

Representative Complaint

FAILURE TO INFORM THAT PERSONAL INFORMATION MAY BE DISCLOSED TO A CREDIT REPORTING AGENCY

This complaint is made under section 38 of the *Privacy Act* 1988 (the Act).

Complainants

Consumer Credit Legal Centre
PO Box 358, Surry Hills
NSW 2010
Contact: Katherine Lane (02) 8204 1350

Consumer Credit Legal Service Inc
Level 1, 11-19 Bank Place,
Melbourne
Victoria 3000
Contact: Carolyn Bond (03) 9670 5088

Respondents

Baycorp Advantage Business Information Services Ltd.
PO Box 963, North Sydney
NSW 2059

Alliance Factoring Pty Ltd
Parramatta NSW 2150

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Description of the Class of Members

In accordance with s 38(2)(a), this complaint describes a class of members, in this case, all individual consumers, with credit report listings by Alliance Factoring ('Alliance') on the credit information files of Baycorp Advantage ('Baycorp'). We understand that there are approximately 600,000 members of this class. The following are common characteristics of this class of consumers:

- They are the subject of a credit information file held by Baycorp; and
- They have on that file a default listing, or serious infringement listing, lodged by Alliance in relation to a Telstra debt.

The class members include both those who are not aware of the adverse listing by Alliance on their credit information file and those who are aware of the adverse listing by Alliance either because:

- (a) they have requested a copy of their credit information file from Baycorp; or
- (b) they have been refused credit and have been advised there is an adverse listing on their credit information file.

We have not provided details of any particular individuals, as we understand that Alliance, Baycorp and the Federal Privacy Commissioner are aware of this class. Accordingly, to our understanding, there would be nothing gained from providing the names of some of the members. However, should the Federal Privacy Commissioner be assisted by the identification of some individuals, we will arrange to provide this information.

Nature of Complaints

In accordance with s.38(2)(b), we submit that this complaint relates to default listings of debts by Alliance with respect to debts assigned to Alliance by Telstra between 2002 and 2003.¹

¹ This range of dates was identified by the Alliance Factoring in its undertaking to the ACCC dated 17 August 2005.

We note that pursuant to s11B(1)(b)(v)(B) the Privacy Commissioner has power to make determinations as to corporations to be considered credit providers for the purposes of the *Privacy Act*.

Credit Reporting Determination 1997 No 1 states that:

‘1. A corporation which acquires the rights of a credit provider with respect to the repayment of a loan (whether by assignment, subrogation or other means) shall, in relation to that loan, be regarded as the credit provider for the purposes of the Act.

2. A corporation deemed to be a credit provider by virtue of paragraph 1, above, shall, for the purposes of the Act, be regarded as the credit provider to whom application for the loan was made, or who provided the loan’.²

We submit that Alliance as a credit provider for the purposes of Part IIIA of the *Privacy Act* has breached section 18E(8)(c) of the Act.

Section 18E(8)(c) states:

A credit provider must not give to a credit reporting agency personal information relating to an individual if:

...

(c) the credit provider did not, at the time of, or before, acquiring the information, inform the individual that the information might be disclosed to a credit reporting agency.

We submit that the section prohibits credit providers from giving personal information relating to an individual to a credit reporting agency if the individual has not been given notification prior to or at the time of acquisition of the information by the credit provider.

We therefore submit that Alliance has contravened the section in reporting personal information to a credit reporting agency (Baycorp) in circumstances where the credit provider did not notify

² The original determination was continued by further determinations made by the Privacy Commissioner: Credit Reporting Determination 2002 No 2; Credit Reporting Determination 2003 No 2; Credit Provider Determination No. 2006-1.

the individual of the potential for credit report listing prior to or at the time of acquisition of the information by the credit provider.

Questions of fact

In accordance with s 38(2)(d) of the Act, we submit that the following questions of fact were common to the class members at the time at which the alleged debts accrued:

- Class members made a “credit application”³ to Telstra in relation to the provision of telephone services
- Class members provided personal information to Telstra in the course of making the application;
- Telstra did not inform class members at the time of, or before acquiring the information, that the information might be disclosed to a credit reporting agency;
- The alleged debts were assigned to Alliance during 2002 and 2003;
- Shortly after the assignment, Alliance reported to Baycorp:
 - Personal information acquired from class members at the time of the credit applications; and
 - defaults (or serious credit infringements) in relation to the accounts.
- Some class members already had a credit information file held by Baycorp, to which the default information was added (and possibly other personal information acquired at the time of the application.
- A number (we believe a significant number) of class members did not have an existing credit information file held by Baycorp. For these class members, a new credit information file was created with the personal information acquired at the time of the application (for a telephone service), and the default information was included in this new file.

