



30 March 2007

By email: [privacy@alrc.gov.au](mailto:privacy@alrc.gov.au)

The Executive Director  
Australian Law Reform Commission  
GPO Box 3708  
SYDNEY NSW 2001

Dear Sir/Madam

**Review of Privacy – Credit Reporting Provisions  
Submission in response to Issues Paper 32 (Paper)**

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the above Paper prepared by the Australian Law Reform Commission (**Commission**). We thank the Commission for allowing Consumer Action additional time to prepare our submission.

At the outset, we commend the Commission for identifying that credit reporting is an issue involving unique issues and of particular importance within the regulation of privacy more generally.

In summary, our view is that the credit reporting regulatory scheme, that is, the “rules and regulations”, is not necessarily in need of great change. While small improvements to the scheme could be made in various areas, the overall scheme is already relatively comprehensive and addresses key areas of concern. In our view, the main problems and concerns currently relate not to the rules, but to the way in which complaints handling and enforcement have operated in practice. In particular, the Office of the Privacy Commissioner (**OPC**) has been an ineffective regulator and complaints-handler, and this has meant that important aspects of the scheme have not operated effectively.

Rather than making large changes to the regulatory scheme itself, perhaps risking the imposition of additional “red-tape” on business (the costs of which are ultimately passed on to consumers), we consider that it would first be more useful and effective to implement measures targeted at improving the operation and enforcement of the current scheme. Improved avenues for dispute resolution and a greater emphasis on compliance and enforcement would be priorities. If, after these were implemented, the regulatory scheme continued to demonstrate problems, further changes to the scheme could then be considered, however, the current scheme should first be given a better opportunity to be implemented effectively.

We also note that there have been several reviews and inquiries on privacy issues including credit reporting over recent times, as identified by the Commission. These include the OPC’s 2005 review of the private sector provisions of the *Privacy Act 1988* (Cth) (**Act**) (the **OPC Review**) and the Senate Legal and Constitutional References Committee’s 2005 inquiry into the Act. We have provided detailed information and submissions to these and other processes in the past and have engaged in significant advocacy on credit reporting issues, as have other consumer organisations. The Commission demonstrates a good understanding of our and other consumer organisations’ views in the Paper.

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Unfortunately, we do not believe that these past submissions and activities have yet been incorporated into any proposals for improvements to the structure or operation of the credit reporting regulatory scheme in any meaningful way. This is disappointing as we have invested much time, energy and resources in attempting to achieve improvements in this area for little practical change.

We therefore do not consider it a useful process to repeat information in this submission in great detail that we have previously made and with which the Commission is already familiar. Nevertheless, we do consider that the Commission's review of this area is important, thus our comments on the Paper are detailed more fully below.

### **About Consumer Action**

Consumer Action is a campaign-focused consumer casework and policy organisation, dedicated to advancing the interests of low-income and vulnerable consumers, and of consumers as a whole. Based in Melbourne, it was formed in 2006 by the merger of the Consumer Law Centre Victoria and the Consumer Credit Legal Service (Vic) and is funded jointly by Victoria Legal Aid and Consumer Affairs Victoria.

Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and throughout the community directly.

### **4-1 Privacy Commissioner powers to audit credit information files and credit reports**

The issue of audit powers is a good example of our general view that the current rules have not been adequately used or enforced to date. As the Commission states, the OPC has not conducted an audit since 2003-2004. This may to some degree be a question of resources, and we certainly strongly advocate that the Federal Government allocate more resources to the OPC to perform its auditing functions.

However, the Commission notes that the OPC suggested in the OPC Review that its resources have been concentrated on complaints handling instead of auditing. This would be concerning for two reasons. First, we have concerns about the adequacy of the OPC's credit reporting complaints handling as well, concerns that raise questions as to whether sufficient resources have been devoted to this function either (discussed further under 4-2 and 4-3 below).

Secondly, and perhaps more importantly, such an attitude betrays a lack of understanding of the importance of proactive as well as reactive engagement with issues that arise in administering a regulatory scheme, especially when administering the complaints handling function.

With limited resources, there is always a tension between undertaking individual complaints handling and working to address broader, systemic issues. Indeed, this is a tension faced by most community groups that undertake client casework but also wish to undertake work on addressing systemic issues that continue to arise in this casework, Consumer Action being one such example. Neither function, however, should be ignored.

Ultimately, it is critical that a complaints handler such as the OPC identify systemic issues both arising from the complaints being received and from proactive intelligence gathering, in order to work on preventing such problems from continually reoccurring. For example, the *Benchmarks for Industry-Based Customer Dispute Resolution Schemes*, published by the Department of Industry, Science and Tourism in 1997, include under the Accountability benchmark the principle that a dispute resolution scheme should highlight systemic issues. The Australian Securities and

Investments Commission (**ASIC**), which has responsibility for approving external dispute resolution (**EDR**) schemes under the *Corporations Act 2001* (Cth), states in ASIC Policy Statement 139 that it is the responsibility of an EDR scheme to identify systemic issues and cases of serious misconduct arising from its consideration of consumer complaints and both refer these matters to the relevant business for response and report on them to the regulator (ASIC), and provides guidance on the manner in which EDR schemes should fulfil these responsibilities.

In the credit reporting regulatory scheme, the OPC is both the complaints handler and the regulator. It is therefore even more important that it identify systemic issues or incidents of non-compliance with the scheme and take action where appropriate. Undertaking audits is the key way in which information about non-compliance may be obtained proactively, with complaints received the key way in which such information is obtained reactively. Given ongoing complaints regarding matters such as inaccuracies in credit information files (discussed further under 5-5 below), it is clear that further work needs to be done to monitor participants in the credit reporting market, for example to ensure that only accurate information is listed.

We also note that the Commission highlights that, when the OPC did conduct audits, it had a policy of not publishing the results vis-à-vis specific businesses, as it considered this might unfairly affect their business position. We suggest, however, that the reporting of the results of audits or monitoring activity (and of complaints received) can be more effective if the results are reported in relation to specific businesses. Otherwise, the incentive for businesses to improve their conduct, one of the principal benefits of public reporting, is reduced.

While the OPC has powers to audit, we believe that its powers to respond to the outcomes of audits should also be expanded, including adding powers to make directions on issues arising from audits and to force industry members to take action to resolve systemic problems.

One further issue of note is that another common way in which regulators and complaints handlers gather information proactively is through meetings and consultation with stakeholders such as consumer and community organisations. However, in Consumer Action's experience the OPC is at the poorer end in terms of engagement with consumer and community organisations. It meets with such organisations rarely if at all, to be compared with the establishment of regular consultation mechanisms by many other regulators and complaints handlers.

#### **4-2 and 4-3 Complaints handling and credit reporting**

Consumer Action's views and suggestions for reform are reflected in the Commission's discussion of these issues in paragraphs 4.27 to 4.36 of the Paper. In addition, a 2002 article by Carolyn Bond and John Corker, *Credit Report Complaint Handling under the Privacy Act: The Merry-Go-Round*, originally published in the Privacy Journal (the **2002 Article**), continues to reflect our concerns about the current complaints handling process for credit reporting complaints. A copy of the 2002 Article is attached.

In summary, Consumer Action considers that the current complaints-handling procedures are failing consumers in a number of ways:

**(a) *The OPC is overly bureaucratic in its approach to accepting credit reporting complaints – the complaints merry-go-round***

Section 36(1) of the Act provides that an individual may complain to the OPC about a breach of the *Credit Reporting Code of Conduct* (**Code**) or a breach of a provision of Part IIIA of the Act by a credit reporting agency (**CRA**) or credit provider as it relates to their personal information.

