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Review of Privacy – Credit Reporting
Provisions
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[Recommendations are in **bold type**]

The Australian Privacy Foundation

The Australian Privacy Foundation (APF) is the leading non-governmental organisation dedicated to protecting the privacy rights of Australians. We aim to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians.

Since 1987 the Australian Privacy Foundation has led the defence of the rights of individuals to control their personal information and to be free of excessive intrusions. We use the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed.

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Scope of the Review

In our view, it is impossible to achieve the objectives of credit reporting regulation without also addressing the *use* of the personal information collected and reported by credit providers. The Privacy Act currently already does so to some extent, but neither the Privacy Act nor credit laws deal with the ultimately critical issues of how the information can be used in credit assessment and scoring. There is no regulation of the relevance, proportionality, completeness or steps taken to verify information that feeds into lending decisions.

Many of the concerns about the use of consumer credit information relate to lending practices – a policy arena in which there is already a major debate between financial industry and consumer groups with expertise in financial services about responsible vs reckless lending. While we understand that this wider policy area may be seen *prima facie* as going beyond the terms of reference of the ALRC Review, we suggest that the wider definition of ‘report’ for the purposes of credit provider obligations (section 18N(9)) already places credit assessment and lending practices within the scope of the Privacy Act jurisdiction, and therefore legitimately within the scope of the Review.

The existing regime already regulates much more than just information held by credit reporting agencies (CRAs); it also covers some activities of credit providers (CPs) using other information, and even the activities of other third parties using information obtained from a CRA or CP. It also clearly defines CRAs so as to regulate their activities ‘whether or not the information is provided or intended to be provided for the purposes of assessing applications for credit’ (s.6(1)).

We note the quotation at paragraph 2.29 from the Minister’s second reading speech on the 1989 amendment Bill which reads in part:

“The principal purpose of this Bill is to provide privacy protection for individuals in relation to their *consumer credit records*.” (our emphasis)

The term ‘credit record’ is not then used in the Act. However, **we submit that the ALRC should recommend that the legitimate wider scope of the regime be recognised by abandoning the narrow term ‘Credit reporting’ and using instead the more accurate ‘Credit information’** which should be defined as ‘report’ is in s.18N(9).

At the same time the implied scope of the terminology could usefully be narrowed – again in line with the second reading speech - by explicit reference to either ‘*Consumer or Personal credit information*’ and ‘*Consumer or Personal credit reporting*’ (as applicable) to make it clear that the regime is only concerned with information about credit extended to natural persons for a non-business purpose.¹ (Q.5-25)

These two changes would support the intent of the legislation, which the Issues Paper correctly paraphrases in paragraph 2.31 as ‘to regulate the collection [etc] of personal credit information.’

While the focus should remain on the use of personal credit information for credit assessment and lending decisions, the review should be mindful of the increasing pressures to use information held by CRAs for other secondary purposes unrelated to credit arrangements’ some of which are already expressly allowed under the Privacy Act. A comprehensive review of privacy protection for personal credit information must in particular take account of any use of information held by CRAs for general identity management purposes, either commercially or in relation to government processes.

Another scope issue relates to the definition of ‘Credit Provider’. This is addressed under a separate heading below.

Rules cannot be divorced from enforcement

Chapter 4 of the Issues Paper addresses the complaints and enforcement aspects of the Privacy Act in the specific context of the credit reporting provisions. Many of the issues raised here are generic ones already canvassed in Issues Paper 31, and our general answers to Qs 4-1 to 4-4 are contained in our submission on that Paper.

We submit that consideration of the credit reporting provisions must take account of views both on the adequacy of the complaints and enforcement provisions and on the fifteen years experience of how those provisions have been used in practice.

We submit specifically that the failure of successive Privacy Commissioners to adequately address systemic non-compliance, and their willingness to make Determinations and issue advices that favour wider business use of credit information, seriously undermine confidence that any further discretion should be given to the Commissioner.

¹ We note that the personal v commercial distinction in the credit reporting provisions is different from the distinction in the Privacy Act more generally between natural and legal persons. The definition of personal information as information about natural persons means that information about sole traders and partners that relates to their business affairs is still personal information subject to privacy principles. We make no judgment here about the appropriateness of this wider definition but do not propose any change to the clear distinction between personal and commercial in relation to credit reporting.

We also have little confidence that allowing detailed rules to be made by Regulation will in practice provide the same protection against progressive function creep as statutory rules.

While in an ideal world more of the rules could be left to Regulations, and to the Commissioner's discretion, to allow for flexibility and easier adjustment, the reality is that business and government interests would find it much easier to achieve changes under such a regime, and consumer groups would find it even harder than at present to resist changes that adversely affected privacy interests.

The specific complaint handling requirements in Part 3 of the Code of Conduct in some cases have no equivalent in relation to the NPPs, and **it is important that these be retained as binding rules**. They include the requirements to refer complaints between CPs and CRAs where relevant (3.3-3.5) and to specifically inform a dissatisfied complainant that they may complain to the Privacy Commissioner (3.7).

We also support the proposal for placing the burden of proof in relation to disputed listings more explicitly on the credit provider (IP 32 paragraph 4.32) – see also our comments on better evidence for defaults below.

In response to Q.4-4, **we favour the replacement of most² of the criminal offence provisions in the Act with a strict liability civil penalty regime**. The burden of proof required for successful criminal prosecutions is too high to be a realistic deterrent – we note that there have been no prosecutions to date under Part IIIA. Civil penalty regimes have proved far more effective for enforcement of financial services and consumer protection laws.

On the specific point of application to acts and practices outside Australia (IP 32 paragraph 5.162 & Q.5-27) **we can see no reason why the provisions of s.5B should not apply to Part IIIA**. Whatever application the Act has for private sector organisations subject to the NPPs, and the Commissioner's powers, should logically apply also to CRAs and CPs.

Underlying assumptions

We submit that the Issues Paper has to some extent fallen into a trap of accepting certain financial industry positions as agreed assumptions. These include:

- More lending is desirable

While growth in overall lending appears to have become a surrogate for economic health, we challenge whether this is necessarily the case, particularly when lending is broken down into different types and purposes.

