Australian Government

Australian Law Reform Commission

Review of Privacy–Credit Reporting Provisions

ISSUES PAPER

You are invited to provide a submission or comment on this Issues Paper

ISSUES PAPER 32
December 2006

This Issues Paper reflects the law as at 30 November 2006

ISBN 0-9758213-7-7

Commission Reference: IP 32

The Australian Law Reform Commission was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth). The office of the ALRC is at Level 25, 135 King Street, Sydney, NSW, 2000, Australia.

All ALRC publications can be made available in a range of accessible formats for people with disabilities. If you require assistance, please contact the ALRC.

Telephone:	within Australia	(02)	8238 6333
	International	+61 2	8238 6333
TTY:		(02)	8238 6379
Facsimile:	within Australia	(02)	8238 6363
	International	+61 2	8238 6363

E-mail: info@alrc.gov.au

ALRC homepage: www.alrc.gov.au

Printed by Canprint Communications Pty Ltd

Making a submission

Any public contribution to an inquiry is called a submission and these are actively sought by the ALRC from a broad cross-section of the community, as well as those with a special interest in the inquiry.

Submissions are usually written, but there is no set format and they need not be formal documents. Where possible, submissions in electronic format are preferred.

It would be helpful if comments addressed specific questions or numbered paragraphs in this paper.

Open inquiry policy

In the interests of informed public debate, the ALRC is committed to open access to information. As submissions provide important evidence to each inquiry, it is common for the ALRC to draw upon the contents of submissions and quote from them or refer to them in publications. As part of ALRC policy, non-confidential submisions are made available during the Inquiry to other state and territory law reform bodies working on a privacy inquiry. Non-confidential submissions are also made available to any other person or organisation upon request after completion of an inquiry, and also may be published on the ALRC website. For the purposes of this policy, an inquiry is considered to have been completed when the final report has been tabled in Parliament.

However, the ALRC also accepts submissions made in confidence. Confidential submissions may include personal experiences where there is a wish to retain privacy, or other sensitive information (such as commercial-in-confidence material). Any request for access to a confidential submission is determined in accordance with the federal *Freedom of Information Act 1982*, which has provisions designed to protect sensitive information given in confidence.

In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as non-confidential.

Submissions should be sent to:

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001
E-mail: privacy@alrc.gov.au

Submissions may also be made using the on-line form on the ALRC's homepage: <www.alrc.gov.au>.

The closing date for submissions in response to IP 32 is 9 March 2007.

Contents

Terms of Reference **3**
List of Participants **5**
List of Questions **9**

1. Introduction to the Inquiry **15**
Background 15
The scope of the Inquiry 16
Organisation of this paper 17
Process of reform 18

2. Credit Reporting and its Regulation **23**
Introduction 23
What is credit reporting? 23
Credit reporting agencies 25
Background to national regulation 26
Legislative history 29

3. Credit Reporting Provisions of the *Privacy Act 1988* (Cth) **35**
Introduction 35
Application of the credit reporting provisions 37
Content of credit information files 40
Accuracy and security of personal information 43
Disclosure of personal information 44
Use of personal information 48
Rights of access, correction and notification 50
Interaction between Part IIIA and the NPPs 51

4. The Regulatory Framework **53**
Introduction 53
Responsibilities and powers of the OPC 54
Complaint-handling 60
Credit reporting complaints experience 62
Remedies and penalties 65

5. Reform of the Credit Reporting Provisions **70**
Introduction 70
Permitted content of credit information files 70
Informing individuals about credit reporting 75
Deletion of information in credit information files 76

Accuracy and security 78
Rights of access and alteration 83
Limits on disclosure by credit reporting agencies 86
Participation in the credit reporting system 91
Consent to disclosure of information 93
Limits on use of credit reports by credit providers 97
Notification of adverse credit reports 98
Limits on disclosure by credit providers 99
Other limits on use or disclosure 100
Debt collection 101
Credit reporting, identity verification and identity theft 102
Debts of children and young people 103
Commercial credit 105
Publicly available information 106
Application to foreign credit providers 108

6. Comprehensive Credit Reporting 111
Introduction 111
Definitional issues 112
Australia's approach to comprehensive credit reporting 114
Deficiencies in the current system of credit reporting 117
Will more comprehensive credit reporting address present deficiencies? 119
Regulation in other jurisdictions 125
Regulatory framework for more comprehensive credit reporting 130
New information to be included in credit reporting 130
Consequential changes if more comprehensive credit reporting introduced 131

7. The Approach to Reform 135
Introduction 135
Structural approaches to reform 135
Consumer and industry perspectives on reform 143
Changes in the credit sector and credit reporting system 145
Other reform considerations 146

Appendix 1. List of Abbreviations 149

Terms of Reference

REVIEW OF THE PRIVACY ACT 1988

I, Philip Ruddock, Attorney-General of Australia, having regard to:

- the rapid advances in information, communication, storage, surveillance and other relevant technologies
- possible changing community perceptions of privacy and the extent to which it should be protected by legislation
- the expansion of State and Territory legislative activity in relevant areas, and
- emerging areas that may require privacy protection,

refer to the Australian Law Reform Commission for inquiry and report pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996*, matters relating to the extent to which the *Privacy Act 1988* and related laws continue to provide an effective framework for the protection of privacy in Australia.

1. In performing its functions in relation to this reference, the Commission will consider:

(a) relevant existing and proposed Commonwealth, State and Territory laws and practices

(b) other recent reviews of the *Privacy Act 1988*

(c) current and emerging international law and obligations in this area

(d) privacy regimes, developments and trends in other jurisdictions

(e) any relevant constitutional issue

(f) the need of individuals for privacy protection in an evolving technological environment

(g) the desirability of minimising the regulatory burden on business in this area, and

(h) any other related matter.

2. The Commission will identify and consult with relevant stakeholders, including the Office of the Federal Privacy Commissioner, relevant State and Territory bodies and the Australian business community, and ensure widespread public consultation.

3. The Commission is to report no later than 31 March 2008.

Dated 30th January 2006

[signed]

Philip Ruddock

Attorney-General

List of Participants

Australian Law Reform Commission

Division

The Division of the ALRC constituted under the *Australian Law Reform Commission Act 1996* (Cth) for the purposes of this Inquiry comprises the following:

Professor David Weisbrot (President)
Professor Les McCrimmon (Commissioner)
Justice Robert French (part-time Commissioner)
Justice Susan Kenny (part-time Commissioner)
Justice Susan Kiefel (part-time Commissioner)

Senior Legal Officers

Carolyn Adams
Bruce Alston
Kate Connors
Isabella Cosenza
Jonathan Dobinson

Legal Officers

Althea Gibson
Lauren Jamieson
Huette Lam
Edward Santow
Peter Turner (until August 2006)

Research Manager

Lani Blackman

Librarian

Carolyn Kearney

Project Assistants

Alayne Harland
Tina O'Brien

Legal Interns

Justin Carter
Elizabeth Crook
Maggie Fung
Dawnie Lam
Fiona Roughley
Teneille Steptoe
Michelle Tse
SooJin Yoon

Advisory Committee Members

Dr Bridget Bainbridge, National E-Health Transition Authority
Ms Robin Banks, Public Interest Advocacy Centre
Mr Paul Chadwick, Consultant (formerly Victorian Privacy Commissioner)
Ms Karen Curtis, Privacy Commissioner (Cth)
Mr Peter Ford, Privacy, Security and Telecommunications Consultant
Mr Ian Gilbert, Australian Bankers' Association
Mr Duncan Giles, Freehills Solicitors
Professor Margaret Jackson, School of Accounting & Law, RMIT University
Ms Helen Lewin, Telstra Corporation
Associate Professor Roger Magnusson, Faculty of Law, University of Sydney
Dr Moira Paterson, Faculty of Law, Monash University
Ms Joan Sheedy, Australian Attorney-General's Department
Mr Peter Shoyer, Information Commissioner (NT)
Professor Colin Thomson, National Health and Medical Research Council
Mr Nigel Waters, Pacific Privacy Consulting
Ms Beth Wilson, Health Services Commissioner (Vic)
Ms Sue Vardon, Department for Families & Communities (SA)

Health Advisory Sub-Committee

Ms Amanda Adrian, Australian Nursing Federation
Ms Melanie Cantwell, Consumers' Health Forum of Australia Inc
Professor David Hill, The Cancer Council (Vic)
Ms Anna Johnston, Australian Privacy Foundation
Dr Graeme Miller, Family Medicine Research Centre
Ms Julia Nesbitt, Australian Medical Association
Professor Margaret Otlowski, Faculty of Law, University of Tasmania
Ms Dianne Scott, Department of Human Services (Vic)
Dr Heather Wellington, Peter MacCallum Cancer Centre

Credit Reporting Advisory Sub-Committee

Ms Carolyn Bond, Consumer Action Law Centre
Ms Christine Christian, Dun and Bradstreet Pty Ltd
Ms Karen Cox, Consumer Credit Legal Centre (NSW)
Mr Ian Gilbert, Australian Bankers' Association

Ms Helen Gordon, Australian Finance Conference
Mr Andrew Want, Baycorp Advantage
Mr Nigel Waters, Pacific Privacy Consulting
Ms Kerstin Wijeyewardene, Treasury (Cth)

List of Questions

4. The Regulatory Framework

4–1 How do the Privacy Commissioner's powers to audit credit information files and credit reports operate in practice? Are the Privacy Commissioner's powers to audit credit information files and credit reports adequate? If not, what powers should the Privacy Commissioner have to audit credit information files and credit reports?

4–2 How do the procedures under the *Privacy Act* and the *Credit Reporting Code of Conduct* for making and pursuing complaints about credit reporting operate in practice? What powers should the Privacy Commissioner have to make preliminary inquiries and investigate complaints about credit reporting?

4–3 What other complaint-handling mechanisms would enhance compliance with credit reporting regulation and the resolution of complaints? How might procedures for making and pursuing complaints about credit reporting be streamlined? Should an external dispute resolution scheme be established? If so, how should such a scheme be funded?

4–4 Should the range of penalties and remedies available to enforce rights and obligations under the credit reporting provisions of the *Privacy Act* be changed and, if so, how?

5. Reform of the Credit Reporting Provisions

5–1 What issues are raised by the provisions of the *Privacy Act* dealing with the permitted content of credit information files? How do these provisions operate in practice, for example, in relation to information about overdue payments, bankruptcy and serious credit infringements? How should the permitted content of credit information files be regulated?

5–2 Should a credit provider that subscribes to a credit reporting agency be required to provide to the credit reporting agency some or all kinds of information that may be included in a credit information file? What issues would be raised by compulsory reporting, for example, in relation to the cost to credit providers of participating in the credit reporting system?

5–3 What issues are raised by the provisions of the *Privacy Act* requiring individuals to be informed about the disclosure of personal information to a credit reporting agency? How do these provisions operate in practice?

5–4 What issues are raised by the provisions of the *Privacy Act* dealing with the deletion from credit information files of permitted content? How do these provisions operate in practice, for example, in relation to multiple listings in respect of the same debt? How should the deletion of personal information in credit information files be regulated?

5–5 What issues are raised by the provisions of the *Privacy Act* and *Credit Reporting Code of Conduct* dealing with the accuracy of credit information files and credit reports? How do these provisions operate in practice? What regulation should apply to ensure the accuracy of credit information files and credit reports?

5–6 What issues are raised by the provisions of the *Privacy Act* and *Credit Reporting Code of Conduct* dealing with the security of credit information files and credit reports? How do these provisions operate in practice? What regulation should apply to ensure the security of credit information files and credit reports?

5–7 Is there any evidence that employers, insurers or government agencies request individuals to provide copies of their credit reports for employment, insurance, licensing or other purposes unrelated to the provision of credit? If such requests are made, what steps should be taken to address this issue?

5–8 What issues are raised by the provisions of the *Privacy Act* dealing with individuals' rights of access to, and alteration of, information in credit information files and credit reports? How do these provisions operate in practice? What rights of access and alteration should individuals have?

5–9 What issues are raised by the provisions of the *Privacy Act* that limit the disclosure of personal information by credit reporting agencies? How do these provisions operate in practice? What limits should apply to the disclosure of personal information by credit reporting agencies?

5–10 What issues are raised by the disclosure of personal information by credit reporting agencies to credit providers covered by the Privacy Commissioner's *Credit Provider Determination No. 2006–4 (Classes of Credit Provider)*?

5–11 What issues are raised by the disclosure of personal information by credit reporting agencies to credit providers covered by the Privacy Commissioner's *Credit Provider Determination No. 2006–3 (Assignees)*?

5–12 What issues are raised by the definition of a 'credit provider' for the purposes of the *Privacy Act*? How does this definition operate in practice?

5–13 What persons or organisations should be permitted to obtain personal information contained in credit information files held by credit reporting agencies? How should this aspect of the credit reporting system be regulated? Should regulation permit different levels of access to the information contained in credit information files?

5–14 What issues are raised by the practice of credit providers seeking 'bundled consent' to a number of uses and disclosures of personal information, including in relation to credit reporting?

5–15 Is reliance on the principle of consent to protect the privacy of personal information in credit reporting effective? What alternative approaches are available to protect individuals' information privacy?

5–16 What issues are raised by the provisions of the *Privacy Act* that limit the use by credit providers of personal information contained in credit reports? How do these provisions operate in practice? What limits on the use by credit providers of personal information contained in credit reports should apply, for example, in relation to marketing?

5–17 What issues are raised by the provisions of the *Privacy Act* requiring individuals to be notified when an application for credit is refused based wholly or partly on a credit report? How do these provisions operate in practice? What obligations should apply when an application for credit is refused based on a credit report?

5–18 What issues are raised by the provisions of the *Privacy Act* placing limits on the disclosure by credit providers of personal information contained in reports relating to credit worthiness? How do these provisions operate in practice? How should the disclosure by credit providers of personal information relating to credit worthiness be regulated?

5–19 What issues are raised by the application of s 18N of the *Privacy Act* to 'reports', as defined by s 18N(9)? Should information relating to credit worthiness that is not contained in a credit report be left to be covered by the disclosure principles in NPP 2.1 of the National Privacy Principles?

5–20 What issues are raised by the provisions of the *Privacy Act* placing limits on the use or disclosure of personal information contained in credit reports by those corporations or persons covered by ss 18P and 18Q of the *Privacy Act*? How do these provisions operate in practice? How should the use or

disclosure of personal information by these corporations or persons be regulated?

5–21 What issues are raised by the use of the credit reporting system in debt collection? How should the use of personal information contained in credit information files and credit reports for debt collection be regulated?

5–22 What issues are raised by the possible use of credit information files for electronic identification and verification? How should the use of credit information files for electronic identification and verification be regulated?

5–23 Should credit reporting regulation provide expressly for the problem of identity theft, for example, by permitting credit reports to contain information that the individual concerned has been the subject of identity theft?

5–24 What issues are raised by credit information files and credit reports about children and young people? How should the collection, use and disclosure of personal information relating to children and young people be regulated?

5–25 Is the distinction in the credit reporting provisions of the *Privacy Act* between consumer and commercial credit necessary? Should personal information about consumer and commercial credit worthiness be regulated by the same statutory provisions?

5–26 What issues are raised by the collection of publicly available personal information for use in credit reporting? How should the collection, use and disclosure of such information be regulated?

5–27 Should information from foreign credit providers or about foreign loans be permitted in credit information files and credit reports? Should foreign credit providers be permitted to obtain credit reports and, if so, in what circumstances? What issues are raised in relation to the enforcement and extra-territorial operation of the credit reporting provisions? How should these matters be regulated?

5–28 Are there any other issues in relation to the content and drafting of Part IIIA of the *Privacy Act* that the ALRC should consider in the context of this Inquiry?

6. Comprehensive Credit Reporting

6–1 What deficiencies, if any, exist in the current regulatory framework for credit reporting that could be addressed by permitting more comprehensive credit reporting (also known as ‘positive’ credit reporting)? What are the

advantages and disadvantages of more comprehensive credit reporting over the current credit reporting system in Australia?

6–2 What would be the economic and social impact of introducing a system of more comprehensive credit reporting in Australia?

6–3 Should Australian law be amended to expand the categories of personal information that may be collected and used in credit reporting? If so, what categories of personal information should be permitted?

6–4 If Australian law is amended to permit more comprehensive credit reporting:

(a) What changes, if any, should be made to the way in which personal information is collected and disseminated for the purposes of credit reporting?

(b) Should changes be made to the way in which credit reporting is regulated? For example, should the Privacy Commissioner remain the primary regulator in this area? Would powers and penalties need to increase?

(c) Would it be desirable to make personal credit information available to a broader or narrower spectrum of individuals and organisations than may currently access such information? Should any additional safeguards be introduced to protect the privacy of personal information?

(d) Should there be differential levels of access to personal information that is collected under such a system?

7. The Approach to Reform

7–1 Should Part IIIA and related provisions of the *Privacy Act* dealing specifically with credit reporting:

(a) continue to regulate credit reporting, with appropriate amendment;

(b) be repealed, and credit reporting regulated under the *Privacy Act*, National Privacy Principles and a privacy code;

(c) be repealed, and credit reporting regulated under new sectoral legislation outside the *Privacy Act*; or

(d) be repealed, and credit reporting regulated by a self-regulatory scheme?

7–2 Should the credit reporting provisions of the *Privacy Act* be amended to take account of the following (and if so, how):

(a) developments in technology;

(b) changes in credit reporting practices; or

(c) any other considerations?

1. Introduction to the Inquiry

Contents

Background 15
The scope of the Inquiry 16
Terms of Reference 16
Organisation of this paper 17
Process of reform 18
Advisory Committee 18
Community consultation and participation 19
Timeframe for the Inquiry 20

Background

1.1 On 30 January 2006, the Attorney-General of Australia, the Hon Philip Ruddock MP, asked the Australian Law Reform Commission (ALRC) to conduct an Inquiry into the extent to which the *Privacy Act 1988* (Cth) and related laws continue to provide an effective framework for the protection of privacy in Australia.

1.2 The *Privacy Act* itself was partially the product of a seven year research effort by the ALRC, which culminated in 1983 with the three volume report, *Privacy* (ALRC 22). The Act also gave effect to Australia's obligations to implement the Organisation for Economic Co-operation and Development (OECD) *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*,[1] and partially implemented into domestic law Australia's obligations under art 17 of the *International Covenant on Civil and Political Rights*.[2]

1.3 Initially, the *Privacy Act* applied exclusively to the Commonwealth (and Australian Capital Territory) public sectors.[3] Commonwealth and ACT public sector agencies are required to comply with Information Privacy Principles (IPPs) that are similar, but not identical, to the OECD Guidelines.

---

1 Organisation for Economic Co-operation and Development, *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (1980).

2 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976).

3 In 1994, as part of the transition to self-government, the ACT public service was established as a separate entity from the Australian Government public service. The *Privacy Act* was amended at that time to ensure that ACT public sector authorities continued to be covered by the Act: *Australian Capital Territory Government Service (Consequential Provisions) Act 1994* (Cth).

1.4 The *Privacy Amendment Act 1990* (Cth), which commenced operation in September 1991, extended the coverage of the Act to consumer credit reporting. Credit reporting for these purposes is the practice of providing information about consumer credit-worthiness to banks, finance companies and other credit providers through credit reporting agencies that collect and disclose information about individuals. The credit reporting provisions of the Act are contained in Part IIIA and associated provisions (the credit reporting provisions) and are the subject of this Issues Paper.[4]

1.5 In 2000, amendments to the *Privacy Act* established a further set of privacy principles, known as the National Privacy Principles (NPPs), which apply to the private sector.[5] As discussed in Chapter 3, credit reporting agencies and credit providers must comply with the NPPs as well as with the credit reporting provisions in Part IIIA. The relationship between the obligations set out in the credit reporting provisions and those in the NPPs is an important issue discussed in this Issues Paper.

The scope of the Inquiry

Terms of Reference

1.6 The Terms of Reference are reproduced at the beginning of this Issues Paper. The ALRC is directed to focus on the extent to which the *Privacy Act* and related laws continue to provide an effective framework for protection of privacy in Australia. The Attorney-General identified four factors as relevant to the decision to initiate the Inquiry:

- rapid advances in information, communication, storage, surveillance and other relevant technologies;
- possible changing community perceptions of privacy and the extent to which privacy should be protected by legislation;
- the expansion of state and territory legislative activity in areas relevant to privacy; and
- emerging areas that may require privacy protection.

1.7 During the course of the Inquiry, the ALRC is directed to consider:

- relevant existing and proposed Commonwealth, state and territory laws and practices;
- other recent reviews of the *Privacy Act*;

---

4 All other matters relevant to the Terms of Reference are dealt with in Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006), released in October 2006.

5 *Privacy Amendment (Private Sector) Act 2000* (Cth), which came into effect on 21 December 2001.

- current and emerging international law and obligations in the privacy area;
- privacy regimes, developments and trends in other jurisdictions;
- any relevant constitutional issue;
- the need of individuals for privacy protection in an evolving technological environment;
- the desirability of minimising the regulatory burden on business in the privacy area; and
- any other related matter.

1.8 The ALRC is also directed to identify and consult with relevant stakeholders, including the Office of the Privacy Commissioner (OPC), relevant state and territory bodies and the Australian business community. The ALRC is also directed to ensure widespread public consultation. The ALRC is asked to provide a final Report to the Attorney-General by 31 March 2008.

Organisation of this paper

1.9 This Issues Paper is organised into seven chapters. Chapters 2, 3 and 4 explain the content and current operation of the credit reporting provisions of the *Privacy Act*. Chapters 5, 6 and 7 focus on aspects of credit reporting that may require reform. These range from minor changes to the current law on credit reporting through to major structural issues concerning the location and nature of credit reporting regulation. In each context, the Issues Paper asks whether information privacy is protected adequately in the credit reporting system. In this regard, the ALRC is interested in views on whether the level of privacy protection should be increased, decreased or maintained, and how various aspects of credit reporting should be regulated.

1.10 Chapter 2 briefly describes the role of credit reporting, the background to national regulation and the legislative history of the credit reporting provisions.

1.11 Chapter 3 summarises the credit reporting provisions and the relationship between the obligations in Part IIIA and the NPPs, which also regulate information handling by credit reporting agencies and credit providers.

1.12 Chapter 4 describes the responsibilities and powers of the OPC with regard to the privacy regulation of credit reporting; sets out information about credit reporting complaints received by the OPC, the Telecommunications Industry Ombudsman and the Banking and Financial Services Ombudsman; and discusses whether the *Privacy*

Act contains sufficient remedies and penalties in the event of non-compliance with the credit reporting provisions.

1.13 Chapter 5 discusses the experience of regulation under the credit reporting provisions, perceived inadequacies in the regulation of credit reporting and suggestions for reform.[6]

1.14 Chapter 6 summarises various proposals for extending the practice of credit reporting in Australia to a system of more 'comprehensive' (or 'positive') credit reporting. The chapter asks whether credit reporting should be expanded in this way and, if so, how it should be regulated. It also outlines some possible models of comprehensive credit reporting schemes, taking account of developments in other jurisdictions.

1.15 Finally, Chapter 7 discusses the overall approach to credit reporting reform. The ALRC asks whether credit reporting should continue to be regulated by Part IIIA of the *Privacy Act* and its related provisions; by the NPPs and a privacy code; in new sectoral legislation outside the *Privacy Act*; or by a self-regulatory scheme. The chapter also considers a number of background factors relevant to reform, including changes in the credit sector and credit reporting system and the regulatory burden of existing or new legislation.

1.16 While it can be suggested that structurally such fundamental questions should precede the detailed discussion of the existing credit reporting system, the ALRC is of the view that these questions cannot be answered without reference to the current regime. The discussion of the overall approach to credit reporting reform is therefore left to the final chapter of this Issues Paper.

Process of reform

Advisory Committee

1.17 It is standard operating procedure for the ALRC to establish an expert Advisory Committee to assist with the development of its inquiries. In this Inquiry, the Advisory Committee includes current and former Privacy Commissioners; privacy and consumer advocates; privacy professionals; health and social service professionals; academics with expertise in privacy, health law and e-commerce; and public and private sector officers with responsibility for privacy.

1.18 Given the breadth of this Inquiry, the ALRC also has established two sub-committees of the Advisory Committee in the areas of health privacy and credit reporting. An additional sub-committee on technology will be established in early 2007.

---

6 The ALRC acknowledges the assistance of the OPC in identifying some of the issues discussed in Chs 5 and 7.

1.19 The Advisory Committee and Sub-committee members have particular value in helping the ALRC identify the key issues and stakeholders, as well as in providing quality assurance in the research and consultation effort.[7] The committees will assist with the development of reform proposals as the Inquiry progresses. However, the ultimate responsibility for the final Report and recommendations remains with the Commissioners of the ALRC.

Community consultation and participation

1.20 Under the terms of its constituting Act, the ALRC 'may inform itself in any way it thinks fit' for the purposes of reviewing or considering anything that is the subject of an inquiry.[8] One of the most important features of ALRC inquiries is the commitment to widespread community consultation.

1.21 The nature and extent of this engagement is normally determined by the subject matter of the reference. Areas that are seen to be narrow and technical tend to be of interest mainly to experts. Some ALRC references—such as those relating to children and the law, Aboriginal customary law, multiculturalism and the law, and the protection of human genetic information—involve a significant level of interest and involvement from the general public and the media. The ALRC considers that this Inquiry falls into the latter category.

1.22 Some consultations have been held with experts in the credit reporting field. Following the release of this Issues Paper, further consultations will be held with a wide cross-section of individuals, groups and organisations including credit reporting agencies; representatives of the banking and finance industries and other credit providers; consumer representatives and advocacy groups; state and territory departments of fair trading and other bodies; academics and lawyers with expertise in privacy; and federal, state and territory privacy commissioners.

1.23 There are several ways in which those with an interest in this Inquiry may participate. First, individuals and organisations may indicate an expression of interest in the Inquiry by contacting the ALRC or applying online at <www.alrc.gov.au>. Those who wish to be added to the ALRC's mailing list will receive notices, press releases and a copy of each consultation document produced during the Inquiry.

1.24 Secondly, individuals and organisations may make written submissions to the Inquiry, both after the release of the Issues Papers and again after the release of the Discussion Paper. There is no specified format for submissions. The ALRC will accept gratefully anything from handwritten notes and emailed dot-points, to detailed

---

7 A list of the Advisory Committee and Credit Reporting Sub-committee members can be found in the List of Participants at the front of this publication.

8 *Australian Law Reform Commission Act 1996* (Cth) s 38.

commentary on matters related to the Inquiry. The ALRC also receives confidential submissions. Details about making a submission may be found at the front of this Issues Paper.

