Australian Privacy Foundation

email: mail@privacy.org.au

website : www.privacy.org.au

Exposure Drafts of the Australian Privacy Amendment Legislation

Credit Reporting

Submission to the Senate Committee on Finance and Public Administration

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The Australian Privacy Foundation

The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. Since 1987, the Foundation has led the defence of the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. For further information about the Foundation and the Charter, see www.privacy.org.au

Introduction

It is important for everyone to understand that the credit reporting system (both now and under these amendments) 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.

There has never been anything to stop lenders asking applicants for loans about their existing commitments, and making evidence of such commitments (e.g. bank references) a condition of a loan. Lenders do not of course want to do this – it would be costly and 'annoy' many applicants. The government decided, in 1990, to insert Part IIIA into the Privacy Act to allow, and regulate, a system of 'no choice' exchange of credit reporting information. This was presumably based on calculation that the public interest in the efficiency of the consumer credit market outweighed the inherent loss of personal privacy involved in a system of centralised credit reporting.

It is important to understand this context because the proposed amendments involve the 'licensing' of a significant further intrusion into individuals privacy, with no choice (other than not to apply for credit at all, including telephone or electricity accounts – which is unrealistic in the modern economy). 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.

More comprehensive reporting

The main change to be brought about by these reforms is the introduction of additional categories of information to be held in the central credit reporting databases. As the Companion Guide notes: "Under the exposure draft provisions, five new positive data sets will be included in the credit reporting system. The five new data sets will be: the type of each active credit account, date of opening *and* closure of account, account credit limits and credit repayment history."

Industry has argued that knowing what other credit commitments a prospective borrower has will contribute to "responsible lending". In fact, current laws already allow the listing in credit reports of all current credit providers, however industry hasn't considered it worthwhile to ensure that this information is shared.

Overseas research shows that access to more personal data leads to an overall increase in the level of consumer credit. What might be considered to be "responsible" lending does not directly align with "profitable" lending. We continue to have concerns that the increase in levels of consumer credit will have a detrimental effect on some consumers – but the overall impact will depend on the detail of this increase – which consumers will receive the additional credit and what types of credit products will be offered.

These additional data sets represent a major increase in the level of statutorily authorised intrusion into the financial affairs of most Australians. The APF has consistently argued that this move towards more comprehensive reporting (we think it is misleading to call it 'positive' reporting, which is a loaded word implying beneficial effect) is unnecessary and undesirable. We acknowledge however that we have lost the argument against *any* extension in the ALRC and subsequent consultations. We note however that the proposals in this Bill do not go as far as the financial industry would have liked, and suggest that the government's decision to only allow a more limited extension validates many of our concerns. We reluctantly accept that government policy is to allow a limited form of 'positive' reporting, and this submission does not attempt to re-open the threshold argument. We wish to place on record, however, that we still regard the extension as unnecessary and undesirable, especially in the context of recent history of irresponsible lending, contributing to the global financial crisis of 2008-09.

Understanding the proposed changes

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.

For this reason, many of the comments below are expressed as questions, since the intent or effect is not clear.

First impressions are of additional and unwelcome complexity – e.g. four main categories of information – Credit Information (CI below), Credit Reporting Agency derived Information (CRADI) (+ a fifth category of Credit Reporting Information = CI+CRADI), Credit Provider derived information (CPDI), and de-identified information (DII). Also Credit eligibility information CEI = CI+CPDI.

The intention is to completely replace the APPs for CRAs (s104), but the situation for Credit Providers (CPs) varies between principles –the position is specified in each provision.

To the extent that the Credit Reporting Provisions do replace the APPs it is necessary to ensure that none of the APP obligations have been inadvertently omitted, or their effect weakened other than to the extent unavoidable in the 'privileged' context of credit reporting. In this respect it is helpful that the provisions have been structured (Subdivisions in Divisions 2 & 3) to follow that of the APPs (Divisions in the APP Exposure Draft). (We understand that numbering etc, is difficult to rationalise until the 'tranches' of the exposure drafts are brought together in one Bill, but in the meantime it is quite difficult to follow).