The OPC is charged with investigating these complaints under section 40 of the Act. However, section 40(1A) provides that the OPC must not investigate a complaint if the complainant did not

complain to the respondent before making the complaint to the OPC. This is supported by clause 3.17 of the Code, which provides that the OPC may decide not to investigate a complaint if it considers that the dispute should first be dealt with by a CRA or credit provider. The OPC does have the discretion under section 40(1A) to decide to investigate the complaint anyway, however, if it considers that it was not appropriate for the complainant to complain to the respondent.

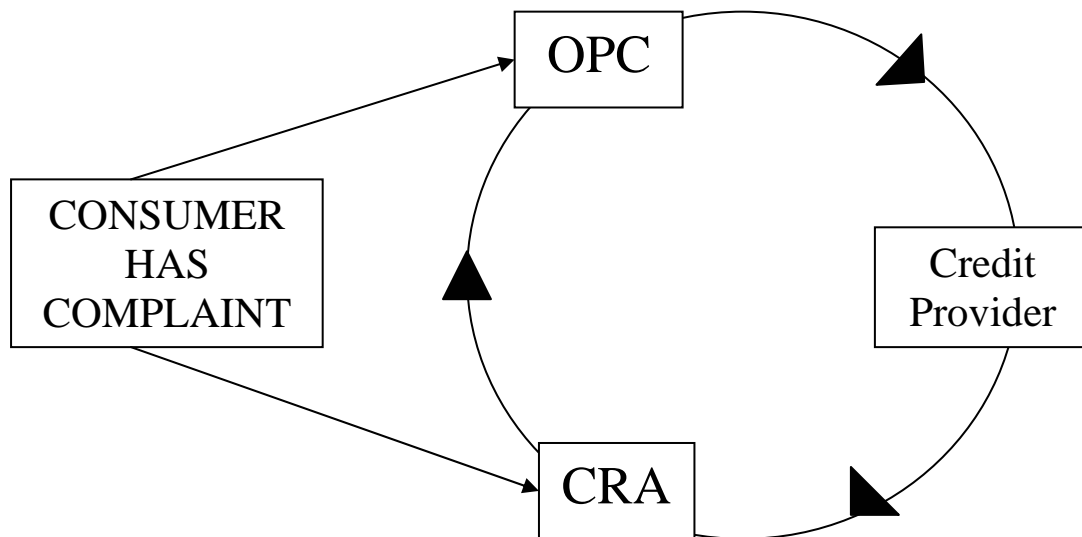
The Act also states that the complaint should be in writing and specify the respondent (ss36(3) and 36(5)). The respondent to a complaint is the person who engaged in the act or practice the subject of the complaint (s36(8)).

There is a difficulty here for the consumer. Unlike most other privacy breaches or interferences, which involve an individual and an organisation with the individual's personal information, credit reporting involves the individual and *at least two* organisations with the individual's personal information. In the case of a potential breach, for example the inclusion of inaccurate information in an individual's credit information file or credit report, it is often unclear whether this has been caused by the credit provider or the CRA. This means that the 'respondent' to the complaint is not easy to identify.

The Code assumes a dispute resolution process in which the consumer first complains to the credit provider, the credit provider then refers the dispute to the CRA, and the CRA then informs the consumer of the consumer's ability to complain to the OPC if the dispute is not resolved.

However, the most common way in which a consumer discovers that inaccurate information has been included in their credit information file is when they obtain a copy of their credit report, usually after being notified by another credit provider that their application for a loan has been rejected on the basis of their credit report. This generally means that the consumer makes a complaint to the CRA. Under the Code, the CRA must try to resolve the dispute but, where it cannot, it is required to inform the individual concerned that it is unable to resolve the dispute and that the individual may complain to the OPC (not to the credit provider).

Unfortunately, the practice of the OPC upon receipt of these complaints is to take a very narrow, and possibly incorrect, view of the provisions of the Act and Code, and refer the consumer to the relevant credit provider before it will take the complaint, even though the consumer has already complained to the CRA (and the CRA would most likely have dealt with the credit provider in its investigation of the complaint). If the credit provider cannot or does not resolve the complaint, under the Code they must refer it back to the CRA (although credit providers generally do not do this in practice, another concern). It is no wonder that many consumers become confused by the process. We have termed this the Merry-Go-Round of credit reporting complaints.



The ability for this to occur is left open by the provisions of the Act that leave it unclear who the 'respondent' to the complaint is and by the provisions of the Code that prescribe too strict a process for complaints to go first to the credit provider, then the CRA, then the OPC. However, ultimately it occurs because the OPC does not use its discretion to accept complaints under section 40(1A) of the Act nor accept that a complaint made to a CRA has been made to the respondent.

This narrow and overly bureaucratic approach demonstrates an underlying lack of will to deal with credit reporting complaints. We note that current statistics indicate a similar situation as that of concern in the 2002 Article remains ongoing. According to the OPC's 2005-2006 Annual Report, credit reporting complaints made up a significant 13.7% of complaints received in 2005-2006.<sup>1</sup> Of the total number of complaints closed in 2005-2006, only 11% involved investigation under section 40 of the Act. A further 29% were closed after preliminary inquiries only. The OPC declined to investigate the large bulk of complaints, 60%.<sup>2</sup> Following this general trend, the bulk of credit reporting complaints closed appear to be closed following no investigation. The three principal reasons listed for declining to investigate a credit reporting complaint are: under section 40(1A) that the complaint was not raised with the respondent; under section 41(1)(a) that there was no interference with privacy; and under section 41(2)(b) that the respondent has not had adequate opportunity to deal with matter.<sup>3</sup> Together these three grounds account for 83% of the credit reporting complaints not investigated.

**(b) The OPC can avoid determinations by forcing settlements**

The OPC has a wide range of grounds on which it can decide not to further investigate a dispute under section 41 of the Act, including if it is satisfied that the respondent has dealt, or is dealing, adequately with the complaint or if there has been no interference with privacy (noted above). Again, this is supported by clause 3.17 of the Code, which provides that the OPC may decide not to investigate a complaint about a credit reporting dispute if it considers that the dispute is being, or has been, dealt with adequately by the CRA or credit provider.

<sup>1</sup> Office of the Privacy Commissioner, *The Operation of the Privacy Act Annual Report: 1 July 2005 – 30 June 2006*, 2006 at 30.

<sup>2</sup> As above at 32.

<sup>3</sup> As above at 37. As in 2002, we remain unsure as to the OPC's interpretation of what constitutes 'no interference with privacy'.

The OPC is therefore able to “force” a settlement of disputes, avoiding the need to make a determination on the complaint under section 52 of the Act. If a credit provider or CRA offers to resolve a dispute in a certain way and the consumer does not agree that the offer is reasonable, the OPC has the ability to advise the consumer to accept the offer or the OPC will not investigate the complaint further, rather than having to proceed to make a determination either dismissing the complaint or finding it substantiated.