1.25 The ALRC strongly urges interested parties, and especially key stakeholders, to make submissions *before* the publication of the Discussion Paper. Once the basic pattern of proposals is established it is difficult for the ALRC to alter course radically. Although it is possible for the ALRC to abandon or substantially modify proposals for which there has been little support, it is more difficult to publicise, and gauge support for, novel approaches suggested to us late in the consultation process.

1.26 Thirdly, the ALRC maintains an active program of direct consultation with stakeholders and other interested parties. The ALRC is based in Sydney but, in recognition of its national character, consultations will be conducted around Australia during the next phase of the Inquiry. Any individual or organisation with an interest in meeting with the ALRC in relation to the issues being canvassed in the Inquiry is encouraged to contact the ALRC.

1.27 Finally, in this Inquiry it is the intention of the ALRC to hold public meetings, and a series of roundtable discussions with specific interest groups, such as small and large business, non-governmental organisations, consumer groups and so on.

Timeframe for the Inquiry

1.28 Two Issues Papers have been released during the course of this Inquiry. This Issues Paper (IP 32) deals with the credit reporting provisions. The other Issues Paper, *Review of Privacy* (IP 31), was released in October 2006, and deals with all other matters relevant to the Terms of Reference. An overview document *Reviewing Australia's Privacy Laws: Is Privacy Passé?* highlights, in a general manner, the key issues that the ALRC is exploring in this Inquiry.

1.29 The ALRC notes that the decision to prepare a separate Issues Paper dealing with credit reporting should not be taken as indicating that the ALRC has reached any concluded view on whether credit reporting should continue to be regulated by Part IIIA of the *Privacy Act* or should be regulated under the NPPs or in new sectoral legislation. Factors concerning the ALRC's available resources, and the timing of the Inquiry, dictated the decision to prepare a separate Issues Paper for this topic.

1.30 The two Issues Papers will be followed by the publication of a **Discussion Paper** in mid-2007. The Discussion Paper will contain a more detailed treatment of the issues, and will indicate the ALRC's current thinking in the form of specific reform proposals. The ALRC will then seek further submissions and undertake a further round of national consultations concerning these proposals. The Issues Papers and the Discussion Paper may be obtained from the ALRC free of charge in hard copy or on CD-ROM, and may be downloaded from the ALRC's website, <www.alrc.gov.au>.

1.31 The ALRC's final Report, containing the final recommendations, is due to be presented to the Attorney-General by 31 March 2008. Once tabled in Parliament, the Report becomes a public document.[9] The final Report will not be a self-executing document—the ALRC provides advice and recommendations about the best way to proceed, but implementation is a matter for the Government and others.[10]

1.32 The ALRC's earlier Report on privacy contained draft legislation, which formed the basis of the *Privacy Act.* Such draft legislation was typical of the law reform effort in those times. Since then the ALRC's practice has changed, and draft bills are not produced unless specifically called for by the Terms of Reference. This is partly because drafting is a specialised function better left to the legislative drafting experts and partly a recognition that the ALRC's time and resources are better directed towards determining the policy that will shape any resulting legislation. The ALRC has not been asked to produce draft legislation in this Inquiry, but no doubt many of the recommendations in the final Report will indicate the precise nature of the desired legislative change.

In order to be considered for use in the Discussion Paper, **submissions addressing the questions in this Issues Paper must reach the ALRC by 9 March 2007**. Details about how to make a submission are set out at the front of this publication.

9 The Attorney-General must table the Report within 15 sitting days of receiving it: Ibid, s 23.

10 However, the ALRC has a strong record of having its advice followed. About 59% of the ALRC's previous reports have been fully or substantially implemented, about 29% of reports have been partially implemented, 4% of reports are under consideration and 8% have had no implementation to date.

2. Credit Reporting and its Regulation

Contents

Introduction 23
What is credit reporting? 23
Credit reporting agencies 25
Background to national regulation 26
State legislation 26
New regulatory momentum 28
Legislative history 29
Privacy Amendment Bill 1989 29
Senate deliberations 30
Privacy Amendment Act 1990 31
Constitutional basis of the credit reporting provisions 32
Subsequent amendments 33
Credit Reporting Code of Conduct 34

Introduction

2.1 This chapter briefly describes the role of credit reporting, the background to national regulation and the legislative history of the credit reporting provisions of the *Privacy Act 1988* (Cth).[1]

2.2 The *Privacy Act* regulates the collection, use and disclosure of personal information concerning credit that is intended to be used wholly or primarily for domestic, family or household purposes.[2] Commercial credit information is only incidentally regulated by the Act, for example, where it is used to assess an application for consumer credit.[3] In this Issues Paper the term 'credit reporting', unless the context otherwise indicates, refers only to consumer credit reporting.

What is credit reporting?

2.3 Credit reporting involves providing information about an individual's credit worthiness to banks, finance companies and other credit providers such as retail

1 Ch 3 describes the regulatory scheme established by Part IIIA of the *Privacy Act* and associated provisions in more detail.
2 See *Privacy Act 1988* (Cth) s 6(1) definitions of 'commercial credit' and 'credit'.
3 Ibid s 18L(4).

businesses that issue credit cards or allow individuals to have goods or services on credit.

2.4 Credit reporting is generally conducted by specialised credit reporting agencies that collect and disclose information about potential borrowers, usually in order to assist credit providers to assess applications for credit. Credit reporting agencies collect information about individuals from credit providers and publicly available information (such as bankruptcy information obtained from the Insolvency and Trustee Service Australia—a federal government agency).

2.5 This information is stored in central databases for use in generating credit reports for credit providers. These credit reports augment information obtained from an individual's credit application and the credit provider's own records of past transactions involving the individual concerned.

2.6 As Professor Daniel Solove explains, credit reporting is an understandable response to a modern, interconnected world containing 'billions of people' and where 'word-of-mouth is insufficient to assess reputation'. He goes on to state:

> Credit reporting allows creditors to assess people's financial reputations in a world where first-hand experience of the financial condition and trustworthiness of individuals is often lacking.[4]

2.7 The role of a credit reporting agency is to provide rapid access to accurate and reliable standardised information on potential borrowers. Such information enables credit providers to manage the risks of lending and to guard against identity fraud. In economic theory, it is said that:

> Credit reporting addresses a fundamental problem of credit markets: asymmetrical information between borrowers and lenders that leads to adverse selection and moral hazard.[5]

2.8 Information asymmetry refers to the fact that, because a credit provider often cannot know the full extent of an applicant individual's credit history, the individual has more information about his or her credit risk than the credit provider. Adverse selection refers to the situation where a credit provider, operating in response to information asymmetry, prices credit based on the *average* credit risk of individuals. This creates an incentive for high risk applicants to apply (the price is low to them) and low risk applicants to reject credit (it is overpriced for them).

> The result is adverse selection because the client group the credit provider ends up with is a higher risk than the credit provider priced for. Better information allows credit providers to more accurately measure borrower risk and set loan terms accordingly, which is why credit providers maintain their own databases of

---

4 D Solove, 'A Taxonomy of Privacy' (2006) 154(3) *University of Pennsylvania Law Review* 477, 507–508.

5 M Miller, 'Introduction' in M Miller (ed) *Credit Reporting Systems and the International Economy* (2003) 1, 1.

> information on a consumer but also seek out information shared by other credit providers and supplied to them by a credit reporting agency.[6]

2.9 Information asymmetry also creates moral hazard. A credit applicant may obtain credit fraudulently by failing to disclose his or her credit history. Credit reporting reduces moral hazard because non-payment to one credit provider can inform the actions of other credit providers.[7]

2.10 Nevertheless, there is a near universal view that the practice of credit reporting must be regulated. There are many reasons for this. One is that it vindicates an individual's right to privacy—as Professor Solove puts it, '[p]eople expect certain limits on what is known about them and on what others will find out'.[8] Another justification is that a credit report, which contains aggregated personal data, can be used to make decisions that 'profoundly affect a person's life'.[9] As such, there is special significance in ensuring that it is accurate and not misused.

Credit reporting agencies

2.11 At present, there are three main credit reporting agencies operating in the Australian market. These are—in order of market share—Baycorp Advantage, Dun and Bradstreet and Tasmanian Collection Service.

2.12 The major consumer credit reporting agency is Baycorp Advantage,[10] which states that it maintains credit worthiness related data on 14 million Australians.[11] It has 4,500 subscribers who are credit providers from industries including banking, telecommunications, finance, retail, utilities, trade credit and government.[12]

2.13 Baycorp Advantage's Australian credit reporting business commenced in 1968 as the Credit Reference Association of Australia (CRAA), which was established by the finance industry.[13] As discussed below, the CRAA played a central role in

---

6 Consumer Affairs Victoria, *The Report of the Consumer Credit Review* (2006), 247.

7 M Miller, 'Introduction' in M Miller (ed) *Credit Reporting Systems and the International Economy* (2003) 1, 1.

8 D Solove, 'A Taxonomy of Privacy' (2006) 154(3) *University of Pennsylvania Law Review* 477, 508.

9 Ibid, 508.

10 In October 2006, Baycorp Advantage announced it would change its name to 'Veda Advantage': 'Baycorp Trading in Line with Forecast', *Sydney Morning Herald* (online), 26 October 2006, <www.smh.com.au>.

11 Baycorp Advantage, *Credit Reporting* (2006) <www.baycorpadvantage.com> at 11 August 2006.

12 Baycorp Advantage, *Submission to the Australian Communications and Management Agency on the Draft Standard: Telecommunications (Use of Integrated Public Number Database) Industry Standard 2005*, 1 January 2005.

13 Baycorp Advantage, *Frequently Asked Questions* (2006) Baycorp Advantage <www.mycreditfile.com.au> at 11 August 2006.

developments leading up to the enactment of the credit reporting provisions of the *Privacy Act*.[14]

Background to national regulation

State legislation

2.14 The first Australian legislation regulating aspects of credit reporting was enacted in 1971. In Queensland, Part III of the *Invasion of Privacy Act 1971* (Qld) established a licensing scheme for credit reporting agents.[15] The Act included statutory provisions dealing with:

- the permissible purposes of credit reports;
- the information to be furnished to consumers and credit reporting agencies when credit is refused on the basis of a credit report;
- the information to be disclosed by credit reporting agencies on request by consumers; and
- the obligations on credit reporting agencies to investigate and correct inaccurate information and delete old information.[16]

2.15 The *Invasion of Privacy Act 1971* contained offences in relation to: obtaining information falsely from a credit reporting agency; unauthorised disclosure of credit reporting information; supplying false credit reporting information; and demanding payment by making threats in relation to credit-related information.[17] The credit reporting provisions of the Act were repealed in 2002.[18]

2.16 South Australia enacted the *Fair Credit Reports Act 1975* (SA), which provided individuals with rights of access and correction; required credit reporting agencies to adopt procedures to ensure the accuracy and fairness of consumer reports; and required traders to inform individuals of their use of adverse information in such reports.[19] The Act was repealed in 1987.[20]

---

14 The following background to the enactment of the *Privacy Act* credit reporting provisions is drawn primarily from an article prepared by Roger Clarke, then chair of the Economic, Legal and Social Implications Committee of the Australian Computer Society: R Clarke, *Consumer Credit Reporting and Information Privacy Regulation* (1989) Australian Computer Society; and from annual reports of the New South Wales Privacy Committee: New South Wales Government Privacy Committee, *Annual Report 1984* (1984); New South Wales Government Privacy Committee, *Annual Report* (1989).

15 *Invasion of Privacy Act 1971* (Qld) pt III, div I.

16 Ibid ss 16, 17, 18, 24.

17 Ibid ss 19, 20, 21, 22, 25.

18 *Tourism, Racing and Fair Trading (Miscellaneous Provisions) Act 2002* (Qld) s 45.

19 *Fair Credit Reports Act 1975* (SA) pt II.

20 *Statutes Amendment (Fair Trading) Act 1987* (SA) s 16.

2.17 In Victoria, the *Credit Reporting Act 1978* (Vic) provides consumers with rights of access to copies of files held in relation to them by a credit reporting agency and provides a mechanism to dispute details and request the amendment of incorrect information. Credit reporting regulations were made in 1978 to prescribe procedures and time limitations to be followed by consumers seeking to amend personal credit reports held by credit agents.[21] The Victorian Consumer Credit Review recently noted that:

> With the commencement of the [federal] *Privacy Act*, however, it appears that the continuing relevance of the Victorian Act declined because the *Privacy Act* was binding on the industry and more comprehensive for consumers.[22]

2.18 Australia's first privacy regulator, the New South Wales Privacy Committee, identified credit reporting as an important privacy issue.[23] In 1976, concerns about the privacy of credit reporting information led the Privacy Committee and the CRAA to enter a so-called 'Voluntary Agreement' under which the CRAA would provide individuals with access to the information it held about them.[24]

2.19 Despite the Voluntary Agreement, few incentives existed to encourage CRAA's credit provider subscribers to comply with the Voluntary Agreement, notify individuals about adverse reports and rights of access, or to ensure that information they provided to the CRAA was accurate and complete.[25] Some observers expressed serious doubts about the willingness and ability of the CRAA to discipline its member credit providers.

> Few clients appear to have ever been suspended, had their memberships cancelled, or had specific employees suspended, for breach of CRAA rules. In 1985, when the Secretary of a Hibernian Credit Union was found to have made an enquiry for purposes other than credit granting (and in the process invented an application for a $50,000 mortgage loan), CRAA failed to discipline either its client or the client's employee (NSW Privacy Committee Annual Report, 1985, 92–98). Even a Report to Parliament, the NSW Privacy Committee's ultimate sanction, had no effect.[26]

2.20 During 1983, the New South Wales Privacy Committee reviewed its experience with the Voluntary Agreement and concluded that self-regulation of the credit reporting industry was ineffective. The Committee made proposals that it hoped would be the basis of fair credit reporting legislation or a code of practice under consumer

---

21 Consumer Affairs Victoria, *The Report of the Consumer Credit Review* (2006), 266.
22 Ibid, 266.
23 Established under the *Privacy Committee Act 1975* (NSW).
24 R Clarke, *Consumer Credit Reporting and Information Privacy Regulation* (1989) Australian Computer Society, 4.
25 Ibid, 4–5.
26 Ibid, 5.

protection legislation.[27] The Committee stated that this position was in line with its view that the 'time is now ripe for information privacy legislation'.[28]

2.21 In 1989, Roger Clarke stated:

> Judging by the last decade's complaints and enquiries to the country's only long-standing privacy 'watchdog', the NSW Privacy Committee, the public regards consumer credit reporting as the largest single information privacy issue.[29]

New regulatory momentum

2.22 The momentum for regulation of credit reporting intensified in the late 1980s. In large part this was in response to proposals by the CRAA to implement a new system of credit reporting. This system was referred to by the CRAA as the Payment Performance System (PPS) and was described by the CRAA and others as a form of 'positive' reporting. As discussed in Chapter 6, the ALRC is of the view that such systems are better described as 'comprehensive' or 'more comprehensive' credit reporting.

2.23 In the 1980s, as is still the case, credit reporting in Australia did not involve the collection or disclosure in credit reports of so-called 'positive' information about an individual's credit position. Apart from publicly available information about bankruptcies and court judgments, credit information was restricted to default reports made by CRAA members—that is, 'negative' information.

2.24 During the latter part of 1988, CRAA publicised an intention to augment its collection of credit reporting information by including information about individuals' current credit commitments. The nature of the proposal was summarised by Clarke as follows:

> Under PPS, credit providers would supply CRAA with tapes containing their customers' credit accounts. This data would be merged with previously recorded data every 30 to 60 days. Reports would then contain a complete listing of all known credit accounts, balances owing (at some recent point in time), and the consumer's payment performance on every account during the previous 24 payment periods … Payments 120 days or more overdue would result in a default report being generated automatically.[30]

2.25 The CRAA's proposals intensified concern about its operations. In 1989, the New South Wales Privacy Committee concluded that the CRAA proposals represented a 'new and significant threat to privacy' and again recommended regulation of credit reporting.[31] In April 1989, CRAA announced that it would postpone the introduction of

---

27 New South Wales Government Privacy Committee, *Annual Report 1984* (1984), 30.
28 Ibid, 31.
29 R Clarke, *Consumer Credit Reporting and Information Privacy Regulation* (1989) Australian Computer Society, 2.
30 Ibid, 6.
31 New South Wales Government Privacy Committee, *Annual Report* (1989), 23.

the PPS until January 1990, at the request of the Commonwealth Minister for Consumer Affairs, the Hon Senator Nick Bolkus.

2.26 On 19 April 1989, a 'Summit' was sponsored by the Australian Privacy Foundation. The meeting was attended by federal parliamentarians, CRAA representatives, state government agencies, credit providers, consumer and civil liberties groups and the Australian Computer Society.[32]

2.27 At the conclusion of the Summit, the Minister for Consumer Affairs announced that the Australian Government intended to extend the *Privacy Act* to cover consumer credit reporting. Credit reporting would therefore become subject to national legislation for the first time.

Legislative history

2.28 As enacted, the *Privacy Act* had limited application to the private sector. The Act set out the Information Privacy Principles (IPPs), which regulated the collection, handling and use of personal information by Commonwealth public sector agencies.[33] The Act also provided guidelines for the collection, handling and use of individual tax file number information in both the public and private sectors following enhancements in the use of this unique identifier in 1988.[34]

Privacy Amendment Bill 1989

2.29 The Privacy Amendment Bill 1989 was introduced on behalf of the Minister for Consumer Affairs on 16 June 1989. The second reading speech stated that:

> The Privacy Amendment Bill 1989 is the next step in the Government's program to introduce comprehensive privacy protection for the Australian community. The principal purpose of this Bill is to provide privacy protection for individuals in relation to their consumer credit records.[35]

2.30 To this end, the Bill adapted information privacy principles to provide privacy protection for individuals in relation to their personal information held by the consumer credit reporting industry.

---

32 R Clarke, *Consumer Credit Reporting and Information Privacy Regulation* (1989) Australian Computer Society, 6.

33 Since 1994, the IPPs also cover ACT public sector agencies: *Australian Capital Territory Government Service (Consequential Provisions) Act 1994* (Cth). See also Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006), [3.5].

34 *Taxation Laws Amendment (Tax File Numbers) Act 1988* (Cth).

35 Commonwealth, *Parliamentary Debates*, Senate, 16 June 1989, 4216 (G Richardson).

> At the present time, there are inadequate controls on consumer credit reporting agencies to prevent them from using their databases for non consumer credit purposes.[36]

2.31 The Bill was intended to regulate the collection, storage, access to, correction of, use and disclosure of personal credit information by credit providers and credit reporting agencies. These provisions would be supported by a code of conduct applying to information held in, or disseminated from, a central database and to the transfer of information between industry participants.[37] The Bill also provided individuals with an enforceable right of access to, and correction of, their credit records.

2.32 Significantly, the Bill restricted the categories of information credit reporting agencies were permitted to include in individuals' credit information files. Essentially, credit reporting agencies were limited to collecting the kinds of information that they already held.

2.33 In this context, the second reading speech highlighted public concern about the privacy implications of a more comprehensive form of credit reporting. It was said that 'the credit reporting agency would effectively become a central clearing house of information about the current financial commitments of all Australians'.

> Positive reporting would constitute a major change in the level of information collected on individuals. While the notion of information collected in a centralised agency is not new, the collection of personal information on individuals' spending habits is—credit and spending profiles of individuals would have been built up through all their credit transactions.[38]

2.34 The Australian Government did not consider that there was 'any proven substantial benefit from positive reporting proposals'. In view of such strong privacy concerns it concluded that any such expansion was 'impossible to condone'.[39]

Senate deliberations

2.35 The Privacy Amendment Bill 1989 was the subject of intense debate in the Senate. During the passage of the Bill, some 120 amendments from the Government, the Opposition and the Australian Democrats were proposed.[40]

2.36 On 2 November 1989, the Minister for Consumer Affairs tabled amendments to the Bill as introduced. These amendments were the result of consultations with the

---

36 Ibid.
37 Ibid.
38 Ibid.
39 Ibid.
40 Commonwealth, *Parliamentary Debates*, Senate, 12 November 1990, 3939 (M Tate—Minister for Justice and Consumer Affairs).

credit reporting industry and consumer and privacy groups and were said to clarify aspects of the regulatory scheme.[41]

2.37 Specifically, the amendments were intended to:

- widen the classes of businesses that would be able to have access to a credit reporting agency;
- enable credit information to be used to assist credit providers in combating serious credit infringements and in collecting debts; and
- allow commercial and consumer credit reports to be cross-referenced by credit providers when making lending decisions.[42]

2.38 Following the return of the Hawke Government in March 1990, the Privacy Amendment Bill 1989 was restored to the Senate Notice Paper on 31 May. On 23 August 1990, the Bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs (the Senate Standing Committee) for inquiry and report.

2.39 The Senate Standing Committee report, recommending some 64 amendments to the legislation, was presented to the Senate on 22 October 1990.[43] In debate on 12 November, the Government moved 23 modifications to the amendments recommended in the report.[44]

2.40 The Bill received a third reading, before passing with the support of the Democrats and the independent Senator Brian Harradine. The Bill was returned from the House of Representatives without amendment on 6 December 1990.

Privacy Amendment Act 1990

2.41 The *Privacy Amendment Act 1990* (Cth) received Royal Assent on 24 December 1990. The Privacy Amendment Bill 1989 had been described by the CRAA as containing 'the most restrictive credit reference laws in the Western world'.

> The credit industry launched a concerted campaign against the Bill, and obtained numerous amendments, but the 1989 Bill remained substantially intact when enacted.[45]

---

41 Commonwealth, *Parliamentary Debates*, Senate, 2 November 1989, 2788 (N Bolkus—Minister for Consumer Affairs).

42 Ibid. See also, Supplementary Explanatory Memorandum, Privacy Amendment Bill 1989 (Cth).

43 Parliament of Australia—Senate Standing Committee on Legal and Constitutional Affairs, *The Privacy Amendment Bill 1989 [1990]* (1990).

44 Commonwealth, *Parliamentary Debates*, Senate, 12 November 1990, 3927 (B Cooney).

45 G Greenleaf, 'The Most Restrictive Credit Reference Laws in the Western World?' (1992) 66 *Australian Law Journal* 672, 672.

2.42 Heralding the enactment of the legislation, Professor Graham Greenleaf noted that the credit reporting industry, in attempting to expand its activities into more comprehensive reporting, had 'provoked a degree of legislative control which it had avoided in the past'.[46] The legislation not only limited further expansion of credit reporting but was seen as 'rolling back the clock' by restricting certain existing practices, such as the provision of credit reports to real estate agents to check prospective tenants and mercantile agents to search for debtors' addresses.[47]

> It is rare for privacy legislation in any country to attempt such a retrospective repeal of the extension of data surveillance … This is the major achievement of the legislation: as a matter of public policy, it rejects the development of a multi-purpose reporting system as an unacceptable invasion of privacy—at least in the private sector.[48]

2.43 In order to allow the credit reporting industry time to comply with the new regulatory scheme, and to permit the Privacy Commissioner to issue a credit reporting code of conduct,[49] the Act did not commence operation until 24 September 1991. Before that date, transitional provisions were enacted[50] deferring the commencement of the credit reporting provisions and the obligation to comply with the *Credit Reporting Code of Conduct* until 25 February 1992.[51]

Constitutional basis of the credit reporting provisions

2.44 The constitutional basis of the credit reporting provisions—as with the rest of the *Privacy Act*—rests principally on s 51(xxix) of the *Australian Constitution*, which empowers the Commonwealth Parliament to make laws with respect to 'external affairs'.[52]

2.45 However, the credit reporting provisions were also drafted to be consistent with and, if necessary, to derive their legitimacy from other provisions of the *Constitution*—most notably, the post and telegraph power (s 51(v)); the trade and commerce power (s 51(i)); the corporations power (s 51(xx)); and the banking and insurance powers (s 51(xiii) and (xiv)).

---

46 Ibid, 672.
47 Ibid, 674.
48 Ibid, 674.
49 As required by *Privacy Act 1988* (Cth) s 18A(1).
50 *Law and Justice Legislation Amendment Act 1991* (Cth) s 21.
51 Unless an act or practice breached *Privacy Act 1988* (Cth) ss 18H–18J concerning individuals' access to credit information files and credit reports and the obligations of credit reporting agencies and credit providers to alter files and reports to ensure accuracy.
52 The constitutional basis of the *Privacy Act* as a whole is considered in Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006), Ch 2.

Subsequent amendments

2.46 Amendments were made to the credit reporting provisions even before the *Privacy Amendment Act 1990* commenced operation. The *Law and Justice Legislation Amendment Act 1991* (Cth)[53] made amendments, among other things, to

- clarify the definition of 'credit reporting business';
- provide that agents of credit providers can be treated as credit providers;
- permit individuals to authorise other persons to have access to their credit information file or credit report;
- ensure that credit providers can consider telephone applications for credit;
- permit information to be used for internal management purposes by credit providers;
- provide for notices in the case of joint applications for credit; and
- permit disclosure of personal information by credit providers to guarantors, mortgage insurers, dispute resolution bodies, in credit card and EFTPOS transactions and mortgage securitisation.

2.47 Since the commencement of the *Privacy Amendment Act 1990* there have been three major sets of amendments to the credit reporting provisions. The first set of amendments was contained in the *Law and Justice Legislation Amendment Act (No 4) 1992* (Cth) and related to securitisation, then a relatively new development in the financial sector. Securitisation refers to a complex method of financing loans under which, for example, a mortgage financed ostensibly by a credit provider, such as a credit union or building society, ultimately may be financed under mortgage securitisation using funds invested by investors in a trust.[54] Although the credit reporting provisions of the *Privacy Act* already made some provision for securitisation, it was necessary to substitute these provisions with more comprehensive ones given the complexity of the industry.[55]

2.48 The *Law and Justice Legislation Amendment Act 1993* (Cth) amended provisions governing disclosure of credit information by credit providers to state and

53 *Law and Justice Legislation Amendment Act 1991* (Cth) pt 3, ss 10–20.
54 Explanatory Memorandum, Law and Justice Legislation Amendment Bill (No 4) 1992 (Cth).
55 Ibid.

territory authorities that administer mortgage assistance schemes to facilitate the giving of mortgage credit to individuals.

2.49 Finally, the *Law and Justice Legislation Amendment Act 1997* (Cth) amended the credit reporting provisions to:

- insert a definition of the term 'guarantee';
- give the Privacy Commissioner the power to determine that a federal agency is a credit provider; and
- allow an overdue payment under a guarantee to be listed on the guarantor's credit information file.

