insurers, a related body corporate, credit managers, and advisers etc. The rules apply to recipients that are APP entities, instead of any relevant Australian Privacy Principles.

Credit managers

8.3 Section 154 regulates the use and disclosure of information by credit managers. The Australasian Retail Credit Association (ARCA) commented that the term 'credit manager' is 'materially significant' in the context of this provision but noted that no definition is provided.[1] The National Australia Bank (NAB) and the ANZ Bank also noted that the term 'credit manager' was not defined. The NAB submitted that therefore it 'could not determine the potential impacts of this section' while the ANZ Bank commented that it is unclear which entities in the credit industry the section is intended to capture.[2] It was recommended that a definition be provided.

8.4 ARCA also commented that, pursuant to paragraph 154(2)(a), a permitted use of information is 'managing credit provided by the credit provider'. The term 'managing credit' is defined in section 180 as excluding acts relating to the collection of overdue payments in relation to credit but does not indicate what it does include. ARCA noted that the term is used in paragraph 154(2)(a) to create an exception to the general prohibition on use of credit eligibility information by a 'person' with 'person' also not being defined. ARCA commented that the provision suggests that this information can't be used by a person in activities that relate to the collection of overdue accounts. ARCA went on to comment that 'given the breadth of the definition of credit eligibility information, this could make it very difficult to collect on an overdue account'. ARCA recommended definitions be included for the terms used in section 154.[3]

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1 Australasian Retail Credit Association, *Submission 48*, p. 19.

2 National Australia Bank, *Submission 2a*, p. 4; ANZ Bank, *Submission 64*, p. 17.

3 Australasian Retail Credit Association, *Submission 48*, p. 19.

Committee comment

8.5 The committee agrees that the addition of a definition of 'credit manager' would assist with the understanding of section 154.

Recommendation 21

8.6 The committee recommends that a definition of the term 'credit manager' be provided.

Debt collectors

8.7 Both the Office of the Australian Information Commissioner (OAIC) and the Australian Privacy Foundation (APF) noted that although the Division sets out rules for certain recipients, these recipients do not include debt collectors.[4] The APF stated that the 'use of credit reporting information by debt collectors has been a major issue under Part IIIA and we submit that strict controls are required'.[5] The OAIC also argued that the exclusion of debt collectors means that:

- the APPs will regulate the use and disclosure of that information by debt collectors, other than small business operators. The APPs permit the use and disclosure of information for secondary purposes in certain circumstances; and
- the use and disclosure of credit eligibility information by debt collectors that are small business operators is unregulated. [6]

8.8 The OAIC went on to comment that disclosure of financial information to third parties by debt collectors may have serious consequences for an individual. Mr Timothy Pilgrim, OAIC, expanded on the OAIC's view:

> ...our concern is whether in fact the activities of debt collectors will be sufficiently picked up. From our understanding, they may not be in every circumstance. One example of that is that if they are not covered in terms of the provisions for some of their activities, that is one aspect. They may be covered for receiving some of the information but they may not be covered for how they can use it for secondary purposes. The other issue we raise relates to the small business exemption, which is that if they are a small business operator then there may be no coverage of the information they hold once they have received it, because the Australian privacy principles that are proposed will not apply to them either.[7]

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4 Australian Privacy Foundation, *Submission 33a*, p. 14; Office of the Australian Information Commissioner, *Submission 39a*, p. 16.

5 Australian Privacy Foundation, *Submission 33a*, p. 14.

6 Office of the Australian Information Commissioner, *Submission 39a*, p. 16.

7 Mr Timothy Pilgrim, Australian Privacy Commissioner, Office of the Australian Information Commissioner, *Committee Hansard*, 16 May 2011, p. 3.

8.9 The OAIC recommended that all debt collectors (regardless of size) should be prohibited from using and disclosing credit eligibility information, other than for the primary purpose for which it is collected. This would be consistent with the obligations for other recipients in Division 4.[8]

Committee comment

8.10 The Australian Law Reform Commission (ALRC) considered concerns in relation to debt collection, particularly where debt collection is outsourced from the original credit provider to debt collection businesses, which may also be assignees of the debt. The ALRC noted that where debt collectors are not assignees, under the current Privacy Act they can only access credit reporting information through the credit provider. The ALRC saw no compelling reasons for changes to the rules governing access to credit reporting information.[9]

8.11 The Exposure Draft reflects this view with section 140 providing for the disclosure of credit eligibility information to debt collectors. Subsection 140(2) prescribes the information about the individual that is permitted to be disclosed including identification information, court proceeding information, personal insolvency information and default information in certain circumstances.

8.12 The committee considers that a provision regarding CP disclosures to debt collectors is therefore not required as they do not have the same access to credit information. However, the committee is concerned that there may be inadequate protection of credit information that is provided to debt collectors which are small business operators. As noted by the OAIC, small business operators are currently not captured by the Privacy Act. The committee therefore believes that further consideration is required to ensure that credit eligibility information provided to debt collectors that are small business operators is adequately protected.

Recommendation 22

8.13 The committee recommends that further consideration be given to the regulation of credit eligibility information provided by credit providers to debt collectors that are small business operators.

Penalty provisions

Introduction

8.14 The Credit Reporting Exposure Draft provides for both civil and criminal penalties. The penalties relating to offences by credit reporting agencies and credit providers are contained in the relevant Divisions. Division 6 provides for offences by

8 Australian Privacy Foundation, *Submission 33a*, p. 14.

9 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1899–1902.

entities. An offence is committed if an entity obtains credit eligibility information from a credit reporting agency or a credit provider which is not a permitted disclosure or the entity is not an access seeker; or the entity obtains the information by false pretence. Division 7 regulates contraventions of the civil penalties provisions. The following discussion also incorporates comments relating to specific penalty provisions in various sections of the legislation.

8.15 A civil penalty provision is defined in section 162 as a subsection of the Act where the word 'civil penalty' and one or more amounts are set out in penalty units following the subsection. The penalties for contravening a civil penalty provision and the various forms of civil penalty orders are outlined in section 164.

8.16 The ALRC recommended that the Privacy Act be amended to 'allow the Privacy Commissioner to seek a civil penalty in the Federal Court or Federal Magistrates Court where there is a serious or repeated interference with the privacy of an individual' (Recommendation 50–2). Part IIIA of the current Privacy Act includes a number of credit reporting offences. The ALRC recommended that these offences be removed so that a general 'civil penalties regime' could be implemented (Recommendation 59–9).[10]

8.17 The Government's response to the ALRC review accepted the recommendation to have the credit reporting offences removed with the inclusion of a general 'civil penalties regime'. The Government stated that it 'agrees that civil offences are more appropriate for the breach of any provisions in relation to credit reporting'.[11]

Issues

8.18 The imposition of civil penalties was supported with ARCA commenting that it 'supported a strong regulatory environment, supported by a robust compliance framework to ensure consumers receive the full benefits associated with the introduction of more comprehensive credit reporting'.[12] Mastercard commented:

> We believe that there must be strong protections for applicants and customers specifically in relation to the collection and subsequent use of information relating to them. To that end, we support harsh penalties for any organisation that breaches provisions related to marketing and misuse of the available data.[13]

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10 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, pp 1665 and 2010.

11 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, p. 128.

12 Australasian Retail Credit Association, *Submission 48,* p. 15.

13 MasterCard, *Submission 55*, p. 2.

8.19 The APF welcomed the introduction of civil penalties for breaches, as it was of the view that they are a potentially more effective sanction and deterrent than the current criminal penalties in Part IIIA.[14] However, the APF was concerned that the operation of the civil penalty provisions 'rely entirely' on action by the OAIC. The APF stated that in the past, the OAIC has not actively enforced the current credit reporting penalties and commented:

> ...whether the civil penalty regime will be effective depends partly on the willingness of the Information Commissioner to exercise their powers – experience since 1991 to date has been that the Privacy Commissioner has not effectively enforced the credit reporting (or the more general) provisions of the Act, and we submit that this must change. We invite the Committee to seek assurances from the Information Commissioner that they will address the many criticisms of complaint handling and enforcement under the Privacy Act – financial counselling NGOs can provide numerous examples of these failings in relation to Part IIIA and the Credit Reporting Code.[15]

8.20 The APF acknowledged that it is intended that the powers and functions of the OAIC will be strengthened in the new Privacy Act and stated that it hoped future Information Commissioners will be 'more proactive, and more responsive to complaints, including representative complaints and evidence of systemic failures by CRAs and CPs'.[16]

8.21 The APF also stated that alternative routes to obtaining civil penalty orders should be available for individuals to be able to directly apply to the Federal Magistrates Court and/or to a recognised external dispute resolution (EDR) scheme.[17]

8.22 The Consumer Credit Legal Centre (NSW) (CCLC) stated on the same matter:

> The role of EDR and civil penalties and compensation should be clarified. As most cases go to EDR, there needs to be a mechanism in place for EDR to refer matters to the Information Commissioner for civil penalty investigations.[18]

8.23 In addition, CCLC recommended that the legislation include a compensation regime for affected consumers that can be awarded by EDR.[19] Ms Katherine Lane, CCLC, commented that there are already some provisions for compensation in place

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14 Australian Privacy Foundation, *Submission 33a*, p. 8; see also Consumer Credit Legal Service (WA), *Submission 49*, p. 1.

15 Australian Privacy Foundation, *Submission 33a*, p. 8.

16 Australian Privacy Foundation, *Submission 33a*, p. 15.

17 Australian Privacy Foundation, *Submission 33a*, p. 15.

18 Consumer Credit Legal Centre (NSW), *Submission 66*, pp 16–17.

19 Consumer Credit Legal Centre (NSW), *Submission 66*, pp 16–17.

and the Privacy Commissioner and the Financial Ombudsman Service have made decisions on compensation in relation to credit reports previously. Ms Lane went on to state:

> I just think there needs to be a balance for consumers. I think everybody keeps forgetting that this is our credit history and our credit reports—us as people of Australia—and people are putting that stuff on our credit reports; it needs to be accurate. If it is not, there needs to be a penalty system or a compensation system to compensate you for what is really serious—basically it is saying inaccurate things about you in public, and that is accessible to certain people. In law we have lots of things that account for that: we have libel and defamation and things like that. It is not OK to have inaccuracies on credit reports, so there needs to be a balance...
>
> I think we need to make sure that there is a system of accountability—and this is also to drive accuracy. If there is no penalty for being inaccurate and no compensation that is going to flow, what is the motivation for accuracy? ...I think it is really important that this legislation drive credit providers to be extremely careful and accurate in their listings, and I think that is an outcome that can be achieved by making sure that there is something to drive that compliance.[20]

8.24 Experian raised the issue of the effects of the civil penalty provisions on credit reporting agencies and the extent to which credit reporting agencies are dependent on the actions of other industry participants, in particular, credit providers. Experian stated that:

> ...if a credit provider (or other regulated entity) is transacting with a CRA in a manner that is knowingly or recklessly in contravention of the entity's own obligations under the Exposure Draft provisions, this places the agency at risk of incurring penalties in relation to inadvertent 'flow-on' contraventions.[21]

8.25 Experian recommended that appropriate thresholds be placed around the penalties imposed on credit reporting agencies, focussing on:

> ...whether the contravention was caused by the wrongful actions of other third parties that are outside the control of the agency, or whether the agency had in place reasonable and appropriately robust systems and controls designed to minimise the occurrence of such contraventions.[22]

8.26 Experian went on to comment that if civil penalties were imposed on the agency due to either of these situations, unnecessary harm could be caused to the agency's reputation and relationships with regulators. Experian recommended that many of the civil penalty provisions applicable to credit reporting agencies 'should

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20 Ms Katherine Lane, Principal Solicitor, Consumer Credit Legal Centre (NSW), *Committee Hansard*, 16 May 2011, p. 33.