Again, this is not necessarily a problem with the rules themselves, as it is not generally uncommon or unreasonable to give regulators or complaints handlers the ability to stop their investigation into a complaint on various grounds. The problem here relates to the OPC’s use of these discretionary powers in practice. The 2005-2006 Annual Report states that the OPC did not make a single determination in 2005-2006.<sup>4</sup> Of the 36 grounds relied on for closing a complaint following investigation, 21 were because the ‘respondent has adequately dealt with matter’ (relying on section 41(2)(a)), but only 19 led to records being corrected, only three led to changed procedures for the business involved and only one led to an apology, while only eight resulted in compensation (there is no way to assess whether the compensation was fair or not).<sup>5</sup> Further, of the 51 bases relied on for closing credit reporting complaints following only preliminary inquiries, 23 were because the respondent had adequately dealt with the matter, but only 16 of these complaints led to records being corrected, only three led to an apology and only one led to changed procedures for the business or businesses involved, with only one case resulting in compensation.<sup>6</sup>

**(c) The OPC takes too long to investigate credit reporting complaints**

In our experience, the OPC takes too long to investigate and close credit reporting complaints. For example, the 2002 Article contains some case studies of lengthy complaint-handling periods. This experience is borne out by the statistics in the 2005-2006 Annual Report which show that, on average, complaints subject to only preliminary inquiries nevertheless took six months to finalise, while complaints subject to a formal investigation took a whopping 18 months to finalise.<sup>7</sup> These figures are slower than those reported for the previous year.<sup>8</sup> We can only hope that the additional funding allocated to the OPC will help to reduce these timeframes.

Notably, the 2004-2005 Annual Report stated that all of the case finalisation durations include time in which complaints were held pending allocation to a case officer, which could be up to 12 months. This lengthy delay before complaints are even assessed is obviously of concern.

Consumer Action has direct recent experience of this problem. We are still waiting for the OPC to deal with two representative complaints lodged with the OPC by the Consumer Credit Legal Centre (NSW) (**CCLC**) and the Consumer Credit Legal Service (Vic) (now Consumer Action) under section 38 of the Act, the first in April 2006 and the second shortly afterwards (the **Representative Complaints**). Copies of the Representative Complaints are attached. The complaints were made on behalf of individuals who have an adverse listing on their credit information file held by Baycorp Advantage (now Veda Advantage) lodged by Alliance Factoring in relation to a Telstra debt. We believe this group to include over 500,000 people.

The OPC acknowledged receipt of the two representative complaints in a letter dated 25 May 2006 but we heard nothing further. On 8 February 2007 we sent an email to the nominated contact person at the OPC inquiring about the complaints and received an email response the following day

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<sup>4</sup> As above at 33.

<sup>5</sup> As above at 33-34.

<sup>6</sup> As above at 35-36.

<sup>7</sup> As above at 32.

<sup>8</sup> Office of the Privacy Commissioner, *The Operation of the Privacy Act Annual Report: 1 July 2004 – 30 June 2005*, 2005 at 42.

that their supervisor would chase up the matter as they assumed we had not yet received a response and they had not been handling the matter since the middle of last year.

After we sent a follow-up letter a month after this email exchange, the OPC informed us it will provide a response to us shortly. In the meantime, the individuals affected by the conduct complained of continue to be subject to concerning listings on the credit information files, while serious systemic issues affecting a large number of consumers remain unaddressed.

**(d) *The OPC does not engage with systemic issues raised by complaints***

We simply note here again that the OPC does not adequately engage with or handle systemic issues, either proactively through audits or from an analysis of complaints received. This was discussed in greater detail under 4-1 above, and also in the preceding section in terms of its handling of our Representative Complaints.

**(e) *Credit providers do not have adequate dispute resolution procedures in place***

While clause 3.2 of the Code requires CRAs and credit providers to establish procedures to deal with a request in writing by an individual for resolution of a dispute relating to credit reporting, our experience is that in practice they often don't have well-established procedures.

In particular, the opening up of access to credit reports permitted by the OPC's Credit Provider Determinations means that a large range of non-traditional "lenders" such as utilities, medical practices and video stores now have access to credit reports. While we believe that Veda Advantage may not accept membership from some of these businesses, the Determination nevertheless allows access by a range of industries that is much too broad. These businesses often do not have credit reporting dispute resolution procedures in place as interaction with the credit reporting system may not be a major part of their operations. In fact, some have no dispute resolution systems at all. This problem takes on a larger dimension when it is remembered that the OPC routinely refers consumers with a complaint back to the credit provider for resolution.

As far as Consumer Action is aware, the OPC has made little attempt to ensure that clause 3.2 of the Code is complied with. This can be contrasted with, for example, the majority of EDR schemes that require their members to have appropriate internal dispute resolution (**IDR**) procedures in place as a condition of membership of their EDR scheme, or with the regulation of complaints handling by financial services licensees under the *Corporations Act* and ASIC Policy Statement 165, which incorporates the Australian Standard for Complaints Handling, AS4269-1995, into the requirements for licensees.

On the other hand, Consumer Action considers that the CRAs, particularly Veda Advantage, have made good progress in improving their dispute resolution procedures in recent years. This is to some degree logical given their central role in the credit reporting system, and also their obligation under the Code to effectively act as a complaints-handler between consumers and credit providers. We also welcome Veda Advantage's decision to join the Banking and Financial Ombudsman Scheme (**BFSO**). This gives consumers dealing with Veda Advantage an effective avenue for independent resolution of their complaint (and, we think, a real and effective alternative to the OPC).

***Addressing the problems with credit reporting complaints handling***

Consumer Action considers that there are a number of actions that could be taken to address the concerns listed above. Some involve small changes to the regulatory structure but in general, more effective action by the regulator would address many of the current problems.

First, there is a clear need for major change to the culture and practices of the OPC. We welcome further funding for the OPC to enable them to handle complaints in a more efficient and timely manner, but note that the OPC also requires sufficient resources to undertake proactive auditing, monitoring and enforcement of the provisions of the Act and Code with regard to CRAs and credit providers, including ensuring that credit providers have adequate procedures to deal with credit reporting disputes. Consumer Action has serious doubts as to whether the OPC is currently being funded adequately to perform its functions in relation to Part IIIA of the Act.

However, the OPC should also review its approach to the acceptance of credit reporting complaints, particularly where the complainant has already complained to the relevant CRA. The OPC culture needs to learn to welcome complaints and demonstrate a willingness to take complaints on for investigation and determination, rather than maintain the opposite attitude of attempting to avoid complaints and determinations wherever possible. The OPC also needs to reassess its approach to identifying and acting on systemic issues raised by the complaints it receives. Better procedures to speed up the consideration of complaints must also be implemented, separate to the question of more resources. Problems with backlogs in complaints and timeframe blow-outs have been confronted and handled by various EDR schemes, more effectively than the OPC.

Secondly, we see benefit in an enhanced role for CRAs in the complaints handling process. Some minor changes to the Code, and possibly to the Act, could clarify the appropriate route that a credit reporting complaint should take, in line with our understanding of the way in which most consumer complaints arise in practice. This would see the Code recognise that complaints may be made to a credit provider or a CRA. If a complaint was made to a CRA, or a credit provider referred a complaint to a CRA, the CRA's role would then be to assess and determine a complaint as between the consumer and the credit provider. If a CRA was unable to resolve a dispute, it could refer the consumer to either the OPC or the EDR scheme to which it is a member.

Some minor changes to the Act would assist in implementing these changes. The Act should be amended to clarify that a consumer who has already made a complaint to the CRA has complained to the 'respondent', meaning the OPC is able to take the complaint. Further, the Act should be amended to require all CRAs to join an approved EDR scheme. This would not pose a problem for CRAs that have already done so in line with best practice.