Location of provisions – Act vs Regulations vs Code

Throughout the lengthy consultation on reform of the credit reporting provisions, APF together with other NGOs has been concerned to ensure that as many as possible of the key provisions are 'locked in' in the legislation itself. While Regulations can be a useful mechanism in limited circumstances, they are notoriously weaker than statute – being more easily changed and typically subject to much less scrutiny by Parliament than primary legislation.

We are even more concerned to ensure that important provisions, and safeguards, are not left to the proposed Credit Reporting Code of Conduct, to be approved by the Information Commissioner. 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.

To the extent that some matters are proposed to be dealt with in Regulations, it is important that the Parliament is able to see draft Regulations whilst debating the Bill – otherwise the interrelationship, and adequacy of the overall regulatory package, cannot be properly assessed.

We have identified the following provisions where Regulations are proposed – some of them are very significant determinants of the scope and effect of the regulatory scheme :

- Additional CRA use and disclosure criteria- s108(2)(c) and (3)(f)

- Additional requirements for disclosure CP to CRA - s132(2)(d)(iii)
- Additional uses and disclosures for CEI by CPs – s135(2)(e) and (3)(g)
- Definition of **consumer credit liability information** - s180
- Definition of **credit reporting agency** – s180
- Definition of **enforcement body**, and **enforcement related activity** – s180
- Threshold $ amount in definition of **default information** – s182
- Additional detail for definition of **repayment history information** - s187(2)
- Definition of **credit provider** – s188
- Definition of **credit reporting business** – s194

We submit that the Committee should seek confirmation of this list and insist that draft Regulations be made available for consideration alongside the Bill.

Similarly, the Committee should seek a clear statement of what matters it is proposed be left to the proposed Code of Conduct.

Those we have identified so far are:

- CRAs - Means of access - s119(4)(4)
- Additional notification requirements for CPs - s131(1)
- Contents of notice by CPs - s142(2)(c)(ii)

(Non-exhaustive) Comments on definitions

Various concepts are either new or defined in the Act for the first time – 'commercial credit'; 'consumer credit'; consumer credit liability information'; consumer credit related purpose'; 'CPDI'; CRADI'; 'CEI' (all in s180) – these need careful review to ensure they 'work' as intended.

The definition of 'consumer credit' is different from that in the recently introduced National Credit Code This is unhelpful. If intentional, the reasons need to be explained.

There is a new concept of 'Identification Information' (II), used in the definition of credit information (s181) – definition of II is context specific to credit reporting and 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 – we submit that this should be replaced with Credit Identifying Information (CII).

In s180, 'Identifier' is defined by reference to sub-section 10(5) and (6), and 'government related identifier' references sub-section 10(4) – not clear what these references are to – the relevant section of the Privacy Act do not seem relevant?

The concept of 'credit information file' is removed. One implication is that credit information (and also by implication CRI, CRADI and CPDI) cannot contain 'sensitive' information. While this an admirable intent (it should not), we submit that assurances should be given that credit reports can avoid containing 'implied criminal history' and (looking ahead) biometric identifiers (both of which are (or will be) in the definition of 'sensitive information' in the Privacy Act (section 6)).

The definition of 'repayment history information' in s187 does not clear up 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. We note that the NSWCCL have been in email correspondence with DPMC on this and look forward to further clarification.

There is a new concept of 'access seeker' (s192) – this seems to work as used in s119 – but it is not clear if it is intended to use it in the Act more generally? There is an odd construction in s192(2) of the prohibition on credit providers etc being an access seeker – an individual will not in a position to know that they 'must not authorise' a CP etc – we submit that the prohibition should apply directly to CPs etc.

'Management' of credit (as used in s135(3) and elsewhere) is undefined – this term is too loose and therefore open to abuse – we submit that it needs to be more narrowly defined – the financial counselling NGOs should be invited to suggest specific wording.

The exclusion of real estate agents, general insurers and employers from the definition of 'credit provider' in section 188(5) is welcome but the precise effect is unclear. The past intention has been to deny them access to CRI altogether – we submit that the Committee should seek assurances that is this still the effect.

Specifically, 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).