Credit Reporting Code of Conduct

2.50 On 11 September 1991, the federal Privacy Commissioner, Kevin O'Connor, issued the *Credit Reporting Code of Conduct* under s 18A of the *Privacy Act*. As required by the Act, the Privacy Commissioner consulted with government, commercial, consumer and other relevant bodies and organisations during the development of the Code. The Code became fully operational in February 1992 and was amended in 1995. Since then, amendments to the *Credit Reporting Code of Conduct* and explanatory notes have been made periodically, including to take into account changes made to the credit reporting provisions of the *Privacy Act*.[56]

56 See, Office of the Federal Privacy Commissioner, *Credit Reporting Code of Conduct* (1991), 2.

3. Credit Reporting Provisions of the *Privacy Act 1988* (Cth)

Contents

Introduction 35
Application of the credit reporting provisions 37
Information covered by the provisions 37
Persons within the ambit of the provisions 38
Content of credit information files 40
Accuracy and security of personal information 43
Disclosure of personal information 44
Credit reporting agencies 44
Credit providers 46
Information given by credit providers to credit reporting agencies 48
Use of personal information 48
Credit providers 48
Use and disclosure by mortgage and trade insurers 49
Use and disclosure by other persons 49
Rights of access, correction and notification 50
Interaction between Part IIIA and the NPPs 51

Introduction

3.1 This chapter provides an overview of the coverage of the credit reporting provisions of the *Privacy Act 1988* (Cth), which are principally located in Part IIIA. The chapter first considers the people and information covered by the credit reporting provisions. It then summarises how personal information may be used and disclosed in the credit reporting process, and how the Act provides for rights of access and correction for individuals in relation to their personal information.[1] The chapter then considers the relationship between Part IIIA of the Act and the National Privacy Principles (NPPs).[2]

3.2 Part IIIA of the *Privacy Act* contains the substantive provisions that regulate credit reporting. However, some provisions dealing with the scope and application of

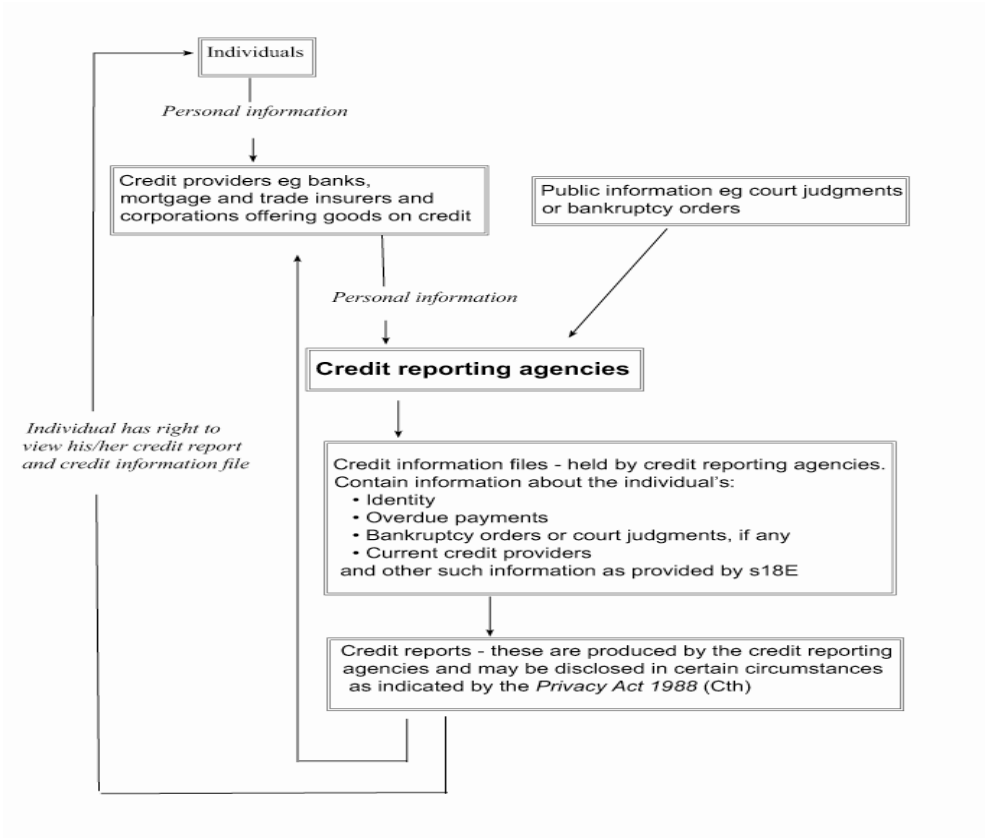
1 Therefore, this part of the chapter is largely explanatory. Chs 5–6 deal with specific issues as to whether these provisions should be amended and, if so, in what ways.

2 The NPPs are located in *Privacy Act 1988* (Cth) sch 3.

the credit reporting provisions are located elsewhere in the Act. The Act empowers the Privacy Commissioner to issue a binding Code of Conduct.[3] A Code of Conduct was issued on 11 September 1991 and it is discussed in Chapter 4.

3.3 Robert Gellman has noted the huge 'potential demand for credit reports', which has the effect of both feeding and amplifying 'the potential mischief' in the event that they are misused. As this chapter explains, the structure of Part IIIA of the *Privacy Act* provides an example of what Gellman has termed 'a classic type of legal response' to the dangers involved in credit reporting.[4]

3.4 This chapter sets out in detail how the *Privacy Act* permits and restricts the transfer of personal information in credit reporting. The diagram below is a summary of the main data flows under the present regulation of credit reporting.



3 Ibid ss 18A, 18B.

4 R Gellman, 'Defining Our Terms', *DM News* (online), 5 October 2006, <www.dmnews.com>.

Application of the credit reporting provisions

3.5 This part of the chapter answers the following questions. What information is covered by the credit reporting provisions? To whom do the provisions apply?

Information covered by the provisions

3.6 A number of terms define the scope of the regulatory framework for credit reporting in the *Privacy Act*. The most important of these are 'personal information', 'credit information file' and 'credit report'. Their respective meanings, and the inter-relationship of these terms, are discussed here.

3.7 The Act, principally in Part IIIA,[5] regulates the use and disclosure of 'personal information' for credit reporting purposes. 'Personal information' is defined to mean:

> information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.[6]

3.8 An individual's personal information may be collated by a credit reporting business to create a 'credit information file'. In relation to an individual, this means:

> any record that contains information relating to the individual and is kept by a credit reporting agency in the course of carrying on a credit reporting business (whether or not the record is a copy of the whole or part of, or was prepared using, a record kept by another credit reporting agency or any other person).[7]

3.9 The credit information file may in turn be used to create a 'credit report'. It is in this form that an individual's personal information may pass from the person collecting the information (the credit reporting agency) to the person wishing to use the information (the credit provider).[8] The term 'credit report' is defined as:

> any record or information, whether in a written, oral or other form, that:
>
> (a) is being or has been prepared by a credit reporting agency; and
>
> (b) has any bearing on an individual's:
>
> (i) eligibility to be provided with credit; or
>
> (ii) history in relation to credit; or
>
> (iii) capacity to repay credit; and

---

5 Note that other parts of the Act also relate to credit reporting. For instance, Part V deals with investigations by the Privacy Commissioner into alleged breaches of, among other things, the credit reporting rules.

6 *Privacy Act 1988* (Cth) s 6(1).

7 Ibid s 6(1).

8 The meanings of 'credit reporting agency' and 'credit provider' are discussed below.

(c) is used, has been used or has the capacity to be used for the purpose of serving as a factor in establishing an individual's eligibility for credit.[9]

Persons within the ambit of the provisions

3.10 There are four main categories of person affected by Part IIIA of the *Privacy Act*. These are: (i) individuals; (ii) credit reporting agencies; (iii) credit providers; and (iv) third parties who provide personal information to credit reporting agencies.

Individuals

3.11 An individual, whose personal information forms the basis of a credit information file, may be affected by a credit report—especially in terms of the individual's application for credit. The Act stipulates that an individual must be 'a natural person' and that the definition of 'credit' does not include 'commercial credit'.[10]

3.12 This means that a corporation, for instance, cannot claim the protection of the credit reporting provisions in its own right. Commercial credit information is only indirectly regulated by the Act—where, for example, it is used to assess an application for consumer credit.[11]

Credit reporting agencies

3.13 The collection of personal information, its collation in credit information files and the disclosure of this information to credit providers only may be performed by a 'credit reporting agency'.[12] Section 11A provides that this term has two elements: a credit reporting agency must be a corporation and it must carry on a credit reporting business.

3.14 The requirement that a credit reporting agency must be a corporation is subject to a qualification: if the entity in question is engaged in wholly intra-state trade or commerce, and it is not engaged in banking or insurance (other than state banking or state insurance), then it is not regulated by Part IIIA.[13]

3.15 Section 6(1) of the Act defines the second element of a credit reporting agency—namely, that the agency carry on a 'credit reporting business'—as being:

> a business or undertaking (other than a business or undertaking of a kind in respect of which regulations made for the purposes of subsection (5C) are in force) that involves the preparation or maintenance of records containing personal information relating to individuals (other than records in which the only personal information relating to individuals is publicly available information), for the purpose of, or for purposes that

---

9 *Privacy Act 1988* (Cth) s 6(1).
10 Ibid s 6(1).
11 Ibid s 18L(4).
12 Ibid s 18C.
13 See Ibid s 18C(2). This qualification is discussed in detail later in this chapter.

include as the dominant purpose the purpose of, providing to other persons (whether for profit or reward or otherwise) information on an individual's:

(a) eligibility to be provided with credit; or

(b) history in relation to credit; or

(c) capacity to repay credit;

whether or not the information is provided or intended to be provided for the purposes of assessing applications for credit.

3.16 This second element remains subject to some exemptions. Information concerning an individual's commercial transactions is excluded.[14] Also, the regulations may exempt certain businesses from being considered credit reporting businesses for the purposes of the Act.[15] To date, however, no such regulations have been made. Chapter 2 discusses the credit reporting agencies currently operating in the Australian market.

Credit providers

3.17 In general, credit reporting agencies may only disclose information in credit information files to 'credit providers'. Credit providers, in turn, may use credit reports only for certain purposes—notably, in assessing a person's application for credit.

3.18 There is a finite list of categories of entities considered credit providers for the purposes of Part IIIA. This list does not include, for instance, real estate agents, debt collectors, employers and general insurers, and thus they are not permitted to obtain credit reports.[16] Under the Act, the following are considered 'credit providers':

- a bank;[17]
- a corporation, or an entity that is neither a corporation nor a government agency, that provides loans or issues credit cards as a substantial part of its business, or is carrying on a retail business;[18]
- an entity that provides loans (including by issuing credit cards), provided the Privacy Commissioner has made a determination in respect of such a class of entity;[19]

---

14 Ibid s 6(5A).

15 Ibid s 6(5C).

16 Office of the Privacy Commissioner, *Credit Reporting: Key Requirements of Part IIIA* <www.privacy.gov.au/act/credit/index.html> at 16 October 2006.

17 *Privacy Act 1988* (Cth) s 11B(1)(a). The term 'bank' is defined in s 6(1) to mean: (a) the Reserve Bank of Australia; or (b) a body corporate that is an authorised deposit-taking institution for the purposes of the *Banking Act 1959* (Cth); or (c) a person who carries on 'State banking' within the meaning of s 51(xiii) of the *Constitution*.

18 *Privacy Act 1988* (Cth) s 11B(1)(b), (c).

19 Ibid s 11B(1)(b)(v). These determinations are discussed further in Ch 5.

- a government agency that provides loans and is determined by the Privacy Commissioner to be a credit provider for the purposes of the Act;[20]

- a person who carries on a business involved in securitisation or managing loans that are subject to securitisation;[21] and

- an agent of a credit provider while the agent is carrying on a task necessary for the processing of a loan application, or managing a loan or account with the credit provider.[22]

3.19 The regulations also can exempt a corporation that would otherwise be considered a credit provider from being so regarded for the purposes of the Act.[23] To date, no such regulations have been made.

Persons providing personal information to credit reporting agencies

3.20 Finally, the credit reporting provisions also apply to a person, X, who provides personal information about another person, Y, to a third person, Z, carrying on a credit reporting business. Subject to certain constitutional limitations discussed later in this chapter, s 18D states that X must not give personal information about Y to Z unless Z is a corporation. Personal information is taken to be 'given' for the purposes of s 18D if the person to whom the information is given (ie, Z) 'is likely to use the information in the course of carrying on a credit reporting business'.[24]

Content of credit information files

3.21 A credit information file may contain information that is 'reasonably necessary … to identify the individual'.[25] Under s 18E(3), the Privacy Commissioner may determine 'the kinds of information that are … reasonably necessary to be included in an individual's credit information file in order to identify the individual'. Any such determination is said to be a 'disallowable instrument', which means that it must be tabled in the Australian Parliament and is then subject to disallowance.[26] In 1991, the Privacy Commissioner determined that the following kinds of information are 'reasonably necessary' to identify the individual:

---

20 Ibid s 11B(1)(d). Indigenous Business Australia is the only entity deemed to be a credit provider under this provision: Privacy Commissioner, *Credit Provider Determination No 2006–5 (Indigenous Business Australia)*, 25 October 2006.

21 *Privacy Act 1988* (Cth) s 11B(4A), (4B).

22 Ibid s 11B(5). The Act makes clear that 'the management of a loan' in subsection (5) does not include action taken to recover overdue loan repayments: s 11B(7).

23 Ibid s 11B(2).

24 Ibid s 18D(5).

25 Ibid s 18E(1)(a).

26 Ibid ss 18E(4)–(6). Note that s 18E(6) of the *Privacy Act* refers to s 46A of the *Acts Interpretation Act 1901* (Cth). However, the latter provision has been repealed. Section 6(d)(i) of the *Legislative Instruments Act 2003* (Cth) provides that an instrument said to be a disallowable instrument for the purposes of s 46A of the *Acts Interpretation Act* should be considered a legislative instrument for the purposes of the *Legislative Instruments Act*.

i. full name, including any known aliases; sex; and date of birth;

ii. a maximum of three addresses consisting of a current or last known address and two immediately previous addresses;

iii. name of current or last known employer; and

iv. driver's licence number.[27]

3.22 The Act does not state that information purporting to identify an individual must be verified in any particular way or be of any particular standard *before* it is included in a credit information file. This may be relevant to such issues as identity theft, which is discussed in Chapter 5.

3.23 As well as information reasonably necessary to identify the individual, s 18E provides an exhaustive list of the other categories of personal information that may be included in a credit information file. Anything that constitutes personal information,[28] but is not included in this list, must not be included in a credit information file. The Act allows a credit reporting agency to hold personal information in an individual's credit information file only for a finite period, the length of which depends on the nature of the information in question. After this period has elapsed, the agency must delete the relevant information within one month.[29]

3.24 In summary, information may be included in a credit information file if it is a record of:

- a credit provider having sought a credit report in connection with an application for consumer or commercial credit, provided the record also states the amount of credit sought;[30]
- a credit provider having sought a credit report for the purpose of assessing the risk in purchasing, or undertaking credit enhancement of, a loan by means of securitisation;[31]
- a mortgage or trade insurer having sought a credit report in connection with the provision of mortgage or trade insurance to a credit provider;[32]

---

27 Privacy Commissioner, *Determination under the Privacy Act 1988: 1991 No 2 (s 18E(3)): Concerning Identifying Particulars Permitted to be Included in a Credit Information File*, 11 September 1991.

28 For the definition of 'personal information', see *Privacy Act 1988* (Cth) s 6(1). It is discussed earlier in this chapter.

29 Ibid s 18F(1).

30 Ibid s 18E(1)(b)(i). The information may be kept for a maximum of five years after the relevant credit report was sought: s 18F(2)(a).

31 Ibid s 18E(1)(b)(ia). The information may be kept for a maximum of five years after the relevant credit report was sought: s 18F(2)(a).

32 Ibid s 18E(1)(b)(ii), (iii). The information may be kept for a maximum of five years after the relevant credit report was sought: s 18F(2)(a).

- a credit provider having sought a credit report in connection with the individual having offered to act as guarantor for a loan;[33]

- a credit provider being a current credit provider in relation to the individual;[34]

- credit provided by a credit provider to an individual, where the individual is at least 60 days overdue in making a payment on that credit and the credit provider has taken steps to recover some or all of the credit outstanding;[35]

- a cheque for $100 or more that has been dishonoured twice;[36]

- a court judgment or bankruptcy order made against the individual;[37]

- a credit provider's opinion that the individual has committed a specific serious credit infringement;[38]

- an overdue payment to a credit provider by a person acting as guarantor to a borrower, provided the following conditions are met: the credit provider is not prevented by law from bringing proceedings to recover the overdue amount; the credit provider has given the guarantor notice of the borrower's default; 60 days have elapsed since the notice was given; and the credit provider has taken steps to recover the overdue payment from the guarantor;[39] and

- a note or annotation to be made to an individual's existing credit information file, pursuant to ss 18J(2), 18F(4) or 18K(5).[40]

3.25 Certain types of personal information must never be included in an individual's credit information file. That is, information recording an individual's:

---

33 Ibid s 18E(1)(b)(iv). The information may be kept for a maximum of five years after the relevant credit report was sought: s 18F(2)(a).

34 Ibid s 18E(1)(b)(v). The information may be kept for a maximum of 14 days after the credit reporting agency is notified that the credit provider is no longer the individual's credit provider: s 18F(2)(b).

35 Ibid s 18E(1)(b)(vi). The information may be kept for a maximum of five years after the credit reporting agency was informed of the overdue payment concerned: s 18F(2)(c).

36 Ibid s 18E(1)(b)(vii). The information may be kept for a maximum of five years after the second dishonouring of the cheque: s 18F(2)(d).

37 Ibid s 18E(1)(b)(viii), (ix). A record of judgment may be kept for a maximum of five years after the judgment was made: s 18F(2)(e). A record of a bankruptcy order may be kept for a maximum of seven years after the order was made: s 18F(2)(f).

38 Ibid s 18E(1)(b)(x). The information may be kept for a maximum of seven years after the information was included in the credit information file: s 18F(2)(g).

39 Ibid s 18E(1)(ba). The information may be kept for a maximum of five years after the credit reporting agency was informed of the overdue payment: s 18F(2A).

40 Ibid s 18E(1)(c), (d); see also s 18E(7). Note that s 18J(2) obliges a credit reporting agency to include a statement of the correction, deletion or addition sought by an individual to his or her credit information file, where the agency has not made the relevant change; s 18F(4) requires a credit reporting agency, when appropriately informed, to include a note saying that the individual is no longer overdue in making a payment; and s 18K(5) requires a credit reporting agency to include a note on a person's credit information file when it has disclosed personal information from the file.

- political, social or religious beliefs or affiliations;
- criminal record;
- medical history or physical handicaps;
- race, ethnic origins or national origins;
- sexual preferences or practices; or
- lifestyle, character or reputation.[41]

3.26 If a credit report contains personal information that does not fall within the permitted categories, a credit provider who holds the report must not use this personal information, and must not use the report at all until the relevant information has been deleted.[42] If a credit provider breaches this requirement, it will not be considered a criminal offence, but it would constitute a credit reporting infringement.[43] In this situation, an individual may complain to the Privacy Commissioner that the credit provider has committed an interference with the individual's privacy.[44] The Privacy Commissioner may then carry out an investigation and issue a determination in accordance with Part V of the Act.[45]

Accuracy and security of personal information

3.27 Credit reporting agencies and credit providers have obligations to ensure the accuracy and security of personal information in their possession or control. Credit reporting agencies and credit providers are required to take reasonable steps to ensure that:

- personal information in a file or report is 'accurate, up-to-date, complete and not misleading';
- the file or report is protected against 'misuse' including 'unauthorised access, use, modification or disclosure'; and
- if an agency or credit provider must give the file or report to a person in connection with the provision of a service to the agency or credit provider, it

41 Ibid s 18E(2). Note that this list is similar to, but differs in some respects from, the general definition of 'sensitive information' in s 6(1).
42 Ibid s 18L(3).
43 A breach of a provision of Part IIIA is a 'credit reporting infringement': Ibid s 6(1).
44 See Ibid ss 13(d), 36(1).
45 The Privacy Commissioner's complaint-handling processes are discussed in Ch 4. See also Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006), Ch 6.

must 'prevent unauthorised use or disclosure of personal information contained in the file or report'.[46]

3.28 Credit reporting agencies and credit providers are prohibited from disclosing a false or misleading credit report to anyone. If an agency or provider intentionally contravenes this provision, it is liable for a fine of up to $750,000.[47]

Disclosure of personal information

3.29 The *Privacy Act* restricts how, and to whom, personal information in credit information files and credit reports may be disclosed. As explained below, the Act largely focuses on regulating the actions of credit reporting agencies, credit providers and others—setting rules on what these entities may do. However, Part IIIA also prohibits any other person from obtaining access to a credit information file or credit report, where the Act does not authorise the person to do so, or where the person gains access by a false pretence.[48]

Credit reporting agencies

3.30 Section 18K of the Act contains four general rules on how personal information may be conveyed by credit reporting agencies to people who are permitted to view that information. If a credit reporting agency intentionally contravenes any of the relevant provisions, it is liable for a fine of up to $150,000.[49]

3.31 The general rules are as follows. First, a credit reporting agency is not permitted to make a credit information file directly available to another entity; instead the agency must convey that information in the form of a credit report. Secondly, a credit report only may be given to a credit provider.[50] Thirdly, personal information in a credit report only may be disclosed by a credit reporting agency for one of the purposes specified in the Act—these are summarised below. Fourthly, a credit reporting agency must not disclose personal information if the information does not fall within the permitted categories in s 18E, or if the agency is required to delete the information in question under s 18F.[51] These rules are, however, subject to certain exceptions, which are also set out below.

3.32 The purposes for which an individual's credit report may be given to a credit provider are set out exhaustively in the section. They relate to the state of mind and activities of the credit provider. The permitted purposes are to:

---

46 *Privacy Act 1988* (Cth) s 18G.
47 Ibid s 18R.
48 Ibid ss 18S, 18T. The penalty in respect of each offence is a fine not exceeding $30,000.
49 Ibid s 18K(5).
50 The terms 'credit report' and 'credit provider' are discussed earlier in this chapter.
51 *Privacy Act 1988* (Cth) s 18K(2).

- assess the individual's application for credit;[52]
- assess the risk in purchasing, or undertaking credit enhancement of, a loan by means of securitisation;[53]
- assess an application for commercial credit, provided the individual agrees to the disclosure;[54]
- assess whether to accept the individual as a guarantor of a loan, provided the individual agrees in writing to the disclosure;[55]
- inform a current credit provider that the individual is at least 60 days overdue in making a payment to a second credit provider and this second credit provider has taken steps to recover some or all of the credit outstanding;[56]
- assist in collecting overdue payments from the individual;[57] and
- assist in collecting overdue payments in respect of commercial credit, provided the individual consents or the commercial credit was given prior to 24 September 1991.[58]

3.33 There are some situations in which a credit reporting agency may disclose an individual's credit report to a person who is not a credit provider, including disclosure to: (i) another credit reporting agency;[59] or (ii) a mortgage or trade insurer, where the insurer is assessing matters connected with whether to provide mortgage or trade insurance to a credit provider in respect of the individual.[60]

3.34 The rule prohibiting the direct disclosure of personal information from an individual's credit information file is subject to a number of exceptions, namely where:

- the only personal information disclosed is publicly available;[61]
- the disclosure is required or authorised by law;[62] or

---

52 Ibid s 18K(1)(a).
53 Ibid s 18K(1)(ab), (ac).
54 Ibid s 18K(1)(b). The individual's agreement must usually be given in writing—see s 18K(1A).
55 Ibid s 18K(1)(c).
56 Ibid s 18K(1)(f). The relevant credit reporting agency is permitted to make such a disclosure only where it has received this information at least 30 days before the disclosure.
57 Ibid s 18K(1)(g).
58 Ibid s 18K(1)(h).
59 Ibid s 18K(1)(j).
60 Ibid s 18K(1)(d), (e). In respect of trade insurance, the disclosure is permitted only if the individual has agreed in writing: s 18K(1)(e).
61 Ibid s 18K(1)(k).
62 Ibid s 18K(1)(m).

- the credit reporting agency is satisfied that a credit provider or law enforcement authority reasonably believes the individual has committed a serious credit infringement and the information is given to a credit provider or law enforcement authority.[63]

Credit providers

3.35 The rules dealing with how a credit provider may disclose personal information in its possession are set out in ss 18N and 18NA. The general rule is that a credit provider is prohibited from disclosing an individual's personal information (either from a credit report or other credit worthiness information held by the credit provider and that is not publicly available) unless a stated exception applies. If a credit provider intentionally contravenes this provision, it is liable for a fine of up to $150,000.[64]

3.36 It is important to note that this rule applies to the term 'reports', which is defined in s 18N(9), and includes a much broader spectrum of documents than is encompassed by the term 'credit report'.[65]

3.37 There is a finite list of exceptions to the general rule. In summary, a credit provider is permitted to disclose an individual's personal information to:

- a credit reporting agency that is creating or modifying a credit information file;[66]
- another credit provider for a particular purpose, provided either the individual specifically agrees or it is in connection with an overdue payment;[67]
- the guarantor of an individual's loan in connection with enforcing the guarantee;[68]
- a mortgage insurer for the purpose of risk assessment or as required by the contract between the credit provider and the insurer;[69]
- a recognised dispute settling body that is assisting in settling a dispute between the credit provider and the individual;[70]
- a government body with responsibility in this area;[71]

---

63 Ibid s 18K(1)(n).
64 Ibid s 18N(2).
65 See discussion of this issue in Ch 5.
66 *Privacy Act 1988* (Cth) s 18N(1)(a).
67 Ibid s 18N(1)(b), (fa).
68 Ibid s 18N(1)(ba).
69 Ibid s 18N(1)(bb).
70 Ibid s 18N(1)(bc).
71 Ibid s 18N(1)(bd), (bda).