Questions of law

³ While applications for telephone services were probably not regarded by Telstra or the consumers as “credit applications” at the time, Telstra was a credit provider according to the Privacy Commissioner’s Determination 2006-2 (and its predecessors) that defines classes of credit providers.

In accordance with s38(2)(d) of the Act we submit that the following question of law was common to the class members at the time at which the debts accrued:

- That the credit provider Alliance, gave personal information relating to an individual to a credit reporting agency, in contravention of s18E(8)(c).

As set out above, s 18E(8)(c) provides that a credit provider must not give the personal information of an individual to a credit reporting agency, where the individual has not been informed (at the time of, or before, the credit provider acquired the information) that the information might be disclosed to a credit reporting agency. In giving the personal information to a credit reporting agency, when the individual had not been informed, by either Telstra or Alliance, at the time, or before, either of them acquired the information, that this might occur, Alliance contravened s 18E(8)(c).

Section 6 of the Act defines 'personal information' to include information about an individual whose identity is apparent or can be reasonably ascertained from the information. In the instances of class members, relevant information disclosed by Alliance to a credit reporting agency (Baycorp), includes class members' names, addresses, dates of birth and driver's license numbers.

Interpretation of s 18E(8)(c)

We submit that the correct interpretation of s 18E(8)(c) requires credit providers to notify individuals that their information might be disclosed to a credit reporting agency at the time of, or before, acquiring personal information. The relevant time is therefore the time of the application for a loan, account or other relevant facility.

Our rationale for this position falls under three headings:

1. Natural meaning of s18E(8)(c)
2. Intent of the *Privacy Act*
3. Consistency with other provisions of the *Privacy Act* and the Credit Reporting Code of Conduct

1. Natural meaning of s18E(8)(c)

We submit that the natural meaning of s18E(8)(c) clearly provides that a credit provider must not give any personal information relating to an individual to a credit reporting agency if the credit provider did not inform the individual that the information might be disclosed to a credit reporting agency.

The word “information” in s 18E(8)(c) refers to the “personal information relating to an individual”, as indicated in the initial sentence of s18E(8), to which all subsequent subsections are subject. Providing information to a credit reporting agency for the purpose of making a default listing necessarily involves the disclosure both of information regarding the debt and of information identifying the person, including name, address, date of birth, and driver’s licence number. Both classes of information are ‘personal information relating to an individual’.

A distinction must be drawn between the time of acquisition of the identifying personal information and of information relating to the debt itself. Some information regarding the debt will materialise only after default. In contrast, the identifying personal information is *acquired* at the time of applying for credit.

The word “to acquire” is defined by the Macquarie dictionary as “to come into possession of; get as one’s own”, or “to gain for oneself through one’s actions or efforts”. It implies actively obtaining information from the individual, and does not refer to a set of circumstances arising from default. We submit that a credit provider does not “acquire” the identifying information for the purposes of this section when a default occurs, but that that information is acquired at the time a person applies for credit.

It follows from this distinction between ‘debt information’ and ‘identifying information’, and the necessity for both to be given to a credit reporting agency when a default is reported, that s18E(8)(c) requires disclosure of the potential default listing at the time of or before a credit provider acquires the identifying information. Only if this requirement is met is the credit provider entitled to report any information about the individual to a credit reporting agency.

2. Intent of the Privacy Act

The interpretation of s18E(8)(c) advocated above contemplates that the purpose of the section is to provide a mechanism to ensure that credit providers inform consumers about the potential use for the personal information before disclosure. It is submitted that this construction conforms with the legislative intent expressed at the time of enactment of the Privacy Act.

To ascertain the purpose Parliament intended the legislation to serve, and in particular s18E(8)(c), we make reference to the Second Reading speech during the passage of *Privacy Amendment Bill* (1990), in which the then Attorney-General the Hon. Michael Duffy stated:

“An important aspect of the Government’s proposed regulation is that there will be strict requirements for consent before consumer credit information can be sought or passed on. Such information can be passed on at present without the consent or knowledge of the consumer. The new controls will mean that consumers will be able to have authority over information about themselves. Credit providers will be able to continue to maintain their own information on their clients”.⁴

It is clear that Parliament contemplated a high level of individual control over personal information. It is apparent that all personal information, as opposed to just ‘debt information’, was in direct contemplation when one considers that a credit provider will itself generate the ‘debt information’ thus removing consumer control over its provision to a credit provider. Indeed The Hon. Mr Duffy expressly advises that credit providers ‘will be able to maintain *their own* information on their clients’.

It is also clear that the amendment Bill was introduced to overcome the difficulty of consumers not *knowing* that their information can be passed on. Section 18E(8)(c) ensures that the consumer knows how the information that they are disclosing could be used, and gives them the choice of disclosure or non-disclosure of personal information through their decision to proceed, or not, with the credit transaction.

