



3 February 2009

By email: Emma.Shadbolt@pmc.gov.au

Ms Emma Shadbolt
Privacy and FOI Policy
Government Division
Department of the Prime Minister and Cabinet

Dear Ms Shadbolt

**Credit Reporting Privacy Law
Response to the Australian Law Reform Commission (ALRC) Privacy Report 108 Pt G
Submission to the Australian Government**

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to provide these comments on credit reporting law reform to the Australian Government.

In May 2008 the Australian Law Reform Commission (**ALRC**) published its review of Australian privacy law and practice (ALRC Report 108) (the **Report**). Part G of the Report examines Australian credit reporting arrangements. The Report makes several recommendations for legislative and regulatory change to credit reporting arrangements in Australia.

On 9 December 2008 a consultation meeting was held by the Department of the Prime Minister and Cabinet to consider the ALRC's recommendations. A variety of organisations were present at the meeting, including the Cyberspace Law and Policy Centre (**CLPC**), Legal Aid Queensland and Consumer Action.

Since that meeting, the CLPC has submitted a response. Consumer Action has had the benefit of reviewing the CLPC submission, and broadly supports the recommendations made therein.

In addition, Consumer Action wishes to make selective points regarding the ALRC proposals.

First, we provide responses to particular issues raised during the 9 December 2008 consultative meeting. We provide here further responses to three of the specific points raised at the meeting. Those points are:

- (a) The proposed definition of "credit reporting information" to be expressed in new Privacy Credit Reporting) Regulations (**Regulations**) (Recommendation 54-3);
- (b) The permitted content of credit files; and
- (c) Tiers of access to credit reporting information.

Second, we provide broad input on areas of particular concern to the consumer movement. There are a number of potential uses of credit reporting information that can have serious adverse consequences for consumers. We wish to highlight those areas to ensure that they are considered during the legislative reform process. Those points are:

- (a) Access and use – secondary purposes
- (b) Dispute resolution
- (c) Listing defaults in relation to schemes of arrangement
- (d) Prescreening; and
- (e) Serious credit infringements

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. 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 in the community directly.

Responses to issues raised in meeting on 9 December 2008

Definition of “credit reporting information”

Recommendation 54-3 of the Report proposes that a new definition of “credit reporting information” be established in the Regulations. The proposed definition would define credit reporting information as:

...personal information that is:

- (a) Maintained by a credit reporting agency in the course of carrying on a credit reporting business; or
- (b) Held by a credit provider; and
- (i) Has been prepared by a credit reporting agency; and
- (ii) Is used, has been or has the capacity to be used in establishing an individual's eligibility for credit.

Although no longer general industry practice, credit providers have in the past shared information directly in the form of “credit reports”. The proposed new definition does not refer to “credit reports” and therefore does not regulate personal information unless it is held by, or sourced from, a credit reporting agency.

We do not foresee any significant problems with the proposed new definition because it reflects current industry practice of sharing information through credit reporting agencies (**CRAs**) rather than directly between credit providers.

However, caution is required in relation to any changes of definition, as it is possible that even minor changes that include or exclude various activities from the regulatory regime could have unforeseen

consequences. Given that this change will reduce the coverage of regulation, it will be vital to “stress test” the definition against potential abuses, to ensure that there are no gaps.

While competition, as well as efficiency, discourages direct exchange of information between credit providers, there may be some benefits for related corporations of direct sharing, which could cause detriment, particularly if the corporations were of a particular size or had a large proportion of market share.

In the past, we have had experience of businesses that could cause detriment to consumers but could “escape” regulation – for example “debt default agencies” sharing lists of video library defaults, businesses sharing information in relation to bounced cheques with retailers, and agencies claiming to be credit reporting agencies that appeared to retain no records at all.¹

If the definition is to be narrowed, it is important that the Office of the Federal Privacy Commissioner (**OFPC**) determines the categories of information that can legally be regarded as “credit reporting information”. The OFPC should be able to respond to particular unforeseen consequences, and therefore we agree that the OFPC should have the power to determine that certain categories of information are credit reporting information.

Permitted content of credit files – minors and statute barred debts

We strongly support the recommendation of requiring minimum amounts for listed defaults, and excluding debts of those under the age of 18 and statute barred debts. While there are additional reasons to protect the personal information of minors, this recommendation ensures that amounts that are not recoverable at law cannot be listed as amounts owed, or overdue, in credit reporting information.