² The 'third party' offences in ss.18S & 18T should remain criminal

- Risk based pricing is desirable

While superficially attractive, this ignores any community benefit (public interest) in an averaging or community rating outcomes, which may contribute to important access and equity objectives. As we explain later, we also believe strongly that the costs of ensuring data quality are spread across all lenders (and indirectly all borrowers) rather than that costs be loaded inequitably onto any particular cohort of borrowers.

- Automated Decision-making is desirable

The main argument for this appears to be one of efficiency – reducing the cost of credit assessment. We challenge this on the basis that automated decision making will only ever deliver outcomes that are efficient in the aggregate – at the expense of fairness in individual cases. We submit that there is an essential role for human intervention to review the individual circumstances of each borrower, and that to the extent that this involves higher cost, then that is a cost which should be spread across all borrowers in the interest of fairness.

- If information access can be justified it should be accessible through a centralised system

While there is clearly a legitimate role for some centralised information, it is not the only, or always the most desirable way of getting the right information to the right person. The present regime allows lenders to obtain additional information from other lenders; but few take advantage of this option – perhaps because of cost – preferring to complain about the lack of a centralised source of the same information.

- If information can be justified, individuals cannot be allowed to opt-out

This assumes that the risk of some individuals not being ‘honest’ with potential lenders justifies treating all borrowers as potentially dishonest, and not trusting them to provide full and accurate information about their commitments. In accordance with ‘risk-assessment’ models normally promoted by business interests, we would like to see a detailed evidence-based analysis of the risk profile. If the risk is confined to a relatively small proportion of the population, then alternative ways of addressing that issue should be considered, rather than requiring the entire population to submit to mandatory disclosure and sharing of their financial details.

There is a danger that in a detailed discussion of credit reporting regulation, we lose sight of a fundamental presumption underlying privacy law: that individuals are entitled to a presumption of privacy – particularly in the sensitive area of personal finances – with any exceptions needing to be clearly justified on the basis of other public interests that may outweigh the privacy interests of individuals.

It is also desirable to make it clear that this is not just a financial services issue. The actual and potential secondary uses of credit information files and credit reports, and the attraction of them for both legitimate and illegitimate use (e.g. identity management and identity crime) means that the regulation of personal credit information must take into account much wider public interest issues. In this respect we note the comments made by the Privacy Commissioner in her recent submission on the draft AML-CTF Rules: that these rules leave it unclear as to whether the use of credit history for the purpose of account opening ID verification is authorised by law.³ We return to this issue below.

Comprehensive reporting

(Qs 6-1 to 6-4)

The Discussion Paper chooses to treat the issue of comprehensive reporting⁴ as separate from the review of the current regulation (Chapter 6). This can be seen as a somewhat artificial distinction given that the current law already allow CIFs to contain information that is not necessarily 'negative' - such as current credit providers and inquiries, including type and amount of credit sought.

However, we share the views of other consumer groups that the credit reporting industry should not be allowed to move significantly towards a comprehensive reporting model unless and until the very substantial problems with the existing system are resolved. **We submit that the ALRC should recommend that any further consideration of comprehensive reporting be deferred until after experience with an initial round of reforms resulting from the current Review.**

'One size fits all' approach no longer tenable

The current regime includes a presumption that there is only a single level of access to consumer credit information files. We believe this is too simplistic. **We submit that there needs to be a more nuanced debate about different levels of access: who needs access to what information for what purposes?** This is picked up in the Issues Paper in the context of inquiry information (paragraph 5.9), and more generally later, but in our view deserves much greater attention as a desirable feature of a reformed regime.

Definitions

Generally, we raise issues relating to definitions as they arise in the context of discussion of information privacy principles below. However, the definition of 'credit provider' is so fundamental to the scope and effect of the regulatory regime for credit reporting, as

³ See <http://www.privacy.gov.au/publications/sub-austrac032007.html#Customer>

⁴ We welcome the ALRC's use of the term 'comprehensive reporting' rather than 'positive reporting' as the latter introduces a bias into discussion. We urge the ALRC to continue to avoid the use of the terms positive or negative reporting – as we point out, the current regime allows more than just 'negative' information.

well as being central to the discussion on permitted uses and disclosures later in this submission, deserves separate and initial consideration. The following paragraphs answer the questions posed in Qs.5-10 to 5-13.

'Credit provider' has the meaning assigned by s.11B, but this includes a discretion for the Privacy Commissioner to extend the meaning in Determinations (as provided for in s.11B(1)(d)(ii)). The Commissioner has significantly extended the meaning in successive Credit Provider Determinations since 1991.

The ALRC asserts that the original policy behind the Commissioner's Classes of Credit Provider Determination, first issued in 1991, was to 'seek to declare as credit providers as wide a range of businesses as practicable and permissible' (IP 32 para 5.84). This express objective is missing from subsequent versions of the Determination (most recently August 2006) but the Commissioner has not been swayed by arguments from consumer and privacy groups that this was a wrong policy aim, and has successively re-made the Determination to similar effect.

We argue that it would be more consistent with the primary privacy protection purpose of the Act, notwithstanding the requirement in s.29 to exercise powers with regard to business efficiency etc, for the Commissioner to expand the definition of credit provider only where, on balance, a strong case can be made for access to information held by credit reporting agencies. If this was the starting point, rather than a declared willingness to expand, then consideration of the compliance issues and proportionality arguments raised during consultations might have led to a more restrictive definition.

The failure of the Commissioner to strike the correct balance is illustrated by the references to the Privacy Commissioner's Report on the Review of Credit Provider Determinations included in the Issues Paper at paragraph 5.87. The Commissioner appears to assert that evidence of systemic issues is 'trumped' by the experience of complaint handling bodies – which must necessarily be narrower than the acknowledged 'evidence'. The promised information sheets and education strategies and audit programs to address the acknowledged problems have yet to appear.