Thirdly, serious consideration should be given to some further, minor, enhancements to the Act or Code to support improvements in the handling of credit reporting complaints in practice. CRAs would be better able to fulfil a complaints handling role if they had an ability to ensure credit providers complied with minimum standards in responding to complaints. The Act or Code could set out some requirements that credit providers had to meet if they wished to have access to the credit reporting system, for example that they have IDR procedures that meet certain standards and must respond to CRA requests for assistance in handling complaints in an efficient and timely manner. Further, there is good reason to require all credit providers who access the credit reporting system to be a member of an approved EDR scheme. Given the substantial problems with the current system and difficulties faced by consumers challenging inaccurate or incorrect listings (discussed further below), there is much merit in such a requirement. It is also consistent with developments in other industry areas, especially related areas such as financial services regulation and more recently, moves to implement such a requirement in the consumer credit arena.<sup>9</sup> We note that many credit providers are already members of an EDR scheme, particularly financial service providers, energy and water businesses and telecommunications providers.

Finally, providing for a range of penalties and remedies to enforce complaints handling (and other) obligations would enable more effective enforcement of current obligations. This is discussed further below.

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<sup>9</sup> See, eg, *Victorian Government Response to the Report of the Consumer Credit Review*, 2006 at 15, 44-45.

#### 4–4 Penalties and remedies

As described above, one of the major problems with the operation of the current credit reporting system is not the rules themselves but their lack of implementation and, where this occurs, the lack of enforcement by the regulator. To some degree we consider that the lack of enforcement reflects a lack of both resources and will on the part of the OPC. However, in addition, the Act itself provides only limited remedies in the event of a breach of the credit reporting provisions of the Act and Code and is in need of amendment to ensure that current obligations are able to be enforced effectively.

It is important to distinguish between three types of “credit reporting breaches” provided for by the Act:

1. **Credit reporting infringement:** this constitutes any breach of the Code or Part IIIA of the Act (s.6).
2. **Act or practice that is an interference with the privacy of an individual:** in the case of an act or practice engaged in by a CRA or credit provider, this constitutes a credit reporting infringement in relation to personal information that relates to the individual.
3. **Offence:** this constitutes an act or conduct that is an offence as set out in Part IIIA of the Act and which carries a criminal penalty.

The powers of the OPC and the remedies or penalties available depend upon which sort of “breach” is involved.

In relation to the first type of breach - a credit reporting infringement - the OPC has the power under section 28A(1)(b) of the Act to investigate a possible credit reporting infringement and ‘where the Commissioner considers it appropriate to do so, to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the investigation.’ In other words, if the OPC cannot obtain an agreed resolution to the matter with the CRA or the credit provider, there is no further remedy available. These powers are clearly too limited to enable the OPC to ensure that breaches of the Act or Code are fixed or to enable a penalty to be applied if the breach was serious in nature.

The second type of breach – an interference with an individual’s privacy – is simply a credit reporting infringement that involves a specific individual’s personal information. This enables an individual to make a complaint about a credit reporting infringement that relates to them (under section 36 of the Act). The making of a complaint by an individual triggers greater powers for the OPC to address the credit reporting infringement than if the OPC is simply investigating the infringement under section 28A. However, the OPC also has the power to initiate its own investigation of an interference with an individual’s privacy in the same way as if a complaint had been made, if ‘the Commissioner thinks it is desirable that the act or practice be investigated’ (s40(2)).

After investigating a matter (following a complaint or on its own motion), the OPC has the power to make a determination under section 52 of the Act, including that the credit provider or CRA should not repeat or continue certain conduct, should act to redress any loss or damage suffered by the complainant and/or should pay the complainant compensation for any loss or damage suffered. Determinations made under section 52 may be enforced by proceedings in the Federal Court or the Federal Magistrates Court taken by either the OPC or the individual complainant. Note that the court must first determine afresh whether it considers there has been an interference with an individual’s privacy. The court has a wide discretion to make any order or orders it thinks fit if it is satisfied that the respondent has engaged in conduct that constitutes an interference with the privacy of the complainant.

There are several current problems with the way in which this investigations framework operates. As discussed above under 4-2 and 4-3 (b), the OPC in practice avoids making determinations. Without a determination, the individual complainant has no ability to enforce a remedy for a breach. The OPC has made no complaint determinations since 2004,<sup>10</sup> and only six determinations (four of which related to the same matter) since 1993,<sup>11</sup> none of which related to credit reporting.

In any case, enforcement of a determination by an individual would not be a practical option in most cases, as proceedings may only be taken in the federal courts, which are harder to access and navigate, more expensive to proceed in and more formal in terms of rules of procedure and evidence than, for example, state based tribunals with consumer jurisdictions such as the Victorian Civil and Administrative Tribunal. This leaves the OPC to enforce its determinations through court proceedings, however, we are unaware of any such proceedings being taken, not surprising given that only six determinations have been made in nearly 15 years.

In addition, our experience suggests that many individual complaints involve conduct that is systemic, in that it impacts on a large number of consumers. It is therefore vital that the OPC has the power to make a determination that also addresses the overall conduct as well as the individual matter.

The third type of breach is conduct that constitutes an offence under the Act. These offences are criminally prosecutable only, and the penalties available are conviction and/or a monetary penalty. The offences under Part IIIA of the Act generally relate only to intentional or dishonest conduct, although in the case of the offence set out by section 18P(6) a mortgage or trade insurer can be guilty by way of a *knowing* or *reckless* contravention. Thus only the most egregious conduct is considered an offence under the Act. Further, much has been said and written about the difficulties of undertaking criminal prosecutions for corporate offences such as the ones set out in the Act. We are unaware of any prosecutions for an offence under Part IIIA of the Act.

The lack of flexible remedies and appropriate penalties and lack of enforcement action leaves little practical incentive for CRAs or credit providers to comply with their credit reporting obligations and little scope for individuals to obtain redress in the event of a breach, outcomes that have played out in practice. This means that even if the rules and regulations themselves may be appropriate, it is difficult to assess this as they are not implemented and enforced effectively.

Consumer Action suggests that range of new and flexible remedies should be considered for introduction into the Act. This would greatly assist in allowing the regulatory scheme to be properly implemented as intended. The Commission sets out a range of options in the Paper. In particular, we consider that a broader range of civil and administrative remedies should be inserted into the Act to give the regulator options for dealing with different sorts of breaches in a flexible and proportionate manner. Such changes have been made in other consumer protection contexts, for example ASIC, the Australian Competition and Consumer Commission, and Consumer Affairs Victoria have been given a range of different options to enforce legislative obligations, such as enforceable undertakings, injunctions, adverse publicity orders and civil penalties. Criminal penalties of course remain appropriate for the worst breaches, as reflected in the Act.

However, these are all meaningless if no prosecutions or enforcement actions are taken. Consumer Action considers that the OPC has been greatly under-funded to perform its current

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<sup>10</sup> Office of the Privacy Commissioner, *The Operation of the Privacy Act Annual Report: 1 July 2003 – 30 June 2004*, 2004 at 57-59; Office of the Privacy Commissioner, *The Operation of the Privacy Act Annual Report: 1 July 2004 – 30 June 2005*, 2005 at 45; Office of the Privacy Commissioner, *The Operation of the Privacy Act Annual Report: 1 July 2005 – 30 June 2006*, 2006 at 33.