- a supplier of goods or services for the purpose of determining whether to accept a payment by credit card or funds transfer, provided the personal information disclosed does no more than identify the individual and inform the supplier whether the individual has sufficient funds for the proposed payment;[72]

- a person considering taking on the individual's debt, provided the personal information disclosed does no more than identify the individual and inform the person of the amount of the debt;[73]

- the guarantor, or a proposed guarantor, of a loan, provided the borrower specifically agrees;[74]

- a debt collector in respect of overdue payments to the credit provider, provided the personal information disclosed does no more than: identify the individual; give specified details relating to the debt; and provide a record of any adverse court judgments or bankruptcy orders;[75]

- a corporation related to the credit provider that is itself a corporation;[76]

- a corporation, in connection with its taking on a debt owed to the credit provider;[77]

- a person who manages loans made by the credit provider;[78]

- a person, as required or authorised by law;[79]

- the individual or another person authorised by the individual;[80] and

- another credit provider or a law enforcement authority, where the credit provider reasonably suspects the individual has committed a serious credit infringement.[81]

---

72 Ibid s 18N(1)(be).
73 Ibid s 18N(1)(bf).
74 Ibid s 18N(1)(bg), (bh). The borrower's agreement is not necessary if: the guarantee (or security) was provided before 7 December 1992; the information discloses the guarantor's liability; and the credit provider previously advised the borrower that such disclosures may take place: s 18N(1)(bg)(ii). See also s 18NA in respect of indemnities.
75 Ibid s 18N(1)(c). If the debt relates to commercial credit, the credit provider is prohibited from disclosing the details of the debt to a debt collector: s 18N(1)(ca).
76 Ibid s 18N(1)(d).
77 Ibid s 18N(1)(e).
78 Ibid s 18N(1)(f).
79 Ibid s 18N(1)(g).
80 Ibid s 18N(1)(ga), (gb).
81 Ibid s 18N(1)(h).

3.38 The Privacy Commissioner has a power to determine the manner in which such a report may be disclosed;[82] however, the Commissioner is yet to make such a determination.

Information given by credit providers to credit reporting agencies

3.39 In practice, credit reporting agencies, in compiling credit information files, obtain most of that information from credit providers themselves.[83] This creates a two-way flow of personal information between credit reporting agencies and credit providers.

3.40 In view of this, the Act limits the information that a credit provider may provide to a credit reporting agency. That is, a credit provider must not give to a credit reporting agency personal information relating to an individual in any of the following situations:

- where the information would not fall within the categories in s 18E(1) summarised above;
- where the credit provider does not have reasonable grounds for believing the information is correct; or
- where the credit provider did not, at the time of, or before, acquiring the information, inform the individual that the information might be disclosed to a credit reporting agency.[84]

Use of personal information

Credit providers

3.41 Section 18L(1) states the general rule that a credit provider may only use an individual's credit report, or personal information it derives from the credit report, for the purpose of assessing the individual's application for credit, or for one of the other permitted purposes for which the report was originally given to the credit provider.[85] If a credit provider intentionally contravenes this provision, it is liable for a fine of up to $150,000.[86]

3.42 The rule in s 18L(1) is subject to the following exceptions, which allow a credit provider to use a credit report:

---

82 Ibid s 18N(5)–(7).
83 This is specifically anticipated in Ibid ss 18E(8) and 18N(1)(a).
84 Ibid s 18E(8).
85 The other permitted purposes are summarised earlier in this chapter.
86 *Privacy Act 1988* (Cth) s 18L(2).

- as required or authorised by law;[87]

- if the credit provider reasonably believes the individual has committed a serious credit infringement, and the information is used in connection with the infringement;[88] or

- in connection with an individual's commercial activities or commercial credit worthiness, provided the individual agrees.[89]

Use and disclosure by mortgage and trade insurers

3.43 Mortgage and trade insurers must only use personal information contained in an individual's credit report in connection with assessing the risk in providing such insurance to the individual's credit provider, or as required or authorised by law.[90] They must not disclose personal information from a credit report to any person unless required or authorised by law.[91]

3.44 If a mortgage or trade insurer 'knowingly or recklessly' contravenes any of these provisions, it is liable for a fine of up to $150,000.[92]

Use and disclosure by other persons

3.45 There are specific rules on how other persons may use personal information that they have obtained from a credit provider or credit reporting agency. Any person who intentionally contravenes one of these provisions will be liable for a fine of up to $30,000.[93] The rules are:

- Where a credit provider discloses information to a related corporation, the related corporation is subject to the use and disclosure limitations that apply to the credit provider. The same rules also apply where a credit report is received by a person, who was deemed to be a credit provider because it was engaged in securitisation of a loan, but has since ceased to be a credit provider.[94]

- Where information is received by a corporation, in connection with its taking on a debt owed to the credit provider, the corporation may only use the information

---

87 Ibid s 18L(1)(e).
88 Ibid s 18L(1)(f).
89 Ibid s 18L(4), (4A). The Privacy Commissioner has a power to determine how this information may be used and how an individual's consent may be obtained: s 18L(6)–(8). To date, this power has not been exercised.
90 Ibid s 18P(1), (2). Mortgage insurers may also use such information pursuant to the contract between the mortgage insurer and the credit provider: s 18P(1)(c).
91 Ibid s 18P(5).
92 Ibid s 18P(6).
93 Ibid s 18Q(9).
94 Ibid s 18Q(1), (6)–(7A).

in considering whether to take on the debt. If it takes on the debt, the corporation may use the information in connection with exercising its rights. Similar rules apply to a professional legal adviser or financial adviser in connection with advising the corporation about these matters, or as required or authorised by law.[95]

- Where information is received by a person who manages loans made by the credit provider, the information may only be used for managing these loans, or as required or authorised by law.[96]

Rights of access, correction and notification

3.46 Credit reporting agencies and credit providers, in possession or control of an individual's credit information file or credit report, must take reasonable steps to allow the individual access to the file or report. The individual can authorise another person (who is not a credit provider or a trade or mortgage insurer) to exercise these same rights in connection with applying for a loan, or advice in relation to a loan.[97]

3.47 Credit reporting agencies and credit providers must, in relation to credit information files and credit reports in their possession or control, 'take reasonable steps, by way of making appropriate corrections, deletions and additions, to ensure that personal information in the file or report is accurate, up-to-date, complete and not misleading'. If so requested, the agency or provider must either amend personal information in a file or report as requested by the individual concerned, or it must include a statement of the correction, deletion or addition sought by the individual.[98]

3.48 Credit providers also have notification obligations when they use a credit report to refuse an application for credit. Where a credit provider refuses an application for credit, and this refusal relates partly or wholly to information in an individual's credit report, the credit provider must: (i) notify the individual of these facts and of the individual's right to access his or her credit report; and (ii) provide the name and address of the relevant credit reporting agency.[99]

3.49 Where a joint application for credit is refused, and this refusal relates partly or wholly to information in the credit report of one of the applicants or proposed guarantors, the credit provider must inform the other applicants that the application was refused for this reason.[100] In this situation, however, the credit provider does not have to provide any further information, as the other applicants do not have a right to view the credit report of this person.

---

95 Ibid s 18Q(2), (3). See also s 18Q(8).
96 Ibid s 18Q(4). See also s 18Q(8).
97 Ibid s 18H.
98 Ibid s 18J.
99 Ibid s 18M(1).
100 Ibid s 18M(2), (3).

Interaction between Part IIIA and the NPPs

3.50 Part IIIA of the *Privacy Act* was originally intended to adopt and reflect the Information Privacy Principles (IPPs), located in s 14 of the Act, in the specific context of credit reporting.[101] The IPPs were themselves based on the Organisation for Economic Co-operation and Development *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (OECD Guidelines),[102] and regulate how federal and ACT government agencies handle personal information.[103]

3.51 The National Privacy Principles (NPPs) were enacted in 2000.[104] The NPPs establish a set of general principles designed to provide privacy protection in respect of personal information in the private (non-government) sector, in situations where no approved privacy code is in operation.[105]

3.52 The rules in Part IIIA are designed to achieve broadly the same objectives as the NPPs. However, the obligations in Part IIIA apply only in respect of credit reporting, whereas the NPPs apply to the private sector generally.

3.53 A breach of a requirement of Part IIIA, unless the relevant provision states otherwise, has the same effect as a breach of one of the NPPs, and constitutes an 'interference with the privacy of an individual'.[106]

3.54 To avoid potential confusion about their combined regulatory impact, the *Privacy Act* establishes that Part IIIA and the NPPs should operate independently.[107] Section 16A(4) reflects this by stating that conduct that does not breach the NPPs is not lawful 'for the purposes of Part IIIA merely because it does not breach [the NPPs]'. As Professor Alan Tyree explains, this means that 'any restriction imposed by Part IIIA on disclosure or use of personal information is not altered by the NPPs'.[108] Under s 13A(2), an organisation commits an interference with the privacy of an individual if it breaches a NPP notwithstanding that the organisation is also a credit reporting agency or a credit provider.

---

101 Commonwealth, *Parliamentary Debates*, Senate, 16 June 1989, 4216 (G Richardson).

102 Organisation for Economic Co-operation and Development, *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (1980).

103 The OECD Guidelines, and their relationship with the IPPs, are discussed in Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006), Ch 4.

104 *Privacy Amendment (Private Sector) Act 2000* (Cth). The NPPs are located in *Privacy Act 1988* (Cth) sch 3.

105 The operation of the NPPs is explained in detail in Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006), Ch 4.

106 See *Privacy Act 1988* (Cth) s 13(d).

107 A Tyree, 'The Privacy (Private Sector) Amendments' (2000) 11 *Journal of Banking and Finance Law and Practice* 313, 315.

108 Ibid, 315. See also *Privacy Act 1988* (Cth), ss 6(7), 7(1)(a), 13, 13A(2).

3.55 Consequently, there is an overlap in regulation where an organisation subject to the NPPs also falls within the ambit of Part IIIA.[109] For example, when using personal information contained in a credit report, a bank, finance company or other credit provider must comply with both the NPPs and Part IIIA.

3.56 On the other hand, the handling of other personal information relevant to credit worthiness by a credit provider, such as that obtained solely from the credit provider's own records, may be covered only by the NPPs.[110] Similarly, while Part IIIA of the *Privacy Act* provides a scheme that regulates consumer credit reporting activities, it does not cover personal information about commercial loans (that is, loans not intended to be used wholly or primarily for domestic, family or household purposes).[111] As noted above, the handling of personal information relating to commercial loans is regulated primarily by the NPPs.

3.57 The handling of some other personal information relevant to credit worthiness is governed by the NPPs, rather than Part IIIA. For example, some organisations operate residential tenancy databases (RTDs) containing information about tenants and their rental history. The purpose of such databases is to enable real estate agents to assess 'business risk' on behalf of property owners.[112]

3.58 Except where an exemption applies,[113] RTDs are regulated by the NPPs and not Part IIIA.[114] While the personal information collected and disclosed by RTDs is relevant to credit worthiness, the operator of a RTD is not a 'credit reporting agency' carrying on a 'credit reporting business' and real estate agents are not 'credit providers', as those terms are defined in the *Privacy Act* for the purposes of Part IIIA.

---

109 Similarly, the obligations in pt IIIA may also overlap with those in the IPPs and tax file number provisions.

110 Note, however, that s 18N dealing with the disclosure of personal information protects a broader category of information than other provisions of Part IIIA, which protect information contained in a 'credit report' or 'credit information file': see Ch 5.

111 *Privacy Act 1988* (Cth) s 6(1) definition of 'credit'. However, pt IIIA does touch on some aspects of commercial credit reporting: see Ch 5.

112 Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006), Ch 7.

113 Such as the small business exemption under *Privacy Act 1988* (Cth) s 6C.

114 The Attorney-General has recently announced that he intends to pass regulations to ensure that all residential tenancy database operators are covered by the *Privacy Act*: P Ruddock (Attorney-General), 'More Protection for Tenants' Privacy' (Press Release, 30 October 2006).

4. The Regulatory Framework

Contents

Introduction 53
Responsibilities and powers of the OPC 54
Credit Reporting Code of Conduct 54
Determinations 56
Audits of credit information files 57
Investigating credit reporting infringements 58
Complaint-handling 60
Credit reporting complaints experience 62
Privacy Hotline inquiries 63
Number of complaints 63
Complaint issues 63
Complaints to other bodies 64
ALRC National Privacy Phone-In 65
Remedies and penalties 65

Introduction

4.1 This chapter describes the responsibilities and powers of the Office of the Privacy Commissioner (OPC) under the *Privacy Act 1988* (Cth) with regard to the privacy regulation of credit reporting.[1] These include responsibilities and powers in relation to issuing a credit reporting code of conduct, investigating complaints, making certain determinations, and auditing information held by credit reporting agencies and credit providers.

4.2 The chapter also sets out some of the available information about the number and nature of credit reporting complaints received by the OPC, the Telecommunications Industry Ombudsman (TIO) and the Banking and Financial Services Ombudsman (BFSO).

1 The powers and responsibilities of the OPC generally are discussed in IP 31: Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006), Ch 6.

4.3 Finally, the chapter discusses whether the *Privacy Act* contains sufficient remedies and penalties in the event of non-compliance with the credit reporting provisions of the Act.[2]

Responsibilities and powers of the OPC

4.4 The *Privacy Act* gives the OPC a range of responsibilities and powers under the Act.[3] These responsibilities and powers are described in more detail in the Issues Paper, *Review of Privacy* (IP 31). This Issues Paper examines the OPC's responsibilities and powers in relation to:

- issuing a code of conduct relating to credit information files and credit reports;[4]
- making certain determinations, on the Privacy Commissioner's initiative, under the credit reporting provisions of the *Privacy Act*;[5]
- auditing credit information files and credit reports held by credit reporting agencies and credit providers;[6] and
- investigating credit reporting infringements,[7] either in response to a complaint or on the OPC's initiative,[8] and making determinations after investigating complaints.[9]

Credit Reporting Code of Conduct

4.5 Under s 18A of the *Privacy Act*, the Privacy Commissioner must, after consulting government, commercial, consumer and other relevant bodies,[10] issue a code of conduct concerning:

> (a) the collection of personal information for inclusion in individuals' credit information files; and
>
> (b) the storage of, security of, access to, correction of, use of and disclosure of personal information included in individuals' credit information files or in credit reports; and
>
> (c) the manner in which credit reporting agencies and credit providers are to handle disputes relating to credit reporting; and

---

2 The remedies and penalties available under the Act generally are also discussed in IP 31: Ibid, Ch 6.
3 Ibid, Ch 6.
4 Office of the Federal Privacy Commissioner, *Credit Reporting Code of Conduct* (1991) issued under the *Privacy Act 1988* (Cth) s 18A.
5 *Privacy Act 1988* (Cth) ss 11B(1), 18E(3), 18K(3), 18L(6), 18N(5).
6 Ibid s 24A(1)(g).
7 A 'credit reporting infringement' is defined as a breach of either the *Credit Reporting Code of Conduct* or the provisions of pt IIIA: Ibid s 6.
8 Ibid pt V.
9 Ibid s 52.
10 Ibid s 18A(2).

> (d) any other activities, engaged in by credit reporting agencies or credit providers, that are connected with credit reporting.[11]

4.6 In preparing the code of conduct, the Commissioner must have regard to the Information Privacy Principles (IPPs), the National Privacy Principles (NPPs), Part IIIA of the Act and the likely costs to credit reporting agencies and credit providers of complying with the code.[12]

4.7 The *Credit Reporting Code of Conduct* (Code of Conduct) was issued by the Privacy Commissioner on 11 September 1991. The Code of Conduct is legally binding. Section 18B of the *Privacy Act* provides that a credit reporting agency or credit provider must not do an act, or engage in a practice, that breaches the Code of Conduct. Breach of the Code of Conduct constitutes a credit reporting infringement and an interference with privacy under s 13 of the Act.[13]

4.8 In broad terms, the Code of Conduct supplements Part IIIA on matters of detail not addressed by the Act. Among other things, the Code of Conduct requires credit providers and credit reporting agencies to:

- deal promptly with individual requests for access and amendment of personal credit information;
- ensure that only permitted and accurate information is included in an individual's credit information file;
- keep adequate records in regard to any disclosure of personal credit information;
- adopt specific procedures in settling credit reporting disputes; and
- provide staff training on the requirements of the *Privacy Act*.[14]

4.9 The Code of Conduct is accompanied by Explanatory Notes, which explain how Part IIIA and the Code interact. For example, in relation to the permitted content of credit information files, the Code of Conduct provides that:

> A credit reporting agency recording an enquiry made by a credit provider in connection with an application for credit may include, within the record of the enquiry, a general indication of the nature of the credit being sought.[15]

---

11 Ibid s 18A(1). The Code of Conduct is a disallowable instrument: *Privacy Act 1988* (Cth) s 18A(4).
12 *Privacy Act 1988* (Cth) s 18A(3).
13 Ibid s 13(d).
14 Office of the Federal Privacy Commissioner, *Credit Reporting Code of Conduct* (1991), 3.
15 Ibid, [1.1].

4.10 The Explanatory Notes explain that, while s 18E(1) expressly permits inclusion of a record of an enquiry made by a credit provider in connection with an application for credit, together with the amount of credit sought:

> because of the size of the credit reporting system, and the large number and variety of credit applications recorded every year, it is accepted that an account type indicator should be allowed to be included in the file in order to facilitate speedy and accurate identification verification by credit providers of the enquiries recorded in credit information files.[16]

Determinations

4.11 The Privacy Commissioner has power to make certain determinations under the credit reporting provisions of the *Privacy Act*, including[17] determinations relating to:

- the definition of 'credit provider';[18] and
- the kinds of identifying information reasonably necessary to be included in credit information files.[19]

Credit provider determinations

4.12 Under Part IIIA, access to personal information provided by credit reporting agencies is generally restricted to businesses that are credit providers. Section 11B defines 'credit providers' for the purposes of the Act. In summary, under s 11B, financial organisations such as banks, building societies, credit unions and retail businesses that issue credit cards are automatically classed as credit providers.

4.13 Other businesses are also credit providers if they provide loans—defined to include arrangements under which a person receives goods or services with payment deferred, such as under a hire-purchase agreement[20]—and are included in a class of corporations determined by the Privacy Commissioner to be credit providers for the purpose of the Act.[21]

4.14 The Privacy Commissioner has made three determinations under s 11B of the Act. These include a determination that corporations are to be regarded as credit providers if they:

- make loans in respect of the provision of goods or services on terms that allow the deferral of payment, in full or in part, for at least seven days; or

---

16 Ibid, Explanatory Notes, [1]–[2].
17 Other determinations by the Privacy Commissioner have been issued under *Privacy Act 1988* (Cth) s 18K(3)(b)—permitting the disclosure of certain information included in a credit information file or other record before the commencement of s 18K (24 September 1991).
18 Ibid s 11B(1).
19 Ibid s 18E(3).
20 Ibid s 6.
21 Ibid s 11B(1)(v)(B).

- engage in the hiring, leasing or renting of goods, where no amount, or an amount less than the value of the goods, is paid as deposit for return of the goods, and the relevant arrangement is one of at least seven days duration.[22]

4.15 Another determination deems corporations to be credit providers where they have acquired the rights of a credit provider with respect to the repayment of a loan (whether by assignment, subrogation or other means).[23]

4.16 The implications of both these determinations for privacy protection, in relation to the disclosure by credit reporting agencies of credit reports, are discussed further in Chapter 5.[24]

Identifying information

4.17 The Privacy Commissioner may determine the kinds of information that are, for the purposes of s 18E(1)(a), 'reasonably necessary to be included in an individual's credit information file in order to identify the individual'.[25] The Privacy Commissioner made a determination under this provision in 1991.[26]

Audits of credit information files

4.18 The Privacy Commissioner has power to audit credit information files and credit reports held by credit reporting agencies and credit providers.[27] The purpose of such audits is to ascertain whether credit information files and credit reports are being maintained in accordance with the Code of Conduct and Part IIIA of the *Privacy Act*.

4.19 The Privacy Commissioner also may examine the records of credit reporting agencies and credit providers to ensure that they are not using personal information in those records for unauthorised purposes and are taking adequate steps to prevent unauthorised disclosure of those records.[28]

4.20 In 2002–03, the OPC finalised six audits of credit providers for compliance with the credit reporting provisions of the *Privacy Act* and the Code of Conduct. The audited credit providers included organisations that purchased debts from credit

---

22 Privacy Commissioner, *Credit Provider Determination No. 2006–4 (Classes of Credit Providers)*, 21 August 2006.

23 Privacy Commissioner, *Credit Provider Determination No. 2006–3 (Assignees)*, 21 August 2006.

24 The third determination involves a specific corporation: Privacy Commissioner, *Credit Provider Determination No 2006–5 (Indigenous Business Australia)*, 25 October 2006.

25 *Privacy Act 1988* (Cth) s 18E(3).

26 Privacy Commissioner, *Determination under the Privacy Act 1988: 1991 No 2 (s 18E(3)): Concerning Identifying Particulars Permitted to be Included in a Credit Information File*, 11 September 1991. See Ch 3.

27 *Privacy Act 1988* (Cth) s 28A(1)(g).

28 Office of the Privacy Commissioner, *Credit Information Audit Process* <www.privacy.gov.au/publications> at 22 August 2006, 1.

providers and organisations that provide credit by supplying services and allowing the deferral of payment for more than seven days (eg, telecommunications organisations).[29] A further two audits of credit reporting agencies were finalised in 2003–04.[30] The OPC's annual reports contain lists of the organisations audited as well as the de-identified summaries of the common issues to have emerged from the audits undertaken during the reporting period.[31] The OPC does not report publicly the detailed results of audits of private sector organisations because such reports might unfairly affect an organisation's business position.[32] Instances of non-compliance with credit reporting regulation identified in OPC audits are referred to in later chapters.

4.21 No audits have been conducted since 2003–04. The OPC review of the private sector provisions of the *Privacy Act* (the OPC Review) noted that the priority given by the OPC to its complaint-handling functions has diverted resources from other areas of responsibility, including auditing.[33] The Consumer Credit Legal Centre (NSW) (CCLC) suggested that

> while the [OPC] may conduct audits of credit reporting agencies to determine if there are any systemic breaches of the *Privacy Act* or the Code of Conduct, and have in fact done so in the past, the [OPC] is no longer able to do so due to their work load and reduced resources since the introduction of the private sector provisions.[34]

Question 4–1 How do the Privacy Commissioner's powers to audit credit information files and credit reports operate in practice? Are the Privacy Commissioner's powers to audit credit information files and credit reports adequate? If not, what powers should the Privacy Commissioner have to audit credit information files and credit reports?

Investigating credit reporting infringements

4.22 Part V, Division 1 of the *Privacy Act* deals with the investigation of complaints and investigations on the Privacy Commissioner's initiative.[35] These provisions must be considered in association with the dispute settling procedures relating to credit reporting, which are set out in the Code of Conduct.

---

29 Office of the Federal Privacy Commissioner, *The Operation of the Privacy Act Annual Report: 1 July 2002–30 June 2003* (2003), 80–81.

30 Office of the Federal Privacy Commissioner, *The Operation of the Privacy Act Annual Report: 1 July 2003–30 June 2004* (2004), 65.

31 See, eg, Ibid, 66.

32 Australian Government Attorney-General's Department, *Response to Questions on Notice for Attorney-General's Portfolio: Senate Legal and Constitutional Legislation Committee Additional Estimates 2003–2004, Questions 38 to 50*, undated, Answer to Q 41.

33 Office of the Privacy Commissioner, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988* (2005), 160. While the OPC Review referred to auditing of Commonwealth government agencies specifically, diversion of resources may also have affected credit reporting audits.

34 Consumer Credit Legal Centre (NSW) Inc, *Submission PR 28,* 6 June 2006.

35 These provisions are discussed in more detail in Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006), Ch 6.

4.23 Under s 36(1) of the *Privacy Act* an individual may complain to the Privacy Commissioner about 'an act or practice that may be an interference with the privacy of the individual'. In the case of an act or practice engaged in by a credit reporting agency or credit provider, an act or practice is an interference with the privacy of an individual if it 'constitutes a credit reporting infringement in relation to personal information that relates to the individual'.[36] In turn, a 'credit reporting infringement' means a breach of the Code of Conduct or a breach of a provision of Part IIIA of the Act.[37] Subject to certain exceptions, the Privacy Commissioner must investigate an act or practice that may be an interference with the privacy of an individual if a complaint has been made under s 36.[38]

4.24 Under Division 2 of Part V of the *Privacy Act*, the Privacy Commissioner may make a determination after investigating a complaint. Under s 52, if the complaint is found to be substantiated, the determination may include declarations that the respondent not repeat or continue the conduct; or provide redress or compensation for any loss or damage suffered by the complainant.[39] The Privacy Commissioner may also order that a respondent make an appropriate correction, deletion or addition to a record, or attach to a record a statement provided by the complainant.[40]

4.25 Under s 41(2), the Privacy Commissioner may decide not to investigate, or to defer investigation, if satisfied that the respondent has dealt, or is dealing, adequately with the complaint; or if the respondent has not yet had an adequate opportunity to deal with the complaint.

4.26 The Code of Conduct sets out dispute settling procedures that must be followed by credit reporting agencies and credit providers.[41] The Code provides, among other things, that:

- credit reporting agencies and credit providers must handle credit reporting disputes in a fair, efficient and timely manner;[42]

- where a credit reporting agency establishes that it is unable to resolve a dispute it must immediately inform the individual concerned that it is unable to resolve the dispute and that the individual may complain to the Privacy Commissioner;[43] and

36 *Privacy Act 1988* (Cth) s 13(d).
37 Ibid s 6(1).
38 Ibid s 40(1).
39 Ibid s 52(1)(b).
40 Ibid s 52(3B).
41 Office of the Federal Privacy Commissioner, *Credit Reporting Code of Conduct* (1991), pt 3.
42 Ibid, [3.1].
43 Ibid, [3.2].

- a credit provider should refer a dispute between that credit provider and an individual to a credit reporting agency for resolution where the dispute concerns the contents of a credit report issued by the credit reporting agency.[44]

Complaint-handling

4.27 IP 31 discusses the procedures set out in the *Privacy Act* for making and pursuing complaints.[45] Specific issues arise in relation to the handling of complaints about credit reporting, some of which were highlighted in the OPC Review[46] and the Senate Legal and Constitutional References Committee inquiry into the *Privacy Act* (the Senate Committee privacy inquiry).[47]

4.28 The OPC Review noted concerns that the Privacy Commissioner may not be using its powers effectively to deal with systemic issues in the credit reporting sector.[48] Systemic issues refer to issues about an organisation's or industry's practices rather than about an isolated act. For example, individual complaints about the inaccuracy of credit reports may raise issues about industry data quality more generally. Questions about the way in which systemic issues are dealt with under the *Privacy Act* are significant to this Inquiry and are discussed in more detail in IP 31.[49]

4.29 Another criticism concerns the processes for initiating a complaint. As highlighted above, under the provisions of the Code of Conduct, the credit reporting agency or credit provider is effectively the first point of contact for lodging disputes, rather than the OPC.[50]

4.30 Some consumer and privacy groups have submitted that the OPC is 'overly bureaucratic in requiring individuals first to raise the specific issues with the respondent before the Office will handle the complaint'.[51] In the context of credit reporting, complainants may be required to write to a credit reporting agency in the first instance to obtain a copy of their credit information file; then write to the credit provider to complain about the inaccuracy.[52] In a submission to the Senate Committee privacy inquiry, the CCLC argued that

---

44 Ibid, [3.3].
45 Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006), Ch 6.
46 Office of the Privacy Commissioner, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988* (2005).
47 Parliament of Australia—Senate Legal and Constitutional References Committee, *The Real Big Brother: Inquiry into the Privacy Act 1988* (2005).
48 Office of the Privacy Commissioner, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988* (2005), 135.
49 Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006), [6.114]–[6.120].
50 *Privacy Act 1988* (Cth) s 40(1A) provides that the Commissioner must not investigate a complaint if the complainant did not complain to the respondent before making the complaint to the Commissioner.
51 Office of the Privacy Commissioner, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988* (2005), 139.
52 Ibid, 139.