21 Experian, *Submission 46*, p. 20.

22 Experian, *Submission 46*, p. 20.

incorporate a prerequisite of fault or wrongdoing by the agency'; that is, a requirement that contraventions have been committed knowingly or recklessly, or that they have resulted from inadequacies in the agency's systems, policies and procedures for ensuring compliance with the relevant provisions.[23]

8.27 Veda Advantage and Dun & Bradstreet provided similar comments. Specifically in relation to section 117 (false or misleading credit reporting information), Veda commented that the penalties fail to 'reflect the fact that in data sharing arrangements one does not always have control over the conduct of others and their processes. These matters are, by their nature, internal to each organisation. It is feasible for data supplied to be incorrect even though the systems and processes that one has in place are world class'. Veda recommended the inclusion of the defence of 'reasonable mistake of fact' as strict liability offences are not appropriate for credit reporting legislation.[24] Veda concluded:

> This is important because despite taking appropriate care, it will always be possible that a record happens to be false in a material particular, in circumstances where the credit reporting agency has no way of knowing this.[25]

8.28 The NAB and ARCA also commented on this matter, stating that the civil penalty provisions do not consider the issue of intent.[26] The legislation 'could impose significant penalties on an otherwise compliant institution based on the activities of a single rogue employee'.[27] ARCA supported the severity of the penalties but commented that as there are differing levels of reporting, an 'incomplete' credit report within this context should not result in it being deemed misleading, and this should be reflected in the drafting of the provisions.[28]

8.29 The ANZ Bank and Westpac also voiced concern that there is no element of knowledge, intent or recklessness required for a credit reporting agency to contravene the civil penalty provisions. Thus, a credit provider could contravene the civil penalty provision simply by using information provided by a credit reporting agency which the credit provider believes to be true. The credit provider may only become aware of the false or misleading information until after the victim starts receiving statements. Furthermore, the credit provider is unable to verify the information without first disclosing it and therefore contravene the civil penalty provision. Both the ANZ Bank and Westpac argued that the penalty sections should be amended to include an

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23 Experian, *Submission 46*, pp 20–21.

24 Ms Nerida Caesar, Chief Executive Officer, Veda Advantage, *Committee Hansard*, 16 May 2011, p. 40.

25 Veda Advantage, *Submission 65*, pp 39–40; see also Dun & Bradstreet, *Submission 47* p. 14.

26 Australasian Retail Credit Association, *Submission 48,* p. 15; National Australia Bank, *Submission 2a*, p. 9.

27 Australasian Retail Credit Association, *Submission 48,* p. 15.

28 Australasian Retail Credit Association, *Submission 48,* p. 18.

element of knowledge, intent or recklessness on the part of the credit reporting agency and credit provider.[29]

8.30 In addition, ARCA noted the requirements of section 167 in relation to multiple contraventions. ARCA stated that if an unintended breach occurred, for example, a processing error, the penalty could be equal to the number of instances of contravention, which could be huge. Similar to the argument from Experian above, ARCA stated that where 'activities...are not wilful and deliberate [they] should be approached with a lesser set of penalties, and that actions on the part of a data sharer should be able to mitigate penalties in appropriate circumstances'. ARCA noted that this is similar to provisions in the Corporations Act.[30]

Sanctions

8.31 In relation to the application of penalty units, Veda Advantage argued that the Exposure Draft does not appear to provide a consistent approach comparable to the nature of the conduct and seriousness or possible harm caused by the relevant contravention. Veda explained:

> For instance, a CRA that collected information falling outside section 106 attracts a $1.1 million penalty. Similarly, a CRA that adopted a Government number as a consumer identifier – a much more harmful offence – would also attract a penalty of $1.1 million.[31]

8.32 In addition, Veda commented that some of the significant civil penalties relate to provisions where there is 'great complexity'. For example, a $550,000 penalty applies under subsection 113(4), a provision which requires two separate assessments on 'reasonable grounds' by the credit reporting agency. Veda also argued that subsection 164(5) does not provide a court with adequate guidance on how to determine an appropriate penalty. Further, Veda stated that there is no express provision in the legislation for account to be taken of any compliance measures to prevent contraventions.[32]

8.33 Experian recommended that the Australian Information Commissioner prepare and publish guidelines on how the Office will pursue civil penalty orders under Division 7 of the legislation.[33]

8.34 Some provisions provide for both criminal and civil penalty: sections 117, 144, 160 and 161. The Australian Finance Conference (AFC) and APF commented

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29 ANZ Bank, *Submission 64*, pp 7–8; Westpac, *Submission 13a*, p. 3.

30 Australasian Retail Credit Association, *Submission 48*, p. 15; see also National Australia Bank, *Submission 2a*, p. 9.

31 Veda Advantage, *Submission 65*, p. 17.

32 Veda Advantage, *Submission 65*, pp 39–40.

33 Experian, *Submission 46*, p. 21.

that it understood that the Government intended that criminal offence provisions be removed in favour of civil penalty provisions and questioned why provisions provided for a criminal offence.[34] Ms Helen Gordon, AFC, stated:

> I understand the Law Reform Commission undertook consultation in relation to [criminal offence provisions] and made a decision that criminal offences probably were not appropriate in the credit reporting context because it is not something familiar in the rest of the Privacy Act. I do not believe there are criminal offences for breaching other provisions in the act. So I understood it was a reflection of, again, modernising the law, looking at what would be an appropriate way to control behaviour or misbehaviour, and they certainly recommended against continuing criminal offence provisions in these new provisions.[35]

Committee comment

8.35 The reforms to the credit reporting legislation will provide access to much greater amounts of personal information. Inaccurate information and the inappropriate use of information may have consequences for consumers which can range from minor inconvenience to significant detriment, for example, the inability to access a mortgage for a home. The committee therefore agrees that appropriate penalties are an important mechanism in ensuring the integrity of the credit reporting system.

8.36 The committee notes that the ALRC considered that 'a civil penalty regime is a more appropriate enforcement mechanism for breaches of credit reporting regulation than the suite of criminal offences currently provided for in the Act'.[36] Submitters pointed to the Government's agreement in relation to the ALRC's recommendation regarding civil penalties but commented that the Exposure Draft still contains some criminal offences. However, the committee notes that the *National Consumer Credit Protection Act 2009* (NCCP Act) contains both civil and criminal penalties. The Minister, in the second reading speech for the National Consumer Credit Protection Bill 2009, commented that the 'relevant provisions are consistent with the *Corporations Act 2001* and other Commonwealth consumer protection laws' and that the NCCP Act provides for a tiered approach to the sanctions regime.[37] The committee understands that the penalty provisions in the Exposure Draft reflect those of the NCCP Act. The committee considers that, like the NCCP Act, the tiered approach enables a targeting of the most appropriate sanctions. Further, it is appropriate for the consistent application of penalty provisions across all aspects of

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34 Australian Finance Conference, *Submission 12a, Attachment 2*, p. vii; Australian Privacy Foundation, *Submission 33a*, p. 11.

35 Ms Helen Gordon, Regional Director and Corporate Lawyer, Australian Finance Conference, *Committee Hansard*, 16 May 2011, p. 27.

36 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108, May 2008, p. 2010.

37 The Hon. Chris Bowen MP, Minister for Financial Services, Superannuation and Corporate Law, *House of Representatives Hansard*, 25 June 2009, p. 7149.

consumer credit regulation including criminal penalties, when the offence suggests that this is warranted or the offence is analogous to similar provisions in the Corporations Act. The committee therefore supports the penalty provisions contained in the Exposure Draft.

8.37 In relation to the APF's suggestion that individuals should be able to directly apply to the Federal Magistrates Court and/or to a recognised external dispute resolution (EDR) scheme, the committee notes that, as a general rule in Commonwealth law, there are strict limitations on who may apply for a civil penalty order. For example, only the Regulator may apply for a civil penalty order under the *Renewable Energy (Electricity) Act 2000* and the AUSTRAC Chief Executive Officer under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006.* In addition, under the NCCP Act only the Australian Security and Investment Commission may apply to a court for a declaration that a person has contravened a civil penalty provision. As outlined above, the provisions of the Exposure Draft are consistent with those of the NCCP Act. The committee also notes that it is Commonwealth policy that civil penalty proceedings be brought by the Commonwealth, or regulators or officials authorised by the Commonwealth, rather than individuals. The committee therefore does not support the AFP's suggestion of individuals applying directly to the Federal Magistrates Court.

8.38 However, the committee is mindful that the effective regulation of credit reporting will require efficient investigation of breaches and where appropriate, the timely imposition of sanctions. The committee therefore considers that the Office of the Australian Information Commissioner may require further resources to enable it to conduct regular audits under the credit reporting system.

Recommendation 23

8.39 The committee recommends that consideration be given to provide increased funding for the Office of the Australian Information Commissioner to effectively and efficiently investigate breaches of the credit reporting provisions.

8.40 The CCLC suggested that the credit reporting regime include compensation for consumers adversely affected by contraventions of the credit reporting provisions. The committee notes that the NCCP Act provides for consumer remedies in two ways:

- through a specific order for a compensation amount for loss and damage (section 178); or
- through a general order to compensate loss or damage or prevent or reduce the loss or damage suffered or is likely to suffer, through a broader range of remedies (section 179).

8.41 The Explanatory Memorandum for the NCCP Bill stated that:

> Consumer remedies are an important element of the enforcement package as it enables consumers to take direct action against a licensee who breaches the law and causes them loss or damage. These actions can

> provide sufficient deterrent against breaches of the law. Private suits are considered a useful way of influencing and curbing market behaviour.[38]

8.42 The committee considers that consideration should be given to including similar compensation provisions in the credit reporting system.

Recommendation 24

8.43 The committee recommends that consideration be given to the inclusion of consumer remedies, similar to those that exist in the National Consumer Credit Protection Act such as compensation, for consumers adversely affected by contraventions of the credit reporting provisions.

8.44 Credit reporting agencies Experian and Veda Advantage commented on the lack of a defence of 'reasonable mistake of fact' or lack of intent. However, the committee notes that subsection 164(5) provides that in determining the pecuniary penalty, the court must take into account all relevant matters, including:

(a) the nature and extent of the contravention; and

(b) the nature and extent of any loss or damage suffered because of the contravention; and

(c) the circumstances in which the contravention took place; and

(d) whether the entity has previously been found by a court in proceedings under this Act to have engaged in any similar conduct.

8.45 The committee therefore considers that there is no requirement for the Exposure Draft to be amended to provide for a defence of a 'reasonable mistake of fact' or lack of intent.