<sup>11</sup> See Office of the Privacy Commissioner, *The Operation of the Privacy Act Annual Report: 1 July 2002 – 30 June 2003*, 2003 at 71.

roles and would strongly advocate for appropriate resources to enforce the provisions of Part IIIA of the Act, in addition to more resources to undertake its audit and complaints handling functions.

We also consider that consumers should be given more effective avenues to resolve disputes and seek redress for breaches. Consumers should have the right to pursue civil penalties for certain breaches, for example listing an inaccurate or false debt on the individual's credit information file. Direct rights of action in court, either alone or as a group, would give consumers an option that does not currently exist except upon the trigger of an OPC determination. Further, although we recognise the Act is a Federal one, the fact remains that the state-based consumer tribunals provide more accessible dispute resolution for consumers than the Federal Court or Federal Magistrates Court. We therefore suggest that consideration be given to how it might be possible to allow any such court action to be taken in specified state-based tribunals.

It should be noted that in Victoria the *Credit Reporting Act 1978* (Vic) continues to operate. Section 7 provides for a direct right of action by a consumer to the Magistrates Court for an order requiring the CRA to make an amendment to, supplement to or deletion from information in the consumer's credit information file. Although the Victorian Government has indicated its intention to repeal the *Credit Reporting Act*, it has also indicated an intention to examine whether this provision should nevertheless be retained given the consumer's lack of access to the courts under the Act (in the absence of a determination by the OPC under section 52).<sup>12</sup> We also note that including such rights in the Act might alleviate the need to retain such rights in Victorian legislation, assisting in efforts to achieve national harmonisation of privacy regulation.

If the proposals we put forward above in relation to complaints handling were adopted, namely clarifying the CRA's role in dispute resolution and requiring all CRAs and credit providers to join an EDR scheme, and the Act was also amended to give consumers rights of action in relation to a credit reporting breach, there would be a clear dispute resolution path for consumers – CRA, EDR scheme, court/tribunal – that currently exists in many other consumer areas but not credit reporting. This would perhaps enable the OPC to devolve some of its complaints handling functions and concentrate more on its role as regulator - investigating breaches, monitoring conduct proactively through the use of audits and information coming from EDR schemes about systemic issues, and taking enforcement action as and when appropriate using a new and more flexible range of civil and administrative remedies.

## **5-1 Content of credit information files**

Consumer Action considers that a common sense guiding principle in terms of permitted content on credit information files is that the information should be **fair**, **accurate** and **relevant**. We discuss the issue of accuracy further under 5-5 below.

### ***Small debts***

There is no doubt that the fact that there is no minimum threshold amount for the listing of a default on a credit information file means that very small debts may be listed and have a disproportionate impact on the ability of an individual to obtain credit. We understand that there has been industry agreement not to list defaults of less than \$100.

However, we note the Commission's discussion in the Paper of different views as to the relevance of small defaults in the consideration of future credit worthiness. More research on this issue could perhaps be recommended by the Commission, as we do have some concerns regarding the Dun & Bradstreet research quoted in the paper, particularly whether the results took age and other characteristics of the individuals into account.

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<sup>12</sup> See Consumer Affairs Victoria, *The Report of the Consumer Credit Review*, 2006 at 270; *Victorian Government Response to the Report of the Consumer Credit Review*, above n 9 at 35.

### ***Debts relating to credit that should not have been extended***

We strongly agree with the view of the BFSO that a debt relating to credit that should not have been extended in the first place should not be able to be listed. Not only is such a listing unfair, it may also give a false impression as to the consumer's general credit worthiness, as the consumer may well be a good credit risk in relation to credit that is appropriately extended to them. Such listings also effectively constitute a punishment on the consumer when in fact it is the credit provider who is at fault.

We recognise that it may be difficult for a CRA to determine in practice if any given default listing notified to them is prohibited on this ground. We therefore suggest that the obligation not to list such a debt should be placed primarily on the credit provider, with both the CRA and credit provider under an obligation to remove such a listing if the debt is disputed on this ground (pending determination of the dispute through either an EDR scheme, the OPC or a court or tribunal as relevant).

### ***Bankruptcy orders***

While bankruptcy and agreements under Parts IX and X of the *Bankruptcy Act 1966* (Cth) are public information, in practice most credit providers would obtain information on their existence in relation to an individual through obtaining the individual's credit report.

We agree with the Commission that the term 'bankruptcy order' in the Act creates uncertainty as it is not defined. The Commission might be interested to note that this issue has a relation to problems we see in the market that has emerged for debt agreement services. Consumer Action remains concerned about the marketing of, and fees attached to, the provision of debt agreement services to consumers who may be facing bankruptcy. One of the concerns we have is that consumers who inquire about a debt agreement are advised by the service provider that entering into a Part IX agreement is better for their interests than bankruptcy, however, as both types of arrangements appear on an individual's credit information file the benefit of entering a debt agreement rather than bankruptcy is to a great degree illusory. In fact, a debt agreement may be worse as an application to enter into one is public information and may appear on the individual's credit information file, even where it is ultimately rejected (often in circumstances in which it had little chance of being accepted by creditors in the first place).

At the very least, we suggest that the Act be clarified to provide for separate categories of listings for the different types of bankruptcy and for Part IX and Part X agreements.

### ***Serious credit infringements***

It is time to define the term 'serious credit infringement' in the Act.

This provision undermines the other protections in the Act against unfair, inaccurate or inappropriate listing of defaults. It has more serious consequences as pointed out by the Commission, yet (despite the test in the Act) is in practice employed based on the subjective view of the credit provider as to whether such an infringement has taken place.

Further, the terms used to describe serious credit infringements, for example 'clearout', clearly carry emotive and prejudicial connotations but are not specified or defined in the Act. If there are to be different categories of serious credit infringement, this should also be clarified to ensure accuracy and fairness.

## **5–2 Compulsory reporting**

Consumer Action strongly opposes any move to implement compulsory reporting.

The underlying rationale for the credit reporting regulatory scheme is not to establish and maintain a credit reporting system - the system was created by the market to meet the need of market participants and remains market-based. Rather, the purpose of the regulatory scheme is to regulate the system in the interests of consumers who would otherwise have little ability to protect their interests in the market. By contrast the market participants, CRAs and credit providers, have a direct ability to advance their interests within the market-based nature of the system.

The market is able to determine at what point the cost of providing more information outweighs the benefits of having more information in the credit reporting system. The proposal to implement compulsory reporting would be a complete inversion of the purpose of the regulatory scheme by using it to advance the interests of certain market participants who have been unable to get the market to justify these interests. It would be the worst sort of regulation – imposing red tape on business to protect the interests of certain industry players.

## **5–3 Informing individuals about the disclosure of personal information to a CRA**

The Commission correctly notes the current requirement of section 18E(8)(c) of the Act that no personal information may be given by a credit provider to a CRA if the credit provider did not inform the individual concerned that the personal information might be disclosed to a CRA *at the time of, or before, acquiring the information*.

Despite some questions over the required timing for notification discussed in the paper, we consider that the provision is reasonably clear. When a listing is made by a credit provider, it provides the CRA with more than one piece of personal information. Much of the personal information is acquired at the time of the individual's initial application for credit, thus notification is required to be given before or at the time of the initial application (and given that applications are themselves often listed on a credit information file, this interpretation must be valid). We believe that notice immediately prior to lodging a default is also required, and this has been adopted generally as good industry practice. However, this does not remove the obligation to notify the consumer at the time the credit application is made.