> a complaint is required to be made in writing 3 or 4 times, to Baycorp, then the OFPC, then the credit provider, then back to the OFPC. The OFPC requires written proof of complaint to the credit provider before the OFPC would investigate.[53]

4.31 The complaint-handling system for credit reporting was subject to serious criticism in the Senate Committee privacy inquiry, particularly in relation to correcting inaccurate information.[54]

> Critics argue that there is no real requirement for entities such as credit providers to establish internal dispute resolution procedures for those consumers who wish to correct their records. Moreover, the dispute resolution procedures that are established by credit providers and/or credit reporting agencies lack transparency and fail to address complaints in relation to repeated problems or possible systemic issues. Concerns were also raised that dispute resolution procedures generally place the onus of proving that listings are inaccurate on individual consumers who lack any real bargaining power.[55]

4.32 It has been suggested that the burden of proof in relation to disputed listings should be placed more explicitly on the credit provider.[56] For example, in the United States, under the *Fair Credit Reporting Act 1970* (US), if the completeness or accuracy of information is disputed by a consumer, the credit reporting agency must conduct an investigation to determine whether the disputed information is inaccurate and record the information as disputed. If not verified, the information must be deleted within 30 days.[57]

4.33 The Senate Committee received evidence from both industry and consumer organisations suggesting that the OPC is 'currently ill-equipped to respond to consumer complaints'.[58] The Senate Committee privacy inquiry noted the claims of consumer advocates that the OPC's credit reporting complaint-handling process is 'inconsistent, inefficient and lacks transparency and procedural fairness, with the result that large numbers of individuals drop out of the system'.[59]

4.34 Baycorp Advantage stated that it was seeking to develop better dispute resolution mechanisms for credit reporting complaints and was considering the

---

53 See Parliament of Australia—Senate Legal and Constitutional References Committee, *The Real Big Brother: Inquiry into the Privacy Act 1988* (2005), [5.12].

54 See Ibid, [5.11]–[5.14].

55 Ibid, [5.11].

56 Centre for International Economics and Edgar Dunn and Company, *Options for Implementation of Comprehensive Credit Reporting in Australia [Prepared for MasterCard Worldwide]* (2006); *Privacy Act 1988* (Cth), 61.

57 *Fair Credit Reporting Act 1970* 15 USC § 1681 (US) s 1681i.

58 Parliament of Australia—Senate Legal and Constitutional References Committee, *The Real Big Brother: Inquiry into the Privacy Act 1988* (2005), [5.12].

59 Ibid, [5.11].

establishment of an external dispute resolution mechanism in addition to its internal processes and complaint-handling by the OPC.[60]

4.35 The Senate Committee privacy inquiry noted that, notwithstanding such developments, 'concerns remain that compliance with privacy laws and requirements will not be a priority for industry without the incentives provided by effective regulatory oversight'.[61]

4.36 Suggestions for reform of the system for handling credit reporting complaints include that:

- an industry-funded external dispute resolution scheme be established, similar to those operating in the financial sector and approved by the Australian Securities and Investments Commission under the *Financial Services Reform Act 2001* (Cth);[62] and

- credit providers only be allowed access to the credit reporting system on demonstrating that they have satisfactory internal dispute resolution procedures and are members of the external dispute resolution scheme.[63]

Question 4–2 How do the procedures under the *Privacy Act* and the *Credit Reporting Code of Conduct* for making and pursuing complaints about credit reporting operate in practice? What powers should the Privacy Commissioner have to make preliminary inquiries and investigate complaints about credit reporting?

Question 4–3 What other complaint-handling mechanisms would enhance compliance with credit reporting regulation and the resolution of complaints? How might procedures for making and pursuing complaints about credit reporting be streamlined? Should an external dispute resolution scheme be established? If so, how should such a scheme be funded?

Credit reporting complaints experience

4.37 The annual reports of the OPC provide some information on the number and nature of inquiries and complaints concerning breaches of the credit reporting provisions of the *Privacy Act* and the Code of Conduct.

60 Ibid, [5.13].
61 Ibid, [5.14].
62 That is, the Banking and Financial Services Ombudsman.
63 Parliament of Australia—Senate Legal and Constitutional References Committee, *The Real Big Brother: Inquiry into the Privacy Act 1988* (2005), [5.18].

Privacy Hotline inquiries

4.38 In 2005–06, the OPC received 1,279 inquiries about credit reporting through its telephone inquiry service, the Privacy Hotline. These represented about 7% of the total number of Hotline inquiries,[64] most of which were from individuals seeking advice about possible interferences with their privacy. Credit reporting inquiries also constituted around 7% of Hotline calls in 2004–05[65] and 2003–04.[66]

Number of complaints

4.39 In 2005–06, the OPC received 1,183 written complaints across all areas of its jurisdiction. Complaints concerning the credit reporting provisions constituted 13.7% of the total (162 complaints).[67]

4.40 In 2003–04, the OPC closed 240 complaints relating to the credit reporting provisions.[68] These constituted around one-fifth (19%) of the total number of complaints closed.[69] While the changed format of the published figures makes it difficult to derive the equivalent percentage for 2004–05, it appears that credit reporting complaints continued to constitute about one-fifth of the total number of complaints closed by the OPC.[70]

Complaint issues

4.41 In its 2005–06 Annual Report, the OPC categorised the issues in credit reporting complaints where the respondent took action following preliminary inquiries or a formal investigation by the OPC. The OPC reported that:

> The most significant issue in these matters was where the individual concerned disputed the validity of a default listing on a consumer credit information file, for example because they had not been advised that a listing would be made, or the credit provider had not first tried to recover the amount outstanding. Where the Office confirmed that the listing had been made without following proper procedures the resolution generally involved removal of the default listing.[71]

---

64 Office of the Privacy Commissioner, *The Operation of the Privacy Act Annual Report: 1 July 2005–30 June 2006* (2006), 26. There were 19,150 Hotline inquiries in total.

65 Office of the Privacy Commissioner, *The Operation of the Privacy Act Annual Report: 1 July 2004–30 June 2005* (2005), 37. There were 21,108 Hotline inquiries in total.

66 Office of the Federal Privacy Commissioner, *The Operation of the Privacy Act Annual Report: 1 July 2003–30 June 2004* (2004), 51. There were 20,208 Hotline inquiries in total.

67 Office of the Privacy Commissioner, *The Operation of the Privacy Act Annual Report: 1 July 2005–30 June 2006* (2006), 29–30. Some of these complaints also involved other areas of the OPC's jurisdiction.

68 Office of the Federal Privacy Commissioner, *The Operation of the Privacy Act Annual Report: 1 July 2003–30 June 2004* (2004), 59.

69 There were 1,297 Hotline inquiries in total: Ibid, 55, 59.

70 See Office of the Privacy Commissioner, *The Operation of the Privacy Act Annual Report: 1 July 2004–30 June 2005* (2005), 41, Tables 3.2–3.4, 3.8.

71 Office of the Privacy Commissioner, *The Operation of the Privacy Act Annual Report: 1 July 2005–30 June 2006* (2006), 39.

4.42 In its 2004–05 Annual Report, the OPC categorised 48 issues in credit reporting complaints resolved by the respondent following investigation. Most (29) of these involved disputes about the validity of a default listing on a credit information file. A further 11 issues concerned accuracy.[72]

Complaints to other bodies

4.43 The Telecommunications Industry Ombudsman (TIO) also receives and resolves complaints concerning credit reporting. The TIO is an independent dispute resolution service for residential and small business consumers who have been unable to resolve a complaint with their telephone or internet service provider.[73]

4.44 In 2005–06, the TIO handled 87,593 complaints. Around 9% of the issues raised in these complaints were categorised as concerning 'credit control'.[74] However, this category also includes complaints concerning debt recovery and payment arrangements.[75] In 2005, the TIO reported that telecommunication companies appear to be using credit reporting agencies more than in the past in an attempt to have overdue accounts paid. As a result, the TIO received many complaints about default listings. The nature of these complaints is discussed later in Chapter 5.

4.45 The Banking and Financial Services Ombudsman (BFSO) is an independent dispute resolution service for complaints about banks and their affiliates. Non-bank institutions and their affiliates can also apply to join the scheme.[76] While the BFSO resolves some complaints about credit reporting,[77] its published statistics do not identify the number of such complaints. Other finance industry ombudsmen—such as the Credit Ombudsman Service and the Credit Union Dispute Resolution Centre—also may deal with credit reporting related complaints.

4.46 Under the Code of Conduct, credit reporting agencies and credit providers must establish dispute settling procedures relating to credit reporting.[78] Credit reporting agencies are responsible for attempting to resolve disputes between credit providers and individuals where the dispute involves the content of a credit report.[79] In 2004,

---

72 Office of the Privacy Commissioner, *The Operation of the Privacy Act Annual Report: 1 July 2004–30 June 2005* (2005), 47.

73 The TIO is wholly funded by telephone and internet service providers, who are required by law to be part of, and pay for, the TIO Scheme: *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) s 126.

74 Telecommunications Industry Ombudsman, *Annual Report 2005–06* (2006), 20, 32, 40.

75 The debt recovery sub-category, which includes complaints about the selling or factoring of debt, was the single largest sub-category of landline credit control complaints, with 3,073 recorded for 2004–05: Telecommunications Industry Ombudsman, *Annual Report 2004–05* (2005), 31.

76 Banking and Financial Services Ombudsman, *About Us* <www.abio.org.au> at 19 October 2006.

77 Banking and Financial Services Ombudsman, *Case Studies* <www.abio.org.au> at 19 October 2006.

78 Office of the Federal Privacy Commissioner, *Credit Reporting Code of Conduct* (1991), Part 3.

79 Ibid, [3.3].

Baycorp Advantage stated that it investigated around 1,100 consumer inquiries each month.[80]

ALRC National Privacy Phone-In

4.47 On 1 and 2 June 2006 members of the public were invited to contact the ALRC—either by telephone or via the ALRC's website—to share their experiences of privacy breaches and protection. The National Privacy Phone-in attracted widespread media coverage, and the ALRC received 1,343 responses.[81]

4.48 A number of calls and submissions addressed issues relating to credit reporting. Some submissions expressed concern about inaccurate listings on credit information files and highlighted many individuals' lack of awareness about listings and the difficulties they experience in having information corrected. Other submissions expressed support for the collection of 'positive' credit reporting information[82] and for broader access to credit reporting information to assist in locating debtors.

Remedies and penalties

4.49 Part IIIA creates a range of credit reporting offences, including offences in relation to:

- non-corporations carrying on a credit reporting business;[83]
- persons giving personal information to a non-corporation carrying on a credit reporting business;[84]
- credit reporting agencies disclosing personal information other than as permitted;[85]
- credit providers using personal information contained in credit reports other than as permitted;[86]
- credit providers disclosing credit-worthiness information other than as permitted;[87]

---

80 Baycorp Advantage, *Submission to the Senate Legal and Constitutional References Committee Inquiry into the Privacy Act 1988*, 16 March 2005.
81 See, Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006), [1.138]–[1.140].
82 See Ch 6.
83 *Privacy Act 1988* (Cth) s 18C(4).
84 Ibid s 18D(4).
85 Ibid s 18K(4).
86 Ibid s 18L(2).
87 Ibid s 18N(2).

- credit reporting agencies or credit providers intentionally giving out a credit report that contains false or misleading information;[88]

- persons intentionally obtaining unauthorised access to credit information files or credit reports;[89] and

- persons obtaining access to credit information files or credit reports by false pretences.[90]

4.50 Section 18R(2) makes it an offence, punishable by a fine not exceeding $75,000, for a credit reporting agency or credit provider intentionally to give to any person a credit report that contains false or misleading information. It has been suggested that, as a means to help ensure the accuracy of credit reporting, s 18R should be amended to impose strict liability civil penalties on a credit reporting agency or credit provider that gives to any other person a credit report containing false or misleading information (whether intentionally or otherwise).[91]

4.51 IP 31 considers whether the *Privacy Act* contains sufficient penalties and remedies in the event of non-compliance with the Act.[92] IP 31 asks, for example, whether available penalties and remedies should include any or all of the following:

- administrative penalties;

- enforceable undertakings or other coercive orders;

- remedies in the nature of damages;

- infringement notices;

- civil penalties; or

- criminal sanctions for particular breaches of the Act.[93]

4.52 The ALRC is interested in comments on this issue as it relates specifically to credit reporting. For example, what penalties should apply where a person provides false or misleading information to a credit reporting agency?

---

88 Ibid s 18R(2).
89 Ibid s 18S(3).
90 Ibid s 18T.
91 Consumer Credit Legal Centre (NSW) Inc, *Submission PR 28,* 6 June 2006.
92 Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006), Ch 6. See also, Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, ALRC 95 (2002).
93 Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006), Question 6–22.

Question 4–4 Should the range of penalties and remedies available to enforce rights and obligations under the credit reporting provisions of the *Privacy Act* be changed and, if so, how?

5. Reform of the Credit Reporting Provisions

Contents

Introduction 70
Permitted content of credit information files 70
- Inquiry information 70
- Overdue payment information 71
- Bankruptcy orders 73
- Serious credit infringements 73
- Compulsory reporting of permitted content 74

Informing individuals about credit reporting 75
Deletion of information in credit information files 76
- Information about statute-barred debts 76
- Multiple listing 77

Accuracy and security 78
- Accuracy of files and reports 78
- Security of files and reports 82

Rights of access and alteration 83
- Access to files and reports 84
- Alteration of files and reports 85

Limits on disclosure by credit reporting agencies 86
- Disclosure to a 'credit provider' 87
- Classes of Credit Provider Determination 87
- Assignees Determination 89
- Other issues 91

Participation in the credit reporting system 91
Consent to disclosure of information 93
- Disclosure to a credit reporting agency 93
- Bundled consent 95

Limits on use of credit reports by credit providers 97
Notification of adverse credit reports 98
Limits on disclosure by credit providers 99
Other limits on use or disclosure 100
Debt collection 101
Credit reporting, identity verification and identity theft 102
Debts of children and young people 104
Commercial credit 105
Publicly available information 106
Application to foreign credit providers 108

Introduction

5.1 This chapter discusses the experience of regulation of credit reporting under the credit reporting provisions of the *Privacy Act 1988* (Cth), perceived inadequacies in the regulation of credit reporting and suggestions for reform.

5.2 The criticisms and suggestions for reform contained in this chapter reflect different perspectives and are drawn from numerous sources. These sources include the complaint investigation and auditing experience of the Office of the Privacy Commissioner (OPC) and the Telecommunications Industry Ombudsman (TIO), consumer and industry contributions to inquiries by the OPC[1] and the Senate Legal and Constitutional References Committee,[2] and initial consultations and submissions made in connection with the ALRC's present Inquiry.

5.3 The issues are discussed broadly in the order the relevant provisions of Part IIIA appear in the *Privacy Act*, followed by discussion of issues that have more general implications for reform. The specific issue of 'positive' or 'comprehensive' credit reporting—and whether reform of the *Privacy Act* to permit more comprehensive reporting is justified—is the subject of Chapter 6.

Permitted content of credit information files

5.4 Section 18E of the *Privacy Act* sets out the permitted content of credit information files held by credit reporting agencies.[3] The *Credit Reporting Code of Conduct* places an obligation on credit reporting agencies to notify a credit provider when information supplied by the credit provider is not permitted and to remove any such information already included in credit information files.[4] The permitted content of credit information files and credit reports has been subject to a range of criticism, which is discussed below.

Inquiry information

5.5 A credit information file may include information that is a record of both a credit provider having sought a credit report in relation to a credit application and the amount of credit sought in the application.[5]

5.6 Concerns have been expressed about the listing of this 'inquiry' information.[6] For example, the Consumer Credit Legal Centre (NSW) Inc (CCLC) has stated that

---

1 Office of the Privacy Commissioner, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988* (2005).

2 Parliament of Australia—Senate Legal and Constitutional References Committee, *The Real Big Brother: Inquiry into the Privacy Act 1988* (2005).

3 The permitted content of credit information files is summarised in Ch 3.

4 Office of the Federal Privacy Commissioner, *Credit Reporting Code of Conduct* (1991), [1.3].

5 *Privacy Act 1988* (Cth) s 18E(1)(b)(i).

6 Consumer Credit Legal Centre (NSW) Inc, *Submission PR 28,* 6 June 2006; Parliament of Australia—Senate Legal and Constitutional References Committee, *The Real Big Brother: Inquiry into the Privacy Act 1988* (2005), [5.17].

'the listing of inquiries on credit reports is completely ambiguous and misleading for credit providers in relation to the assessment of credit'.

> In our advice and casework experience, it is becoming increasingly common for a person's application for credit to be rejected solely on the basis of the number of inquiries on the person's credit report, despite there being no default listings. Worse, it is arguable that consumers are being penalised for shopping around.[7]

5.7 The CCLC has submitted that: (a) an inquiry should not be listed until the loan is actually taken out; and (b) inquiries in relation to a credit application that is ultimately rejected should not be listed.[8]

5.8 The ALRC observes that inquiry information listed on credit reports may not be as misleading under a comprehensive reporting system (see Chapter 6), as information about an individual's current credit position is disclosed—making it clear whether the inquiry related to a loan that was granted.

5.9 Inquiry information may also be important as a privacy safeguard because it provides individuals with a record of who has been given access to a credit report about them. One option for reform might be to allow individuals, but not credit providers, to obtain inquiry information.

Overdue payment information

5.10 Section 18E(1)(b)(vi) permits the inclusion in credit information files of information about credit where the individual is at least 60 days overdue in making a payment and the credit provider has taken steps towards recovery of the amount outstanding.

Small debts

5.11 The CCLC has expressed concern about aspects of the listing of small debts, including by telecommunications companies.

> The consequences of listing a debt for $100 or $200 or even $500 far outweigh the misdemeanour. Many small debts are telecommunications debts and appear to be related to problems with billings systems, billing errors and change of address problems. Small, possibly disputed debts are unlikely to be relevant to a risk assessment for future credit.[9]

5.12 The CCLC's conclusion about the relevance of small debts contrasts with the results of research conducted by Dun and Bradstreet focusing on telecommunications debts. This research was said to challenge

---

7 Consumer Credit Legal Centre (NSW) Inc, *Submission PR 28,* 6 June 2006.
8 Ibid.
9 Ibid.

> a common perception that small defaults should not be given strong consideration in future risk assessment because consumers take their larger commitments, such as home and car loans, more seriously than minor commitments, such as utility bills.[10]

5.13 The research claimed to show that individuals who default on low value amounts (below $500) or non-bank credit are at higher risk of defaulting on larger amounts provided under more traditional credit arrangements. The two main findings were that:

- consumers with only telecommunications defaults are a higher credit risk than all other default categories; and

- consumers defaulting on amounts less than $500 are more likely to default on other credit in the next 12 to 24 months than consumers with larger defaults.[11]

5.14 The credit reporting provisions do not provide for any minimum amount for debts that may be listed, except in the case of presented and dishonoured cheques which must be for an amount of not less than $100.[12] Questions may be raised about the appropriateness of this provision, as there is some doubt about whether a dishonoured cheque constitutes 'credit' as that term is defined for the purposes of Part IIIA.

5.15 The CCLC submitted that credit providers should not be permitted to list overdue credit below a minimum amount of $500.[13] The extent to which small debts are predictive of future default may be seen as relevant to the desirability of such a reform.

Overdue payments and assessing capacity to repay

5.16 The Banking and Financial Services Ombudsman (BFSO) has stated that credit reporting 'needs to be considered in the context of assessing a customer's capacity to repay a credit facility'.[14] The BFSO suggested that defaults currently listed in credit information files include debts 'which were, at the time of entering into the relevant contract for credit, unserviceable' and that:

> The listing of a debt which, in reality, was always beyond the servicing capacity of the individual to whom the credit was extended would appear to be unfair and detrimental to that person's future financial plans, if those plans involve seeking any sort of credit.[15]

---

10 Dun & Bradstreet Australasia, 'Low Value Defaults are a High Risk Equation' (2006) 5 *Consumer Credit Reporting* 2; 'Small Default a Bad Sign: Credit Research', *Canberra Times* (Canberra), 27 June 2006.

11 Dun & Bradstreet Australasia, 'Low Value Defaults are a High Risk Equation' (2006) 5 *Consumer Credit Reporting* 2.

12 *Privacy Act 1988* (Cth) s 18E(1)(b)(vii).

13 Consumer Credit Legal Centre (NSW) Inc, *Submission PR 28,* 6 June 2006.

14 Banking and Financial Services Ombudsman, *Submission in Response to the Consumer Affairs Victoria Issues Paper: Consumer Credit Review*, 1 July 2005.

15 Ibid.

5.17 The BFSO took the view that where a financial services provider extends credit beyond an individual's capacity to repay and payment becomes overdue, no adverse listing should be made on the individual's credit information file.[16] It is relevant to note, in this context, that credit providers have legal obligations, including under the uniform *Consumer Credit Code*,[17] not to provide credit where capacity to repay has not been reasonably established.

Bankruptcy orders

5.18 Section 18E(1)(b)(ix) permits the inclusion in credit information files of information about 'bankruptcy orders made against the individual'. The Act does not define the term 'bankruptcy order' and the term is not used in bankruptcy legislation.

5.19 Under the *Bankruptcy Act 1966* (Cth), a person may become bankrupt upon the making of a sequestration order by the Federal Court following the presentation of a creditors' petition.[18] However, bankruptcy does not always require the making of an 'order against an individual'. For example, bankruptcy can occur following the acceptance of a debtors' petition by the Official Receiver.[19] The *Bankruptcy Act* also provides, as alternatives to bankruptcy, debt agreements under Part IX and personal insolvency agreements under Part X.

5.20 The fact that the term 'bankruptcy order' is not defined in the *Privacy Act* creates uncertainty about what may or may not be listed under s 18E(1)(b)(ix). The ALRC is interested in comments on whether the application of Part IIIA of the *Privacy Act* to information about bankruptcy and agreements under Parts IX and X of the *Bankruptcy Act* should be clarified.

Serious credit infringements

5.21 Section 18E(1)(b)(x) permits the inclusion in credit information files of the 'opinion of a credit provider that the individual has … committed a serious credit infringement'. A serious credit infringement is defined as an act done by a person:

> (a) that involves fraudulently obtaining credit, or attempting fraudulently to obtain credit; or
>
> (b) that involves fraudulently evading the person's obligations in relation to credit, or attempting fraudulently to evade those obligations; or

---

16 Ibid.

17 The *Consumer Credit Code* is set out in the *Consumer Credit (Queensland) Act 1994* (Qld) and is adopted by legislation in other states and territories. Under s 70 of the *Consumer Credit Code* , a court may reopen an unjust transaction. In determining whether a transaction is unjust the court may have regard to, among other things, whether 'the credit provider knew, or could have ascertained by reasonable inquiry of the debtor at the time, that the debtor could not pay': *Consumer Credit Code* s 70(2)(l).

18 See *Bankruptcy Act 1966* (Cth) pt IV, s 43(2).

19 See Ibid pt IV, s 55(4A).

(c) that a reasonable person would consider indicates an intention, on the part of the first-mentioned person, no longer to comply with the first-mentioned person's obligations in relation to credit.[20]

5.22 A serious credit infringement listing has more serious consequences for the individual concerned than other default listings—not least because such a listing may remain on the record for seven years, as compared to five years for most other adverse information.

5.23 For an overdue payment to be listed on a credit information file, an individual must be 60 days overdue in making a payment, and the credit provider must have taken recovery action.[21] There are no similar requirements for the listing of a serious credit infringement.

5.24 The *Credit Reporting Code of Conduct* provides some guidance on what constitutes a serious credit infringement.[22] It may be appropriate, however, for the credit reporting provisions to define what constitutes a serious credit infringement with more precision—rather than leaving it to differing interpretations under the internal policies of credit providers. For example, concern has been expressed about individuals who cannot be found by a credit provider ('clearouts') being listed as having committed a serious credit infringement without further confirmation.[23]

Question 5–1 What issues are raised by the provisions of the *Privacy Act* dealing with the permitted content of credit information files? How do these provisions operate in practice, for example, in relation to information about overdue payments, bankruptcy and serious credit infringements? How should the permitted content of credit information files be regulated?

Compulsory reporting of permitted content

5.25 A related issue is whether it should be compulsory for credit providers to report some or all kinds of information that may be included in a credit information file. At present, there are no obligations placed on credit providers to report information to credit reporting agencies. Further, in some circumstances, there may be a financial disincentive to do so. For example, where a credit provider considers that payments are overdue, it may report this information to a credit reporting agency. The information may then be taken into account by other credit providers in assessing the credit worthiness of the individual concerned. However, there is no direct benefit to the original credit provider, which may even incur additional administrative or other costs—for example, in relation to any dispute about the listing.

---

20 *Privacy Act 1988* (Cth) s 6(1).
21 Ibid s 18E(1)(vi).
22 Office of the Federal Privacy Commissioner, *Credit Reporting Code of Conduct* (1991), [62]–[65].
23 Consumer Credit Legal Centre (NSW) Inc, *Submission PR 28,* 6 June 2006.

5.26 The value of credit information files in the assessment of credit worthiness may be reduced significantly by the fact that credit providers may 'pick and choose' whether information about particular overdue payments or other adverse information is reported. It has been suggested, therefore, that it should be made compulsory for credit providers to report negative information.[24] This obligation could be placed on credit providers by contract or by legislation, a code or other form of regulation.

Question 5–2 Should a credit provider that subscribes to a credit reporting agency be required to provide to the credit reporting agency some or all kinds of information that may be included in a credit information file? What issues would be raised by compulsory reporting, for example, in relation to the cost to credit providers of participating in the credit reporting system?

Informing individuals about credit reporting

5.27 Under s 18E(8)(c), a credit provider must not give to a credit reporting agency personal information relating to an individual if 'the credit provider did not, at the time of, or before, acquiring the information, inform the individual that the information might be disclosed to a credit reporting agency'.

5.28 OPC credit reporting audits have found that some credit providers fail to provide adequate notification to credit applicants that personal information may be disclosed to a credit reporting agency.[25]

5.29 It has been suggested that s 18E(8) leaves uncertain the required timing of notification. On one view, personal information may be acquired throughout the course of a relationship between a credit applicant and a credit provider—for example, when a credit application is made, a payment becomes overdue, a debt is assigned or debt collection action is commenced.