38 Explanatory Memorandum, National Consumer Protection Bill 2009, p. 126.

Chapter 9

Definitions

Introduction

9.1 The Exposure Draft contains a range of new definitions. The committee has already commented on the complexity of some of these definitions in chapter 3 of this report. The following discussion covers issues raised by submitters about specific definitions.

Definitions contained in section 180

Consumer credit liability information

9.2 The consumer credit liability information definition refers to certain information, including the name of the provider, and the type of consumer credit, where a credit provider provides credit to an individual. This information includes four of the five new data sets.

9.3 The Communications Alliance commented that the provision of some consumer credit liability information may result in added complexity for telecommunications companies, for example, if the type of credit account requires detailed explanations such as a post-paid mobile service, a home phone service, or an internet service rather than simply specifying that a telecommunications service has been provided. Other matters which will require clarification for telecommunications companies include when an account for a telecommunications service is considered to be 'opened', for example, upon the application being approved, when the SIM card is activated (for a mobile service), upon first use, etc. Similarly, information on when an account is considered to be 'closed' requires clarification as many telecommunications services can be 'deactive' or unused for some months before actually being disconnected or having the telephone number or email address cancelled.[1]

9.4 The Communications Alliance also noted that information on a credit limit is problematic for most telecommunications services as there are no 'credit limits' as such. Instead, telecommunications customers have access to a vast range of different products, services, pricing plans and spend control tools. In addition, a 'credit limit' as used in the banking and financial sectors, indicates a cut-off point where additional 'credit' is no longer available to customers. This does not currently exist with post-paid telecommunications services (although pre-paid services do function in this way).[2]

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1 Communications Alliance, *Submission 56*, pp 7–8.

2 Communications Alliance, *Submission 56*, pp 7–8.

Court proceedings information

9.5 The Consumer Credit Legal Service WA (CCLSWA) commented that there was ambiguity in the definition of 'court proceedings information'. The CCLSWA noted that in Western Australia, summonses are routinely listed on consumers' credit information files. This appears to occur only in Western Australia. The CCLSWA pointed to cases where the listing of summonses has had a significant impact on consumers' ability to obtain credit even though their liability has not been established. In addition, the CCLSWA noted a summons remains on a credit information files for four years even if proceedings are discontinued or the claim is unsuccessful. This listing prevents consumers with summons on their credit information file from obtaining credit regardless of whether a claim is successful.

9.6 The CCLSWA voiced concern that the definition will allow the continuation of this practice: the inclusion of 'information about a judgment' in the definition could be interpreted widely to include the originating summons, as currently appears to be the case. The CCLSWA argued that summonses should be precluded from permitted content of credit information files.[3]

9.7 The Consumer Credit Legal Centre (NSW) (CCLC) noted that 'court proceedings information' is defined as judgments in relation to 'any credit that has been provided to, or applied for by, the individual'. CCLC was of the view that only judgments should be relevant (no other proceedings) and only those relating to 'credit'. CCLC provided the example of a dispute with a builder arising from a contract to undertake work. The dispute may be over the quality of the work, or the interpretation of the contract. In such a case, the fact that the individual loses the dispute should not be relevant to the individual's credit eligibility unless they fail to pay the judgment debt.

9.8 The CCLC concluded that to allow such information to be used 'undermines the legal rights of individuals to conduct any form of civil dispute'. For the same reason, court proceedings information that is publicly available information should not be able to be provided as part of a credit reporting information or credit report derived information supplied by a credit reporting agency.[4]

Committee comment

9.9 The committee considers that any ambiguity about the definition of 'court proceedings information' should be addressed to ensure that summonses cannot be listed on a consumer's credit information file.

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3 Consumer Credit Legal Service (WA), *Submission 49*, pp 3–4.

4 Consumer Credit Legal Centre (NSW), *Submission 66*, p. 17.

Recommendation 25

9.10 The committee recommends that the definition of 'court proceedings information' be reconsidered to ensure that summonses cannot be listed on a consumer's credit information file.

Identification information

9.11 The definition of 'identification information' includes such information as full name, date of birth and sex. The only form of government identification included is a driver's licence. Some submitters argued that other data, for example a passport number, or a State-issued identification card available for those who don't or can't drive should be included. It was stated that the restriction in the definition impacts on the ability of credit reporting agencies and credit providers to meet other regulatory requirements (for example, *Anti-Money Laundering and Counter Terrorism Financing Act 2006* requirements) as well as matching records supplied by various sources, thus potentially undermining the goal of providing a credit report that is 'accurate, complete, and up to date'.[5]

9.12 The Australian Finance Conference (AFC) also commented that the words 'alias or previous name' should be clarified so that, notwithstanding the provisions of the Acts Interpretation Act, it is clear that more than one alias or previous name can be included as identification information.[6]

9.13 The Australian Privacy Foundation (APF) submitted that it would be preferable for 'identification information' to be replaced with 'credit identifying information'. This would ensure that the term which is credit specific is not taken out of context and used as a precedent for other contexts.[7]

Committee comment

9.14 The committee notes that the definition of 'identification information' is based on the existing Privacy Commissioner *Determinations under the Privacy Act 1988 1991 No 2 (s.18E(3))* concerning identifying particulars permitted to be included in a credit information file.[8] In relation to use of government identifiers, the committee notes that the general policy on the use of government identifiers is set out in Australian Privacy Principle 9. The committee does not consider that the use of government identifiers should include identifiers other than a drivers licence. Drivers licences are currently used for identification purposes and any expansion to include

5 Australasian Retail Credit Association, *Submission 48*, p. 13; see also National Australia Bank, *Submission 2a*, p. 10.

6 Australian Finance Conference, *Submission 12a, Attachment 2*, p. iii.

7 Australian Privacy Foundation, *Submission 33a*, p. 4.

8 Australian Government, *Companion Guide, Privacy Reforms: Credit Reporting*, January 2011, p. 12.

other identifiers may lead to targeting of databases for identity fraud. However, the committee considers that matters in relation to *Anti-Money Laundering and Counter Terrorism Financing Act 2006* should be further investigated to ensure that the definition does not restrict entities from meeting their regulatory obligations.

Recommendation 26

9.15 The committee recommends that the definition of 'identification information' be reviewed to ensure that it does not restrict the ability of credit reporting agencies and credit providers from meeting other regulatory requirements.

Section 181 – Meaning of *credit information*

9.16 The meaning of credit information includes 'publicly available information about the individual'. The Office of the Australian Information Commissioner (OAIC) submitted that this should be subject to further limits. The OAIC stated it understood that this provision is to ensure that publicly available information that credit reporting agencies may be collecting (not currently captured under Part IIIA of the Privacy Act) is given adequate privacy protections. The OAIC commented:

> 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. [9]

9.17 However, the OAIC was of the view that the current scope of 'publicly available information' that may be included as 'credit information' seems broad, and its limits are unclear. In particular, the OAIC pointed to the increasing amount of personal information publicly available online, including from social networking sites. While the relevance and accuracy of such information may be doubtful (and give rise to an increasing number of complaints), it may fall within the scope of subsection (k).[10] In order to improve clarity and certainty, the OAIC recommended that 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'.

9 Office of the Australian Information Commissioner, *Submission 39a*, p. 19.

10 Office of the Australian Information Commissioner, *Submission 39a*, p. 19.

Committee comment

9.18 The committee supports amendment of subsection 181(k) to provide greater clarity and certainty for the meaning of 'publicly available information' as proposed by the OAIC.

Recommendation 27

9.19 The committee recommends that section 181 be reviewed to provide for greater clarity and certainty in the meaning of 'publicly available information' as proposed by the Office of the Australian Information Commissioner.

Section 182 – Meaning of *default information*

9.20 The definition of 'default information' refers to the circumstances where an individual is overdue in making a repayment relating to consumer credit or under a guarantee. The issues in relation to the meaning of default information went to the time lag in listing of a default, the inclusion of the amount of $100 in the definition and statute barred debts.

9.21 The Australasian Retail Credit Association (ARCA) commented that the meaning of default information in the current Privacy Act and the current Credit Reporting Code of Conduct has been the source of much discussion and difficulty in interpretation. In particular, the amount for which a default can be listed, is the amount reported to the consumer 60 days ago, less any payments but not any further charges or interest. ARCA stated that as a result, the amount of the listing is not equal to the actual amount owed on the day of the listing. Of further issue is the criterion for listing: as it is 'open ended', defaults can be listed when the criteria is met, later or never at all. Finally, ARCA stated it was expected that the Government would leave the detail of the definition of default to be addressed in the new Code of Conduct, as indicated in its response to the ALRC's recommendations.

9.22 ARCA also argued that the provisions for guarantor defaults place additional requirements on credit providers prior to listing defaults against guarantors. It appears that an additional 60 days must elapse, on the basis of having to wait until 60 days from the day on which the notice to the primary debtor was provided, before listing a default against the guarantor.[11]

9.23 Both the Energy & Water Ombudsman NSW and Telstra commented on the provisions requiring that the debt must be more than $100 or such higher amount as prescribed by regulations. The Energy & Water Ombudsman NSW suggested an increase to $300 to exclude small utility bills from the adverse consequences of credit listing.[12] Telstra however, stated that the threshold amount is an important issue to telecommunications providers and others who provide ongoing services on a deferred

11 Australasian Retail Credit Association, *Submission 48,* p. 16.

12 Energy & Water Ombudsman NSW, *Submission 51,* p. 7.

payment basis. The availability of effective credit management tools to deal with customers who are very late in paying and have been warned of credit management action impacts on the ability of telecommunications providers to offer 'post-paid' services. Listing of those customers with a credit reporting agency assists in controlling overall bad debts which benefits the majority of customers who pay in a timely fashion. Telstra therefore suggested that the reference to the regulations should be excluded as any further changes to the threshold amount should be made with the full scrutiny of legislation, rather than regulations.[13]

9.24 Both Legal Aid Queensland and the CCLC noted that the Government Response to ALRC Recommendation 58–1 accepted that there should be a prohibition on the listing of any overdue payment where the credit provider is statute-barred from recovering the debt. However, the CCLC argued that the acceptance of this recommendation is not adequately reflected in the exposure draft as:

> Section 182(1)(c) is the only provision I can find which reflects this section of the response. It stipulates that in order to be 'default information' under the draft legislation the provider must not be 'prevented by or under any Australian law from bringing proceedings against the individual to recover the amount of the overdue payment'.
>
> The problem with this drafting is that plaintiffs are entitled to bring proceedings for statute barred debts and it is up to the defendant to plead the statutory limitations as a defence. As a result the above provision does not appear to be sufficient to meet the Government commitment.[14]

9.25 Legal Aid Queensland (LAQ) commented:

> The draft legislation does not allow a credit provider to list default information in relation to an overdue payment if the provider is prevented from bringing legal proceedings against the individual to recover the amount of the overdue debt - S182(2)(e). Unfortunately the limitation of actions legislation in various states do not prevent the credit provider from bringing proceedings. Instead the law provides a complete defence to a consumer on the ground that the debt is statute barred. To clarify the position, we would support an amendment that if the individual has a complete defence under any limitation of actions legislation, the credit provider is unable to list.
>
> In addition, it appears that the restriction in the legislation is limited to the party that provided the credit so that an assignee of the debt or the debt collector may be able to list.[15]

13 Telstra, *Submission 19,* p. 2.

14 Consumer Action Law Centre, *Submission 63,* p. 13.

15 Legal Aid Queensland, *Submission 60,* p. 7.

Committee comment

9.26 The committee considers that concerns in relation to statute barred debts should be investigated to ensure that the ALRC's recommendation is adequately reflected in the credit reporting system.