Serious Credit Infringements (SCI)

We note that the definition of 'serious credit infringement' (SCI) in s180 is largely the same as in s6 of the current Act, with the welcome addition of a condition that the CP has to have taken reasonable steps to contact the individual ((c)(ii)). It is also welcome that the definition remains in the Act itself rather than being left to the proposed Code. However, the definition still does not address the many serious concerns that the financial counselling NGOs have with the use of SCI, and we refer to other submissions for details of these concerns.

While there is a minor change from the current requirements in relation to SCIs, we believe this concept should be subject to further examination. When the current legislation was developed, it was envisaged that credit reporting would apply to banks, credit unions and hire-purchase companies – not electricity and telecommunication providers . Failing to make repayments on a car loan or credit card, and moving address without informing the provider, may legitimately be regarded as a serious breach. However, increasingly consumers are finding that they have a serious credit infringement listed for less serious, but more common events, such as a telephone or electricity account which continued in their name after they left a share-house.

There appears to be little change in the definition or application of serious credit infringements. A SCI is the only information that can be held by a CRA which is based on the "opinion of the credit provider" (S.181(l)). While the Draft appears to focus on the "fraud" aspect of a SCI, we understand that it is extremely rare for SCIs to be listed in cases of suspected fraud. In most cases we believe these are listed because an individual has failed to respond to correspondence from the lender. In the case of utilities, we believe that in some cases SCIs are listed as a result of an individual forgetting to provide a forwarding address, which may be rectified in a relatively short period of time – however the SCI would remain on the credit report.

Combining "fraud" with other actions which are sometimes, in practice, minor is of concern. It would be preferable to have a separate category for suspected fraud. Given the serious impact of the recording of a SCI, the provisions relating to correction should provide further clarification in relation to correction of a SCI. Given that a SCI is based on an "opinion", it is unclear when a SCI might be "inaccurate" (S.149(2).

Complaints Process

One of the major areas of concern with the current credit reporting regime is the complaints handling process. Without an effective complaints handling process individual consumers are less likely (and sometimes unable) to enforce their rights, regulators have reduced access to valuable data to identify breaches or systemic issues and the public has less trust in the system.

While we understand that it is the Government's intention to significantly improve the complaints handling process – and we welcome initiatives such as compulsory membership of External Dispute Resolution ("EDR") Schemes – we believe that the two-stage process in the Draft will fail to achieve this objective.

The complaints process envisaged by the Draft is likely to be onerous and confusing one in practice. It may also provide a meaning of complaint that is inconsistent with the *Australian Complaint Handling Standard (ISO AS 10002-2006)* and therefore the meaning adopted *by the Australian Securities and Investments Commission (ASIC), ASIC licensees, financial services licensees and others.*

The key problem is that "complaints" and "correction of information" are dealt with separately (indeed in separate Divisions) in the Draft. Most consumers are likely to believe that in requesting that credit information be changed that they are lodging a complaint. In fact, apart from requesting the change of a name due to marriage for example, the vast majority of requests to correct information will be made

by consumers who believe that incorrect information has been recorded. Therefore they would consider the request to be a "complaint".

This definition of "complaint" is supported by the Australian 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" (*Australian Complaint Handling Standard ISO AS 10002-2006*).

According to the Draft, the complaints process is a two stage one. The customer first requests the CRA ("CRA") or CP ("CP") to correct the information. If the information is not corrected the Draft requires the CP or CRA to provide reasons in writing. Unfortunately, even though the consumer would believe that he or she had lodged a complaint, there is no requirement at this first stage to inform the consumer about External Dispute Resolution Schemes, the Privacy Commissioner or even the right to complain to the CP or CRA.

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 won't know they can complain further, or that there are independent bodies that can deal with their complaint. A two stage process (even if there were additional information requirements at the end of the first stage) will lead to a high proportion of consumers "dropping out" of the process. This could also cause some conflict between the Privacy Act requirements and the other obligations of licensed financial services and requirements of EDR schemes (which both use the Australian Standard definition).

The Draft should be amended so that a request to correct information is dealt with as a complaint (unless the request relates to an inaccuracy that is not due to the action of the CP or CRA such as a simple change of name request).