Based on experience, consumers can have no confidence that Privacy Commissioners will exercise their Determination making power, and subsequent enforcement activity, in such a way as to adequately protect the privacy of their credit information. We therefore submit that this power should be removed from the Commissioner, and that instead, the meaning of 'credit provider' should be exhaustively defined in the Act. Inadvertent oversight of legitimate claims (e.g. for mortgage insurance, securitisation arrangements, and assignees) in the original legislation were rectified in early Determinations. These can now be incorporated in a new statutory definition. There has been enough experience of the law to ensure that all legitimate claims for inclusion have been brought to light and accommodated. Leaving the Commissioner with a power to further extend the definition is now just an open invitation for 'function creep'.

The best example of function creep to date has been the granting of access, by Privacy Commissioner Determination, of utilities – telephone, energy and water suppliers. This was a major extension beyond the scope of credit reporting allowed by Parliament, with profound implications for consumers. Because most utilities are in the nature of ‘essential services’, the consequences for individuals of any interruption of supply are very significant. Without entering into an important debate about ‘rights’ to essential services, it is clear that it is not appropriate to treat utility debts as just another business debt – important issues of public policy come into play. Access to the credit reporting system by utility suppliers has also compounded another problem – that of the disproportionate effect of listing small value defaults. This is discussed further below. **We submit that the Review should re-assess the arguments for and against inclusion of utility suppliers, and for special conditions and safeguards in relation to the use of credit reporting by utility suppliers.**

The Issues Paper refers in paragraph 5.99 to two specific ‘bids’ for access to the system from classes of organisation not currently defined as credit providers – mercantile agents (debt collectors), real estate agents and landlords.

There is no justification for allowing debt collectors direct access to credit information as the Act already provides for them to receive information from CIFs and CRs that is relevant to collection of debts via their client Credit Provider. Independent access could therefore only be for more general ‘tracing’ purposes unconnected to recovery action for a particular debt.

The Parliament expressly excluded the real estate industry from access to the credit reporting system when Part IIIA was originally enacted. Their case was made then and rejected. We are not aware of any new arguments for such access. What has changed since the early 1990s is clear evidence of unsatisfactory tenancy database operation which resulted in four adverse Complaint Determinations by the Privacy Commissioner in 2004⁵, and in an agreement by all Australian governments to specifically regulate tenancy databases. **These developments strengthen the arguments against access to the credit reporting system for tenancy assessment.**

⁵ See <http://www.privacy.gov.au/act/casenotes/index.html>

Applying privacy principles to credit reporting

Collection

Permitted content

(Qs.5-1 & 5-26)

The Act attempts to restrict credit reports to a prescribed set of information, but does so clumsily by prescribing the content of credit information files with both a positive and a negative list (IP32 paragraphs 3.24 & 3.25), and then limiting the content of credit reports to ‘permitted categories’.

The application of these limits in practice is complicated by the choice of some CRAs to hold some of the permitted content in separate databases; of identifying particulars on the one hand and of publicly available information including court judgement and bankruptcy orders on the other. Some items within both of these categories of information can be held in a CIF, while others cannot, but can be held elsewhere. The other (non-CIF) databases are subject only to the general National Privacy Principles, leading to uncertainty and confusion amongst both data users and data subjects as to their obligations and rights respectively. **We submit that any credit reporting rules additional to the NPPs should apply to all information held by CRAs from which credit reports are derived, whether or not the some or all of the information could be held separately subject only to the NPPs.**

In relation to Residential Tenancy data (paragraph 3.58) we note that CPs would be covered by s.18N in respect of any information in an RTD as it is ‘has a bearing on ... creditworthiness ... etc’.

Identifying particulars

In relation to identifying particulars, the Issues Paper explains the current position at paragraphs 3.21-22 but does not discuss the issue further in Chapter 5. We see this as a major omission, as the identifying particulars are critical not only to accuracy of matching – both for commercial access and for ‘subject access’ by individuals – but also to the value of the CIFs for other uses unrelated to credit assessment.

Inquiry information

In relation to inquiry information, the Issues Paper refers to the submission of the CCLC that this information can be seriously misleading if it is ‘assumed’ to be negative. We support the view that individuals should not be penalised for shopping around for credit, but reject the implied support in paragraph 5.8 for comprehensive reporting as the solution. Instead, **there should be a requirement on CPs not to use inquiry information ‘negatively’ in their credit assessment processes without first ascertaining from the individual concerned the reason for the inquiries** (where this

cannot be deduced from a subsequent record of ‘current credit provider’ status – see below).

Mandatory reporting?

(Q.5-2)

In relation to *current credit provider* information, we note that many CPs do not lodge this information with CRAs, as they are allowed to do under the current regime. We understand this to be partly because the marginal contribution this information can make to credit assessment is outweighed by the commercial value of protecting the identity of their customers. It is also partly because there is a consequential obligation on CPs under s.18F(5) to notify a CRA that an individual is no longer a borrower.

There is also no statutory obligation on credit providers to lodge *default information* with CRAs. CRAs encourage subscribers to provide ‘reciprocal’ information but cannot insist on them doing so.

This raises the issue of whether reporting – of any or all of the permitted contents – should be mandatory – either as a statutory requirement or as a commercial condition of access to CIFs (IP 32 paragraphs 5.25-5.26).

Any decision to require or allow mandatory reporting would be a major change to the current regime. Financial counselling organisations can see some advantages in mandatory reporting – not least because it would help prevent debt collectors pushing defaulters into taking out new loans rather than re-negotiating existing terms. Mandatory reporting could also be privacy enhancing in that it would potentially make the CIF more ‘fit for purpose’ (meeting data quality objectives). But it would at the same time reduce privacy by making the content of CIFs less ‘consensual’. On balance we submit that the net effect would be privacy-negative, but accept that this needs to be balanced against other public interests. A separate debate is desirable about that balance, independently of any debate about comprehensive reporting. We suggest that considerable weight be given to views of financial counselling organisations in relation to this issue, given their practical experience. **If reporting was to be made mandatory, it must be accompanied by other conditions and safeguards** suggested elsewhere in this submission – including requiring compliance with the Uniform Consumer Credit Code (UCCC) as a condition of access to CIF data.