Recommendation 28

9.27 The committee recommends that the meaning of 'default information' be reviewed to ensure that statute barred debts are prohibited from being listed.

Section 184 – Meaning of *new arrangement information*

9.28 The ANZ Bank argued that the provisions of section 184 are 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. The ANZ Bank went on to comment:

> 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.[16]

9.29 Westpac also commented that the current definition only allows for new arrangement information to be reported when an account has previously been listed as being in default. Arrangements are generally the result of a customer, who is experiencing financial hardship, requesting assistance from a credit provider. However, the majority of hardship cases occur prior to default, including where hardship has resulted from a natural disaster. Westpac recommended that the provisions be amended to allow for reporting of 'pre-default' arrangements in this context in order to distinguish a temporary inability to pay from unwillingness to pay.[17] Comments on new arrangements are also provided in the discussion on complaints handling in chapter 5.

Section 187 – Meaning of *repayment history information*

9.30 Section 187 provides the meaning of 'repayment history information' such 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

16 ANZ Bank, *Submission 64*, p. 11.

17 Westpac, *Submission 13a*, p. 3; see also National Australia Bank, *Submission 2a*, p. 10.

individual makes the payment — the day on which the individual makes that payment.[18] Regulations will also make provisions in relation to meeting an obligation to make a monthly payment and whether or not a payment is a monthly payment.

9.31 The CCLC did not support the inclusion of repayment history in credit reports as it considered that improved risk assessment can be met through the provision of other information now permitted to be collected, including current accounts, open and closing dates, and available credit limit.[19]

9.32 The CCLC also compared the requirement for a payment to be 60 days overdue before a default can be entered on a credit report, with the notification provisions and the opportunity provided to rectify that default with the repayment history proposals, which contain no such protections. The CCLC concluded that the introduction of repayment history information will:

- lead to more potential errors because of the sheer volume of information being exchanged;
- make it difficult for consumers to keep track of whether their credit report is accurate or not;
- lead to a proliferation of complaints about timing issues; and
- lead to more risk-based pricing in the market place – that is consumers who pay late may not be denied credit but charged more for it, placing self-employed consumers, those with insecure sources of income, and those who are in temporary hardship due to circumstances beyond their control, at a significant disadvantage. Credit providers can already deal with late payers by imposing late payment fees. However, late fees cease being charged once a consumer is back on track, or has entered into a formal hardship arrangement. If these consumers are charged more for credit in future, then a temporary problem becomes entrenched.[20]

9.33 The Credit Ombudsman Services Limited (COSL) also commented on the provisions for default listing and repayment history information. The COSL stated that some of the debate about what information should be adjusted before repayment history information is reported, has arisen because there is confusion between repayment history and default listings. Default listings can only be made if certain requirements are satisfied, and once made are clearly an adverse reflection on the customer's credit worthiness. However, repayment history is 'simply a month by month reporting of the timeliness of payments made by the customer and in itself is neither beneficial nor prejudicial'.[21]

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18 Australian Government, *Companion Guide, Privacy Reforms: Credit Reporting*, January 2011, p. 13.

19 Consumer Credit Law Centre, *Submission 66*, p. 6.

20 Consumer Credit Law Centre, *Submission 66*, pp 6–7.

21 Credit Ombudsman Services Limited, *Submission 68*, p. 4.

9.34 Legal Aid Queensland (LAQ) commented that its support of more comprehensive credit reporting, including repayment history, was based on the precondition of a responsible lending framework. The LAQ argued that the provisions did not provide for responsible lending for all types of consumer credit and therefore the reporting of credit histories should be delayed until phase 2 of the current credit reforms are introduced.[22]

Meaning of repayment history information

9.35 The APF stated that the definition of 'repayment history information' does not clarify some outstanding issues about what is to be permitted and the format in which it can be recorded, and the extent to which the detail on this will be included in regulations and/or the Code.[23] The CCLC also commented that some matters are not clear including how the information will be recorded and when an affected individual will be notified about adverse information on their credit report. The CCLC went on to state that these issues are too important to be left to regulations and that they should be included in the primary legislation.[24]

9.36 ARCA commented that the provisions do not give certainty to a credit reporting agency's ability to provide a credit provider with 24 months of repayment history, nor do they provide certainty to the right of credit providers to provide credit reporting agencies with an initial download of repayment history. ARCA concluded that without the ability to make these initial transfers of information, 'the benefits of allowing for the reporting of repayment history will not accrue for many months or years'.[25] Westpac argued that the definition of repayment history information is likely to introduce practical complexity given the level of detail required.[26]

9.37 Veda Advantage saw the definition as 'very product specific' and therefore unhelpful. Veda Advantage was of the view that the definition should be more generic as the term can be well understood from other sources, for example, guidelines or codes.[27]

9.38 A further matter raised in submissions is that the definition of repayment history information only relates to monthly payment arrangements. It was noted that many credit arrangements are based on different repayment periods, such as weekly or

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22 Legal Aid Queensland, *Submission 60*, p. 5.

23 Australian Privacy Foundation, *Submission 33a*, p. 5.

24 Consumer Credit Law Centre, *Submission 66*, pp 6–7.

25 Australasian Retail Credit Association, *Submission 49*, pp 15–16; see also National Australia Bank, *Submission 2a*, p. 10; Australian Finance Conference, *Submission 12a, Attachment 2*, p. v.

26 Westpac, *Submission 15a*, p. 3.

27 Veda Advantage, *Submission 65*, p. 44.

fortnightly.[28] The ANZ Bank noted that there is provision for regulations to further define monthly payments. However, the ANZ Bank preferred that section 187 be amended to allow for repayment arrangements that are not monthly rather than this being dealt with by the regulations.[29]

Access to repayment history information by non-licensees

9.39 Citigroup also raised the issue of access to repayment history information by charge card issuers. For example, Diners Club issue charge cards and are exempt from the obligation to maintain an Australian Credit Licence under the National Consumer Credit Regulations. However, the Exposure Draft permits certain disclosures only to licensees, for example, subsection 108(4) prohibits a credit reporting agency from disclosing credit reporting information that is or was derived from repayment history, unless the disclosure is to a credit provider that is a licensee and subsection 132(2) limits disclosure of repayment history to credit reporting agencies by a credit providers that are licensees. As a result Diners Club is unable to receive or provide repayment history information including from related corporate bodies such as Citi.[30]

9.40 Citigroup stated that:

> We assume that this is an unintended consequence of the legislation as the effect to exclude charge card providers from the benefits of enhanced reporting appears illogical. That a business is structured in such a way so as to not require an Australian Credit Licence should not in itself mean that it is inappropriate for that business to have access to repayment history information.[31]

9.41 In order to address this concern, Citigroup proposed that:

- references in the exposure draft to 'licensee' be replaced by 'licensee or exempted credit provider'; and
- a new definition of 'exempted credit provider' be inserted into the Act to read:

  Exempted credit provider means any provider of credit under a credit contract to which Schedule 1 of the National Consumer Credit Protection Act would apply but for an exemption under that Act.[32]

9.42 The Communications Alliance also commented on the access to repayment history information by non-licensees as telecommunications providers are not holders

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28 See for example, Australasian Retail Credit Association, *Submission 49*, p. 15; ANZ Bank, *Submission 64*, p. 12; Credit Ombudsman Services Limited, *Submission 68*, p. 13.

29 ANZ Bank, *Submission 64*, p. 12; see also Credit Ombudsman Services Limited, *Submission 68*, p. 13.

30 Citigroup, *Submission 59*, pp 1–2.

31 Citigroup, *Submission 59*, p. 2.

32 Citigroup, *Submission 59*, p. 2.

of Australian Credit Licences. While most members of the Alliance were supportive of this approach, some providers expressed an interest in being able to opt-in to disclose repayment history information to credit reporting agencies.[33]

Grace periods

9.43 The CCLC argued that there should be a minimum grace period included in the regulations to ensure that payment system delays and minor oversights are not captured in the reporting system. This, it was argued, would lead to 'an explosion of complaints and potentially inaccurate data'. The CCLC noted that those opposed to a grace period argued that consumers quickly learn what the grace period is and start treating the end of the grace period as the due date. While acknowledging that this may occur, the CCLC was of the view that there will be fewer complaints as a result of payment system delays and minor oversights if a grace period was allowed.[34]

9.44 The COSL also commented on 'innocent' late payments, that is, payments which are received late because of matters beyond the control of the customer. The COSL observed that although this is equally likely to affect all customers, it is unlikely to occur so frequently on any individual's credit record to affect a lender's overall assessment of their credit history or creditworthiness. The COSL concluded that:

> The integrity of the system requires it to contain an objective record of borrowers' actual repayment histories, reported in a timely and consistent manner. There are many reasons why a customer's payment may be late, and a repayment history database may not necessarily be the most appropriate place for all of those reasons to be identified and recorded. If certain late repayments were to be excused, that is to say, regarded as not being late, it would appear that:
>
> - the customer's record would show that the payment was made on time, when this was actually not true;
> - apart from issues about the factual accuracy of the record, its integrity would be further challenged by the potential for concerns about the consistency with which such exemptions were managed in practice;
> - excluding late payments for apparently meritorious reasons will make credit reports factually inaccurate and/or incomplete, and may also serve to conceal important information or trends and may lead to mis-interpretation of credit reports; and
> - every exemption, allowance or concession made in relation to the reporting of a late repayment effectively diminishes the value to all customers of repayments that they do make on time, and devalues the overall impact of more comprehensive credit reporting by making it

33 Communications Alliance, *Submission 56*, p. 9.

34 Consumer Credit Law Centre, *Submission 66*, p. 8.

> impossible to identify borrowers who truly do have a faultless repayment history.[35]

Notification of late payment listing

9.45 The CCLC observed that there is no provision for consumers to be notified if a late payment is to be listed. The CCLC argued that this is 'totally inadequate and procedurally unfair'. While the Department of the Prime Minister and Cabinet has indicated that this matter will be dealt with in the regulations, the CCLC submitted that the regulations for such notifications must be time specific and prescribe the form in which the notification is to be given.[36]

Hardship

9.46 The issue of hardship flags on credit reporting histories is discussed in chapter 4.

Committee comment

9.47 The committee has noted the comments in relation to grace periods. The committee understands that grace periods are available in some overseas jurisdictions including the United Kingdom. The committee considers that there are benefits in the provision of grace periods in relation to information in repayment histories.

Recommendation 29

9.48 The committee recommends that consideration be given to the inclusion of provisions for grace periods in relation to information in repayment histories.