This issue is also discussed in detail in the first of the Representative Complaints discussed earlier (attached). This Representative Complaint is specifically concerned with alleged breaches of section 18E(8)(c), thus we encourage the Commission to examine the arguments made in the complaint document as they elaborate on the summary set out above.

However, despite what we consider to be the reasonably clear meaning of the provision, we are aware that in the past the OPC has argued that a credit provider can simply notify an individual that it is listing a default a few weeks prior to listing and does not need to have notified the individual of this possibility at the time of the initial application. We think this interpretation is simply wrong, and further, has been developed to meet the interests of debt purchase firms and CRAs to maximise the listing of utility defaults.

Nevertheless, given this unfortunate interpretation, we agree with the Commission that more prescriptive notice provisions may be appropriate, as they would in effect simply clarify the operation of the existing provision, namely that notice should be given at relevant times, for example at initial application stage, if a default is to be listed, if a debt is assigned and so on.

The Commission notes the relationship between the issues of notification and consent. We discuss consent further under 5-14 and 5-15 below.

## **5–5 Accuracy of information in credit information files and credit reports**

This is one of the most significant concerns regarding credit reporting. The Commission notes concerns about the extent of inaccuracies in credit information files and credit reports raised in, for example, the CHOICE survey in 2004, OPC reporting, Telecommunications Industry Ombudsman reporting and information provided by consumer groups at pages 79-82 of the Paper.

While we believe that industry has made some improvements, Consumer Action remains very concerned about the level of inaccuracies contained in credit information files and credit reports and the difficulties consumers face in having these inaccuracies corrected or deleted. For example, the second of the Representative Complaints discussed earlier is specifically concerned with a large number of alleged inaccuracies in individuals' credit information files (attached). This Representative Complaint sets out a number of provisions of Part IIIA of the Act and of the Code that regulate the accuracy of information in the credit reporting context.

Essentially, the Act and Code already require CRAs and credit providers to ensure information used for credit reporting is accurate, for example sections 18G and 18J(1). The problem is clearly their lack of effectiveness in practice. We discussed above under 4-1, 4-2, 4-3, and 4-4 in detail some of the reasons why this is the case, including the lack of auditing and proactive monitoring by the OPC, the poor complaint handling process and the limited and inflexible remedies available to enforce compliance.

Given the lack of monitoring and compliance activity, it is not surprising that inaccuracies continue to abound. There is little incentive to comply when the cost of doing so is higher than the cost of dealing with a small number of complaints each year.

We set out a number of ways to improve the effectiveness of the provisions requiring accurate information under 4-2, 4-3 and 4-4 above. For example, the use of civil penalties would enable enforcement action to be taken more flexibly, and would also allow for the imposition of appropriate penalties short of criminal fines and convictions, thus changing the cost equation above and providing a real incentive for CRAs and credit providers to comply with their obligations.

However, another major reason for the extent of inaccuracies in credit information files and credit reports is that a credit provider does not need to show proof before listing a debt. It is inherent to such a system that inaccuracies will occur. While we recognise that the cost involved in showing proof before the listing of each and every overdue debt may be large and therefore showing proof should not necessarily be required automatically, we also consider that proof should be required where requested or in the event of a dispute, commensurate with the goals of ensuring fairness and accuracy. This would recognise the inherent risks in allowing defaults to be listed without proof, while allowing for this to continue to occur in most cases on a costs justification.

Under 4-2 and 4-3 above we suggested that CRAs should be given an enhanced role in the credit reporting dispute resolution process, with support from provisions requiring credit providers to participate appropriately in these processes if they wish to have access to credit reports. In line with this approach, there should be a clear requirement on credit providers to provide proof of a debt on request. Otherwise, with the onus on the individual to disprove a debt (or debt amount) that they played no role in listing in the first place, it is much more difficult to resolve the dispute, both an unfair outcome for the consumer and an inefficient way for the system to resolve complaints.

## **5–4 Deletion of information and 5–8 Rights of access to and alteration of files**

Issues surrounding the access to, alteration of and deletion of information from credit information files and credit reports are related to the above issues regarding accuracy.

### **Consumer access to credit information files at no cost**

As a starting point, we strongly advocate that Part IIIA of the Act be amended to clarify the right of an individual to access their credit information file at no cost. The file contains important personal information and every person should have free access in order to ensure it is accurate and fair. We note that the Victorian *Credit Reporting Act*, which is still in force, provides for a right of access to a credit report at no cost (s4). While the Victorian Government has agreed to repeal the *Credit Reporting Act*, it may look at whether any provisions should nevertheless be retained.<sup>13</sup> Consumer Action contends that the right of an individual to free access to their credit information file should be one such provision.

### **Statute-barred debts**

The Commission raises the issue of statute-barred debts in the Paper and rightly points out that the Act only prohibits their listing in relation to guarantors, although the Code prohibits a credit provider from giving information about a statute-barred debt to a CRA.

Statute-barred debts cannot be recovered. Limitation periods on rights of action to recover a debt have been implemented by legislatures in acknowledgement of the inherent unfairness in the situation whereby a creditor seeks to recover an alleged debt many years after the debt was allegedly incurred, creating difficulties for the consumer to prove their case and also meaning that a consumer can never be free of a debt incurred in their past.

The Act should be amended to clarify that statute-barred debts may not be listed, in line with the Code provisions. This prohibition should operate in the same way as the one currently applying to statute-barred debts relating to a guarantor, namely it should not only prohibit the listing if the debt in question is already statute-barred, it should also prohibit a debt's continued inclusion in the credit information file once it becomes statute-barred even though it may have been enforceable at the time of listing.

Otherwise, we will continue to have concerns about the practice of using listings (or the threat of listings) to coerce consumers to pay a debt that is not in fact legally enforceable. The case of *Taylor v Collection House*<sup>14</sup> is a good example of the fact that these sorts of practices do occur. Of course, we note that enforcement of the current provisions and any clarified provisions is also necessary to ensure statute-barred debts are not listed.

### **Debts owed by minors**

Contracts with minors are generally not legally enforceable unless for 'necessaries' (except in New South Wales as noted by the Commission). For similar reasons to those in relation to statute-barred debts, we consider that debts owed by minors should be prohibited from inclusion in a credit information file. Otherwise, listings can be used to coerce payment where in fact no legal right to payment exists. This would be a particular danger for young people, who are generally less likely to be aware of their rights.

If it was felt that there should be some scope to be able to list a debt incurred by a minor, namely in the limited situations where it is legally enforceable, this may pose some problems for CRAs in determining whether a debt owed by a minor is one that may be listed or not. As we said above under 5-1 in relation to debts where credit should not have been extended, we recognise this difficulty for CRAs and suggest that the obligation not to list such a debt should be placed primarily on the credit provider, with both the CRA and credit provider under an obligation to remove such a

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<sup>13</sup> See, eg, *Victorian Government Response to the Report of the Consumer Credit Review*, above n 9 at 35; *The Report of the Consumer Credit Review*, above n 12 at 267.

<sup>14</sup> *Taylor v Collection House Ltd* [2003] VCAT 687 (13 June 2003).

listing if the debt is disputed on this ground (pending determination of the dispute through either an EDR scheme, the OPC or a court or tribunal as relevant).