Default information

The issue of small debts being listed is canvassed in the Issues Paper (paragraphs 5.11-5.15). We submit that the research conducted by Dun & Bradstreet about the relevance of telecommunications debts is firstly not necessarily applicable to Australia, and secondly not necessarily conclusive as to causality. Even if there was a similar correlation in Australia it does not follow that allowing the use of this information is justified, given the significant consequences for individuals of a ‘default’ record. We

note that the CRA Veda Advantage (was Baycorp) has introduced a voluntary threshold of \$100 for telecommunications debts.

We note the discussion of ‘unserviceable loans’ at paragraphs 5.16-5.17. We submit that this is an important issue for lending policy, but that it is difficult to justify excluding any actual defaults (over a sensible monetary threshold) from ‘permitted content’ of CIFs given that they are clearly relevant to an individual’s capacity to repay other loans. **There should however be an obligation on CPs to notify CRAs if any adjudication is made that in relation to a particular default, the transaction was unlawful or unjust.** This would at least allow this fact to be taken into account by other prospective lenders. A related issue is whether a default should be removed once the transaction to which it relates has been judged to be unlawful or unfair – see under ‘Retention and disposal’ below.

Later in the Issues Paper, the ALRC raises the issue of disputed debts (5.134). Clearly a defaulter should not be able to avoid listing indefinitely simply by asserting that there is no debt, but given the substantial evidence of disputed debts being resolved in the borrowers favour, it seems appropriate to have **a statutory moratorium on listing while a dispute debt is being resolved** within an appropriate court or external dispute resolution (EDR) scheme (see later for our recommendation about EDR membership).

Dishonoured cheques

We note that there is some uncertainty about whether a dishonoured cheque constitutes ‘credit’, and therefore whether Part IIIA is internally consistent. We submit that it should be clearly established that dishonoured cheques are not ‘credit’ (and s.18E(1)(b)(vii) deleted) on the basis that this is a completely different issue. If it were determined, and widely known, that dishonoured cheques are ‘credit’, there is the potential for almost any other individual or organization to be a ‘credit provider’ and gain access to CIFs. This would allow a major expansion of consumer credit reporting well beyond the relatively constrained limits, and beyond the policy objectives of the legislation.

Some statistics on the extent of reporting of dishonoured cheques, and some empirical evidence of the ‘problem’ would assist the debate.

Court judgements and bankruptcy orders

We note that there is no official definition of ‘bankruptcy order’ (paragraph 5.18). This is clearly unsatisfactory as it allows too much discretion by CPs and CRAs, and the relationship of this item of permitted content to the Bankruptcy Act should be clarified in the Privacy Act.

Serious credit infringements

There is clearly too much scope at present for different interpretations of the term ‘serious credit infringement’, especially given the potentially serious adverse

consequences for individuals whose CIF includes such a listing. The practice of listing ‘missing’ borrowers as clearouts (one type of SCI recorded by CRAs) without further investigation⁶ should be prohibited.

ID theft flags

It is suggested later in the Issues Paper that CIFs and CRs might be allowed to contain ‘warnings’ about individuals having been the victim of identity crimes (theft or fraud) (IP 32 paragraph 5.140). This would seem to be both in the interests of consumers, and directly relevant to the primary purpose of credit assessment. It does however require further debate in the context of the wider identity management discussion recommended below.

Sensitive information

In the context of possible structural reforms, the ALRC raises the possibility of credit information being included in the definition of ‘sensitive information’ in the Privacy Act. (IP 32 paragraph 7.26) This would have two main consequences – collection would be subject to NPP 10 as well as NPP 1, and secondary disclosures relying on exception 2.1(a) would have to be directly related to the primary purpose of collection (see later).

As explained in our submission on IP 31, we are sceptical about the value of NPP 10, which only deals with the permitted circumstances of collection and not with the more significant issues of use and disclosure. In practice, CRAs and CPs would have to satisfy NPP10 by obtaining consent. As we explain below, we believe that any consent for exchanges of information in the credit reporting system is ‘spurious’ – giving consent is in effect a mandatory condition of obtaining credit. Subjecting CRAs and CPs to NPP10 would be an obstacle to our preferred approach which is to replace consent with a more ‘honest’ acknowledgement.

Notification

(Qs.5-3 & 5.17)

The notice obligations fall entirely on CPs, on the basis that CRAs have no direct contact with individuals (unless they exercise their rights of access) and therefore have no opportunity to give information to individuals. Leaving aside the important issue of whether these requirements on CPs are honoured and enforced (see IP32 paragraph 5.119), there is a key issue of principle. Given the significance to individuals of a CIF entry, we submit that there should be an obligation for CRAs to inform individuals periodically of the existence of a CIF entry, and specifically at the time a default listing is made. While these requirements might appear to be onerous, we submit that the contribution that pro-active notification would make to data quality should more than outweigh the cost.

⁶ See also IP 32 paras 5.24 and 5.135

The law should be clearer about the timing of notice (IP 32 paragraphs 5.27-5.31, and 5.118-5.122). It is unacceptable to allow the requirement to be interpreted to permit notice only at a later stage in the life cycle (e.g. debt assignment or collection) when there is no opportunity for the individual to affect their position. We submit that there should be a requirement to notify at or prior to any significant event including the initial collection (loan application), listing a default, assigning a debt, or commencing debt collection, in addition to the existing requirement to notify refusal of credit on the basis of an adverse credit report.

In the case of default listing, the notice should be required *prior to* listing to give individuals an opportunity to avoid the listing. This is surely in the interests of lenders as well. However, the use of the threat of listing to harass individuals, particularly in debt collection (IP 32 paragraph 5.133), must be controlled.

Use & Disclosure

With respect to disclosures by CRAs (Q.5-9), s.18K effectively replaces NPP 2.1, which is a set of permitted purposes, with a more prescriptive set of permitted circumstances, which involve prescription of both purpose and recipient (IP 31 para 5.75).