Section 157(5) requires a complaint to be in writing. While we can understand the benefits of receiving a written complaint for a CP or CRA, our experience shows that many consumers won't lodge a written complaint. The CP or CRA should have the ability to waive this requirement. Many CPs (and possibly credit reporting agencies) have systems in place to deal with telephone or email complaints. The law should not prevent consumers from taking advantage of more accessible processes.

Comments on other clauses

In most clauses, Credit Reporting Agency (CRA) is abbreviated to 'agency' after first mention – this is potentially confusing given that 'agency' has a specific meaning in the Act (and is used even in this Part with that meaning; i.e. government agency).

Some provisions, while having the same effect as in the equivalent APPs, have been structured slightly differently (e.g. s105(4) (a) and (b) vs APP 1(4) (a) and (b)) It would be preferable for these to be made consistent in the final Bill.

Part A Division 2 – Credit Reporting Agencies

In section 105 (the equivalent of APP1), there is no equivalent to APP (1) (f) and (g), and no equivalent at all to APP8, both concerning overseas transfers. The explanation of this on page 10 of the Companion Guide is unclear and unsatisfactory. If the intention is to prohibit overseas transfer of CRI (subject to future exceptions for NZ), then this prohibition needs to be in the Bill. We submit that the Committee should seek a further explanation from the government, and assurances that most overseas transfers will be prohibited.

There is no equivalent to APP 2 – anonymity – but this is acceptable, as it is not applicable in credit reporting context – other than in relation to de-identified information, which is addressed adequately by s115.

The Bill introduces civil penalties for breaches of the credit reporting provisions (Section 106 et al). This is welcome, as a potentially more effective sanction and deterrent than the current criminal penalties in Part IIIA. However, 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.

We note that the provisions in s106 ss(4)(c) and (d) concerning persons under 18, and seek clarification that there are no equivalent age related provisions in ss(3) because the relevant obligation will lie with CPs?

Section 106 ss(4)(f) hints at mutual exchange between CRAs – but needs clarification – there is an important outstanding policy issue about reciprocity – whether only lenders inputting information to the credit reporting system should be allowed to access the pooled information. We submit that the Committee should specifically seek input on reciprocity from interested parties during oral hearings.

We note that there is no equivalent to APP3(5), preferencing collection directly from individual – since this is not applicable in the context of a credit reporting system that expressly authorises indirect sharing of information.

We note that s107 – dealing with unsolicited information is the equivalent of APP 4 and, appropriately, has the same effect.

We note that there is no equivalent of APP5 (notification) in this part as this obligation will lie with CPs.

Section 108(2) and (3) separate use from disclosure, which are combined under the one provision in the equivalent general principle APP6 (and current NPP2). We question why it is necessary to provide for extra uses/disclosures to be authorised by Regulation (s 108(2)(c) and (3)(f)) – this is not provided for in APP 6, and we question why it is seen as appropriate for credit reporting? In our view, 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.

There are some good additional restrictions/conditions on disclosure in s108(3)-(5), compared to the equivalent APP8 – these are justified for the 'privileged' credit reporting regime.

The right to disclose information to an enforcement body if that body believes that the individual has committed a SCI (s108(3)(d)), illustrates the problem (already outlined above in the wider submission about SCI) 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. 108(3)(d)(ii) should refer to the enforcement body being satisfied that the individual has committed "fraud".

Section 109 – supplements s108 with detailed table of permitted disclosures.

Section 110 (=APP7) prohibits the use of credit reporting information for direct marketing but provides an exception for pre-screening (ss(2)). This exception is oddly constructed – we submit that it needs careful review to check that it does not allow too wide a use if it becomes law. We and other NGOs have consistently argued that pre-screening can too easily be 'reverse engineered' to have the practical effect of targeted marketing of credit, which the government have accepted (and intend to effect through s110) should not be allowed. 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.

Section 110(2)(f) leaves detail for the Code – see our generic concerns about the Code, above.

Section 110(5) provides for an 'opt-out' from the use of credit information for pre-screening but this will not work well as there is no direct relationship/contact between individual and a CRA – it is unrealistic to rely on individuals 'finding' a CRA to opt-out – they must be given the opportunity via their direct relationship with a Credit Provider. Section 110(2) does after all purport to regulate pre-screening by a CRA *on behalf of a CP*. We submit that an obligation to offer an opt-out from pre-screening should therefore be included in Part A Division 3.