5.30 In this context, the words 'at the time of, or before, acquiring the information' may permit the credit provider a choice about when to provide notice to the individual that information may be disclosed. Given that a significant period may elapse between the relevant events, more prescriptive notice provisions may be appropriate. These

24 Centre for International Economics and Edgar Dunn and Company, *Options for Implementation of Comprehensive Credit Reporting in Australia [Prepared for MasterCard Worldwide]* (2006), 63.

25 Office of the Federal Privacy Commissioner, *The Operation of the Privacy Act Annual Report: 1 July 2002–30 June 2003* (2003), 81; Australian Government Attorney-General's Department, *Response to Questions on Notice for Attorney-General's Portfolio: Senate Legal and Constitutional Legislation Committee Additional Estimates 2003–2004, Questions 38 to 50*, undated, Answer to Q 42.

provisions might, for example, require credit providers to give notice prior to processing a loan application, listing an overdue payment, or assigning a debt.

5.31 In addition to the notification obligation under s 18E(8)(c), other provisions of Part IIIA require an individual's consent to the disclosure of his or her personal information. These provisions, and the issue of consent in the context of credit reporting generally, are discussed later in this chapter.

Question 5–3 What issues are raised by the provisions of the *Privacy Act* requiring individuals to be informed about the disclosure of personal information to a credit reporting agency? How do these provisions operate in practice?

Deletion of information in credit information files

5.32 Credit reporting agencies must ensure that personal information contained in credit information files is deleted after the expiry of maximum permissible periods set out in s 18F of the *Privacy Act*.[26] For example, under s 18F(2)(c) information about overdue payments must be deleted five years after the day on which the credit reporting agency was informed of the overdue payment concerned. The interaction of these provisions with those relating to the permitted content of credit information files raises a number of issues.

Information about statute-barred debts

5.33 The *Credit Reporting Code of Conduct* states that a credit provider must not give to a credit reporting agency information about an individual being overdue in making a payment where recovery of the debt by the credit provider is barred by the statute of limitations.[27] While s 18E(1)(ba)(i) prevents statute-barred debts from being listed against a guarantor's credit information file, there is no parallel provision applying to the credit information files of other individuals. This anomaly may need to be addressed.

5.34 The CCLC has also expressed concern that credit providers may list overdue payments or other debts 'a few months, weeks or even days' before they become barred.

> The effect of this is to extend the adverse consequences of the default nearly five (or seven in the case of a listing for a 'serious credit infringement') years beyond the limitation period. This is inconsistent with the policy prohibiting the listing of statute barred debts and should not be allowed.[28]

---

26 These periods are summarised in Ch 3.
27 Office of the Federal Privacy Commissioner, *Credit Reporting Code of Conduct* (1991), [2.8].
28 Consumer Credit Legal Centre (NSW) Inc, *Submission PR 28,* 6 June 2006.

5.35 It has been suggested that credit providers should not be permitted to list default information later than one year after the issue of a default notice.[29]

Multiple listing

5.36 Multiple adverse listings in respect of the same debt on credit information files may occur for a range of reasons. The following circumstances are examples:

- A credit provider lists an overdue payment and then makes further listings to update the amount or record another overdue payment for the same debt. This can extend the period that an overdue payment listing remains on a credit information file—potentially to the maximum term of the loan plus the five year period prescribed by s 18F(2)(c).

- A credit provider assigns a debt and the assignee automatically lists the overdue payments without checking whether the credit provider has already listed the debt; or because the assignee uses information different from that used by the original credit provider—making it difficult to determine whether the debt is the same debt.

- A credit provider lists an overdue payment and later lists a serious credit infringement with respect to the same debt. This can extend the period that an adverse listing remains on a credit information file—potentially to five years plus the seven year period prescribed by s 18F(2)(g).

5.37 Sections 18E and 18F do not clearly prohibit multiple listing. The ALRC is interested in comments on whether new provisions should do so. Another option would be to allow credit providers to 'update' the amount of an existing overdue payment listing rather than making a second separate listing.

5.38 There is also some ambiguity about the application of ss 18E and 18F where the individual enters into a new arrangement with the credit provider to repay the debt, such as by entering into a scheme of arrangement. In these circumstances, the OPC advises that the 'new situation is not regarded as being information about the same default as the original entry'.[30] Therefore, if payments become overdue under the new arrangement, a new default entry may be listed and remain on the individual's credit information file for a further five year period.

5.39 The ALRC is interested in comments on whether legislation should clarify the application of Part IIIA to payments under new arrangements with respect to the same debt. In this context, the ALRC understands that finance industry groups are examining

---

29 Ibid.

30 Office of the Privacy Commissioner, *Credit Reporting Advice Summaries* (2001), [9.3].

how schemes of arrangements might be listed without the need to list an overdue payment,[31] and be made subject to a maximum permissible period of retention shorter than that for overdue payment information.

Question 5–4 What issues are raised by the provisions of the *Privacy Act* dealing with the deletion from credit information files of permitted content? How do these provisions operate in practice, for example, in relation to multiple listings in respect of the same debt? How should the deletion of personal information in credit information files be regulated?

Accuracy and security

5.40 Section 18G of the *Privacy Act* deals with the accuracy and security of credit information files and credit reports in the possession or control of credit providers and credit reporting agencies.[32]

Accuracy of files and reports

5.41 The accuracy of information in credit information files is of fundamental importance to individuals, given the significant consequences that may flow, in terms of future access to credit, from an adverse credit report.

5.42 Credit providers and credit reporting agencies have an obligation under s 18G to take reasonable steps to ensure that personal information in a credit information file or credit report is 'accurate, up-to-date, complete and not misleading'. The *Credit Reporting Code of Conduct* provides for the steps to be taken by a credit reporting agency when it becomes aware that information supplied by a credit provider may be inaccurate. If the agency believes that other credit information files may contain similar inaccurate listings it must, as soon as practicable, notify the credit provider and request the credit provider to investigate the accuracy of other files that may be similarly affected. The OPC also must be notified of these actions.[33]

5.43 The Senate Legal and Constitutional References Committee's inquiry into the *Privacy Act* (Senate Committee privacy inquiry) noted that, despite the provisions of Part IIIA:

---

31 The *Credit Reporting Code of Conduct* states that, where an overdue payment or serious credit infringement has previously been listed, a credit provider may contact the credit reporting agency to advise that a note indicating that a scheme of arrangement has been entered should be included in the individual's credit information file: Office of the Federal Privacy Commissioner, *Credit Reporting Code of Conduct* (1991), [2.10].

32 See Ch 3.

33 Office of the Federal Privacy Commissioner, *Credit Reporting Code of Conduct* (1991), [1.4].

> Both industry and consumer advocates agree that credit reporting agencies' databases contain inaccurate data on consumers (although they differ on the extent of this inaccuracy).[34]

5.44 The Australian Consumers' Association (ACA) has highlighted what are claimed to be unacceptable levels of inaccuracy in credit reports. In 2004, the ACA published the results of a survey of CHOICE Magazine subscribers who had been asked to get a copy of their credit report.

> Of the 50 received, 34% had one or more mistakes. A clear majority of these (84%) were mistakes in personal details, such as a wrong licence number, wrongly spelled name or street names, addresses recorded they hadn't lived at, wrong date of birth and misspelled or wrong employment details.[35]

5.45 The importance of inaccuracies in personal details is said to be that:

> These errors expose individual consumers to the risk of mismatching—where wrong information can be given out on the basis of incorrect personal details.[36]

5.46 In response to a 2004 online survey, conducted by the CCLC in the context of an inquiry into debt collection practices,[37] 22% of 139 respondents said that they had a default listing for a debt they denied.[38]

5.47 As noted above, in 2004, Baycorp Advantage stated that it investigates over 1,000 consumer inquiries monthly.[39] Baycorp reports that approximately 40% of these require a minor change to be made to credit information files (eg, to correct spelling) and 20% 'identify possibly material errors'.[40]

5.48 Regulators have identified ongoing problems with the accuracy of credit information files and credit reports. In 2005, the OPC reported that the most significant issues in complaints where the respondent took action (following preliminary enquiries or a formal investigation by the OPC) were disputes about the validity of default listings on credit information files.[41] OPC credit reporting audits have focused on

---

34 Parliament of Australia—Senate Legal and Constitutional References Committee, *The Real Big Brother: Inquiry into the Privacy Act 1988* (2005), [5.8].

35 Australian Consumers' Association, 'Credit Reporting: Mistaken Identity and Other Stories' (Press Release, 10 February 2004).

36 Ibid.

37 The use of credit reporting in debt collection is discussed later in this chapter.

38 Consumers were invited to participate in the survey in a CHOICE press release: CCLC *Report into Debt Collection*, April 2004, 64, Ch 10; Australian Consumers' Association, 'Credit Reporting: Mistaken Identity and Other Stories' (Press Release, 10 February 2004).

39 Baycorp Advantage, *Submission to the Senate Legal and Constitutional References Committee Inquiry into the Privacy Act 1988*, 16 March 2005.

40 Ibid.

41 Office of the Privacy Commissioner, *The Operation of the Privacy Act Annual Report: 1 July 2004–30 June 2005* (2005), 47.

identifying systemic practices which may lead to inaccuracy rather than checking individual's files with the individual concerned.[42]

5.49 These audits have highlighted instances of 'lack of clarity in determining when individual consumer credit information files can be linked' and problems where credit reporting agencies do not always collect name, address, date of birth or driver's licence before creating new credit information files.[43] In addition, a number of credit providers failed to establish whether loans were for a domestic or commercial purpose before disclosing information to, or obtaining information from, a credit reporting agency, leading to inaccurate information being placed on the individual's file.[44]

5.50 In 2005, the TIO reported that it received complaints about:

- consumers not being notified of a company's intention to list an account as being in default;
- credit providers proceeding to list accounts, despite the account being in dispute; and
- credit providers listing accounts as being in default after attempts to negotiate a payment arrangement have been unsuccessful.[45]

5.51 The TIO stated that its investigations into these complaints 'indicate that a significant proportion have merit' and expressed concern that 'complaints of this nature continue to occur' given the serious possible consequences of a default listing.[46]

5.52 There have been some high profile instances of systemic inaccuracy in the information given to credit reporting agencies by telecommunications companies. In August 2004, 65,000 default listings by telecommunications company One.Tel were removed, following investigation by the OPC, for being potentially inaccurate because its companies did not have proper systems in place to update customer credit default listings once a debt had been paid.[47] The CCLC stated that:

---

42 Commonwealth Senate Legal and Constitutional Legislation Committee, Additional Estimates Hearing 2003-2004, Australian Government Attorney-General's Department, *Response to Questions on Notice for Attorney-General's Portfolio: Senate Legal and Constitutional Legislation Committee Additional Estimates 2003–2004, Questions 38 to 50*, undated, Answer to Q 39.

43 Office of the Federal Privacy Commissioner, *The Operation of the Privacy Act Annual Report: 1 July 2003–30 June 2004* (2004), 65–66.

44 Australian Government Attorney-General's Department, *Response to Questions on Notice for Attorney-General's Portfolio: Senate Legal and Constitutional Legislation Committee Additional Estimates 2003–2004, Questions 38 to 50*, undated, Answer to Q 42.

45 Telecommunications Industry Ombudsman, *Annual Report 2004–05* (2005), 31.

46 Ibid, 31.

47 Consumer Credit Legal Centre (NSW) Inc, *Submission PR 28,* 6 June 2006; K Needham, 'Bad Debt Files Purged After Privacy Watchdog's Finding', *Sydney Morning Herald* (Sydney), 27 August 2004; Office of the Privacy Commissioner, *Review of Credit Determinations: Consultation Paper No 1* (2006), 12.

> This indicates that systemic and one-off inaccurate listings from credit providers do occur, and it also begs the question as to whether appropriate and adequate audits and systems are in place to ensure data quality of credit report listings. Given both the One.Tel and First Netcom listing inaccuracies were in place for some years before detection, it indicates a much deeper problem with the way that the system functions and leaves the possibility of widespread inaccuracies wide open.[48]

5.53 Much of the information contained in credit information files, and provided by agencies to their subscribers in credit reports, is reported to the agencies by credit providers. Credit reporting has been described as operating on an 'honour system', in that agencies do not check the accuracy of the information given to them by credit providers. While s 18G requires credit reporting agencies to 'take reasonable steps' to ensure the accuracy of information they are provided with, the high volume of information handled by them may 'beg the question of what they may "reasonably" do'.[49]

5.54 Consumer groups have submitted that there is no adequate incentive to correct systemic flaws in the reporting of consumer credit information, in part because the cost of dealing with a small number of complaints is less than the cost of ensuring the data is accurate in the first place.[50] There is no penalty for inaccurate reporting, unless false or misleading information is intentionally given out—conduct punishable by a maximum fine of $75,000.[51]

5.55 It has been suggested that further obligations should be placed on credit reporting agencies to ensure the accuracy of credit reports. For example, under the New Zealand *Credit Reporting Privacy Code 2004*, credit reporting agencies must:

- enter into agreements with their subscribers that contain obligations to ensure accuracy in the information subscribers provide;
- establish and maintain controls to ensure that, as far as reasonably practicable, only accurate information is used or disclosed;
- monitor information quality and conduct regular checks on compliance with the agreements and controls; and
- identify and investigate possible breaches of the agreements and controls.[52]

---

48 Consumer Credit Legal Centre (NSW) Inc, *Submission PR 28,* 6 June 2006.

49 Parliament of Australia—Senate Legal and Constitutional References Committee, *The Real Big Brother: Inquiry into the Privacy Act 1988* (2005), [5.11].

50 Office of the Privacy Commissioner, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988* (2005), 135.

51 *Privacy Act 1988* (Cth) s 18R.

52 *Credit Reporting Privacy Code 2004* (NZ) r 8(3)(a)–(d).

5.56 The Senate Committee privacy inquiry noted reform proposals put forward by consumer groups, including that credit providers should be required to demonstrate to the agency the existence of the debt and failure to pay, and disputed debts should not be listed while the dispute is being resolved.[53]

5.57 From another perspective, however, such requirements may be seen as unnecessarily increasing the cost of compliance with the *Privacy Act* and transaction costs in the finance industry generally. It has been noted that credit reporting agencies and credit providers have a strong interest in ensuring the accuracy of credit information. Baycorp Advantage has observed that, without accurate data, the value of their services is limited.

> Data quality is the critical factor in Baycorp Advantage's business. Errors in data, while frustrating and sometimes harmful for consumers, do real damage to our business.[54]

5.58 The ALRC is interested in views about the accuracy of information in credit information files and credit reports and the appropriateness of existing provisions of the *Privacy Act* and *Credit Reporting Code of Conduct* dealing with accuracy. In assessing the extent of problems concerning the accuracy of credit reporting information, it is important to distinguish between information that is inaccurate because the individual has been misidentified (cases of mistaken identity) and information that is inaccurate for other reasons, but is 'about' the correct individual. In the latter case, a default listing may be considered 'inaccurate' because the debt is disputed.

Question 5–5 What issues are raised by the provisions of the *Privacy Act* and *Credit Reporting Code of Conduct* dealing with the accuracy of credit information files and credit reports? How do these provisions operate in practice? What regulation should apply to ensure the accuracy of credit information files and credit reports?

Security of files and reports

5.59 Credit providers and credit reporting agencies have an obligation under s 18G to ensure that credit information files or credit reports are 'protected, by such security safeguards as are reasonable in the circumstances, against loss, against unauthorised access, use, modification or disclosure, and against other misuse'.

---

53 Parliament of Australia—Senate Legal and Constitutional References Committee, *The Real Big Brother: Inquiry into the Privacy Act 1988* (2005), [5.18].

54 Baycorp Advantage, *Submission to the Senate Legal and Constitutional References Committee Inquiry into the Privacy Act 1988*, 16 March 2005.

5.60 In 2003, the OPC reported that its credit reporting audits of credit providers had found that

> individuals' credit reports and credit worthiness information were not protected sufficiently from unauthorised use, or against loss, modification or disclosure, or other misuse. In some cases, these records were left unsecured outside normal working hours, and there was a lack of logical security controls over access.[55]

5.61 Subsequent audits resulted in other security-related concerns being expressed by the OPC. The security issues included: insufficient security of the manner in which passwords and user codes were provided to new subscribers; passwords of former employees not being automatically deactivated; and the poor security of passwords in the online environment, such as the storage of passwords by web browsers.[56] In addition, it was found that some credit providers did not have provisions in their service provider contracts regarding the security and confidentiality of information, even though these contractors can obtain access to personal information held by credit providers.[57]

5.62 The ALRC is interested in views about the security of information in credit information files and credit reports and the appropriateness of existing provisions of the *Privacy Act* dealing with security.

Question 5–6 What issues are raised by the provisions of the *Privacy Act* and *Credit Reporting Code of Conduct* dealing with the security of credit information files and credit reports? How do these provisions operate in practice? What regulation should apply to ensure the security of credit information files and credit reports?

Rights of access and alteration

5.63 Section 18H of the *Privacy Act* provides that credit reporting agencies and credit providers must take reasonable steps to ensure that individuals can obtain access to their credit information files and credit reports. Credit reporting agencies and credit providers must also take reasonable steps, under s 18J, to alter files or reports to ensure

---

55 Office of the Federal Privacy Commissioner, *The Operation of the Privacy Act Annual Report: 1 July 2002–30 June 2003* (2003), 81.

56 Office of the Federal Privacy Commissioner, *The Operation of the Privacy Act Annual Report: 1 July 2003–30 June 2004* (2004), 65–66; Australian Government Attorney-General's Department, *Response to Questions on Notice for Attorney-General's Portfolio: Senate Legal and Constitutional Legislation Committee Additional Estimates 2003–2004, Questions 38 to 50*, undated, Answer to Q 42.

57 Australian Government Attorney-General's Department, *Response to Questions on Notice for Attorney-General's Portfolio: Senate Legal and Constitutional Legislation Committee Additional Estimates 2003–2004, Questions 38 to 50*, undated, Answer to Q 42.

files and reports are accurate, up-to-date, complete and not misleading. Such alterations may be made in response to requests by the individuals concerned.

Access to files and reports

5.64 All major Australian credit reporting agencies provide individuals with access to their own credit reports on request and free of charge.[58] About 200,000 Australians each year request a copy of their credit information file from Baycorp Advantage.[59] In many cases, an individual requests access to his or her credit information file because he or she has been refused credit.

5.65 Baycorp Advantage provides access free of charge by post within 10 working days; or for $27 within one working day by email, facsimile or mail.[60] Dun and Bradstreet provides access free of charge by post within 10 working days; or for $25 posted by express mail within one working day.[61] Tasmanian Collection Service provides access to credit information files free of charge 'where the request relates to an individual's refusal of credit, or is otherwise related to the management of the individual's credit arrangements' and, otherwise, for $13.[62]

5.66 Some credit reporting agencies actively encourage individuals to obtain access to their own credit information files. The Baycorp Advantage website notes the benefits in doing so to 'ensure your information is accurate and up to date to avoid unwanted surprises when you next apply for credit'.[63] Baycorp also offers a service, named 'Credit Alert', that, for a fee, notifies an individual whenever someone obtains the individual's credit information file or there is an addition or change to the information included in the file.[64]

5.67 In 1992, Professor Graham Greenleaf warned that the right of access in s 18H might be used as a 'backdoor' means of access by organisations prohibited from obtaining credit reports.

> There is nothing in the legislation to prevent an employer, insurer, State Government licensing authority or real estate agent from requesting or requiring a person to supply a copy of their file as a condition of being considered for a position, licence, etc.[65]

---

58 *Privacy Act 1988* (Cth) s 18H does not require that access be free of charge to the individual concerned.

59 Baycorp Advantage, *Consultation PC 2*, Sydney, 24 February 2006; S Holmes, 'Australian Consumers Ignorant About Bad Credit Risks', *AAP Newswire* (online), 27 May 2005, <newscentre.aap.com.au/newswire.asp>.

60 Baycorp Advantage, *Discover Your Credit History* (2005) <www.mycreditfile.com.au> at 29 August 2006.

61 Dun & Bradstreet, *Your Individual Credit File* (2006) <www.dnb.com.au> at 29 August 2006.

62 Tasmanian Collection Service, *TCS Credit Reports* (2006) <www.tascol.com.au/reports.htm> at 30 August 2006.

63 Baycorp Advantage, *Discover Your Credit History* (2005) <www.mycreditfile.com.au> at 29 August 2006.

64 Baycorp Advantage, *My Credit Alert Information* (2006) <www.mycreditfile.com.au> at 29 August 2006.

65 G Greenleaf, 'The Most Restrictive Credit Reference Laws in the Western World?' (1992) 66 *Australian Law Journal* 672, 674.

5.68 The National Privacy Principles (NPPs) and state privacy legislation enacted since these comments were made,[66] may provide some additional protection. For example, NPP 1 of the *Privacy Act* provides that an organisation must not collect personal information unless the information is necessary for its functions or activities.

5.69 The ALRC is interested in views on whether individuals are asked to provide copies of their credit reports for employment, insurance, licensing or other purposes.

Question 5–7 Is there any evidence that employers, insurers or government agencies request individuals to provide copies of their credit reports for employment, insurance, licensing or other purposes unrelated to the provision of credit? If such requests are made, what steps should be taken to address this issue?

Alteration of files and reports

5.70 Consumer groups have claimed that there are, in practice, no adequate procedures to ensure that inaccurate information is removed from credit information files or credit reports at the request of the individual concerned. Some of these difficulties may arise from the dispute settling procedures for credit reporting, discussed in Chapter 4. Others, however, are seen as arising from the drafting of the credit reporting provisions of the *Privacy Act*.

5.71 The CCLC has noted that, while s 18J requires credit reporting agencies to take reasonable steps to alter files or reports to ensure they are accurate, up-to-date, complete and not misleading, s 18J(2) provides for the inclusion of a statement on the file or report in circumstances where the credit reporting agency 'does not amend' the information in accordance with an individual's request.

5.72 The CCLC submitted that:

> This poor drafting effectively provides no incentive for the credit reporting agency to comply with the requirement of ensuring that the credit report is accurate. In practice, all that the credit reporting agency is required to do under this section is to include a statement of the amendment sought and to notify people nominated by the individual of the amendment made, if any, or the statement of the amendment sought.[67]

5.73 Further, the OPC's credit reporting audits have revealed that a number of credit providers were not even aware of their obligation under s 18J to notify the relevant

66 Eg, *Privacy and Personal Information Protection Act 1998* (NSW); *Information Privacy Act 2000* (Vic).
67 Consumer Credit Legal Centre (NSW) Inc, *Submission PR 28,* 6 June 2006.

credit reporting agency when an individual contends that an overdue payment has been incorrectly listed on his or her credit information file.[68]

5.74 The ALRC is interested in views about individuals' rights of access to, and alteration of, information in credit information files and credit reports, and the appropriateness of existing provisions of the *Privacy Act* dealing with these matters.

Question 5–8 What issues are raised by the provisions of the *Privacy Act* dealing with individuals' rights of access to, and alteration of, information in credit information files and credit reports? How do these provisions operate in practice? What rights of access and alteration should individuals have?

Limits on disclosure by credit reporting agencies

5.75 Section 18K contains detailed provisions placing limits on the disclosure of personal information by credit reporting agencies. These limits are based on the identity of the person or organisation to whom information is disclosed; and the purpose for which the information is to be used.

5.76 In general, credit reporting agencies only may disclose personal information contained in credit information files (for example, a credit report) to those persons who are 'credit providers' as that term is defined in the Act.[69] Issues concerning the definition of a credit provider and, more generally, about the kinds of persons or organisations that should have authority to obtain credit reports, are discussed in more detail below.

5.77 In addition, a credit reporting agency may disclose personal information contained in a credit information file:

- to a mortgage insurer for the purpose of assessing matters connected with the provision of mortgage insurance to a credit provider;[70]
- to a trade insurer for the purpose of assessing matters connected with the provision of trade insurance to a credit provider;[71] and
- as required or authorised by or under law.[72]

---

68 Australian Government Attorney-General's Department, *Response to Questions on Notice for Attorney-General's Portfolio: Senate Legal and Constitutional Legislation Committee Additional Estimates 2003–2004, Questions 38 to 50*, undated, Answer to Q 42.

69 These provisions are summarised in more detail in Ch 3.

70 *Privacy Act 1988* (Cth) s 18K(1)(d).

71 Ibid s 18K(1)(e).

72 Ibid s 18K(1)(m).

Question 5–9 What issues are raised by the provisions of the *Privacy Act* that limit the disclosure of personal information by credit reporting agencies? How do these provisions operate in practice? What limits should apply to the disclosure of personal information by credit reporting agencies?

Disclosure to a 'credit provider'

5.78 An entity is a credit provider under s 11B if the entity is, among other things,

- a bank;
- a corporation a substantial part of whose business or undertaking is the provision of loans;
- a corporation that carries on a retail business in the course of which it issues credit cards; or
- a corporation that provides loans and is included in a class of corporations determined by the Privacy Commissioner to be credit providers for the purposes of the *Privacy Act*.[73]

5.79 A loan is defined to include a hire-purchase agreement or an agreement for the hiring, leasing or renting of goods or services under which full payment is not made or a full deposit is paid for the return of goods.[74]

5.80 The Privacy Commissioner has made three determinations in relation to the definition of credit provider under s 11B. Two of these determinations, which were renewed from August 2006, are discussed below.