The first set of permitted disclosures are to credit providers and related bodies, for a range of purposes connected with credit assessment and management. ((1)(a)-(j)). There seems to be general agreement that the purposes covered by these subsections are, in NPP 2 terms, directly related (and within reasonable expectations of someone who understands the way credit industry works – but not of the layman or typical applicant for credit).

The main contentious issue about these ‘related purpose’ disclosures is the definition of ‘credit provider’. This has been discussed above under the ‘Definitions’ heading.

Consent

(Qs 5-14 and 5.15)

The complex issue of consent and its role in privacy laws has already been canvassed by the ALRC in its general Issues Paper 31, and we have commented on it in our submission on that Paper.

Spurious consent – really only notice

In relation to the operation of the credit reporting regime, we submit that the requirements for ‘agreement’ in ss.18K and N to disclosure by CRAs to CPs and by CPs to other CPs be replaced with requirements for notice. This would acknowledge the reality that all credit providers routinely make ‘agreement’ to disclose a condition of loan applications. It is not therefore free and informed consent in that individuals cannot in practice proceed with an application for credit without giving their agreement to disclosure. In these circumstances it is more ‘honest’ and accurate to impose only an

obligation to notify – as has already been done for disclosure of information by CPs to CRAs (and effectively for collection by CRAs) by s.18E(8)(c).

The discussion of the NPPs in this context in Issues Paper 32 reflects a particular interpretation on NPP 2.1 with which we do not agree. It is suggested that it may be necessary for Credit Providers to obtain consent for disclosures involved in the credit reporting system because they would not fit within the alternative exception for secondary purposes (paragraphs 5.106-5.107). We submit that it is at least arguable that within the context of the well established operation of the credit market, disclosure to CRAs and other CPs is both a related purpose and within reasonable expectations (NPP 2.1(a)). We support the suggestion made elsewhere that CRAs and CPs could do more to educate the general public about credit reporting, thereby strengthening the basis for relying on exception 2.1(a). But we believe a relatively generous interpretation of this exception is in this context preferable to having to rely on consent (2.1(b)) when that consent could not, in the circumstances, be free and informed.

We submit that the Bankers' common law duty of confidentiality, as incorporated in the ABA Code of Banking Practice, should similarly not be used as an excuse for seeking meaningless or spurious 'consent' (IP 32 paragraphs 5-108-5-109). We submit that the disclosure of credit information without consent by banks would meet the common law test of being 'in the interests of the bank' as well as, in many cases, being required to meet the bank's duties under legislation.

'Bundled' consent

The issue of 'bundled consent' has also been covered in the more general Issue Paper. In the credit reporting context, explored in IP 32 at paragraphs 5.110-5.115, we submit that it is particularly important that consent for secondary purposes such as marketing be clearly separated from any (spurious) consent (or acknowledgement of notice) for the disclosures involved in credit checking and assessment.

We note the view of one CRA that restrictions on bundled consent would be 'unnecessarily burdensome' (IP 32 para 5.112) but submit that any cost or logistical difficulties are simply the price that must be paid for giving consumers fair choices.

We also note that guidelines on bundled consent promised by the Privacy Commissioner in early 2005 have yet to appear, confirming that relying on non-binding guidance is not a sufficient solution to this important issue. What is required is clear statutory prohibition of bundled consent in the context of credit reporting.

Genuine consent for any additional information

Our preference for notice rather than spurious consent outlined above should not be taken as negating the need for genuine consent for any exchange of further details as part of any move towards more 'comprehensive reporting'. If one of the characteristics of a comprehensive reporting scheme was a genuinely free choice for consumers as to

whether to allow extra details to be listed in a CRA's CIF, then we would obviously support them being offered this choice, on an express consent or 'opt-in' basis rather than either an implied consent or 'opt-out' basis, or simply being notified that it was a condition of a loan application.

Marketing (Q.5-16)

The conditional exception for direct marketing available under NPP 2.1(c) is not available to CRAs or CPs under Part IIIA – this restriction should remain – see above for comments on ensuring that bundled consent cannot be used to bypass this restriction.

One practice that has been identified as possibly breaching the restriction on direct marketing (IP 32 paragraph 5.117) is the use of credit information held by CRAs to 'screen out' those of a CPs existing customers (or new prospects) that do not meet certain criteria – typically using credit scoring or other derived rankings. CP representatives have suggested in recent discussions with NGOs that using CIF data in this way allow them to avoid making unsolicited offers of credit (either new or increased limits) to consumers who are less likely to be able to service the commitment, thereby contributing to 'responsible lending'. Unfortunately, experience suggests that many CPs use any additional information they can acquire to increase the total volume of offers, inevitably leading to a least some inappropriate offers and to some excessive or unconscionable lending. **We support the position of consumer NGOs that access to CIF data be permitted only where the individual has initiated an enquiry or transaction.**

Disclosure by CRAs and CPs (Qs.5-9, 5-18 & 5-19 & 5-26)

The exception provided by s.18K(1)(m) is identical to NPP 2.1(g), and could therefore be repealed if a decision was made to strip Part IIIA back to only those requirements that are additional to, or more specific than, those in the NPPs. (see separate discussion later.

The exception provided by s.18K(1)(n) appears to cover similar circumstances as NPP 2.1(f) and (h), but is more tightly limited to disclosures in relation to 'serious credit infringements' which are defined in s.6 as being, in effect, credit related fraud or intended evasion of credit related obligations. This is a very specific type of 'wrongdoing' and leaves CRAs unable to either investigate, or assist enforcement agencies to investigate, any other type of alleged crime or 'wrongdoing', as most organisations can do under the NPP 2. Disclosures can only be made for 'enforcement purposes' under the previous exception where they are expressly required or authorised by or under law (s.18K(1)(m)) e.g. in response to a warrant or subpoena.