In section 110(7) (and elsewhere), there is provision for 'written notes' of particular actions. It is unclear as to how this would be implemented in electronic records and/or automated systems, and the value is also unclear ; i.e. who gets to see them in what circumstances – or are they just for post-facto audit? It

More generally, the term "written note" is used throughout the Draft – it would be clearer if the requirements were for a "record" rather than a "note", and there was an express obligation to retain the records. It is unclear as to whether these notes/records will be included in the credit report so that the individual can access them, and if necessary challenge them. We believe they should be.

Specifically, in s110(7) the "note" (record) in relation to access for pre-screening purposes should be available to the individual when s/he obtains a copy of the credit report.

Given the limited amount of data that can be used in pre-screening, it appears that in allowing the CP to determine the eligibility requirements, some CPs may only choose to exclude people with no defaults; more than one defaults etc. It would also appear possible for a CP to screen out those without defaults. If pre-screening is to allow offers to be made to consumers who have defaults, we would question the benefits (if any) of pre-screening in contributing to responsible lending.

Section 111 seems to be addressing the outsourcing of contact – e.g. to a mailing house. We submit that the Committee should seek confirmation that this is the intention and effect.

Section 112 is the equivalent of APP 11(2) applied expressly to pre-screening determinations – we note that there appears to be some overlap between s112(2) and s104, which could be clarified?

Section 113 provides for an individual to trigger a 'ban period' – this is welcome, but there should also be provision for action by CRAs becoming aware of possible fraud by other means, which is arguably much more likely than an individual's report.

The requirement that the agency must believe on "reasonable grounds" that individual likely to be, or is, a victim of fraud could cause some disputes. It would be worth considering whether there would be less detriment in placing a "ban" on a report if there was any doubt. We envisage that any potential CP who saw there was a ban would wait until the ban was lifted before providing credit, or at least make appropriate enquiries.

Section 113(2)(a) seems too broad – why would an individual have consented in writing to disclosure under the whole CRA Division and when would this be directly relevant to a specific instance of suspected fraud?

Section 113(4)(d) gives too much discretion to the CRA in relation to extension of the ban period – there needs some mechanism for individuals to appeal decisions they disagree with – e.g. to the Information Commissioner.

Section 114 is the equivalent of APP9. As with APP9, it is unclear what 'adopt ... as its own identifier' means in practice. If it would potentially apply to Drivers Licence Numbers , would the inclusion of DLN in the definition of 'identification information' at s180 invoke s114(2)?

Section 115 – provides for rules relating to the use of de-identified information to be made by the Information Commissioner, but leaves too much discretion - the IC ('may... make ; '... any Rules ...") – we submit that there should be an obligation on the Commissioner to make such rules.

Section 116 si the equivalent of APP10, but appropriately omits the 'if any' steps – there will always be some appropriate data quality measures in the credit reporting context. This section also includes some useful extra requirements for independent audit and an obligation to 'deal with' suspected breaches (s116(3)) – although the meaning of this remains subject to interpretation.

Section 117 includes both offence and civil penalty provisions – we are unclear what the difference is in practice – is (1) still a *criminal* offence – we understood that the reforms were replacing the criminal offences in Part IIIA with civil penalty provisions. Also, the 10x difference in penalty units between ss (1) and (2) is unexplained.

Section 18 is the equivalent of APP 12, with some valuable extra requirements in (2), although (b) and (c) subject to interpretation. The equivalent to APP11(2) concerning disposal is separately provided in Sections 123-126.

Section 119 is also a part equivalent of APP12, and introduces a valuable new concept of 'access seeker', with very limited exceptions (at (2)), compared to APP 12, which is appropriate in a credit reporting context. The manner of provision is left to the Code (ss(4)). Section 119(5)(b) provides for only one free request per year. This limitation needs justifying, and must allow for more than one free when requests are associated with dispute resolution etc.

In section 119(3), a CRA should have an obligation to provide a credit report within a specific period of time (say 10 days) – "a reasonable period" is not adequate, leaving too much discretion with the CRA.