Classes of Credit Provider Determination

5.81 Under the Privacy Commissioner's *Credit Provider Determination No. 2006–4 (Classes of Credit Provider)* (Classes Determination)—first made in substantially similar form in 1991—corporations are to be regarded as credit providers if they:

- make loans in respect of the provision of goods or services on terms that allow the deferral of payment, in full or in part, for at least seven days; or

73 Ibid s 11B(1)(b)(v)(B).
74 See, Ibid s 6.

- engage in the hiring, leasing or renting of goods, where no amount, or an amount less than the value of the goods, is paid as deposit for return of the goods, and the relevant arrangement is one of at least seven days duration.[75]

5.82 The Senate Committee privacy inquiry noted concerns about 'the proliferation in entities accessing the credit reporting system'. Baycorp Advantage alone has over 4,500 subscribers.[76] The report of the Senate Committee privacy inquiry stated that:

> Determinations issued by the Privacy Commissioner under Part IIIA of the Privacy Act have extended access to the credit reporting system beyond traditional lenders such as banks to a wide range of retailers and service providers. Video store operators, legal services and healthcare providers, for example, are now deemed to be credit providers.[77]

5.83 The ACA has noted that the broad access to credit reports permitted under the Classes Determination raises concerns because the number of listings being made with credit reporting agencies is increased and, therefore, so is the capacity for errors; and borrowers listed for small debts will suffer the 'disproportionate penalty of denial of credit for larger amounts or services which they require'.[78] The CCLC suggested that many small debts are telecommunications debts and that the Classes Determination should be revoked.[79]

5.84 The policy behind the Classes Determination, as set out in 1991, was that the determination should seek to declare as credit providers as wide a range of businesses as practicable and permissible. The businesses to be covered should be those whose need to access consumer credit information was similar to that of businesses automatically classed as credit providers under the principal categories of s 11B of the *Privacy Act*.[80]

5.85 In 2006, the OPC published a consultation paper on the review of credit provider determinations. The OPC asked whether there was any evidence of systemic issues relating to compliance with the *Privacy Act* by credit providers covered by the Classes Determination.[81]

5.86 In its report, the OPC noted that, in general, industry participants suggested that compliance breaches by credit providers covered by the Classes Determination were no

---

75 Privacy Commissioner, *Credit Provider Determination No. 2006–4 (Classes of Credit Providers)*, 21 August 2006.

76 Baycorp Advantage, *Submission to the Australian Communications and Management Agency on the Draft Standard: Telecommunications (Use of Integrated Public Number Database) Industry Standard 2005*, 1 January 2005.

77 Parliament of Australia—Senate Legal and Constitutional References Committee, *The Real Big Brother: Inquiry into the Privacy Act 1988* (2005), [5.15].

78 C Wolthuizen, 'Reporting on the Credit Reporters' (2004) (Autumn) *Consuming Interest* 6, 7.

79 Consumer Credit Legal Centre (NSW) Inc, *Submission PR 28,* 6 June 2006.

80 Office of the Privacy Commissioner, *Review of Credit Determinations: Consultation Paper No 1* (2006), 10.

81 Ibid, 12.

more frequent than for traditional credit providers.[82] In contrast, the CCLC maintained that non-traditional credit providers do not have systems in place to identify statute-barred debts, to ensure accurate data collection at the time that goods and services are provided, or to comply with the notification requirements of the *Privacy Act*. The CCLC expressed particular concern about the inability of telecommunication organisations, due to the poor application processes for many telecommunications services, to ensure that their information is accurate.[83]

5.87 The OPC stated that telecommunication organisations make up around 20% of credit complaints where there appeared to be a compliance issue and the matter was satisfactorily resolved between the parties.[84] The OPC concluded that while there were recurring issues that required attention, these issues had not prevented the Classes Determination from operating satisfactorily:[85]

> Although the consumer groups responding provide evidence of persisting issues, the input from the complaints handling bodies participating in the review do not support the view that systemic issues exist in relation to the operation of [the Classes Determination].[86]

5.88 The OPC decided to renew the Classes Determination without any substantive amendment. The OPC undertook to develop information sheets and education strategies targeted at businesses covered by the Classes Determination and those operating in the telecommunications sector; and to consider, as resources became available, the development of a credit reporting audit program focusing on non-traditional credit providers.[87]

Question 5–10 What issues are raised by the disclosure of personal information by credit reporting agencies to credit providers covered by the Privacy Commissioner's *Credit Provider Determination No. 2006–4 (Classes of Credit Provider)*?

Assignees Determination

5.89 Under the Privacy Commissioner's *Credit Provider Determination No. 2006–3 (Assignees)* (Assignees Determination)—first made in substantially similar form in 1995—corporations are to be regarded as credit providers for the purposes of the

82 Office of the Privacy Commissioner, *Report on the Review of the Credit Provider Determinations (Assignees and Classes of Credit Providers)* (2006), 13.
83 Ibid, 13. The views of the CCLC were supported by the Consumer Credit Legal Service (Vic) Inc.
84 Ibid, 16.
85 Ibid, 20.
86 Ibid, 21.
87 Ibid, 22.

Privacy Act if they acquire the rights of a credit provider with respect to the repayment of a loan (whether by assignment, subrogation or other means). A corporation deemed to be a credit provider by virtue of the Assignees Determination is regarded as the credit provider to whom the loan application was submitted, or who provided the loan.[88]

5.90 The initial Assignees Determination followed representations from a mortgage insurer taking assignment of a loan upon the default of a borrower. The mortgage insurer wished to be able to obtain a credit report in relation to such a loan as if it were the original credit provider.[89]

5.91 In its consultation paper on the review of credit provider determinations, the OPC asked whether there was any evidence of systemic issues in relation to credit providers covered by the Assignees Determination concerning, in particular:

- the listing of statute-barred debts;
- unlawful double listing of defaults; or
- record keeping necessary for compliance with the *Privacy Act*.[90]

5.92 The OPC's report on the review of the credit provider determinations stated that, in general, the industry participants acknowledged past problems but reported no evidence of current systemic issues. They pointed to improved business practices and implementation of policies, procedures and technology to prevent the listing of statute-barred debts and unlawful double listings by assignees and credit reporting businesses. In contrast, the CCLC contended that these issues remained current problems, as evidenced by case studies.[91]

5.93 The OPC stated that complaints about assignees make up around 18% of credit complaints where there appeared to be a compliance issue and the matter was satisfactorily resolved between the parties.[92] The OPC concluded that the Assignees Determination was operating satisfactorily and should be renewed without substantive amendment. It recommended, however, that education programs should be developed and audit programs considered.[93]

---

88 Privacy Commissioner, *Credit Provider Determination No. 2006–3 (Assignees)*, 21 August 2006.
89 Office of the Privacy Commissioner, *Review of Credit Determinations: Consultation Paper No 1* (2006), 6.
90 Ibid, 7–8.
91 Office of the Privacy Commissioner, *Report on the Review of the Credit Provider Determinations (Assignees and Classes of Credit Providers)* (2006), 6.
92 Ibid, 11.
93 Ibid, 20, 22.

Question 5–11 What issues are raised by the disclosure of personal information by credit reporting agencies to credit providers covered by the Privacy Commissioner's *Credit Provider Determination No. 2006–3 (Assignees)*?

Other issues

5.94 The ALRC is interested in comments on other issues concerning the definition of 'credit provider' that should be addressed by the Inquiry. For example, under s 11B(1)(b)(iii), a corporation is a credit provider if a 'substantial' part of its business or undertaking is the provision of loans. This requirement may create uncertainty for corporations that provide loans as part of their business or undertaking. Broadening the definition may be desirable in order to remove the need for corporations to seek determinations by the Privacy Commissioner.[94]

5.95 Another issue is that while the Privacy Commissioner may determine that corporations[95] or federal government agencies are credit providers for the purposes of the *Privacy Act*,[96] there is no power to determine that a state government agency—for example, a state housing commission—is a credit provider.

Question 5–12 What issues are raised by the definition of a 'credit provider' for the purposes of the *Privacy Act*? How does this definition operate in practice?

Participation in the credit reporting system

5.96 As discussed above, under the credit reporting provisions of the *Privacy Act* the definition of 'credit provider' is the key determinant of whether a person or organisation may obtain credit reports from credit reporting agencies, and report information to be included in credit information files. There are, however, broader issues about who should be permitted to participate in the credit reporting system; and what standards participants should have to comply with, in relation to credit reporting and more generally.

---

94 The OPC considers that the word 'substantial' connotes both value and proportion—so that this aspect of the definition of a credit provider may be satisfied where a corporation's lending activities involve substantial amounts of money, even if such activities are not the dominant part of its overall business: Office of the Privacy Commissioner, *Credit Reporting Advice Summaries* (2001), [1.4].

95 *Privacy Act 1988* (Cth) s 11B(1)(b).

96 Ibid s 11B(1)(d).

5.97 For example, it has been suggested that, in order to participate in the credit reporting system, credit providers should have to comply with the *Consumer Credit Code*.[97] The *Consumer Credit Code*, which has been adopted by all state and territory governments, governs many aspects of credit transactions and provides a range of important protections for consumers.

5.98 These protections include, for example, notice requirements that must be met before a credit provider may begin enforcement proceedings and prescribed periods within which a default may be remedied by the consumer.[98] Some organisations that are recognised as credit providers for the purposes of the credit reporting provisions of the *Privacy Act* are not required to comply with the *Consumer Credit Code*.[99]

5.99 Other issues arise in relation to the classes of organisation that do not meet the current criteria for participation in the credit reporting system but consider that they should be permitted to obtain personal information contained in credit information files. Mercantile agents and others engaged in debt collection, investigation and related activities are one such group. Real estate agents and landlords are another. In relation to the latter, the New Zealand *Credit Reporting Privacy Code 2004* specifically permits a credit reporter to disclose credit information (where authorised by the individual) to a prospective landlord for the purpose of assessing the credit worthiness of the individual as a tenant.[100]

5.100 When considering what classes of persons or organisations should be permitted to obtain credit reports, it is important to understand that participation in the credit reporting system need not be 'all or nothing'. That is, regulation might permit different levels of access to the information contained in credit information files. For example, mercantile agents might be permitted to obtain name and address information in order to locate debtors, but not other details.[101]

---

97 Office of the Privacy Commissioner, *Report on the Review of the Credit Provider Determinations (Assignees and Classes of Credit Providers)* (2006), 15.

98 *Consumer Credit Code* ss 80–81.

99 Office of the Privacy Commissioner, *Report on the Review of the Credit Provider Determinations (Assignees and Classes of Credit Providers)* (2006), 20. The OPC recommended that this issue be dealt with by the ALRC's privacy inquiry (and by the Uniform Consumer Credit Code Management Committee): Office of the Privacy Commissioner, *Report on the Review of the Credit Provider Determinations (Assignees and Classes of Credit Providers)* (2006), 22.

100 *Credit Reporting Privacy Code 2004* (NZ) r 11(2)(b)(ii).

101 This approach is taken in relation to disclosure of personal information by credit providers. Under s 18N(1)(c), a credit provider may disclose certain items of personal information to a debt collector from a credit report, but not others. The information that may be disclosed is limited to identifying information about the individual; information about overdue payments; and information about court judgments and bankruptcy orders: *Privacy Act 1988* (Cth) s 18N(1)(c).

Question 5–13 What persons or organisations should be permitted to obtain personal information contained in credit information files held by credit reporting agencies? How should this aspect of the credit reporting system be regulated? Should regulation permit different levels of access to the information contained in credit information files?

Consent to disclosure of information

5.101 Part IIIA of the *Privacy Act* contains provisions that require the agreement of an individual to the disclosure of his or her personal information. For example, under s 18K, an individual's agreement, sometimes in writing, is required in relation to the disclosure by a credit reporting agency of information contained in a credit report to a:

- credit provider for the purpose of assessing an application for commercial credit;[102]
- credit provider for the purpose of assessing whether to accept the individual as a guarantor;[103]
- trade insurer for the purpose of assessing insurance risks in relation to commercial credit;[104] and
- credit provider for the purpose of collecting payments overdue in respect of commercial credit.[105]

5.102 Further, under s 18N, an individual must have 'specifically agreed' to the disclosure of a credit report or other credit-worthiness information by a credit provider to another credit provider for the particular purpose;[106] to a guarantor for a loan given by the credit provider to the individual concerned;[107] and to a person considering whether to offer to act as a guarantor.[108]

Disclosure to a credit reporting agency

5.103 As noted above, a credit provider must not give personal information to a credit reporting agency unless the individual concerned has been informed that the

102 Ibid s 18K(1)(b).
103 Ibid s 18K(1)(c).
104 Ibid s 18K(1)(e).
105 Ibid s 18K(1)(h).
106 Ibid s 18N(1)(b).
107 Ibid s 18N(1)(bg).
108 Ibid s 18N(1)(bh).

information might be disclosed to a credit reporting agency.[109] There is no express requirement that the individual must have consented to the disclosure. An individual's consent may be required, however, by the NPPs or by common law duties of confidence owed by some credit providers to their customers.

National Privacy Principles

5.104 Under NPP 2.1, an organisation must not use or disclose personal information about an individual for a purpose (the secondary purpose) other than the primary purpose of collection unless:

> (a) both of the following apply:
>
> (i) the secondary purpose is related to the primary purpose of collection and, if the personal information is sensitive information, directly related to the primary purpose of collection;
>
> (ii) the individual would reasonably expect the organisation to use or disclose the information for the secondary purpose; or
>
> (b) the individual has consented to the use or disclosure; …

5.105 The distinction between a primary and secondary purpose is important in many privacy contexts,[110] including in the banking and finance industries. How broadly an organisation can describe the primary purpose needs to be determined on a case-by-case basis and it depends on the circumstances.[111] The OPC's *Guidelines to the National Privacy Principles* state that when an individual provides, and an organisation collects, personal information, they almost always do so for a particular purpose. This is 'the primary purpose of collection even if the organisation has some additional purposes in mind'.[112]

5.106 Finance industry representatives have stated that how a primary purpose is defined 'continues to be an area of confusion'.

> For example, when information is collected as a result of a customer submitting an application for finance in the narrowest sense processing the application for finance is the primary purpose of collection. However, on a broader interpretation, and in our view one better aligned with the Parliament's policy objectives, the primary purpose could equally be described as the provision of finance. This broader defined purpose would include more than just assessing the application, but managing the account, administering insurance claims, recovering any money owed and maintaining the value of any asset the subject of security.[113]

---

109 Ibid s 18E(8).

110 See, eg, Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006), [8.162]–[8.171] (in relation to health information).

111 Office of the Federal Privacy Commissioner, *Guidelines to the National Privacy Principles* (2001), 35.

112 Ibid, 35.

113 Australian Finance Conference, *Submission to the Office of the Privacy Commissioner Review of the Private Sector Provisions of the Privacy Act 1988*, 22 December 2004.

5.107 Even on a broad conception of the primary purpose, however, it is hard to argue that the disclosure of information by a credit provider to a credit reporting agency is for the primary purpose of collection. Disclosure does not directly serve purposes connected with the provision of finance by the credit provider to the particular individual. Rather, the information is disclosed so that it may be used in the future, including by other credit providers in assessing other loan applications. For the same reason, disclosure is unlikely to be considered a related secondary purpose for the purposes of NPP 2.1(a).

Bankers' duty of confidentiality

5.108 Consent to disclosure also may be required—at least where the credit provider is a bank[114]—to avoid breaching the duty of confidence owed by banks to their customers. This common law duty was defined in *Tournier v National Provincial and Union Bank of England*.[115]

5.109 This duty is reflected in the Australian Bankers' Association's *Code of Banking Practice*, which provides that, in addition to a bank's duties under legislation, it has a general duty of confidentiality towards a customer except in the following circumstances: where disclosure is compelled by law; where there is a duty to the public to disclose; where the interests of the bank require disclosure; or where disclosure is made with the express or implied consent of the customer.[116]

Bundled consent

5.110 Bundled consent refers to the practice of bundling together consent to a wide range of uses and disclosures of personal information without giving individuals an opportunity to choose which particular uses and disclosures they agree to and which they do not.[117]

5.111 The Senate Committee privacy inquiry related concerns over the use of bundled consent whereby consent to disclose personal information to a credit reporting agency is 'bundled' into a group of other consents in credit or loan applications.[118] For credit reporting agencies and credit providers, the consents may include those required under the credit reporting provisions and the NPPs. For example, Baycorp Advantage noted that:

---

114 The duty may also apply to building societies, credit unions and other authorised deposit-taking institutions: A Tyree, 'Does Tournier Apply to Building Societies?' (1995) 6 *Journal of Banking and Finance Law and Practice* 206.

115 *Tournier v National Provincial & Union Bank of England* [1924] 1 KB 461. The duty extends to disclosure to related bodies corporate: *Bank of Tokyo Ltd v Karoon* [1987] AC 45, 53–54.

116 Australian Bankers Association, *Code of Banking Practice* (1993), [12.1].

117 Office of the Privacy Commissioner, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988* (2005), 86.

118 Parliament of Australia—Senate Legal and Constitutional References Committee, *The Real Big Brother: Inquiry into the Privacy Act 1988* (2005), [5.6].

> In the credit reporting business and to a lesser degree in the marketing solutions business Baycorp Advantage relies on the consent obtained by our customers from their consumers, and will provide advice to customers on the form of consent sought. This consent will sometimes be bundled, to include for example a credit assessment purpose, as well as a marketing purpose.[119]

5.112 Baycorp Advantage stated that 'practices such as bundled consent indisputably create more efficient processes for a wide range of businesses' and that restrictions on the ability to obtain consent in this manner would

> have an unnecessarily burdensome impact on the ability of businesses to operate efficiently, and especially their capacity to rely on specialist service providers such as Baycorp Advantage.[120]

5.113 The contrasting position of consumer organisations was highlighted by the Senate Committee privacy inquiry, which noted:

> Consumer advocates argue that the relevant forms and disclosure statements can be unreadable, confusing and appear designed not to invite consumers to read it. Others argued that the market power of credit providers effectively negates any notion that a person is genuinely 'consenting' to how their personal information is to be handled … For these reasons, it was argued that reform is required to mandate standards for privacy and consent clauses.[121]

5.114 The OPC's review of the private sector provisions of the *Privacy Act* also considered the issue of bundled consent. The OPC concluded that bundled consent may confuse consumers and may derogate from their rights under the Act. The OPC noted that there is possible tension between the desirability of short form privacy notices and the desirability of lessening the incidence of bundled consent, and stated that it would develop guidelines on bundled consent.[122]

5.115 The issue of bundled consent is discussed more generally in the ALRC Issues Paper *Review of Privacy* (IP 31).[123] The ALRC is also interested in comments on the issues as they arise in the context of the credit reporting industry specifically.

Question 5–14 What issues are raised by the practice of credit providers seeking 'bundled consent' to a number of uses and disclosures of personal information, including in relation to credit reporting?

---

119 Baycorp Advantage, *Submission to the Senate Legal and Constitutional References Committee Inquiry into the Privacy Act 1988*, 16 March 2005.

120 Ibid.

121 Parliament of Australia—Senate Legal and Constitutional References Committee, *The Real Big Brother: Inquiry into the Privacy Act 1988* (2005), [5.6].

122 Office of the Privacy Commissioner, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988* (2005), 92.

123 Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006), [4.90]–[4.92].

Question 5–15 Is reliance on the principle of consent to protect the privacy of personal information in credit reporting effective? What alternative approaches are available to protect individuals' information privacy?

Limits on use of credit reports by credit providers

5.116 Section 18L limits the use by credit providers of personal information contained in credit reports. In broad terms, credit providers may only use credit reports:

- to assess applications for credit;
- assess whether to accept a person as a guarantor of a loan;
- to assist an individual to avoid defaulting where the credit provider is a current credit provider;
- to collect overdue payments in respect of credit;
- for internal management purposes relating to the provision or management of loans; or
- in connection with a serious credit infringement.[124]

5.117 The ALRC is interested in comments on the existing statutory limits on the use by credit providers of personal information contained in credit reports. For example, one issue that has been raised is whether credit providers should be able to use credit reports to 'exclude' individuals from offers to increase credit limits or refinance loans.

Question 5–16 What issues are raised by the provisions of the *Privacy Act* that limit the use by credit providers of personal information contained in credit reports? How do these provisions operate in practice? What limits on the use by credit providers of personal information contained in credit reports should apply, for example, in relation to marketing?

124 These provisions are summarised in more detail in Ch 3.

Notification of adverse credit reports

5.118 Under s 18M, when an individual's application for credit is refused based wholly or partly on a credit report, the credit provider must give the individual written notice of that fact and advice about the individual's right to obtain access to his or her credit information file held by the credit reporting agency.

5.119 OPC credit reporting audits have found that some credit providers failed to meet their obligations to inform applicants in writing when an application for credit was declined wholly or partly on the basis of an adverse credit report.[125] In any case, it has been suggested that the obligation under s 18M is insufficient to ensure that individuals are made aware of the information in their credit information files. The report of the Senate Committee privacy inquiry noted that:

> Consumer advocates and representatives maintain that consumers are not informed of listings or inquiries made on their credit reports or even that they have a credit report. The fact that a credit report contains adverse information is generally only brought to consumers' attention when they are denied credit. This, it is argued, denies consumers the opportunity to check information held on them and to correct it.[126]

5.120 As noted above, credit reporting agencies offer, for a fee, to notify individuals of additions or changes to their credit information files, but few individuals use these services or take an active interest in the management of their credit records.[127] Consumer groups have suggested that there should be an obligation to notify individuals when adverse information is added to their file.[128] The CCLC stated that notification should occur at the time that information is to be disclosed:

> Currently, this is *not* the case with credit reporting of defaults and clearout listings. Often the individual consents to the listing of the default at the time of the application, which is often *years* before the actual default is listed.[129]

5.121 The CCLC argued that individuals have a reasonable expectation that they will be informed when information is disclosed to a credit reporting agency.[130] In this context, the TIO has noted that it receives complaints about consumers not being notified of a company's intention to default list an account.[131]

5.122 The CCLC submitted that credit reporting agencies should be obliged to notify an individual that a default or a serious credit infringement has been listed on his or her

---

125 Office of the Federal Privacy Commissioner, *The Operation of the Privacy Act Annual Report: 1 July 2002–30 June 2003* (2003), 81.
126 Parliament of Australia—Senate Legal and Constitutional References Committee, *The Real Big Brother: Inquiry into the Privacy Act 1988* (2005), [5.9].
127 Ibid, [5.10].
128 Ibid, [5.18].
129 Consumer Credit Legal Centre (NSW) Inc, *Submission PR 28,* 6 June 2006 (emphasis in original).
130 Ibid.
131 Telecommunications Industry Ombudsman, *Annual Report 2004–05* (2005), 31.

credit report within 14 days of listing and provide information about how to dispute an inaccurate listing at the same time.[132]

Question 5–17 What issues are raised by the provisions of the *Privacy Act* requiring individuals to be notified when an application for credit is refused based wholly or partly on a credit report? How do these provisions operate in practice? What obligations should apply when an application for credit is refused based on a credit report?

Limits on disclosure by credit providers

5.123 Section 18N places limits on the disclosure of personal information by credit providers.[133] The provision details more than 20 circumstances in which a credit provider may disclose information contained in 'reports relating to credit worthiness'. These circumstances include disclosure:

- to a credit reporting agency;
- with the individual's specific agreement;
- to the guarantor of a loan or to enforce the guarantee;
- to a mortgage insurer;
- to state or territory government bodies dealing with mortgage credit;
- to facilitate credit card and Electronic Funds Transfer at Point of Sale (EFTPOS) transactions;
- to the assignee of a debt to the credit provider;
- for debt collection; and
- to another credit provider who shares the same property security for mortgage credit.

5.124 In some cases, the section also limits the kinds of information that may be disclosed. For example, s 18N(1)(be) permits the disclosure of personal information to

132 Consumer Credit Legal Centre (NSW) Inc, *Submission PR 28,* 6 June 2006.
133 The limits on disclosure are summarised in Ch 3.

a person or body supplying goods or services to an individual who intends to pay by credit card or electronic funds transfer. The information that may be disclosed is limited to information reasonably necessary to identify the individual, and as to whether the individual has access to funds sufficient to meet the payment concerned.

5.125 Section 18N applies to information contained in 'reports relating to credit worthiness'. A 'report' is defined, for the purposes of the section, as

> (a) a credit report; or
>
> (b) …any other record or information, whether in a written, oral or other form, that has any bearing on an individual's credit worthiness, credit standing, credit history or credit capacity;
>
> but does not include a credit report or any other record or information in which the only personal information relating to individuals is publicly available information.[134]

5.126 Consequently, s 18N(9) protects a broader category of information than other provisions of Part IIIA, which protect information contained in a 'credit report' or 'credit information file'. For example, while the disclosure by a credit provider of this broader category of information is protected, credit providers' obligations to ensure the accuracy and security of information under s 18G apply only to information in a credit report—that is, information provided by a credit reporting agency.

5.127 The ALRC is interested in comments on the existing statutory limits on the disclosure by credit providers of personal information contained in reports relating to credit worthiness.

Question 5–18 What issues are raised by the provisions of the *Privacy Act* placing limits on the disclosure by credit providers of personal information contained in reports relating to credit worthiness? How do these provisions operate in practice? How should the disclosure by credit providers of personal information relating to credit worthiness be regulated?

Question 5–19 What issues are raised by the application of s 18N of the *Privacy Act* to 'reports', as defined by s 18N(9)? Should information relating to credit worthiness that is not contained in a credit report be left to be covered by the disclosure principles in NPP 2.1 of the National Privacy Principles?

Other limits on use or disclosure

5.128 Section 18P places limits on the use or disclosure of personal information contained in credit reports by mortgage insurers or trade insurers. In broad terms, a mortgage or trade insurer must only use a credit report for purposes connected with

134 *Privacy Act 1988* (Cth) s 18N(9).

providing insurance to a credit provider in respect of mortgage credit. A trade insurer must only use a credit report for purposes connected with providing insurance to a credit provider in respect of commercial credit.

5.129 Section 18Q places limits on the use of personal information obtained from credit providers by: a corporation that is related to the credit provider; a corporation that proposes to use the information in connection with an assignment or purchase of debt; or a person who manages loans made by the credit provider.

Question 5–20 What issues are raised by the provisions of the *Privacy Act* placing limits on the use or disclosure of personal information contained in credit reports by those corporations or persons covered by ss 18P and 18Q of the *Privacy Act*? How do these provisions operate in practice? How should the use or disclosure of personal information by these corporations or persons be regulated?

Debt collection

5.130 Credit providers may use credit reports to assist them in recovering overdue payments.[135] A credit provider, in this context, may include a debt collection agency that has purchased debts from a credit provider.

5.131 In addition, a credit provider may disclose certain items of personal information from a credit report to a debt collector for the purpose of collecting overdue payments. The information that may be disclosed is limited to identifying information about the individual; information about overdue payments; and information about court judgments and bankruptcy orders.[136]

5.132 Mercantile agents and others engaged in debt collection and related activities have expressed concern because they are not permitted to obtain personal information on credit information files directly from credit reporting agencies.[137] This is said to hamper the ability of mercantile agents to locate debtors and, more generally, to assist small businesses in risk management.[138]

---

135 Ibid s 18K(1)(g) permits credit reporting agencies to disclose information to credit providers for this purpose.

136 Ibid s 18N(1)(c).

137 The Institute of Mercantile Agents represents debt collectors, investigators, process servers and repossession agents.

138 Institute of Mercantile Agents and Australian Collectors Association Symposium on Privacy, *Consultation PM 15*, Sydney, 23 November 2006.

5.133 Other issues arise in relation to credit reporting and debt collection. For example, based on the results of a 2004 online survey, the CCLC has stated that problems include individuals being threatened with having a default listed as a 'collection tool'.