The exception provided by s.18K(1)(k) for information that is publicly available has a similar effect to the exclusion of information in a generally available publication from the application of all the NPPs except the collection principles. However, s.18K(1)(k) creates a loophole that potentially allows CRAs to make the identifying particulars held as part of

a credit information file available to third parties for non-credit-related purposes, such as identity verification services, although at least one CRA is uncertain about its ability to provide electronic identification and verification services (IP 32 paragraph 5.139)

These issues are taken up separately by the ALRC in IP 32 paragraphs 5.136-140 and 5.152-160 & Qs 5.22 & 5-23. **We submit that further discussion is required about identity management in general**, in the wider context of developments such as the proposed Document Verification Service, the due-diligence requirements of financial services legislation including the *AML-CTF Act 2006* and similar statutory identification obligations such as under the *Telecommunications Act 1997*. **No express provision should be made for credit information files to be used for identification outside the credit reporting context pending the outcome of those wider discussions.**

Other conditions of access

(Qs.5-18 to 5-20)

An important potential safeguard in the credit reporting regime which has no direct equivalent in the NPPs is the imposition of standards as a condition of access to the credit reporting system. The Issues Paper mentions suggestions that CPs should only be allowed to participate if they are also subject to the Uniform Consumer Credit Code (UCCC), which contains important consumer safeguards.

We submit that compliance with the UCCC should be a condition of access to the credit reporting system.

We also submit that another condition of access should be membership of a binding and enforceable External Dispute Resolution (EDR) scheme, such as the Banking and Financial Services Ombudsman (BFSO) or the Telecommunications Industry Ombudsman (TIO) (IP 32 paragraph 4.36 & Q.4-3). We understand that while there is a voluntary Credit Ombudsman scheme, not all credit providers – even all those who are subject to the UCCC - are required to be members of a mandatory co-regulatory scheme supported by legislation, and meeting recognised standards.

Making membership of an effective EDR scheme would not only ensure that credit providers accessing the credit reporting system had redress for breaches of non-privacy lending standards, but also that they had access to an alternative and more responsive first instance complaint body for privacy complaints as a first instance alternative to the Privacy Commissioner. Both the TIO and the BFSO have jurisdiction, and agreements with the Privacy Commissioner, to handle complaints about breaches of the NPPs in the first instance, and these arrangements could be extended to breaches of the credit reporting provisions of the Privacy Act.

We note in this context that telecommunications providers (telcos) are subject to a mandatory Credit Management Code⁷ which, amongst other things, limits the

⁷ Australian Communications Industry Forum (now Communications Alliance) Code C541, 2006

circumstances in which a telco can list a default against a customer with a CRA. Any amendment of the credit reporting provisions of the Privacy Act should acknowledge and provide for mandatory 'higher' standards in or under other specific legislation.

Automated decision-making

Another condition of use which has a precedent in data protection laws in the European Union is a prohibition on wholly automated decision-making, specifically in the context of credit assessment.⁸ There is also a precedent in Australian law for a 'no-automated decision' condition – that is in the *Data-matching Program (Assistance & Tax) Act 1990*, section 11 of which requires notice to individuals before any adverse action can be taken based on the results of data matching between specified Commonwealth agencies. This gives the individual the opportunity to challenge the information and to have a human review of any proposed action.

We understand that fully automated assessment of loan applications is common, using highly sophisticated credit scoring systems. However predictive and accurate these systems are, and however efficient they are compared to human judgement, they cannot be 'fair' in all individual cases. We submit that the requirement to notify loan applicants of adverse credit reports, and of their right of access to their CIF (s.18M) only goes some way towards ensuring fairness. **Credit providers should be required to offer applicants an opportunity for a human review of any adverse decision.**

Data quality

(Qs 5-5 and 5-8)

Both s.18G(a) and s.18J(1) imposes an obligation on both CRAs and CPs to take reasonable steps to ensure that personal information in a CIF or CR (narrower definition) is 'accurate, up-to-date, complete and not misleading'. S.18J(1) differs from s.18G(a) only in specifying that 'reasonable steps' include making 'appropriate corrections, deletions and additions'. While the rest of s.18J is concerned with changes requested by an 'individual concerned', the obligation in 18J(1) is independent of any such request and therefore applies however a CRA or CP becomes aware of data quality problems.

The obligation s.18G(a) and s.18J(1) is the same obligation as applies to all organisations subject to NPP 3, with the addition of the 'not misleading' criterion. Ideally, it would be desirable to make the data quality obligation consistent. We would support doing so by changing NPP 3 to add 'not misleading' (see our response to IP 31), but not by deleting 18G(a) and defaulting to NPP 3. Given a broad consensus that CIFs held by CRAs have some major data quality deficiencies (paragraphs 5.43-5.53), all quality criteria should be maintained.

⁸ Directive 95/46/EC Article 15 - see http://ec.europa.eu/justice_home/fsj/privacy/docs/95-46-ce/dir1995-46_part1_en.pdf

The obligation imposed by the Code of Conduct on CRAs to investigate suspicions of inaccuracy, and to report to the Privacy Commissioner (described in paragraph 5.42), should also be maintained, although it is not clear how frequently these obligations are being invoked. Greater transparency would aid an assessment of the value of these requirements.

We agree with the CCLC analysis that there are too few incentives, and too few sanctions to ensure compliance with the data quality obligations. While the main CRA has taken helpful voluntary steps to improve data quality, we submit that the following additional obligations are desirable:

- **CRAs to include data quality obligations in subscriber agreements; monitor and conduct regular checks on quality, and investigate any possible breaches** (as in the NZ Code – see paragraph 5.55)
- **CPs to provide CRAs with evidence to support listings** (requirements noted by the 2005 Senate Committee)

We also refer to our earlier suggestion that a requirement for routine communication between CRAs and all individuals who are the subject of a CIF would result in a major improvement in data quality, to the benefit of both consumers and lenders.

As the ALRC acknowledges, the current system is an ‘honour system’ (IP 32 paragraph 5.53). One potential measure that has been suggested is a requirement on CPs to provide evidence to CRAs of a default before the CRA would list it (IP 32 paragraph 5.56), but the industry contends that this would be far too onerous and costly. We submit that at the very least, **there should be a statutory obligation on CPs to provide evidence to support a default listing**, on request from either a CRA or the Privacy Commissioner (or other relevant EDR scheme), and of course on request from the individual concerned – although this may already be required by other laws.