Section 188 – Meaning of *credit provider*

9.49 The definition of credit provider includes banks, certain agencies, organisations or small business operators. The concept of credit provider is broader under the new regime. 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.[37]

9.50 The APF and Consumer Action both welcomed the exclusion of real estate agents, general insurers and employers from the definition of 'credit provider' but

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35 Credit Ombudsman Services Limited, *Submission 68,* p. 6.

36 Consumer Credit Legal Centre (NSW), *Submission 66*, p. 12.

37 Australian Government, *Companion Guide, Privacy Reforms: Credit Reporting*, January 2011, p. 7.

commented that the precise effect is unclear. Specifically, they submitted that the use of credit reporting for assessing potential tenants should be prohibited, as businesses other than real estate agents can and do undertake the management of rental properties (including landlords).[38]

9.51 The Financial Counsellors' Association of Queensland commented that the 'simplified' definition of credit provider could open the way for agencies that purchase debts to have a wider access to information contained in credit reports. These agencies then use the information to 'badger' consumers. The Association considered that agencies that purchase debts should only have restricted access to credit reporting information and should only have access to report that the account they purchased has been finalised.[39]

9.52 The CCLSWA voiced concern regarding the inclusion of small business operators in the definition of 'credit provider'. It stated that this will enable unsophisticated 'credit providers' to list defaults and access consumers' credit information files without understanding the credit reporting system or its effects on consumers. As a consequence, privacy breaches may occur and the actions of unsophisticated 'credit providers' may materially affect a consumer's ability to obtain credit without having the understanding of the privacy laws. CCLSWA submitted that the definition of 'credit providers' be restricted to those listed in subsection 188(1) of the Exposure Draft.[40]

9.53 The committee received submissions from the Communications Alliance and Optus on the effect of the definition on telecommunications providers. It was noted that under the Privacy Act, the Privacy Commissioner is able to make a determination that certain classes of corporations are to be regarded as credit providers for the purposes of the Privacy Act. Telecommunications companies are deemed to be credit providers by virtue of such a determination: the Credit Provider Determination No. 2006–4 (Classes of Credit Providers) as telecommunications companies provide goods or services on terms that allow deferral of payment for at least seven days.

9.54 However, it was argued that telecommunications companies use credit information in a vastly different way to banks and other financial sector entities as they provide goods and services to customers and allow them to pay after they have used the goods or services. Any 'trade credit' provided is only for use of those specific telecommunications products and services. It is not discretionary credit which can be spent on anything (like a credit card) or a large loan of money (such as for a mortgage or a car loan). Further, the 'trade credit' is provided on a fixed payment cycle; that is, the customer is required to pay in full each month for the telecommunications services they have used.

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38 Australian Privacy Foundation, *Submission 33a*, p. 5; Consumer Action Law Centre, *Submission 63*, p. 14.

39 Financial Counsellors' Association of Queensland, *Submission 67*, p. 2.

40 Consumer Credit Law Service (WA), *Submission 49*, pp 1–2.

9.55 The Communications Alliance stated that access to, recording of and use of credit information by telecommunications companies is entirely different to that of traditional credit providers and is not taken into account in the Exposure Draft. As a consequence, the Communications Alliance suggested that the Exposure Draft be reviewed with the following objectives:

- determining whether each of the 'credit provider' rules is relevant across all industries; and
- if not, removing them from the Exposure Draft and instead allowing them to be dealt with in the Credit Code which is to be developed by a cross-sectoral industry group.

9.56 The Communications Alliance advised the committee that the Department of the Prime Minister and Cabinet had indicated at the Credit Reporting Roundtable held on 10 February 2011 that the Government is supportive of a Credit Code which would contain different rules for each of the different 'credit provider' types/industry sectors. The Communications Alliance concluded:

> If telecommunications providers are to be required to comply with this new legislation, then it needs to be re-written to allow sufficient flexibility for different sectors, or be simplified and have more matters dealt with under the Credit Code for this same purpose.[41]

9.57 Optus also commented on the differences between telecommunications companies and traditional credit providers. Optus stated:

> It is critical to us, therefore, to ensure that – just as we do not require additional data sets that are important to other types of credit providers – we are not captured by some of the new obligations requiring us to contribute additional data to the credit reporting agencies.
>
> Any changes to the information we need to provide to the agencies will require upgrades to our computer systems, changes to internal processes and training hundreds of staff members. As the Committee can imagine, the costs of undertaking such tasks are not low – particularly where systems changes are involved.[42]

Committee comment

9.58 The committee notes the concerns of the APF and Consumer Action in relation to the use of credit reporting information for assessing potential tenants. While real estate agents are excluded from the definition of credit provider, it was argued that other entities manage rental properties. The committee considers that clarity regarding this matter could be provided in the Explanatory Memorandum.

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41 Communications Alliance, *Submission 56*, pp 3–4.

42 Optus, *Submission 58,* pp 2–3.

9.59 The committee also notes the advice from the Department of the Prime Minister and Cabinet regarding the provision of different rules in the Code of Conduct for different types of credit provider and/or industry sector. The committee considers that use of the Code in this way would ensure flexibility of approach and recognition of the business practices of different industries.

Section 192 – Meaning of *access seeker*

9.60 Section 192 provides a meaning of access seeker in relation to credit reporting information or credit eligibility information, about an individual as:

- the individual; or
- a person who is assisting the individual to deal with the credit reporting agency or credit provider and who has been authorised in writing by the individual to make a request. The person cannot be a credit provider, a mortgage insurer, trade insurer or a person prevented from being a credit provider under the Act.

9.61 The ALRC recommended (Recommendation 59–3) that a provision equivalent to subsection 18H(3) be included in the credit reporting provisions so that an individual may access their credit reporting information, for a credit-related purpose, with the assistance of a person authorised in writing. The Government accepted this recommendation and commented that this stringent approach was required so that credit reporting information does not become accessed for non-credit related purposes which would in turn undermine the role of credit reporting regulation. However, the Government went on to note that it was not intended to place onerous restrictions on third parties assisting individuals to communicate with credit reporting agencies or credit providers. The Government indicated that it would encourage the Office of the Privacy Commissioner to provide guidance on appropriate third party access to credit reporting information.[43]

9.62 The National Relay Service (NRS) commented that section 192 could be interpreted as covering someone in the role of relay officer. If this is the case, the NRS stated that it would imply that the NRS caller would need to provide prior written permission to the credit provider for the relay officer to be on the line because the relay officer would, in fact, be the 'access seeker'. While the Government response indicated that this was not intended to be an onerous restriction, the NRS considered that was indeed the case. Further, the NRS stated that this would also be impractical and it was 'concerned that it could reduce the NRS's ability to achieve its legislated intent'.[44]

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43 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, p. 125.

44 National Relay Service, *Submission 52*, p. 1.

9.63 The NRS provided the committee with three scenarios to illustrate that the proposed provisions would be:

- personally onerous as whether written authorisation can be obtained during a phone call from the customer via the NRS relay officer will depend on the call type the customer uses. For example, In Speak and Read, and Speak and Listen calls, customers use their own speech. Because the individual does not write during these calls they cannot give written consent via the NRS relay officer. Written consent will be required before making a call for credit information purposes through the NRS. The time delay in accessing, completing and returning an authorisation form is onerous and often severely disadvantages the NRS caller. As well as the time delay, some NRS callers [particularly Speak and Listen callers who often have multiple disabilities] may need assistance completing and signing an authorisation form.
- operationally impractical as it is unclear whether authorisation forms need a specific named individual or whether general wording such as 'any person employed in the role of Relay Officer by the party contracted by the Commonwealth to provide the Relay Service' would be suitable. Specifically naming an individual would be prohibitive as any of the 120 relay officers may take the call. In addition, all relay officers use pseudonyms to protect their anonymity as their real names are kept confidential; and
- potentially conflicting if a relay officer is considered to be 'an access seeker', it may work against the legislated intent of the NRS – that the Relay Officer is a silent/ hidden/ minor party in the conversation and only relays what is said by either of the two parties.

9.64 The NRS concluded that it is concerned that the need for authorisation of a relay officer could reduce trust in the NRS and, overall, reduce the NRS's ability to achieve its legislated intent.[45]

9.65 The OAIC also commented on the 'access seeker' provision in relation to the NRS. The OAIC stated that the provisions may not take sufficient account of situations where individuals obtain access using the NRS and the need for individuals to provide written authorisation may be problematic. The OAIC noted that the Privacy Act currently only requires written authorisation for third parties that access information 'on behalf of an individual'. The ALRC took the view that the NRS was not involved in accessing information 'on behalf of an individual' and therefore written authorisation was not required under the current provisions. The OAIC noted that the ALRC, partly for this reason, did not recommend and express exception from the requirement to give written authorisation for users of the NRS. However, the OAIC commented that the Exposure Draft uses the term 'assists' rather than 'on behalf of' and, as such, it may require users of the NRS to provide written authorisation.

45 National Relay Service, *Submission 52*, pp 1–2.

9.66 The OAIC suggested that the views of the NRS and its customers be sought to ensure the best outcome under the new credit reporting regime. Subject to those considerations, and the need for supplementary safeguards, the OAIC recommended that either:

- an express exception from the requirement for written authorisation be included in the Exposure Draft 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.[46]

9.67 Experian noted that there are certain entities, including real estate agents, which cannot be access seekers. Experian welcomed this provision but submitted that these exceptions alone do not place sufficiently stringent constraints on the types of entities that can obtain access to credit information on the basis of authorisation by an individual. It was noted that the ALRC recognised that third party access regimes are vulnerable to being used as a 'backdoor' means to allow entities, who are prohibited from obtaining credit information, to get indirect access to such information for non-credit related purposes. The Government Response also emphasised the need for stringent controls to 'assist in ensuring that credit reporting information does not become accessed for non-credit related purposes which would in turn undermine the role of credit reporting regulation'. Experian submitted that the Exposure Draft provisions should enable credit reporting agencies and credit providers to distinguish between applications by third parties who are genuinely assisting the individual in obtaining access to their credit information, and those where the third party is seeking to obtain access to information for its own purposes.[47]

Committee comment

9.68 The committee considers that the ability of individuals to access their credit reporting information with assistance from the NRS should not be hampered by onerous restrictions. However, as both the OAIC and the NRS have indicated, it is unclear whether the Exposure Draft requires individuals who use the NRS to access credit reporting information to provide written authorisation. To many individuals, the need to provide written authorisation may be problematic. In addition, this does not reflect the provisions of the current Privacy Act.

9.69 The committee considers that section 192 should be reviewed to ensure that onerous conditions are not placed on individuals accessing their credit reporting information via the NRS. The committee also recommends that the Department of the Prime Minister and Cabinet consult with the NRS and the Office of the Australian Information Commissioner to ensure that the most appropriate outcome is achieved.

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46 Office of the Australian Information Commissioner, *Submission 39a*, p. 21.

47 Experian, *Submission 46*, p. 19.

Recommendation 30

9.70 The committee recommends that section 192 be reviewed to ensure that onerous conditions are not placed on individuals accessing their credit reporting information via the National Relay Service, in particular the need to provide written authorisation. Further, the committee recommends the Department of the Prime Minister and Cabinet, in undertaking the review, consult the National Relay Service and the Office of the Australian Information Commissioner.