However, we suggest that no listings be permitted while the individual remains under the age of 18, in recognition of the different capacities and experience of young people. If debts incurred by a minor are to continue to be allowed to be listed, we would strongly advocate that such listings (and other listings related to minors) be subject to a shorter timeframe before deletion, for example two years, in recognition of the different legal position of minors.

### ***Time limit for listing***

The Commission rightly notes the issue of whether there should be a time limit for the listing of a default. It is correct that in the current absence of any time limit, a statute-barred debt may be legally listed by a credit provider a short time before it becomes barred, meaning it remains on the individual's credit information file for many years after it is legally enforceable.

The absence of a time limit for listing runs contrary to the principles underpinning the legislative limitation of actions described above, as a default may be listed many years after it was allegedly incurred, making it harder for the consumer to dispute it and extending the life of the impact of the debt. For example, a debt listed soon after default would be removed from an individual's credit information file five years after the default, but the same default listed five years after it occurred would be on the individual's credit information file a massive 10 years after the default.

We therefore support a maximum time limit of one year for the listing of a default, and a prohibition on the continued inclusion of a debt on a credit information file once it becomes statute-barred.

### ***Multiple listings***

Multiple listings of the same debt provide an inaccurate and unfair picture of an individual's credit worthiness and we consider it obvious that they should be banned. However, we note that the updating of an existing listing could be permitted, so long as the listing must still be removed at the end of the time limit prescribed in the Act taken from the time of its initial listing, not the latest update.

Consumer Action also suggests that multiple listings should be subject to a harsher penalty than other breaches, given they are particularly damaging both to the individual concerned and to the integrity of the credit reporting system, while at the same time are preventable if credit providers and CRAs have the appropriate systems in place to ensure accurate data regarding matters such as account names and numbers.

### ***Inaccurate and disputed information***

The Commission correctly notes that there is some uncertainty as to the obligations of a CRA to amend or delete inaccurate information in a credit information file due to the ability to simply add a statement noting that the individual disputes the listing.

This is one area where it is clearly the rules themselves that require amending. It is wholly unfair to allow inaccurate information to remain on a credit information file, even if a note of the individual's dispute is included. It should be a requirement for a CRA to amend or delete such information.

This is particularly so given the actual manner in which credit providers now use credit information files given technological developments. Consumer Action understands that many credit providers are not given a copy of a full credit report relating to an individual of interest. Instead, their information systems have access to the information systems of the CRA and simply pick out the

data required for input into the credit provider's credit scoring or other automated programs. The credit provider never sees any notes placed on the credit information file.

Above we noted that defaults in relation to credit that should not have been extended or incurred by a minor should be removed from a credit information file if disputed, pending the resolution of the dispute.

In fact we consider that this principle is a sound one for application to all disputed listings (as well as inaccurate information generally), on the grounds of both fairness and a desire to ensure that only accurate information is contained in credit information files. Disputed listings should be removed from credit information files pending resolution of the dispute. To allow them to remain on the file is unfairly prejudicial to the consumer's interests and pre-empts the resolution of the dispute. To ensure that such provisions were fully effective, it would also be necessary to require credit providers to notify a CRA if a matter the subject of a listing, for example a default, was disputed with the credit provider. Placing the onus of proof more explicitly on the credit provider is not an unusual concept, for example the Commission notes at paragraph 4.32 of the Paper that this is provided for in the United States by the *Fair Credit Reporting Act 1970* (US).

We acknowledge the argument that consumers could abuse such a process, for example by lodging a dispute "fraudulently" to allow them to apply for credit. An alternative to our proposal above may therefore be to require removal of any disputed listing within two weeks unless the credit provider is able to prove the debt and details. Further, if any fault is found to have been caused by the practices of the credit provider or CRA, the consumer would have a right to payment of a civil penalty.

It follows that any default not yet listed and the subject of a current dispute should not be permitted to be listed until the dispute is resolved. Consumer Action considers that as a matter of good practice, defaults that are currently subject to negotiations as to repayment, for example a consumer is negotiating a payment plan to enable them to repay the debt, or are being repaid under such an arrangement, and have not yet been listed, should also be prevented from being listed. This could be provided for in the Code.

Given that the modern use of the data in credit information files has seen the diminishing of the use of the traditional credit report in favour of automatic selection of desired information only, the impact of any notes placed on a credit information file will be minimal if any. Credit providers do not see the note, only the information selected. The ability to add a note to a credit information file should therefore be removed, as its continued existence and use gives consumers the false impression that it will have an impact on credit providers who use their credit information, when this is no longer the case.

## **5-23 Identity theft**

The question of whether a credit information file should be able to contain information about identity theft needs to be viewed subject to the modern practice of credit providers, discussed directly above, of simply selecting desired information out of credit information files rather than viewing the whole credit report.

Consumer Action supports a proposal to enable an individual to put an "identity theft alert" or flag on their credit information file. However, this will only be effective if it is seen by credit providers. We therefore suggest that any provision inserted into the Act to enable an individual to place such an alert on their credit information file also include a requirement that the alert be given to any credit provider who accesses information in that credit information file.

We also advise that if an individual asks a CRA to place an identity theft alert on the credit information file, the CRA be required to advise the individual that this may lead to difficulties for the individual themselves in applying for future credit and tougher identification requirements.

However, we note that the ability for identity theft to occur is largely unrelated to credit reports and partly generated by the fact that credit providers do not have adequate identification requirements in place before they agree to extend credit.

### **5–10 and 5–11 Expanding the definition of credit provider and 5–21 Debt collection**

The paper sets out the concerns of consumer organisations in relation to the OPC's Credit Provider Determinations and the practices of debt collection firms. It also correctly notes that despite our views being put forward in relation to the reviews of these Determinations, the OPC left them largely unchanged.

Our concerns around this issue therefore remain. We are also still waiting for the information sheets and education strategies, let alone audit programs, that the OPC committed to developing in deciding not to amend the Determinations.<sup>15</sup>

The definition of 'credit provider' is too broad and includes firms that do not actually extend credit other than allowing consumers to pay in short periods of arrears rather than in advance. While the purpose of the credit reporting system is accurately described by the Commission in the Paper as to correct information asymmetry in the lending market, non-traditional "lenders" such as utilities, medical practices and video stores primarily use the credit reporting system as a tool in debt collection and do not use the information at the time of deciding whether to provide services to a consumer on terms of payment in arrears (with the exception of some larger utility businesses).

At the very least, the determinations should scale back access to prevent businesses such as medical practices and video stores that do not access the system for credit worthiness information from using the system as a tool to coerce payment. We also note that it is generally these sorts of business that do not have the required dispute resolution systems in place, as discussed under 4-2 and 4-3 (e) above, nor proper systems to ensure accurate data relating to the consumer and the debt (for example, whether it is statute-barred).

Such a move would be consistent with other regulation of consumer credit, particularly the uniform *Consumer Credit Code*, which does not recognise services provided with payment in arrears terms as credit and therefore does not provide consumers of these services with the same level of protection as consumer taking out consumer credit.

For the same reasons, debt collection firms should not be given access. They do not extend any sort of credit or arrears payment terms at all, rather they wish to use the information for wholly different purposes. The fact that a body of personal information exists is not a reason to give others access to it. This would represent significant function creep for the credit reporting system. We note the general principle under the Act that collected personal information should be used only for the purposes for which it was collected. This principle is clearly applicable in the context of debt collectors wishing to access personal information collected and reported to CRAs for the purpose of enabling better decision making in assessing whether to extend credit.