Multiple listings

It is essential in the interests both of borrowers and of lenders that ways be found to reduce the incidence of multiple listings (paragraphs 5.36-5.39 – but we see this as more a data quality issue than as about deletion). We submit that a clear distinction should be made between marginal changes in the amount owing on a single debt (often as a result of fees and charges) and a second default on the same loan (or an SCI), separated by a period of ‘normal’ repayments. It is legitimate for such second defaults (or SCIs) to be listed separately whereas it is in no-one’s interests for a single default to be reported and recorded multiple times. **However, default on a scheme of arrangement should be not be treated as a separate event so as to trigger a new five year listing.** We welcome the discussions that are taking place about listing of schemes of arrangement, including the possibility of a shorter retention period. (paragraphs 5.38-5.39).

If a case can be made for needing an accurate record of the amount of a default, then the law should provide for updating of overdue payment records as a clear alternative to a new separate listing (paragraph 5.37).

There should be *both* a requirement for assignees to take reasonable steps to check whether the original credit provider has already listed an overdue payment *and* an obligation on CPs assigning debt to inform the assignee which if any of the assigned debts have been reported to one or more CRAs (and if so which ones).

All these new requirements (and some existing ones) might be facilitated by a system of identifiers for loans (as opposed to borrowers). This should be explored with the finance industry.

Costs of data quality measures

We submit that while there will undoubtedly be costs associated with improving data quality, both under existing and proposed new obligations, these must be regarded as unavoidable costs of operating a fair consumer credit reporting system. They are in a sense the price that the finance industry pays for the privilege of being allowed access to shared credit history information as an exception to the normal presumption of access only with free and informed consent. It is entirely appropriate that the costs of ensuring data quality are spread across all lenders (and indirectly all borrowers) rather than the inequitable loading of costs onto any particular cohort of borrowers.

Security

Security measures

(Q.5-6)

The security obligation on CRAs and CPs under s.18G(b) is similar to the general obligation in NPP 4.1, but with the addition of another type of risk – that of unauthorised use (as well as unauthorised access, modification and disclosure).

Section 18G(c) adds an additional obligation based on that in IPP 4 (applying to Commonwealth agencies) to take steps to ensure security when giving personal information to a third party service provider

Retention and disposal

(Q.5-4)

In contrast to the general ‘dispose when no longer needed’ obligation of NPP 4.2, Part IIIA currently sets three specific retention periods – 5 years for overdue payment (default) and other ‘negative’ information, and inquiry information; 7 years for bankruptcy and serious credit infringement (SCI) information, and 14 days for current credit provider status information after notice from a CP that it is no longer a current credit provider.

We submit that a finer-grained regime with differential collection and access rules, such as we suggest elsewhere in this submission, needs to be accompanied by a more graduated set of retention periods for different types of information and circumstances.

Simply defaulting to the general NPP 4.2 obligation would leave CRAs and CPs with too much discretion – this is an area in which more rather than less prescription is desirable.

For consistency, the statute barred override that currently applies to guarantors should also apply to other individuals' CIFs and both should be subject to an 'anti-abuse' condition that default information cannot be listed more than a year after the issue of a default notice (paragraphs 5.33-5.35).

CPs are required to notify CRAs when a previously listed default has been repaid, such that there is no longer an overdue payment (s.18F(3)). However, the CRA is only required to add a note to that effect, not remove the listing, which can stay on the CIF for up to five years (see below). The potential effect of this long-term negative information lies at the heart of much NGO dissatisfaction with the current system. **We submit that a revised regime should provide for, and in some cases mandate, earlier removal of default listings for smaller debts and in a range of other 'mitigating' circumstances.**

We also support the suggestion referred to above that a default listing should be removed once the transaction to which it relates has been judged to be unlawful or unfair.

Access and Correction

(Q.5-8)

Part IIIA provides for access by individuals to information about themselves held by CRAs in CIFs and by CRAs and CPs in CRs (s.18H) but this is not as detailed as NPP 6 which also applies. NPP 6 also applies to *other* personal information held by CRAs and CPs, including information held by CPs covered by the wider definition of 'credit report' in s.18N(9). This other information will include credit scores and other 'rankings' derived from analysis of credit information. Australian CRAs and CPs rely on the 'evaluative information' exception in NPP 6.2 to avoid giving individuals actual credit scores or rankings – providing them instead with an 'explanation'. In contrast, the NZ Credit Reporting Privacy Code does require a Credit Reporter (equivalent to a CRA in Australia) to give access to all credit information (Rule 6) including credit scores (Commentary on Rule 6)⁹

We submit that there should be a clear statutory right of access to credit scores and other rankings held by CRAs and CPs, together with explanatory material on scoring systems and current thresholds for acceptance, to allow individuals to better understand how they are being assessed. We acknowledge that different scoring systems are used both within and between organisations, that scores will vary over time with the same

⁹ It would seem that the conditional Trade Secrets exception in s.28 of the Privacy Act 1993 (NZ), while apparently similar to the NPP 6.2 grounds, do not allow NZ Credit Reporters to withhold credit scores.

information and may only be held temporarily, and that while CRAs provide scoring services to some clients, will not necessarily hold a score for every individual with a CIF. We also acknowledge that scoring systems are highly valued and closely guarded commercial assets. However, given the significance of scores for individuals, none of these factors are sufficient reason why individuals should not be allowed to see their scores. The fact that the largest Australian CRA has been able to operate under the the NZ Code suggests that this requirement is not too onerous.

Charges for access

All three Australian CRAs currently offer a form of access free of charge, but this is at their discretion. Given the significant impact of credit information files to individuals, and the value to the overall system of individuals checking their records, we submit that a strong case can be made for access to CIFs and CRs to be free of charge as of right, rather than just that any charge be 'not excessive' (NPP 6.4)

Annotation as an alternative

NGOs have submitted that s.18J does not expressly require correction rather than mere annotation (IP 32 para 5.72). This is a debatable interpretation of the quality requirements in 18G(a) and 18J(1) but for the avoidance of doubt, the law should be amended to require correction where it is objectively determined that information is inaccurate, out of date, incomplete or misleading.