Tiers of Access

We support the concept of different tiers of access to credit reporting information.

Utilities were allowed to access the system as a result of a Determination by the OFPC, so this will be the first time that the Government has made a decision in relation to the ability of utilities and other businesses (including internet service providers and orthodontists) to access this information. This “secondary” level of credit providers should have limited access to detailed information about an individual’s financial transactions – particularly if credit reports are to contain additional financial information.

We also note that the Federal Government has recently announced that credit providers currently regulated by the Uniform Consumer Credit Code (**UCCC**) will be subject to new responsible lending requirements. Other “credit providers” such as telecommunications companies have limited obligations, generally in voluntary codes and often not effective in practice.

There are two main problems here. The first is one of privacy, and of what personal information is necessary for these businesses to assess application for a service. The second one is one of

¹ In 2002, Consumer Credit Legal Service (Vic) complained about a company called “Debt Default Register” which was considered by the Office of the Federal Privacy Commissioner to be a credit reporting agency, but which in the ACCC’s view was misleading consumers by claiming it was a credit reporting agency.

appropriate processes to report information to a CRA and the ability to investigate and respond to any disputes that arise. Different tiers of access are unlikely to address this second problem.

We maintain our objection to utilities and other service providers being classified as 'credit providers'. However, if they are to be regarded as such then the legal requirement to conduct internal dispute resolution must be clear, effective and enforceable.

Other concerns

In addition to the above points, we would use this opportunity to highlight credit reporting issues that are of particular concern to Consumer Action:

Access and use – secondary purposes

We note that the ALRC recommends that “a credit reporting agency or credit provider may use or disclose credit reporting information for a secondary purpose related to the assessment of an application for credit or the management of an existing credit account...” (Recommendation 57–2).

We have concerns that secondary purposes such as “management of accounts” could enable credit reporting information to be used for marketing and other purposes.

Secondary purposes must be clearly set out, and any terms used such as “management of accounts” must be clearly defined. For example, “management of accounts” could include making future “pre-approved” credit limit offers, offering additional credit products to current customers or marketing products to refinance other existing credit commitments. We have concerns that even if such use was prohibited, it may not be possible to monitor whether information was being used for this purpose.

In considering secondary purposes, it is vital that secondary “use” is not combined with secondary “disclosure”. For example, even if some use was allowed for “management of accounts”, it must be clear that the information that is to be used is that information accessed at the time of the credit application. Credit reporting agencies must not be allowed to disclose new information to credit providers in relation to current customers unless they have submitted a new credit application.

Dispute Resolution

We generally support the recommendations by the ALRC in relation to dispute resolution, and welcome the recommendation that credit providers who access credit reports must be members of an external dispute resolution scheme.

However, dispute resolution has been one of the failures of the current system, and we have some concerns that consumers will continue to have problems with some credit providers and have difficulty in having their complaints resolved.

We have concerns, in particular, about some telecommunications companies. The 2008 annual report of the Telecommunications Industry Ombudsman (**TIO**) showed that telecommunications companies are consistently failing to meet their obligations to consumers. In the 2007/2008 period, the TIO received 149,742 complaints – representing a 46.1% increase on 2006/2007. Furthermore, the TIO has reported

a significant increase in failure by telecommunications firms to respond to complaints, or rectify problems even after a remedy had been agreed.

This illustrates a need to have very clear obligations on credit providers and credit reporting agencies that should include a requirement to amend the information that is the subject of complaint if the credit provider does not respond appropriately within a set period of time.

We believe that the development of processes at Veda Advantage, which now include Veda acting as liaison between the consumer and credit provider in some cases (for example requiring the credit provider to substantiate a listing within a period of time) has been a positive one. We therefore would not support an obligation for a CRA to refer a consumer to the credit provider, as some consumers would benefit from the CRA's intervention.

We do not see a simple solution to the design of a complaints handling process, but we will be shortly taking part in a forum hosted by Veda Advantage on this topic, and hope that we will be able to support a proposal arising from that forum.

However, regardless of the processes involved, the range of types of businesses and the fact that at least two businesses (CRA and credit provider) are potentially involved in each dispute means that dispute resolution will be a challenge.

We agree with the recommendation that the Government should review the Regulations within 5 years, but believe that this should be expanded to include a detailed review of dispute resolution mechanisms.