Section 194 – Meaning of *credit reporting business*

9.71 The meaning of 'credit reporting business' includes a business that involves collecting, holding using or disclosing 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. Exemption by regulation is provided for.

9.72 Submitters commented that the definition of credit reporting business appears to remove the dominant purpose test that exists in the definition contained in the current Privacy Act. There was concern that the omission of a dominant purpose test may lead to other organisations being 'unintentionally captured' by the definition contained in the exposure draft, for example, a credit provider such as a bank.[48] The Australian Institute of Credit Management (AICM) commented that:

> On a day-to-day basis, credit reporting currently functions within an industry code of conduct, governed by specific industry legislation and overseen by privacy regulators. It is an activity that has a unique set of obligations and remedies, and non-compliance carries substantial penalty. AICM is concerned that organisations which provide credit may unintentionally come within the definition of a credit reporting agency and as previously indicated be obliged to meet additional regulatory and compliance burdens.[49]

9.73 The AFC also noted the Government's intention to remove the dominant purpose test 'so that any business that engages in credit reporting regardless of whether it is a large or small component should be regulated' as a credit reporting agency. However, the AFC stated that as a result the definition of credit reporting business may be unintentionally broader than the Government's policy. The AFC provided the following example to illustrate its view:

> ...a current common industry practice for credit providers who are looking to offer credit is the exchanging of credit references with other credit providers. A normal component of this involves disclosing (with consent) personal information of a customer (existing or past) for the purpose of

48 National Australia Bank, *Submission 2a*, p. 11; Australian Institute of Credit Management, *Submission 8a*, p. 2; Australian Bankers' Association, *Submission 15a*, p. 5; Australasian Retail Credit Association, *Submission 48*, p. 9.

49 Australian Institute of Credit Management, *Submission 8a*, p. 2.

> providing another entity with information about the individual's history in relation to consumer credit (ie s. 180 defined credit worthiness of an individual). We understand that this practice is intended to be allowed to continue. As a consequence, as currently drafted any AFC credit provider member may meet the definition of a credit reporting business if it were to continue this practice. It would also likely meet the definition of an organisation (s. 17) and consequently be caught within the definition of a CRA (s. 180). We query whether this was intended. The inclusion of s. 194(3) adds a further aspect to our concern. We understand the intention was positive; namely, to ensure information sharing between related entities could continue without them being regarded as a CRA. However, it also potentially has the negative outcome of effectively indicating that a credit provider can fall within s. 194(1) without doing more than conducting its business of credit provision and consequently would be a CRA. We understand this was not the Government's intended outcome.[50]

9.74 While there is a regulation making power to exempt business or undertakings from the definition, the AFC argued that it would be preferable for the definition to be narrowed so that the practice of a credit provider engaging in credit reference exchanges with another credit provider does not constitute a credit reporting business or undertaking and consequently will not meet the definition of a credit reporting agency.[51]

9.75 Veda Advantage provided similar comments in relation to the dominant purpose test and stated that it should be reinstated to ensure a clear compliance framework. Veda went on to state that the definition is 'wide reaching' and 'then proposes exemptions through regulation. This creates uncertainty as it becomes possible for organisations to be regarded as conducting a credit reporting business on an incidental, temporary or transient basis'.[52] In addition:

> This would make it very difficult (if not impossible) to have a stable, permanent and transparent compliance environment required to support credit reporting activity or activities.
>
> It would also impact on the rights of consumers when it comes to enforcing their rights and the ability of regulators to audit and otherwise undertake enforcement activities as these relate to credit reporting.[53]

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50 Australian Finance Conference, *Submission 12a, Attachment 2,* p. i.

51 Australian Finance Conference, *Submission 12a, Attachment 2,* p. i; see also Australian Bankers' Association, *Submission 15a,* p. 5.

52 Veda Advantage, *Submission 65,* p. 17.

53 Veda Advantage, *Submission 65,* pp 37–38.

Committee comment

9.76 Submitters were strongly of the view that a dominant purpose test should be included in the meaning of credit reporting business. However, the committee notes that the Government's response in this regard was clear:

> The Government proposes to remove the 'dominant purpose' test from the definition of 'credit reporting business' as it is concerned that any relevant business, regardless of whether credit reporting is a large or small component of its activities, should be covered by the credit reporting provisions. This would continue to allow a business to engage in other activities unrelated to credit reporting without being covered by the credit reporting provisions to the extent that the business activity is not being conducted for a credit reporting purpose.[54]

9.77 The committee therefore does not support the inclusion of a dominant purpose test.

9.78 In relation to the specific example provided by the AFC, the committee understands that a credit provider providing information to another credit provider is permitted under section 137 (if consent is given). If credit providers exchange information that does not fall within the definition of credit eligibility information, that is non-credit information, the exchange is covered by APP 6.

54 Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice,* October 2009, p. 101.

Chapter 10

Committee conclusions

10.1 The credit reporting Exposure Draft represents a significant step in the reform of credit reporting in Australia. The Exposure Draft implements a more comprehensive credit reporting regime in place of a regime which is seen as being outmoded, cumbersome and inadequate for today's complex finance sector.

10.2 Under the proposed regime, the types of information which credit reporting agencies and credit providers can collect, use and disclose for credit purposes is expanded, including five new data sets. In addition, the regime will apply to a wider range of credit reporting agencies and credit providers.

10.3 While consumer advocates raised concerns about access to greater amounts of information, for example, that it may allow credit providers to impose unfavourable terms on vulnerable customers, the committee supports the move to a more comprehensive credit reporting system. The new credit reporting system supports responsible lending by providing a clearer picture of a consumer's ability and capacity to repay a debt. This will assist in ensuring that consumers do not over commit themselves, particularly those consumers who are disadvantaged or in a vulnerable position. The credit reporting system will also increase competition between large and small lenders thereby benefiting consumers.

10.4 Submitters to the inquiry raised a number of concerns including the complexity of the draft, the need for greater clarity of provisions and the way in which provisions may work or be interpreted. As the new requirements have been provided as an Exposure Draft, no Explanatory Memorandum was available. The committee considers that many of the matters raised will be clarified in the Explanatory Memorandum. In addition, as with the Australian Privacy Principles, many matters will be addressed in guidance from the Office of the Australian Information Commissioner.

10.5 The committee also notes that the Credit Reporting Code of Conduct is being developed in consultation with stakeholders. The Code is an important mechanism in ensuring that credit reporting agencies and credit providers know how to practically apply the credit reporting provisions. It will also address and clarify many matters raised during the committee's inquiry. In addition, the Code will ensure that the credit reporting system remains flexible and responsive to future challenges and developments.

10.6 There were, however, substantial comments in relation to the complexity of the Exposure Draft. The committee notes concerns that this makes the Exposure Draft less user-friendly and may undermine consumer protections and rights. It was also argued that the complexity of the Exposure Draft makes it difficult for credit reporting agencies and credit providers to understand and meet their obligations. The committee

acknowledges these concerns however, the credit reporting system involves large amounts of information which flow between multiple entities. The Exposure Draft proposes to regulate these information flows at each stage to ensure adequate information protection. However, the committee considers that there are some avenues for improving the clarity of the Exposure Draft and has made recommendations in relation to definitions, the use of certain terms and the need for consistency across the consumer credit regulatory regime. In relation to comments about the complexity of definitions, the committee has acknowledged that there are many new definitions, but these reflect the complexity of the information flows and information use in the credit reporting system. The committee did not support the proposal for a single definition of regulated information as this would involve a major re-drafting of the Exposure Draft and does not reflect the current business model of the credit reporting sector.

10.7 During the inquiry, a number of industry stakeholders and consumer advocates undertook consultations on five major issues: identity theft; serious credit infringement; hardship flags; complaints handling; and the simplification of definitions. The committee sought the response of the Department of the Prime Minister and Cabinet to the outcomes of the consultations. The committee has recommended that consideration be given to matters in relation to serious credit infringements so that those listings that do not relate to intentional fraud are dealt with in a different way. This new approach would apply particularly to instances where utilities and telecommunications debts were not paid because of inadvertently failing to provide a change of address notification to a utilities or telecommunications provider. In relation to identity theft, the committee did not support a change from a 'ban' to a 'flag' mechanism. However, the committee made recommendations in relation to ensuring the intent of the Government's response to the ALRC's recommendation in this regard is adequately provided for in the Exposure Draft and that consideration be given to extending the initial ban period from 14 days to 21 days.

10.8 Much evidence was received in relation to hardship provisions. The provision of a hardship 'flag' was not supported by the ALRC. However, credit providers supported such an approach. The committee considers that there are circumstances where a consumer will request a change of credit arrangement because of a change of circumstances, for example, illness. Credit providers also provide consumers with changes to arrangements in response to natural disasters and other events. In these circumstances, the new arrangement is entered into before a default is listed. The committee considers that consideration should be given to allowing these changes to the terms or conditions of an arrangement to be included as an individual's credit information.

10.9 In relation to the complaints handling process, submitters commented on the perceived complexity of the new arrangements. The committee notes that much of the evidence did not support a separate 'correction' and 'complaints' process. However, the committee was not of this view as there is significant merit in allowing for corrections to be handled quickly through the correction process before a consumer proceeds to a complaints process.

10.10 The committee has made recommendations in relation to a range of specific provisions. Many of these recommendations recognise that matters should be dealt with in the Credit Reporting Code of Conduct or that terms should be clarified. In particular, the committee has recommended that the meaning of 'access seeker' be reviewed to ensure that consumers may continue to use the National Relay Service to access their credit reporting information without overly onerous requirements.

10.11 In conclusion, the committee considers that the Exposure Draft comprehensively addresses the recommendations of the Australian Law Reform Commission and implements an effective credit reporting system that protects consumers' rights and assists responsible lending by credit providers.

Senator Helen Polley
Chair

Comments from Coalition Senators

Introductory comment

It should be noted that the membership of this committee has changed along with the change in the composition of the Senate on July 1, 2011. Neither of the Coalition Senators currently members of this committee were members at the time of the public hearings held into this exposure draft in May, 2011.

These comments are based on a consideration of the submissions made to the Committee.

Coalition concerns

Coalition Senators understand that the policies enacted by this legislation stand to substantially benefit consumers and businesses operating in the credit provision market – in terms of better pricing of credit as well as increased protections for consumers. The move to positive credit reporting is not a particularly contentious one.

Coalition Senators also concede that there has been an extensive period of consultation regarding this legislation. However, the consideration of exposure drafts of such substantial pieces of legislation is made more challenging by the lack of an Explanatory Memorandum to assist with deliberation – although this is not an uncommon challenge when dealing with draft legislation.

Coalition Senators are particularly concerned about two issues arising from this inquiry:

- The complexity and prescriptive nature of the legislation
- The inclusion of de-identified data under the provisions of the Privacy Act for the first time.

1. Complexity

Many submitters commented that the exposure draft relies on a prescriptive approach to regulation in this area, in particular submissions from those directly involved in the provision of credit or credit information.

These concerns are recorded at length in the Chair's report (Chapter 3).