Section 120 is an equivalent to APP13 (1) separating the correction obligation when the CRA becomes aware by other means from correction 'on request' (which is addressed in s121). This separation is acceptable in principle but we seek re-assurance that no rights have been lost in this separation – e.g. why should an individual not be informed of correction even if they did not initiate it?

Also, we have concerns about reference in s120(3)(a) to it being "impracticable" for a CRA to give notice to a recipient of credit reporting information that the information has been corrected. There is similar wording in some other sections. We can't understand why it might be impracticable for a CRA to provide corrected information to a recipient if it has appropriate systems in place.

Section 121 is an equivalent to APP13(2) and incorporates a welcome time limit (ss(2)(c) and requirement to consult ss(3). However, the provisions are weaker than the ALRC's recommendation 59-8 which was to require a CRA to delete or correct challenged information if the CP did not either substantiate the information or refer the dispute to a recognized EDR scheme within 30 days . We submit that the ALRC recommendation should be implemented in full.

Section 122 picks up other elements of APP13. We submit that a CRA should have to notify rights and EDR scheme contact details with any notice of decision not to correct under s122(3). S122(4) provides

too much 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. If these derogations from the default APP13 rights are based on an argument that automated credit systems couldn't cope with such statements and notice requirements, we questions whether this is a good enough excuse – individuals should not be deprived of rights as a consequence of technological choices or business process decisions – it is up to the industry to devise means of flagging disputed information and bringing it to the attention of users. We note that s127 provides for the Information Commissioner to intervene in disputes but only to direct destruction or de-identification, and only by an elaborate 'legislative instrument' process.

Sections 123-126 provide for detailed disposal requirements (replacing APP 11(2)) and are generally acceptable.

In relation to fraud the agency must be "satisfied" that the individual has been a victim of fraud (s126(1)(c)). However, there is no obligation for the agency to take steps to satisfy itself of the fact, often leaving the consumer to prove that s/he didn't apply for credit. It may be necessary to place obligations on CPs and credit reporting agencies to assist in the investigation of a fraud allegation.

Part A Division 3 – Credit Providers

Many of the comments on Part A Division 2 above also apply to the equivalent provisions in Division 3 – and are not repeated here.

Section 131 leaves the detail of content of the required notice to the proposed Code. This is a very important matter and we submit that more detailed content requirements should be included in the Act, as well as more specific requirements as to timing of notice.

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.

This is the case with the current laws, although the PC has allowed this notice to be provided just prior to listing, even if there was no notice provided at the time the consumer first provided information to the credit provider.

It is not appropriate for this information to be provided only once – whether this is at the time that initial information is collected or just prior to a default listing being made.

We submit that the Act should require that consumers are notified at the time their personal information is collected (at the time they apply for credit) and it should also expressly require notice within a reasonably short time period before any listing, irrespective of what notice has been provided earlier; e.g. when the loan was taken out.

In Section 132(2) the exceptions are jumbled – we submit that they would be better grouped as 'type of information' (d) &(e), then limits (b) & (c), then conditions (a).

Further to our general concern about Regulations, expressed above, we submit that the Committee should ask what if any Regulations under s132(2)(d)(iii) are proposed from outset?

In Section s132(2)(e)(ii), 'reasonable period' is too subjective and leaves it to the judgment of the CP – we submit that the Act should specify a minimum – we suggest 14 days.

We submit that there should be a fairness provision that requires CPs 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.

In Section 135(3)(b), ownership should not override the purpose limitations – individuals typically have no understanding, or interest, in corporate structures and their reasonable expectation is that their dealings are with the entity with whom they are transacting – uses and disclosures by and to 'related bodies corporate' should be subject to the same rules as for other third parties. The limits placed on related bodies corporate by section 153 do not adequately address this concern. This is a more general criticism of the Privacy Act but has particular significance in the context of credit reporting.

In Section s135(3)(e)(ii) it is not clear why 'or credit reporting agency' is included?

The limit on the use of repayment history in s135(4) is undermined by (5)(a) and it is not clear what purpose this exception serves?

There are no direct marketing or pre-screening controls applying directly on CPs – all are via the CRA obligations in Division 2 – this is unsatisfactory and may leave loopholes – we submit that there should be appropriate versions of these controls in Division 3.