Role of CRAs in policing the regime

Even a much more pro-active and better resourced regulator would not be able to routinely monitor the entire credit reporting industry, given the thousands of CPs making use of CRA information. The role of CRAs is therefore of critical importance.

Any regulatory scheme has to accept the existence of multiple CRAs in competition with each other.

This is not ideal as we submit there is a strong argument for credit reporting to be seen as an important element of national infrastructure. Analogies include ASIC's companies register, and the proposed Personal Property Securities Register – no-one would suggest that competition was desirable in these markets. A competitive market in credit reporting creates incentives for privacy unfriendly practices – including pressures for increasing volumes of information and transactions, lower barriers to access etc. It also complicates and works against the objectives of regulation of credit reporting.

It is necessary to accept the limitations of conventional market theory in the credit reporting context – because consumers have no direct relationship with CRAs, they are not in a position to signal their preference for particular policies – they cannot choose one CRA over another – that choice is made on commercial grounds by CPs. Consumer

dissatisfaction with particular practices cannot translate into effective market pressure on CRAs to change those practices. This is one of the foundations for the clear need for regulation.

At least one of the Australian CRAs has been taking progressively greater steps to ensure compliance by its subscribers with the credit reporting provisions, although it can only do so by persuasion – particularly with its larger subscribers. There may be some difficulty, both legally and ethically, in giving CRAs *statutory* powers e.g. to monitor or audit the activities of their member credit providers. We would however like to see the regulatory scheme encourage and support a wider role for CRAs in promoting, monitoring and enforcing privacy standards.

The approach to reform

(Qs.7-1 to 7-2)

Chapter 7 of the Issues Paper canvasses several options for structural reform of credit reporting regulation.

Some of the options which seem reasonable and attractive in principle unfortunately rely on a presumption of a pro-active compliance culture, and of active enforcement by the Privacy Commissioner. Experience suggests that neither of these can safely be presumed.

Given that regulation limits the freedom of action and imposes costs, CRAs and CPs will generally seek to minimise the impact by interpreting obligations in their own favour, which will generally, although not always, diminish the level of control and choice available to individuals.

While we sympathise with industry frustration at the inflexibility of detailed statutory rules, and the difficulty of obtaining even agreed changes, we have no confidence that alternative framework would not be abused. In considering moving some of the ‘rules’ into more easily changed instruments such as Regulations and Codes, the benefits of flexibility have to be balanced against the risk of changes contrary to the interests of consumers.

In recent years, some CRAs and CPs have shown a greater willingness to acknowledge compliance problems and to engage with consumer organisations, many of whom experience at first hand the harm caused to consumers by reckless lending (often not even using the information currently available) and by systemic practices which contribute to poor data quality.

However this goodwill is by no means universal, and even where genuine efforts are being made, improved outcomes are slow to appear.

We conclude that it would be premature and dangerous to significantly change either the 'location' or the strength of the credit reporting rules. We therefore support a continuation of some prescriptive statutory rules for the collection, use and disclosure of credit information. These need not remain in a separate Part IIIA, but could instead be expressed as additional NPPs applying only to CRAs and/or CPs as appropriate.

Amendments to these rules should be considered on their merits, and where existing rules only duplicate obligations under the NPPs, they can be repealed, provided that all users of the credit reporting system are brought under the NPP regime, by removing them from the small business exemption. This could be easily achieved by amending s.6D(4) to expressly include 'participating in a credit reporting system'.

We submit that it should be possible to simplify the overall regulatory framework by consolidating the current mix of Part IIIA, Determinations and Code. As suggested above we favour incorporating the substance of the existing Privacy Commissioner Determinations into the Act – there is now sufficient experience of the expanded definitions of 'credit provider' and of permitted CIF contents for a consensus position to be included in the Act. Codifying these definitions in the legislation would provide valuable protection against further 'function creep'.

In contrast, some of the detailed provisions in Part IIIA could be moved into a Code. Again, each proposed change or relocation should be considered on its merits. If the Act is changed, as has been suggested in response to IP 31, to allow the Commissioner to initiate and make binding Codes under Part IIIAA, then the Credit Reporting Code of Conduct could be re-made under this Part.

We understand that one of the major Australian CRAs has proposed the introduction of Data Governance Standards (DGS) as a complementary layer of regulation. DGS would be developed and proposed by individual organisations to set out the processes by which they would comply with the statutory or Code rules. The DGS would however, once registered, become binding on the organisation under the Act, and a breach of the DGS would be treated as an 'interference with privacy' for the purposes of the complaint and enforcement provisions, in the same way as a breach of the NPPs, or Part IIIA or a Code would be.

We cautiously welcome the concept of DGS, although we would prefer a different terminology – 'standard' implies a substantive compliance criteria rather than a process matter such as we understand the proposed DGS would address. We would see a Data Governance 'plan' (DGP) as explaining how a particular organisation intends to comply with the 'standards' set in the Act or Code.

We would not however see a DGS (or DGP) as an *alternative* to the required standards being set out elsewhere. Given that there would possibly be multiple DGS/DGP addressing the same compliance issues, but in organisation-specific ways, they could not set a substantively different standard – otherwise individuals would have different levels of enforceable rights depending on who they dealt with.

The suggestion that the regulation of credit reporting be moved out of the Privacy Act (IP32 paragraph 7.28) has some attractions – mainly the better ‘fit’ with regulation of financial services and the UCCC, and the prospect of enforcement by a more pro-active regulator with greater powers, such as ASIC. However the substance of credit reporting regulation is clearly fair information handling, which places it squarely in the area of data protection or information privacy law. On balance, we favour keeping the regulation of credit reporting within the Privacy Act, and urgently addressing the shortcomings of that Act and its enforcement. The wider ALRC Review will hopefully result in significant improvements, such that the Privacy Act can be an effective ‘home’ for credit reporting regulation.