In terms of assignees, we understand that access to credit information files is more appropriate as they effectively "stand in the shoes" of the original credit provider, unlike contracted mercantile agents and collection firms. However, it should be remembered that, in practice, assignees use credit reporting information for debt collection purposes as assignment is, in effect, the outsourcing

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<sup>15</sup> Office of the Privacy Commissioner, *Report on the Review of the Credit Provider Determinations (Assignees and Classes of Credit Providers)*, 2006 at 22.

of debts and debt collection. For this reason, we suggest the Commission consider if assignees could be given more limited access to credit information files. We also consider that the concerns about the listing of statute-barred debts and multiple listings are particularly relevant in relation to assignees and suggest that if the measures we advocated in relation to these issues were adopted, it would assist in dealing with concerns around the practices of assignees.

We do not think it is a coincidence that the Representative Complaints attached to this submission, which relate to significant and systemic problems, involve a non-traditional lender (a telecommunications service provider) and an assignee.

#### **5–14 and 5–15 Consent to disclosure**

Consumer Action makes the comment that consent requirements are largely ineffective, as terms providing that the consumer consents to the disclosure of personal information for credit reporting purposes can simply be, and is, included as a matter of course in standard-form credit applications and other contracts to provide services. Consumers do not have any effective bargaining power to remove such consent terms from standard-form contracts.

For this reason, the more effective way to protect consumers from inappropriate conduct is to regulate the notification of disclosure of, and the use of, personal information.

Our comments around the issue of notification are discussed above under 5-3. Regulation also needs to allow only for reasonable use of personal information held by credit providers and CRAs. The credit reporting regulatory scheme largely does this, with some exceptions as discussed in other parts of this submission. As stated elsewhere, it is the lack of enforcement of these rules that is causing many of the current problems.

#### **6 Comprehensive credit reporting**

We commend the Commission for its detailed discussion in the Paper of what is a complex issue. We also note that the Commission demonstrates a good understanding of the views of consumer organisations in relation to the findings of commonly cited research in this area and comprehensive credit reporting (**CCR**) generally.

Consumer Action strongly opposes any move to expand the types of information permitted in credit information files for the reasons discussed in the Paper. We do not wish to repeat in detail arguments with which the Commission is obviously familiar. However, a good summary of some of our views is provided in the attached discussion brief which was presented by Carolyn Bond at the Sixth ITSA Bankruptcy Congress last year.

We do wish to emphasise that the results of research cited as demonstrating the benefits of introducing CCR is being misrepresented by proponents of CCR. The research demonstrates that it may lead to *either* a lower default rate with the same target number of loans as currently *or* more loans with the same target default rate as currently. The actual outcome will depend on which of these options lenders choose. Given that the latter allows for more lending business overall, it is highly likely that CCR would mean lenders choose to expand their businesses. While the default rate would remain the same, the greater overall business means that more people overall would face defaults, and in human terms defaults equate to financial hardship, home losses, impaired credit information files and bankruptcies.

There appears little doubt that CCR would increase the amount of lending overall. Even proponents of CCR state that there will be an increase in the overall level of consumer borrowing. While CCR would allow lenders to more accurately assess and price risk, again the results of the research are being misrepresented to suggest that this would mean lenders would better be able to avoid extending credit to consumers who cannot afford to repay it. Rather, the research and

overseas experience both suggest that rather than avoiding loans, CCR would allow lenders to offer highly priced credit to these consumers, the ones least able to afford it. Indeed, there are already many new participants in the lending market whose business model is precisely to lend to higher risk consumers despite the information available that demonstrates that they may be a risk.

We are seeing more and more lenders offering credit to consumers who cannot afford to repay it. In many cases this is asset based lending, but it also includes pay day lenders and other fringe lenders who use unfair securities such as promissory notes or loans secured over essential household goods. We note that predatory lending is a significant problem in the United State despite credit provider access to a significant amount of personal financial data.

There are alternatives to introducing CCR. We note that the deregulation of the financial sector more broadly has already led to a huge increase in competition and efficiency and a corresponding reduction in interest rate margins. If a goal is to increase access to appropriate and affordable finance to low-income or disadvantaged consumers, we consider that affordable finance initiatives such as No Interest and Low Interest Loans Schemes are clearly more equitable and appropriate.

We also agree with Veda Advantage's comments noted in the Paper that improving data quality (accuracy) and dispute resolution mechanisms are more important than introducing CCR. These comments reflect the arguments presented elsewhere in this submission and would greatly improve the usefulness of our current credit reporting system. It is also useful to note the recent presentation at the National Consumer Congress by ANZ bank's Managing Director Consumer Finance, which stated that in terms of managing and avoiding defaults, '[e]xcluding "marginal" customers is more likely to be effective than increasing disclosure or asking for more details'.<sup>16</sup>

Another means to assist in reducing defaults would be to impose a positive obligation on lenders to assess capacity to repay at the time of extending credit, rather than merely relying on taking security over an asset. As discussed above, better access to dispute resolution would also represent a significant improvement.

Given the complex issues involved in considering CCR, we would welcome the opportunity to discuss these issues in more detail with the Commission if the Commission considered that this would be helpful to it.

## **7 Reform of the credit reporting provisions**

A key contributing factor to many of the problems discussed in this submission is the messy and complicated nature of the structure of the credit reporting regulatory scheme. Some obligations are contained in Part IIIA of the Act. General issues of process are contained in other part of the Act. Further obligations are contained in the Code. Credit Provider Determinations made by the OPC also regulate access to the system. Ordinary individuals have little hope of navigating this system! Clearer notes and advices by the OPC may have helped to clarify the operation of various provisions. However, in practice this has not occurred.

Consumer Action considers that some reform of the regulatory scheme would be helpful. In particular, we consider that the various provisions of Part IIIA, the Code and the Credit Provider Determinations could be consolidated into one body of provisions, whether that be Part IIIA or a detailed code sitting under the National Privacy Principles. However, we are strongly opposed to a reliance on the NPPs alone or to a self-regulatory system. The current problems already demonstrate that, in the absence of compliance and enforcement activity, the industry is not self-regulating appropriately. There is thus clear evidence that a self-regulatory scheme would not be effective.

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<sup>16</sup> Jenny Fagg, *Win-Win situations: Responsible Lending at ANZ*, Presentation to the National Consumer Congress, 14 March 2007, available at [www.anz.com/aus/values/resources/default.asp](http://www.anz.com/aus/values/resources/default.asp).

The Commission also asks if there are any other relevant considerations that should be taken into account. We noted above under 5-4 and 5-8 that we understand that credit providers no longer use credit reports in the traditional sense, rather their systems select relevant data from credit information files for use in credit scoring and other programs and notes on files are not viewed. This has a significant impact on whether certain provisions of the Act and Code are still effective. We also understand that in some cases credit providers may use information in credit information files relating to their existing customers in order to determine whether marketing of further products and services to these customers should be undertaken.

These sorts of practices raise questions as to both the effectiveness of the current provisions given technological and procedural advances and whether current practices comply with the Act. However, Consumer Action does not have a detailed understanding of industry practices in this regard. We therefore urge the Commission to obtain further details about current practices of credit providers in their use of information in credit information files from the industry itself.

We thank the Commission again for the opportunity to provide input into the Review of Privacy in relation to the credit reporting provisions of the Act.

Should you have any questions, please contact us on 03 9670 5088.

Yours sincerely

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Attach.