In the table in s136(b), one permitted purpose (Item 5) is for the purpose of 'assisting an individual to avoid defaulting on his/her obligations'. We have concerns about the ability of a CP to obtain ongoing access to a customer's credit report under this provision. It is unclear how this might be used by a CP. If it is to allow a CP to reduce a credit limit then it should be limited to that. If this provision is unchanged, there is a need to have additional audit processes to monitor specifically how this information is used.

In Section 137(1)(a) – 'a' particular purpose is too loose/permissive, as it could be read, in conjunction with (b) as 'any' particular purpose to which the individual has consented. Given the common practice of requiring consent as a condition of financial transactions, this 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.

Section s137(2)(a)(i) appears to mean that no consent is required for credit assessment – we submit that the implications of this are very significant and need to be explored by the Committee. Under the current Act (Part IIIA), consent is required. 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 .

In Section 138(3)&(4), the guarantor consent requirement seems less onerous than for borrower i.e. it need not be in writing) – we would expect it to be the same or tougher. We submit that the Committee should seek an explanation of this provision.

We don't understand s140(2)(d)(ii) , as it seems to suggest that a CP might not hold payment information relating to an overdue payment to the CP, which seems improbable?

In Section 147(4)(a) there seems to be some duplication – the effect in relation to coverage of APP 13 is unclear?

In relation to s149(1)(b), in practice almost all consumers who complain to CPs do so because of information that has been reported to a CRA by a credit provider, so it shouldn't be necessary for the CP to "hold at least one type of personal information" - and it would be unfair if any consumer had to show that the CP did. The key issue here is that the CP has reported the information to the CRA. Therefore, 149(1)(b) should include the additional words (in bold) " the provider holds OR HAS REPORTED TO A CRA at least one kind of the personal information referred to in paragraph (a)."

Sub-sections 149(2) & (3) are weaker than the ALRC's recommendation 59-8 which was to require a CRA to delete or correct challenged information if the CP did not either substantiate the information or refer the dispute to a recognized EDR scheme within 30 days . We submit that the ALRC recommendation should be implemented in full.

Section 149 (3) appears to leave consultation with the CRA/other CP as a discretion, but s159 in effect *requires* CP to notify – we submit that a cross reference note would be useful here.

In Section 150, we submit that the notice of correction should include a statement of the individual's rights and EDR scheme contact details.

Part A Division 4 – Other recipients

There appear to be no limits placed on debt collectors. 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.

Part A Division 5 – Complaints

The provisions in Section 157 are in an odd sequence – we would expect the generic grounds (3) & (4) to precede specific access & correction grounds (1) & (2).

The obligation of CRAs and CPs to be a member of a recognized external dispute resolution scheme is imposed indirectly by the provisions in sections 158 & 159. We submit that there should be a separate express direct requirement for EDR scheme membership.

In relation to section s158(6), we question what the effect would be if an EDR scheme has different rules/time periods under its existing constitution and operational procedures?

There should be a requirement that if a CP goes into liquidation, or otherwise ceases to be a member of a recognized EDR scheme, all listings made by that CP on a CRA database should be removed. It is not acceptable for listings to remain without a mechanism for challenge.

Part A Division 7 – Civil Penalty Orders

We are concerned that the operation of the civil penalty provisions relies entirely on action by the Information Commissioner. The track record of the privacy Commissioner in enforcing the existing credit reporting regime is not good. We understand that it is intended to generally strengthen the Commissioner's functions and powers under the Privacy Act generally in a subsequent tranched of amending legislation, and we hope that Commissioners will in future be both more proactive, and more responsive to complaints, including representative complaints and evidence of systemic failures by CRAs and CPs.

However, we also submit that an alternative route should be provided to obtain civil penalty orders, by providing, in appropriate circumstances, for direct application to the Federal Magistrates Court and/or application by a recognized EDR scheme.

Contact for this submission: Nigel Waters, Board Member, Australian Privacy Foundation
Email: Board5@privacy.org.au; Telephone: 0407 230342

Please note that APF no longer has a dedicated postal address. Our preferred mode of communication is by email, which should be answered without undue delay. If postal correspondence is required, please contact us by email or phone to obtain an address.