This reflects a concern that rather than legislating principles or desired outcomes, the proposed bill legislates actual behaviour and business processes. Submitters argued that regulations or codes of practice would be more suitable for detailed implementation of the new regime. This would provide both flexibility to deal with future developments as well as room for innovation in the market.

Submitters also expressed concern that the prescriptive nature of the legislation would lead to unintentional breaches through the sheer complexity of the provisions. This is a valid concern as one of the objectives of this regime needs to be the ease of compliance, particularly as it relates to genuine human error.

An example that illustrates this concern is the fact that the exposure draft contains 60 new definitions , as opposed to the seven key definitions in the current Privacy Act. The number of new definitions is compounded by their complexity. Again, submitters expressed concern about this.

Coalition Senators concede that there are good reasons that the bill should be progressed rather than delayed. However, we are concerned at the response of the Department to the concerns regarding complexity.

The fact that redrafting legislation to take account of these would be time-consuming is not a sufficient response to these legitimate concerns.

While the exposure draft may implement the policies of the Government in this regard, the number of concerns raised indicates that alternative approaches in some of these areas may also achieve this, although with less complexity and a lower compliance burden.

2. De-identified data

A second issue of concern to Coalition Senators is the issue of bringing depersonalised data into the ambit of the Act.

By its very nature, depersonalised information does not contain identifiable personal data. It is, however, particularly useful for research purposes – and Coalition Senators note that the Government is occasionally the beneficiary of such research.

While the ALRC originally recommended against such a prescriptive approach on the use of depersonalised data, Coalition Senators also note that there has been no case put by the Government that it should be included in the bill.

There are clear costs to imposing restrictions on the use of depersonalised data – some of which will counteract the intentions of this bill (in particular the ability to use more information to more efficiently price credit).

Coalition Senators are not convinced that depersonalised data should be included in the provisions of this bill.

Concluding comments

Conscious that consideration of an Exposure Draft has its limitations, Coalition Senators do not wish to delay progress and passage of this bill. However, we believe that the Government has sufficient time to address the two concerns outlined above and should do so as a priority. This is a significant opportunity to get this legislation right. Where possible, all changes that simplify and streamline reporting should be undertaken.

Senator Scott Ryan
Deputy Chair

Senator Sean Edwards

APPENDIX 1

Submissions and additional information received by the committee

Submissions

1a Australian Law Reform Commission
2a National Australia Bank
8a Australian Institute of Credit Management
12a Australian Finance Conference
13a The Westpac Group
15a Australian Bankers' Association
17a Insurance Council of Australia
19a Telstra Corporation Ltd
29a Office of the Privacy Commissioner NSW
31b Law Council of Australia
33a Australian Privacy Foundation
36a Law Institute of Victoria
39a Office of the Australian Information Commissioner
46 Experian
47 Dun & Bradstreet Australia
48 Australasian Retail Credit Association
49 Consumer Credit Legal Service of Western Australia (CCLSWA)
50 Tasmanian Collection Service
51 Energy and Water Ombudsman NSW (EWON)
52 National Relay Service
53 GE Capital Finance Australasia
54 Commercial Asset Finance Brokers Association
55 MasterCard
56 Communications Alliance
57 Confidential
58 Optus
59 Citigroup
60 Legal Aid Queensland
61 Insolvency Practitioners Association
62 Confidential

63 Consumer Action Law Centre

64 ANZ Bank

65 Veda Advantage

66 Consumer Credit Legal Centre (NSW)

67 Financial Counsellors Association of Queensland (FCAQ)

68 Credit Ombudsman Service Limited

69 Telecommunications Industry Ombudsman

70 Consumer Credit Legal Centre NSW, Consumer Action Law Centre, Financial Counselling Australia, Australian Privacy Foundation, FCRC (Financial and Consumer Rights Council Inc.) and Care Inc. - Consumer Law Centre of the ACT

71 Princeville Credit Advocates

72 Confidential

Additional information received

1 Department of the Prime Minister and Cabinet: Background information on the *Privacy Act 1988* reforms

2 Dr Normann Witzleb, Faculty of Law, Monash University, 'Privacy: Exposure Draft of the new Australian Privacy Principles – The first stage of reforms to the Privacy Act 1988 (Cth)', *Australian Business Law Review*, 39 (2011)

3 Dun & Bradstreet: *Roadmap to Reform*, October 2008

4 Dun & Bradstreet: *Credit Reporting Customer Payment Data*, March 2009

5 Dun & Bradstreet: *New to Credit from Alternative Data*, March 2009

6 Dun & Bradstreet: *Financial Inclusion Through Credit Reporting - Hurdles and Solutions*, April 2010

7 Veda Advantage: *Economic Impacts of Payment Reporting Participation in Latin America*, May 2007

8 Veda Advantage: *The Economic Consequences of Consumer Credit Information Sharing - Efficiency, Inclusion, and Privacy*, October 2010

9 Veda Advantage, Additional Information, provided on 9 August 2011

10 Department of the Prime Minister and Cabinet's response to proposals made by Veda Advantage, provided on 5 September 2011

Answers to Questions on Notice

1 Australian Law Reform Commission: Answers to Questions on Notice following the public hearing on 25 November 2010, dated 15 March 2011

2 Department of the Prime Minister and Cabinet: Answers to Questions on Notice provided following the public hearing on 25 November 2010

3 Australian Privacy Commissioner, Office of the Australian Information Commissioner (OAIC): Answer to a Question on Notice asked at the public hearing held on 16 May 2011, provided on 28 June 2011

APPENDIX 2

Public Hearing

Monday, 16 May 2011
Jubilee Room, NSW Parliament House, Sydney

Witnesses

Australasian Retail Credit Association
Mr Stephen Wykeham Balme, General Manager
Mr Carlo Cataldo, Chairman
Mr Matt Gijselman, Chief Industry Adviser
Ms Ardele Blignault, Vice President, Government Affairs and Policy

Australian Bankers Association
Mr Ian Bruce Gilbert, Policy Director
Dr David John Grafton, Chief Risk Officer, Retail Banking Services, Commonwealth Bank of Australia
Mr David Fodor, Chief Credit Officer, Personal Banking Risk, National Australia Bank

Australian Finance Conference
Mr Ronald Hardaker, Executive Director, Australian Finance Conference
Ms Helen Mary Gordon, Regional Director and Corporate Lawyer

Communications Alliance
Mr John Leslie Stanton, Chief Executive Officer

Consumer Action Law Centre
Ms Carolyn Louise Bond, Co-Chief Executive Officer

Consumer Credit Legal Centre (NSW) Inc.
Ms Karen Cox, Coordinator
Ms Katherine Lane, Principal Solicitor

Dun & Bradstreet
Mr Damian Karmelich, Director, Marketing and Corporate Affairs
Mr Steve Brown, Director, Commercial and Consumer Services
Ms Jane Wilson, Director, Information Technology and Data

Office of the Australian Information Commissioner
Mr Timothy Pilgrim, Australian Privacy Commissioner
Ms Angelene Falk, Director, Policy

Veda Advantage
Ms Nerida Caesar, Chief Executive Officer
Mr Rory Matthews, Chief Operations Officer, Managing Director International
Mr Chris Gration, Head of External Relations

APPENDIX 3

Other matters raised in submissions

The following matters were raised in submissions. These matters go to technical issues on which the committee has no comments to make but draws to them to the attention of the Department of the Prime Minister and Cabinet.

Provision	**Comments received**
Throughout	Consumer Action Law noted that the term 'written note' is used throughout the Draft and stated that these references should perhaps be changed to a 'record' rather than a 'note'. It is unclear whether there is a requirement to retain these notes or whether these notes will be included in the credit report so that the individual can access them. Consumer Action Law believed that they should be. Consumer Action Law, *Submission 63,* p. 13.
Part A – Credit reporting *Division 2 – Credit reporting agencies*	
Section 103 – Application of the Division to credit reporting agencies	The National Australia Bank (NAB) queried why subsection 103(3) referred to CP derived information as it is unclear why a credit reporting agency would hold this information. National Australia Bank, *Submission 2a*, p. 5.
Section 105 – Open and transparent management of credit reporting information	The NAB submitted that subsection 105(4) appears to allow credit reporting agencies to have their own data standard. If this is the case, NAB stated that it would impractical from a credit reporting system perspective and add enormous cost for all users. National Australia Bank, *Submission 2a*, p. 5.
Section 106 – Collection of solicited credit information	The NAB commented that section 106 (collection of solicited information) appears to attach a limitation on the collection of identification information. This may affect a credit reporting agency's ability to conduct identity verification services and NAB suggested that an exception be included for these purposes. National Australia Bank, *Submission 2a*, p. 5. The APF commented that paragraph 106(4)(f) 'hints at mutual exchange between CRAs but needs clarification'. In addition, the APF commented that the issue of reciprocity is outstanding, that is whether only lenders inputting information to the credit reporting system should be allowed to access the pooled information'. Australian Privacy Foundation, *Submission 33a*, p. 8. The AFC submitted that subsection 106(4)(d) should also be qualified by a knowledge/reasonableness test in the same way as subsection 106(4)(c) is qualified. Australian Finance Conference, *Submission 12a, Attachment 2,* p. vi.

Section 107 – Dealing with unsolicited information	Experian commented that section 107 provides for the destruction of unsolicited credit information as soon as practicable if a credit reporting agency determines that the information could not have been collected under 106 if the agency had solicited the information. Subsection 107(4) provides for a civil penalty if this does not occur. Experian commented that the remaining provisions of Division 2 already have the effect of prohibiting a credit reporting agency from using or disclosing such credit information. Experian argued that these provisions, which include civil penalty provisions, are adequate to constrain the agency from dealing further with such credit information and that the additional obligations in subsection 107(4) regarding the destruction of such information are unnecessary and should not carry civil penalty consequences. Experian, *Submission 46*, p. 21.
Section 111–Use or disclosure of pre-screening determinations	The APF commented that section 111 seems to be addressing the outsourcing of contact, for example, to a mailing house. The APF questioned whether this was the intention of the section. Australian Privacy Foundation, *Submission 33a*, p. 10.
Section 112 – Destruction of pre-screening determinations	The APF commented that there appears to be some overlap between subsection 112(2) and section 104, which could be clarified. Australian Privacy Foundation, *Submission 33a*, p. 10.
Section 116 – Quality of credit reporting information	ARCA argued that because credit reporting is not mandatory and there are different levels of information that can be supplied by certain credit providers, a credit report is unlikely to contain a total complete record of all of a consumer's debts. Thus it is unclear what 'complete' means. ARCA recommended that all credit providers be allowed to access repayment history, or alternatively to clarify that each record within a credit report is required to be 'complete'. Australasian Retail Credit Association, *Submission 48*, p. 17.
Section 117 – False or misleading credit reporting information	The NAB commented that it supported the inclusion of the reference to 'a material particular' requirement in reference to any claim of credit reporting information being false or misleading. However, the NAB suggested that a threshold assessment be articulated in relation to this concept. National Australia Bank, *Submission 2a*, p. 6.
Section 118 – Security of credit reporting information	The APF commented that the audit and dealing with suspected breach elements of the agreements between credit providers and credit reporting agencies in paragraphs 118(2)(b) and (c) are subject to interpretation. Australian Privacy Foundation, *Submission 33a*, p. 10. Telstra commented on the inclusion of the word 'interference' in this provision as it had done in relation to the APPs. Telstra also noted that there is no mention of including the word 'interference' in relation to security in the ALRC's report. Telstra, *Submission 19*, p. 2.