⁴ The Hon Michael Duffy, the then Attorney-General, 4 December 1990, page 4343.

We note that s15AA of the *Acts Interpretation Act* 1901 provides that an interpretation which promotes the purpose or object underlying the Act shall be preferred. The only reasonable interpretation of S 18E(8)(c) is that a consumer should be notified at the time of, or before, the handing over of personal information. The relevant time is therefore the time of application for a loan, account or other relevant facility.

3. Consistency with other provisions of the *Privacy Act* and the *Credit Reporting Code of Conduct*, as interpreted by the Privacy Commissioner

We submit that any proposition that consumers only need to be informed about the use of their personal information once they have defaulted in payment, is inconsistent with other provisions of the Act, and of the Credit Reporting Code of Conduct (which is itself a binding statutory instrument).

The Privacy Commissioner's *Explanatory Notes* to the Code of Conduct, although not themselves binding, indicate the intention of the legislation.

The Commissioner advises that:

“There are other occasions during the life of the individual’s loan contract with the credit provider where the credit provider may wish to disclose personal information to a credit reporting agency. The credit provider will not be permitted to do this unless the individual has previously been notified of the disclosure. These notices should be given at the time the individual applies for credit with the credit provider.....” (Commissioner’s Note 30)

The provisions relating to serious credit infringements are also illustrative of this point.

A “serious credit infringement” is defined in s 6 of the Act as an act done by a person:

- (a) that involves fraudulently obtaining credit, or attempting fraudulently to obtain credit; or
- (b) that involves fraudulently evading the person's obligations in relation to credit, or attempting fraudulently to evade those obligations; or
- (c) that a reasonable person would consider indicates an intention, on the part of the first-mentioned person, no longer to comply with the first-mentioned person's obligations in relation to credit.

With respect to subsection (c) of the above, the Commissioner’s Explanatory Notes to the Code of Conduct helpfully provides some guidance as to what could reasonably be considered an intention

on the part of an individual no longer to comply with credit obligations. One of the exemplar circumstances is where:

“the individual has stopped making payments under a credit agreement/contract or breached it in some other serious way, and the credit provider has made reasonable efforts to contact the individual either in person or in writing, but has been unsuccessful in establishing contact”
(Commissioner’s Note 65).

Accordingly, it is contemplated that there are some circumstances where a serious credit infringement listing may be made to an individual’s credit file where the credit provider has been unable to contact the person. It follows that if the individual is to be informed about the giving of information to a credit reporting agency only after a default or serious credit infringement has occurred, that many consumers would not receive *any* notification about the use of their personal information.

This position is untenable with respect to consumer rights; and is in direct contradiction of s18E(8)(c).

We further draw attention to the Privacy Commissioner’s Credit Reporting Advice Summaries⁵. The advice restates the notification requirement of s 18E(8)(2)(c) without qualification (paragraph 9.1), and confirms it in the context of default listings:

Before a credit provider can notify a credit reporting agency that a payment in respect of consumer credit is in default, it must have fulfilled the relevant requirements of the Act and the Credit Reporting Code of Conduct. Specifically, in accordance with s.18E(8)(c), the credit provider must have notified the individual, at the time of or before acquiring the information that information about him or her may be disclosed to a credit reporting agency.....” (Paragraph 9.7)

The advice then specifically addresses the same issue in the context of reporting (listing) serious credit infringements:

“Credit providers should note, also, that the reporting to a credit reporting agency of a serious credit infringement, is subject to the s.18E(8)(c) notice requirement.”
(Paragraph 9.13)

⁵ See <http://www.privacy.gov.au/publications/casw6.pdf>

Nature of Relief Sought

In accordance with s 38(2)(c), we make the following submission in relation to relief.

Paragraph 1.3 (b) of the Credit Reporting Code of Conduct provides that if a credit reporting agency becomes aware that information on a credit information file is not permitted under the Act, it must,

- (i) remove the information from the credit information file;
- (ii) notify the credit provider in writing that the information may not be permitted to be included in the file; and
- (iii) make a written record of its actions in relation to (i) and (ii).

We submit that the Privacy Commissioner should make a determination under s.52 of the *Privacy Act* requiring that Baycorp:

1. Remove all default listings on the Baycorp database related to Telstra debts, whether listed by Telstra or by Alliance Factoring, other than any listings for which evidence can be produced to show that the individuals concerned were notified that their information might be disclosed to credit reporting agencies at the time they made an application for credit.

We submit that the Privacy Commissioner should make a determination under s.52 of the *Privacy Act* requiring that Alliance:

1. Compensate members of the group who have been refused credit on the basis of the Alliance listing, for stress and inconvenience as well as any financial loss.