Listing defaults in relation to schemes of arrangement

We have some concerns about allowing overdue payments under new arrangements to be listed and to remain on the credit report for the full five year period (Recommendation 58–2). The effect could be to place a debtor who had made an attempt at repayment in a much worse position than another debtor who simply made no payment. While some debtors make arrangements to avoid the consequences of legal action, many debtors seen by our service have few assets at risk, and may not have a lot to gain from a payment arrangement. The risk for credit providers is that some consumers may decide (or receive advice) that they are better off not making an offer to repay than agreeing to an arrangement if there is any risk they may default in the future.

Pre-screening

“Pre-screening” is a practice whereby credit providers use credit reporting information to ‘exclude’ individuals from direct marketing offers.

In relation to pre-screening, we do not agree with CLPC’s submission that concerns about pre-screening “could be alleviated with adequate responsible lending requirements in consumer credit law, and by better implementation of ‘opt-out’ facilities”.

We believe that “pre-screening” is primarily used to enhance the effectiveness of marketing programs. We therefore support the ALRC’s recommendation to prohibit the use of credit reporting information for direct marketing purposes, including pre-screening.

There is broad acceptance by the community that credit reporting regulation allows broader access to, and use of, personal information than would otherwise be allowed. This acceptance is based on what is perceived as a clear advantage to consumers, industry and to the community as a whole. It is therefore vital that any expanded use of this information can be shown to be in the public interest – and not just the interests of industry.

Lenders argue that pre-screening is not marketing, but simply a practice enabling them to withhold marketing from those whose applications for credit would be refused. This is spurious reasoning. There is little difference between using information to identify consumers you wish to target, as opposed to those that you do not. In each case the main purpose is to enhance direct marketing strategies. Pre-screening enables lenders to target a wider range of profiles (for example big spenders or financially stressed), in the knowledge there will be some filtering of their offers. It also enables lenders to avoid embarrassing events such as sending offers to children or pets, or having to reject an application from someone who received a “special offer”.²

The more targeted lenders can be with marketing offers, the more aggressive that marketing is likely to be. In the comfort of knowing that only a small percentage of applications are likely to be rejected, lenders are attracted to addressing the recipient as specially chosen or pre-approved. Lenders would like us to think that as long as these marketing offers are being sent to people who are less likely to default, this leads to “responsible lending”. First, while it may be embarrassing for lenders, they can reject credit applications once they are made – and reject the suggested risk that even if the application is rejected, the high risk consumer has been given the “idea” of seeking credit. Secondly, this type of marketing has contributed to high levels of debt that can cause significant financial stress for some individual consumers even if they do not actually default on payments.

If credit reporting information is to be made available to enhance marketing strategies (for example by pre-screening) Government should commission rigorous research to establish that pre-screening does not increase the overall number of offers, that it does not have an impact on the aggressive nature of credit marketing and that there is overall community benefit.

Without clear evidence of public interest, the Government should accept the ALRC’s recommendation that pre-screening be prohibited.³

Serious Credit Infringement

We do not believe that a requirement for a credit provider to take “reasonable steps” alone, even if those steps are described in a Code, is adequate to prevent problems we have experienced in relation to “serious credit infringements” (Recommendation 56–6).

While such a listing is based on the “opinion” of the credit provider, it can lead to problems. We have seen clients in the past who were in contact with their credit provider by telephone, but were listed as a “serious credit infringement” because mail was returned. We are also aware that, particularly in relation

² UK company CallScreen says about pre-screening: “The main benefits of using CallScreen+ are substantial savings in the costs of marketing and processing applications for consumers who will not be accepted for credit. Effective credit pre-screening also avoids the adverse PR associated with inviting consumers to apply for credit only to reject them at decision stage”, <http://www.euroidirect.co.uk/pages/callscreen-plus>.

³ We understand that lenders already engage in ‘prescreening’ even though there is some doubt about whether it is permitted under current law.

to utilities, consumers can overlook advising of change of address (or a utility can fail to record the advice). Even if the consumer later contacts the utility, if the "serious credit infringement" has been listed, there is nothing that can be done.

The impact of a "serious credit infringement" is significant, and it should therefore be limited to circumstances where there is evidence that the consumer has failed to advise of a new address in order to avoid liability. If it can later be shown that there is a reasonable excuse (even if the credit provider has taken reasonable steps) then the listing should be removed.

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

Yours sincerely

CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink, appearing to read 'Carolyn Bond', written in a cursive style.

Carolyn Bond
Co-CEO