Section 120 – Correction of credit reporting information	APF sought re-assurance that no rights have been lost through the separation of the correction obligation when the credit reporting agency becomes aware by other means (section 120) from correction 'on request' (section 121). APF also voiced concern with the reference in paragraph 120(3)(a) to it being 'impracticable' for a credit reporting agency to give notice to a recipient of credit reporting information that the information has been corrected. APF noted that there is similar wording in some other sections and commented that it could not understand why it might be impracticable for a credit reporting agency to provide corrected information to a recipient if it has appropriate systems in place. Australian Privacy Foundation, *Submission 33a*, p. 11. The NAB suggested that obligation to provide previous recipients of the information with a written notice of the correction unless it is impracticable for them to give the notice appears to be in conflict with subdivision E obligations (integrity of information). National Australia Bank, *Submission 2a*, p. 6.
Section 125 – Retention period for credit information – personal insolvency information	Section 125 provides for the retention periods for credit information that relates to personal insolvency information. ARCA commented that there appears to be items of information in the retention criteria that are not data that is allowed within the definition of Credit Reporting Information, for example, certificates signed under section 232 of the *Bankruptcy Act 1966* are not something for which provision has been made for credit reporting agencies to be able to score this data. In addition, for items 2, 3, 4 (personal insolvency agreements and debt agreements) the retention period starts 'on the day' on which the agreement is executed. ARCA commented that the timing of bankruptcy notifications (the lag between when these items actually occur) and when the credit reporting agency could first know about them is likely to be more than 'on the day'. This makes the deletion of the data in accordance with the provisions not possible. ARCA recommended that the requirement be amended to a 'reasonable period'. Australasian Retail Credit Association, *Submission 48*, pp 17–18.
Division 3 – Credit providers	
Section 137 – Permitted CP disclosures between credit providers	ARCA also commented on the intent of paragraph137(2)(b) in relation to consent being given to the credit provider or recipient and stated that this provision is unclear, particularly whom the 'recipient' is. ARCA recommended that paragraph 137(2)(b) be removed from the Exposure Draft. Further, subsections 137(1) and 137(2) require the consent to allow for the transfer of data, however, subsection 137(3) does not require consent for the transfer to an external agent. ARCA questioned whether this lower standard of data security was intentional. Australasian Retail Credit Association, *Submission 48*, pp 17–18.

Section 140 – Permitted CP disclosures to debt collectors	Section 140 provides for disclosures of certain information to debt collectors. ARCA and the NAB commented that this provision requires clarification as it is unclear what information can and can't be provided to or obtained by debt collectors. Australasian Retail Credit Association, *Submission 48*, p. 18; National Australia Bank, *Submission 2a*, p. 7.
Section 143 – Quality of credit eligibility information	The ANZ Bank argued that this section is unnecessary as there is a similar requirement under APP 10. In addition, the agreements that must be entered into between credit reporting agencies and credit reporting providers under section 116 would seem to make the provision unnecessary. The ANZ recommended that the subsection should be omitted to streamline compliance requirements to credit providers and avoid overlap with other provisions in the Exposure Draft. ANZ Bank, *Submission 64*, pp 7–8.
Section 145 – Security of credit eligibility information	Section 145 provides for the security of credit eligibility information including the destruction of information no longer needed. ARCA commented that paragraph145(2)(b) 'may increase the danger of deleting information that is still legally required to be held' as the provision relates to information no longer needed 'under this Division'. ARCA submitted that this may be problematic if the data is needed to meet requirements of another Division, for example, an allowable use would be research sanctioned by the Information Commissioner but because that capacity to sanction research is not within this provision, the data could arguably not be retained for that purpose. ARCA recommended that the words 'under this Division' are deleted from the provisions. Australasian Retail Credit Association, *Submission 48*, p. 18.
Section 147 – Correction of credit information	Credit providers must take steps to correct information that is inaccurate, out-of-date, incomplete or irrelevant. ARCA suggested that clarification is required regarding 'out-of-date' in paragraph 147(1)(b). ARCA stated that it is unclear where in the Privacy Act there is provision for holding data for use in scorecard development, which may require holding data for several years which for other purposes could be deemed to be out-of-date. Australasian Retail Credit Association, *Submission 48*, p. 19.
Section 148 – Correction of credit eligibility information	ARCA commented that section 148 seems to duplicate 147 and therefore should be removed. Australasian Retail Credit Association, *Submission 48*, p. 19.
Section 149 – Individual may request the correction of credit information etc	The ANZ was of the view that individuals should not be entitled to amend CP derived information and CRA derived information as proposed by section 149 as 'this is an assessment by either the credit provider or credit reporting agency of the individual's credit worthiness'. Rather, the ANZ considered that individuals should be

	able to request corrections to the credit information that feeds into those assessments. ANZ Bank, *Submission 64*, p. 6. The APF also commented: • paragraph 149(1)(b) requires that the credit provider must hold at least one kind of personal information that an individual may have corrected. The APF stated that, in practice, almost all consumers who complain to credit providers do so because of information that has been reported to a credit reporting agency by a credit provider, so the requirement of paragraph 149(1)(b) is unnecessary and it would be unfair if a consumer had to show that the credit provider held that information. Therefore, 149(1)(b) should be amended to read 'the provider holds *or has reported to a CRA* at least one kind of the personal information referred to in paragraph (a)'; • subsection 149(3) appears to leave consultation with the credit reporting agency/other credit provider as a discretion, but section 159 in effect requires the credit provider to notify the individual. It was submitted that a cross reference note would be useful here. Australian Privacy Foundation, *Submission 33a*, p. 12.
Section150 – Notice of correction etc must be given	The APF suggested that the notice of correction should include a statement of the individual's rights and EDR scheme contact details. Australian Privacy Foundation, *Submission 33a*, p. 12.
Section 157 – Individuals may complain to a credit reporting agency or credit provider	The Law Institute of Victoria (LIV) suggested a further ground for complaint be provided for in section 157. The LIV commented that section 126 provides for the destruction of credit reporting information in cases of fraud. The section applies if a number of circumstances arise including that an agency is satisfied that an individual has been the victim of fraud (including identity fraud) and the consumer credit was provided as a result of that fraud (paragraph 126(1)(c)). The LIV noted that there is no right of review or complaint with respect to any decision of an agency that is not satisfied of the matters set out in paragraph 126(1)(c) and recommended that such a ground for complaint be included in section 157. Law Institute of Victoria, *Submission 36a*, p. 3.
Part B – Other relevant provisions *Division 1 – Definitions*	
Section 180 Definitions	Consumer credit ARCA commented that as the definition of consumer credit is based on a threshold of 'primarily', this would mean that up to 50 per cent of the credit in a 'package' product could be consumer, but any difference in the allowability of certain types of information to be used in assessing (and presumably managing and collecting) on such credit would be applied to all of the consumer credit within that

	package as well. Such a situation could have an impact on packaged products for small business customers. Australasian Retail Credit Association, *Submission 48*, p. 13. Consumer credit related purpose In relation to a consumer credit related purpose, Westpac commented that it was concerned that the definition of a consumer credit related purpose in section 180 is currently restricted to assessing an application and collecting overdue payments. The definition does not include credit providers periodically obtaining an updated credit report for open accounts post-approval. Westpac argued that periodic reviews are important tools to ensure that customers are accessing and managing credit in a responsible manner and therefore recommended that such a purpose be included in the definition. Westpac, *Submission 13a*, p. 2. Credit reporting agency The ANZ Bank submitted that given the broad definition of credit reporting business, credit providers could be inadvertently captured by the definition. As a consequence, credit providers could be regulated as both credit providers and credit reporting agencies. The ANZ Bank recommended that the definition of credit reporting business be amended to exclude credit providers. Alternatively, the definition could be amended to include a dominant purpose test, as is the case currently in the Privacy Act. ANZ Bank, *Submission 64*, p. 5. Pending correction request ARCA stated that the definition of pending correction request refers specifically to 'credit information' and 'CRA derived information' only. Therefore, this would exclude CP derived information. Subsection 157(2) includes the ability to complain about 'credit eligibility information' which includes CP derived information. ARCA commented that this would suggest that due to the limited definition of a pending correction request, there can be no pending complaints that relate to CP derived information. The same issue arises with the definition of pending dispute. Australasian Retail Credit Association, *Submission 48*, p. 13.
Section 191 – Acquisition of the rights of a credit provider	ARCA commented that section 191 states that a debt buyer, upon buying a specified debt, becomes for the purposes of the Act a credit provider. If that is the case, then other sections with regard to collections agencies, and other assignees, would seem to be inconsistent. Australasian Retail Credit Association, *Submission 48*, p. 13.
Section 181 – Meaning of *credit information*	APF commented a new concept of 'Identification Information' is used in the definition of credit information. The definition of identification information is context specific to credit reporting and APF argued that it would be better not to introduce a term into

	Australian law which may be taken out of context and used as a precedent in other contexts. APF submitted that this should be replaced with Credit Identifying Information. Australian Privacy Foundation, *Submission 33a*, p. 4.
Section 185 – Meaning of *payment information*	ARCA stated that within the meaning of payment information, it is unclear whether the requirement for updating a previously listed default is only when it is paid in full (or the debt is settled for less than the full amount) or if the requirement is to update when any payment of the previously default amount is made. Further, as the amount of a defaulted debt can increase with the addition of further missed payments or fees or interest, it is not clear whether a previously default amount can be updated (assuming the appropriate notification and collections actions have been undertaken). Australasian Retail Credit Association, *Submission 48*, p. 13.
Section 189 – Agents of credit providers	ABA noted that an agent of a credit provider is treated as a credit provider itself. Section 189 appears to recreate section 11B(4B) of the current Privacy Act with respect to an agent acting on behalf of a credit provider. ABA stated that some of its members operate branch structures as franchises. These franchisees are agents of the principal bank and their operations are seamless to the customer, branded as the bank and they create deposits and credit facilities as items on the bank's balance sheet. Under the NCCP these franchised branches are treated as credit representatives of the licensee bank. ABA argued that a similar approach may need to be taken in the Exposure Draft because the franchisees are not licensees within the meaning of the NCCP and hence the Exposure Draft. Under the NCCP the bank as licensee is liable for the conduct of its credit representatives. There is scope for this to be addressed under the regulation making power in subsection 194(4). Australian Bankers' Association, *Submission 15a,* p. 5.
Section 193 – Meaning of *credit* and *amount of credit*	Within the meaning of credit and amount of credit, ARCA argued that it is unclear whether or not interest, fees and charges are to be considered as part of the debt when referring to the amount. If it were the case that they were not, then this would create substantial issues in relation to the listing of missed repayments and defaults, for example. Unpaid fees and charges are incorporated into the principle for certain products. Separating these, if that were required under this section could require substantial systems modification and may have tax and other legal ramifications not contemplated when this section was drafted. Australasian Retail Credit Association, *Submission 48*, pp 13–14.