> A default listing seriously affects a person's ability to get credit for the duration of the listing … Consequently the threat of listing is a real threat. Using listing as a threat, or actually listing, gives the collector considerable leverage in its relationship with the debtor. About one half of the respondents to the surveys reported that the debt collector or creditor had threatened to report a default on the respondent's credit report and/or to ruin his or her credit rating.[139]

5.134 It is also claimed that debt collectors may list defaults that are disputed by the individuals concerned. This may have the effect of coercing individuals to pay off debts for which they are not liable in order to have the listing removed.[140] The CCLC stated that credit providers or debt collectors should not be able to list a debt when the alleged debtor has denied liability for the debt until liability is ascertained.

5.135 The CCLC also has expressed concern at debt collectors using the credit reporting system to obtain up-to-date address information; listing individuals without notification; listing statute-barred debts; and listing individuals they cannot locate as having committed a serious credit infringement.[141]

Question 5–21 What issues are raised by the use of the credit reporting system in debt collection? How should the use of personal information contained in credit information files and credit reports for debt collection be regulated?

Credit reporting, identity verification and identity theft

5.136 Personal information contained in credit information files assists in verifying the identity of individuals engaging in financial transactions. For example, a credit report is worth 35 points under the 100 point identity verification test provided for under the *Financial Transaction Reports Act 1988* (Cth).

5.137 Credit information files also have the potential to be used in electronic verification and identification. Electronic verification and identification involves verifying identity information provided by individuals, by comparing it with information contained in databases.

---

139 Consumer Credit Legal Centre (NSW) Inc, *Report in Relation to Debt Collection* (2004), 62.
140 Consumer Credit Legal Centre (NSW) Inc, *Submission PR 28,* 6 June 2006.
141 Consumer Credit Legal Centre (NSW) Inc, *Report in Relation to Debt Collection* (2004), 62.

5.138 Issues concerning the use of credit reporting information in electronic verification and identification have been raised in the context of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (Cth). The Bill builds on existing obligations imposed under the *Financial Transaction Reports Act*, including in relation to the identification and verification of customers by reporting entities, such as banks, finance companies and other credit providers.

5.139 Baycorp Advantage has expressed concern that the *Privacy Act* may prohibit the use of credit information files in electronic identification and verification.[142] In particular, s 18K places detailed limits on the disclosure of personal information by credit reporting agencies, and makes no express provision for identity checks. The ALRC is interested in comments on the potential use of information held by credit reporting agencies in electronic identification and verification.

5.140 More generally, it may be desirable for the credit reporting provisions of the *Privacy Act* to provide expressly for the problem of identity theft—the theft or assumption by a person of the pre-existing identity of another person.[143] In the United States, under the *Fair Credit Reporting Act 1970* (US), an individual may, in defined circumstances, require that a credit reporting agency insert a 'fraud alert' on a credit information file. A fraud alert is a statement that notifies prospective users of a credit report that the individual concerned 'may be a victim of fraud, including identity theft'.[144]

Question 5–22 What issues are raised by the possible use of credit information files for electronic identification and verification? How should the use of credit information files for electronic identification and verification be regulated?

Question 5–23 Should credit reporting regulation provide expressly for the problem of identity theft, for example, by permitting credit reports to contain information that the individual concerned has been the subject of identity theft?

142 Baycorp Advantage Ltd, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006*, 17 November 2006.

143 See Australasian Centre for Policing Research and Australian Transaction Reports and Analysis Centre Proof of Identity Steering Committee, *Standardisation of Definitions of Identity Crime Terms: A Step Towards Consistency* (2006), 15.

144 *Fair Credit Reporting Act 1970* 15 USC § 1681 (US) § 1681c–1.

Debts of children and young people

5.141 Some concerns have been expressed about credit information files and credit reports concerning individuals under the age of 18—especially in relation to the listing of debts by telecommunication companies in relation to mobile telephone contracts.[145]

5.142 Decisions regarding consumer credit can have a long term impact if the young person is then unable to meet the commitments and is listed as having a bad credit record. The effect may not be immediate, but may have repercussions some years later when the young person is in need of credit. A question was raised as to whether any person under the age of 18 has the developmental capacity to consider the long term consequences of these decisions.[146]

5.143 This 'protective' approach is reflected in the common law, where contracts are not binding on a person under the age of 18 unless it is a contract for 'necessaries'. The common law applies in all Australian states and territories except New South Wales, where legislation has modified the common law position and focuses on the contract being for the 'benefit' of the child or young person, where the child or young person is sufficiently mature to understand his or her participation in the contract.[147]

5.144 Some 89% of 13–19 year olds in Melbourne and Sydney own a mobile telephone.[148] While many companies are mindful of the law of contract applying to under 18s, and many mobile telephone contracts are signed by adults on behalf of young people, nevertheless young people regularly purchase mobile telephones in their own name or sign contracts for future telecommunications services in their own name.[149]

5.145 Other young people may enter contracts with banks or other financial institutions for loans or credit cards. While some seek loans or credit facilities due to the need to live independently, others may complete offers for credit cards inadvertently sent to them as part of a marketing campaign. Other young people may accumulate a debt by not paying a fine, such as parking fines, or fines issued for public transport ticket violations.

---

145 New South Wales Commission for Children and Young People, *Consultation PC 34*, Sydney, 18 July 2006.

146 Ibid.

147 *Minors (Property and Contracts) Act 1970* (NSW). Some limited exceptions to the common law apply in the other states and territories: see L Blackman, *Representing Children and Young People: A Lawyers Practice Guide* (2002), 240.

148 Newspoll study cited at Australian Mobile Telecommunications Association, *Tech Talk: Cool Stuff on Mobs + Technology* (2005) Str8 Tlk: Information for Young People on Mobiles <www.str8tlk.mata.org.au> at 10 November 2006.

149 A 1999 Australian study indicated that 48% of young people under the age of 18 with a mobile telephone signed the contract in their own name: A Funston and K MacNeill, *Mobile Matters: Young People and Mobile Phones* (1999) Communications Law Centre, 3.

5.146 Where credit obligations are not discharged, telecommunications companies and other credit providers may list overdue payment information with a credit reporting agency. Such information can remain on the individual's credit information file for up to five years and prejudice a young person's future access to credit. This may be the case even where the legality of the contract is in question.

5.147 There are also issues around the use of children's names to facilitate identity theft. Children are a common target for identity theft as they will usually have unblemished credit records, or no records at all.[150] As children are not usually credit users, the identity theft may not be discovered for some time. Often those that perpetrate the identity theft are family members or someone known to the family.[151]

Question 5–24 What issues are raised by credit information files and credit reports about children and young people? How should the collection, use and disclosure of personal information relating to children and young people be regulated?

Commercial credit

5.148 The *Privacy Act* distinguishes between consumer and commercial credit. The term 'credit' for the purposes of the credit reporting provisions is defined to encompass consumer credit only—that is, credit that is intended to be used wholly or primarily for domestic, family or household purposes.[152] Commercial credit is defined to mean a loan other than of a kind referred to in the definition of credit.[153]

5.149 The credit reporting provisions of the Act generally seek to regulate only consumer credit. The provisions were 'intended to protect privacy by recognising a distinction between personal affairs and business affairs'.[154]

5.150 The *Privacy Act*, however, permits credit reports to contain information about commercial credit.[155] It contains complex provisions to the effect that information about consumer credit can be used in commercial credit transactions, and vice versa,

150 M Bosworth, 'Sen Clinton Targets Child Identity Theft', *ConsumerAffairsCom*, 31 October 2006, <www.consumeraffairs.com>.

151 P Conty, *Child Identity Theft Crime Occurrences Increasing* (2005) Hansconian Online <www.hanscom.af.mil/hansconian> at 13 November 2006.

152 See *Privacy Act 1988* (Cth) s 6(1) definition of 'credit'.

153 See Ibid s 6(1) definition of 'commercial credit'.

154 G Greenleaf, 'The Most Restrictive Credit Reference Laws in the Western World?' (1992) 66 *Australian Law Journal* 672, 673.

155 *Privacy Act 1988* (Cth) s 18E(1)(b).

provided that agreement of the individual concerned is obtained.[156] In 1992, Professor Greenleaf commented that:

> As a result, there is little real restriction on interconnections between consumer credit and commercial credit reporting, but no privacy protections such as access or correction rights provided in relation to 'commercial credit' information.[157]

5.151 Since these comments were made, the *Privacy Amendment (Private Sector) Act 2000* (Cth) extended the coverage of the *Privacy Act* to private sector organisations through the operation of the NPPs (including NPP 6, which provides for rights of access and correction).[158] The ALRC is interested in comments on the appropriateness of continuing to distinguish between consumer and commercial credit in privacy regulation.

Question 5–25 Is the distinction in the credit reporting provisions of the *Privacy Act* between consumer and commercial credit necessary? Should personal information about consumer and commercial credit worthiness be regulated by the same statutory provisions?

Publicly available information

5.152 The permitted content of credit information files includes some categories of publicly available information, notably information about court judgments and bankruptcy orders.[159] Some identifying particulars, such as an individual's current address, also may be publicly available. Other publicly available information is left unregulated, provided that it is kept separate from other information that affects credit worthiness.[160]

5.153 This position was identified as a significant limitation in the protection provided by the credit reporting provisions. Professor Greenleaf stated, in 1992:

> Any private sector organisation can therefore keep and disseminate information about matters such as default judgments or bankruptcy without providing even basic privacy rights such as access or correction. Credit bureaus can also keep such information separately, and none of the consumer rights, or criminal offences, which apply to the other consumer records kept by them, will apply … This limitation has, in effect, created a distinction between regulated and unregulated consumer credit reporting.[161]

---

156 Ibid ss 18K(1)(b); 18L(4).

157 G Greenleaf, 'The Most Restrictive Credit Reference Laws in the Western World?' (1992) 66 *Australian Law Journal* 672, 673.

158 The relationship between the credit reporting provisions of pt IIIA and the NPPs is discussed in more detail in Ch 3.

159 *Privacy Act 1988* (Cth) s 18E(1)(viii)–(ix).

160 See Ibid ss 6(1) (definition of 'credit reporting business'), 18K(1)(k), 18N(9).

161 G Greenleaf, 'The Most Restrictive Credit Reference Laws in the Western World?' (1992) 66 *Australian Law Journal* 672, 673.

5.154 Since these comments were made, the *Privacy Amendment (Private Sector) Act 2000* (Cth) extended the coverage of the *Privacy Act* to private sector organisations through the operation of the NPPs. The NPPs protect personal information that is held, or collected for inclusion, in a 'record'.[162] Personal information includes information that is publicly available, whether in a 'generally available publication' or otherwise. Separate records of publicly available personal information held by credit reporting agencies or credit providers will, therefore, be covered by the NPPs.

5.155 Questions remain, however, about the appropriateness of regulating some categories of publicly available information under Part IIIA, but not others. For example, if a credit reporting agency holds publicly available information about court judgments in separate records—rather than in credit information files—the information can be retained indefinitely as there are no specified time limits for retention under the NPPs. If governed by Part IIIA, the information would have to be deleted five years after the judgment was made.[163]

5.156 Additional complexity concerning the regulation of publicly available information arises from s 18K(2). This provision prohibits a credit reporting agency from disclosing 'personal information contained in an individual's credit information file, or in any other record containing information derived from the file', if the information is not permitted content of a credit information file.[164] If, as seems likely, a credit report is considered to be 'derived' from a credit information file, it is not clear whether s 18K(2) allows the disclosure of publicly available information by a credit reporting agency where that information is not permitted content under s 18E.

5.157 Access to other categories of publicly available information when processing credit applications is said to be increasingly important to the finance industry. In a submission to the Senate Committee privacy inquiry, Baycorp Advantage suggested that the range of publicly available information that can be used for business purposes should be reviewed. In particular, it stated that publicly available information helps to distinguish between different individuals' data.

> Moreover, Baycorp Advantage submits that identification and information-based document verification services will become more important in the future. Identification theft is a significant problem and it is vital that sufficient systems are in place to protect credit providers and other groups that bear the risk of fraudulent behaviour in respect of identification details.[165]

---

162 A 'record' is defined as a document, a database, or a photograph or other pictorial representation: *Privacy Act 1988* (Cth) s 6(1).

163 Ibid s 18F(2)(e).

164 That is, under Ibid ss 18E and 18F.

165 Baycorp Advantage, *Submission to the Senate Legal and Constitutional References Committee Inquiry into the Privacy Act 1988*, 16 March 2005.

5.158 Another credit reporting agency, Dun and Bradstreet, has suggested that credit reporting agencies should be able to collect information from state government births, deaths and marriages registries in order to combat identity fraud.[166]

5.159 Greater use of publicly available information in credit reporting may create problems. For example, OPC credit reporting audits have highlighted instances where 'processes used in the collection of publicly available information need to be improved'.[167]

5.160 IP 31 asked what privacy issues are raised generally by the publication in electronic form of publicly available records such as public records, court records and media reports and whether the *Privacy Act* needs to be amended in response to these issues.[168] The ALRC is also interested in comments on issues concerning the use of publicly available information in credit reporting specifically.

Question 5–26 What issues are raised by the collection of publicly available personal information for use in credit reporting? How should the collection, use and disclosure of such information be regulated?

Application to foreign credit providers

5.161 There is some uncertainty about the application of the credit reporting provisions to foreign credit providers and loans. Under the *Privacy Act*, a credit provider is defined to include a corporation if a substantial part of its business or undertaking is the provision of loans.[169] In turn, a corporation includes a foreign corporation within the meaning of s 51(xx) of the *Australian Constitution*.[170]

5.162 On the other hand, the provisions of the *Privacy Act* dealing with its application to acts and practices outside Australia do not apply to the credit reporting provisions.[171] In particular, the Privacy Commissioner is not empowered to take action outside Australia to investigate credit reporting complaints.[172]

5.163 There has been some concern about: (a) the listing on credit information files of information about foreign credit; and (b) the disclosure of credit reports to foreign credit providers. For example, as some credit reporting agencies operate in both New

166 P Switzer, 'Identity Crisis' (2006) (January) *Charter* 1. Information in state births, deaths and marriages registries is not made publicly available until the expiry of certain periods prescribed by legislation.
167 Office of the Federal Privacy Commissioner, *The Operation of the Privacy Act Annual Report: 1 July 2003–30 June 2004* (2004), 66.
168 Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006), [11.94]–[11.104]; Question 11–5.
169 See *Privacy Act 1988* (Cth) s 11B.
170 Ibid s 6(1) definitions of 'corporation' and 'foreign corporation'.
171 Ibid s 5B(1).
172 Ibid s 5B(4).

Zealand and Australia, individuals applying for credit in Australia may have default listings relating to loans from New Zealand credit providers.

5.164 The OPC faces difficulties in investigating complaints about information from foreign credit providers, given limitations on the extra-territorial operation of Part IIIA. In response to these concerns, Baycorp Advantage agreed not to include information about foreign loans in its credit reports.

5.165 More generally, there may be no means to ensure that a foreign credit provider complies with any of the obligations of credit providers under Part IIIA—for example, in relation to notifying individuals that information may be disclosed to a credit reporting agency.

Question 5–27 Should information from foreign credit providers or about foreign loans be permitted in credit information files and credit reports? Should foreign credit providers be permitted to obtain credit reports and, if so, in what circumstances? What issues are raised in relation to the enforcement and extra-territorial operation of the credit reporting provisions? How should these matters be regulated?

Question 5–28 Are there any other issues in relation to the content and drafting of Part IIIA of the *Privacy Act* that the ALRC should consider in the context of this Inquiry?

6. Comprehensive Credit Reporting

Contents

Introduction 111
Definitional issues 112
Terminology: 'positive' credit reporting? 112
What personal information is included in comprehensive credit reporting? 113
Australia's approach to comprehensive credit reporting 114
Current law 114
Government inquiries 115
Deficiencies in the current system of credit reporting 117
Will more comprehensive credit reporting address present deficiencies? 119
Background 119
Possible benefits of more comprehensive credit reporting 119
Possible disadvantages of more comprehensive credit reporting 121
Alternatives to comprehensive credit reporting 123
Regulation in other jurisdictions 125
New Zealand 125
United States 126
United Kingdom 127
Other jurisdictions 128
Lessons for Australia 129
Regulatory framework for more comprehensive credit reporting 130
New information to be included in credit reporting 130
Consequential changes if more comprehensive credit reporting introduced 131
Types of 'credit reporter' 131
Regulator 132
Access and additional privacy safeguards 133

Introduction

6.1 This chapter considers proposals to extend the current system of credit reporting to permit a broader spectrum of personal financial information to be collected and disclosed as part of the credit reporting process.

6.2 As explained in Chapter 3, the *Privacy Act 1988* (Cth) restricts the types of personal information that may be collected and disclosed in the course of credit reporting. Broadly speaking, the Act mainly permits the collection and disclosure of personal information that detracts from an individual's credit worthiness—such as the

fact that an individual has defaulted on a loan. This is commonly referred to as 'negative' or 'delinquency-based' credit reporting.

6.3 There has been a strong push by some stakeholders to expand the types of personal information that may be collected and disclosed in the credit reporting process. While these proposals differ in their detail, the common unifying feature is a system that permits the reporting of personal information relating to an individual's current credit commitments. This is sometimes referred to as 'positive' or 'comprehensive' credit reporting.

6.4 This chapter asks whether credit reporting should be expanded in this way and, if so, how it should be regulated. The chapter summarises a number of the main arguments for and against such an expansion of credit reporting. It also outlines some possible models of comprehensive credit reporting schemes, taking account of developments in other jurisdictions.

Definitional issues

Terminology: 'positive' credit reporting?

6.5 In order to understand the debate about whether credit reporting should be expanded to permit the collection and disclosure of a wider spectrum of personal information, it is important to note an important feature of the terminology that is used. Much of the literature distinguishes between two distinct systems of credit reporting: 'negative' and 'positive' credit reporting.[1]

6.6 The difference between these two sorts of credit reporting is said to lie in the kinds of personal information that can be collected as part of the credit reporting process. As the term suggests, negative credit reporting involves 'negative' information—that is, information that detracts from an individual's credit worthiness, such as the fact that an individual has defaulted on a loan. On the other hand, positive credit reporting is said to involve 'positive' information about an individual's credit position and includes information relating to an individual's current credit commitments. An example of information in this category is a record of an individual having made a loan repayment.

6.7 The terms 'negative' and 'positive' credit reporting are convenient shorthand expressions, insofar as they distinguish between what is permitted under the current law (negative reporting) and what may be permitted if the current restrictions on reporting were relaxed (positive reporting). However, the term 'positive credit reporting' may in fact be misleading because information collected through a positive credit reporting scheme can, in reality, be positive (in the sense of enhancing an

1 See, eg, Consumer Affairs Victoria, *The Report of the Consumer Credit Review* (2006); Parliament of Australia—Senate Legal and Constitutional References Committee, *The Real Big Brother: Inquiry into the Privacy Act 1988* (2005).

individual's credit worthiness) or negative (that is, detracting from credit worthiness) depending on the particular situation.[2]

6.8 Therefore, a debate on whether 'positive' information should be included in credit reporting runs the risk of introducing a false premise—namely, that all information in this category would enhance the credit worthiness of the individual concerned. It is important that the debate be framed more clearly. As a result, the focus of this chapter is on whether it is appropriate to *expand* the categories of personal information involved in credit reporting and, if so, how.

6.9 Partly as a response to this semantic problem, some terms have been developed as alternatives to the term 'positive' credit reporting. The alternative term with the widest currency is 'comprehensive' credit reporting.[3] This term is preferable because it conveys more clearly that the information covered will not necessarily assist, nor hamper, an individual's application for credit. 'Comprehensive' in this context does not necessarily mean 'all' conceivable personal information of a financial nature that relates to an individual's credit worthiness. It is more appropriate, therefore, to talk about a *more comprehensive* system of credit reporting because this more accurately conveys the idea that what is being proposed is an expansion of credit reporting, but the precise extent of this expansion is a matter for further debate.

6.10 While the use of the term 'positive' credit reporting has become prevalent in describing proposals to expand credit reporting in Australia, the ALRC is of the view that 'comprehensive' or 'more comprehensive' credit reporting represent clearer and more accurate short-hand expressions. Therefore, when the terms 'comprehensive' or 'more comprehensive' credit reporting are used in this chapter, they simply refer to a system of credit reporting that permits more types of personal information to be collected and used in credit reporting than is currently allowed under the *Privacy Act*.

What personal information is included in comprehensive credit reporting?

6.11 Even if it is assumed that more comprehensive credit reporting should be introduced in Australia, this does not suggest any particular regulatory structure, nor

---

2 See, eg, Centre for International Economics and Edgar Dunn and Company, *Options for Implementation of Comprehensive Credit Reporting in Australia [Prepared for MasterCard Worldwide]* (2006), 2; Consumers' Federation of Australia, *Full-File Credit Report: Is it Really the Answer to Credit Overcommitment?* (2005) <www.consumersfederation.com/creditreporting.htm> at 2 November 2006, 1; Commonwealth, *Parliamentary Debates*, Senate, 2 November 1989, 2788 (N Bolkus—Minister for Consumer Affairs).

3 See, eg, Centre for International Economics and Edgar Dunn and Company, *Options for Implementation of Comprehensive Credit Reporting in Australia [Prepared for MasterCard Worldwide]* (2006). Another synonym is 'full-file reporting': see, eg, Consumers' Federation of Australia, *Full-File Credit Report: Is it Really the Answer to Credit Overcommitment?* (2005) <www.consumersfederation.com/creditreporting.htm> at 2 November 2006, 1.

does it indicate precisely what personal information would be included in credit reporting. This is because there is no one universal model of comprehensive credit reporting.

6.12 It is possible, however, to generalise about what categories of personal information are commonly included in a regulatory system that permits more comprehensive credit reporting.[4] Most jurisdictions that permit some form of more comprehensive credit reporting include some or all of the following types of personal information:

- information about an individual's current loans or credit facilities, including the balances;
- an individual's repayment history;
- information about an individual's bank and other accounts, including the identity of the institution where the account is held and the number of accounts held; and
- further information than is currently permitted under the *Privacy Act* relating to overdue or defaulted payments.[5]

6.13 There have also been some specific proposals to introduce more comprehensive credit reporting in Australia.[6] Reform to permit the collection and use of such categories of personal information in credit reporting would represent a significant extension of the current system.[7]

Australia's approach to comprehensive credit reporting

Current law

6.14 As noted above, comprehensive credit reporting is currently prohibited under the *Privacy Act*. This prohibition derives from the interaction of ss 18E and 18K.[8]

6.15 Section 18E sets out what information may be included in a credit information file. The section provides that a credit reporting agency may include information that

---

4 It should be emphasised that the personal information must relate to the individual's *financial* circumstances. This means that it is generally considered that, for instance, personal information relating to the individual's political or religious affiliation would not be included in a system of comprehensive credit reporting.

5 See, eg, Centre for International Economics and Edgar Dunn and Company, *Options for Implementation of Comprehensive Credit Reporting in Australia [Prepared for MasterCard Worldwide]* (2006), 2.

6 See, eg, Dun & Bradstreet's proposal to permit the following categories of information in credit reporting: '1. The name of each current credit provider; 2. The type of each current credit account; 3. The date on which each current credit account was opened; 4. The limit of each current credit account': Dun & Bradstreet, *Submission PR 11,* 13 April 2006, 2.

7 The personal information that may be used currently in credit reporting is summarised in Ch 3.

8 These provisions are summarised in greater detail in Ch 3.

identifies the individual in question and sets out an exhaustive list of the other categories of personal information that may be included in the file. This list contains mainly so-called negative information, such as information relating to the individual having defaulted on a loan.

6.16 Section 18K(2)(a) provides that a credit reporting agency must not disclose personal information if the information does not fall within the permitted categories in s 18E. Similarly, s 18E(8)(a) provides that a credit provider must not disclose personal information to a credit reporting agency if the information does not fall within the permitted categories in s 18E.

Government inquiries

6.17 There have been a number of government inquiries since the 1980s that have considered comprehensive credit reporting. The most significant of these are summarised below.

Credit Reference Association of Australia proposal

6.18 As noted in Chapter 2, there was a push in the late 1980s for the introduction in Australia of a form of comprehensive credit reporting. In that year, the Credit Reference Association of Australia (CRAA) stated its intention to collect information about individuals' current credit commitments.[9] This plan was postponed, however, at the request of the then Commonwealth Minister for Consumer Affairs, the Hon Nick Bolkus.[10] Subsequently, the Commonwealth Parliament passed the *Privacy Amendment Act 1990* (Cth), which had the effect of prohibiting positive credit reporting.

6.19 There were a number of concerns about the CRAA's proposal. The New South Wales Privacy Committee feared that CRAA's proposal 'would greatly increase the quantity of personal information held by CRAA', and it may be too widely available.[11] The Australian Computer Society was concerned that this was 'an extremely privacy-invasive measure' demanding 'substantial justification'. It maintained that no detailed justification was publicly presented.[12]

6.20 Prior to the *Privacy Amendment Act 1990* (Cth) being passed, the then Minister for Consumer Affairs stated that one of the government's aims in passing this legislation was to 'tackle the whole question of positive reporting'. He noted that the government's rejection of 'positive reporting' was endorsed both by the Opposition

---

9 R Clarke, *Consumer Credit Reporting and Information Privacy Regulation* (1989) Australian Computer Society, [3.1].

10 New South Wales Government Privacy Committee, *Annual Report* (1989), 23.

11 Ibid, 22.

12 R Clarke, *Consumer Credit Reporting and Information Privacy Regulation* (1989) Australian Computer Society, [3.2].

and the Australian Democrats.[13] In the Second Reading Speech, the Minister went further, stating that so-called 'positive reporting' represents an unwarranted 'intrusion into individuals' lives' and that:

> The Government does not consider that there is any proven substantial benefit from the positive reporting proposals and that in view of the strong privacy concerns held by the community this massive expansion of the extent of information held about individuals should not be allowed to develop.[14]

Senate Committee privacy inquiry

6.21 The inquiry undertaken in 2005 by the Commonwealth Senate Legal and Constitutional References Committee[15] (Senate Committee privacy inquiry) dealt with credit reporting. Generally, the inquiry stated that while 'government action is required to maintain community confidence in [the] integrity of the credit reporting regime', it did 'not see any need for review or reform of Part IIIA at this time'.[16]

6.22 More specifically, the Senate Committee privacy inquiry recommended 'that the Privacy Act not be amended to allow the introduction of positive credit reporting in Australia'.[17] It explained this position by saying:

> The committee sees no justification for the introduction of positive credit reporting in Australia. Moreover, the experience with the current range of credit information has shown that industry has not run the existing credit reporting system as well as would be expected and it is apparent that injustice can prevail. As mentioned elsewhere in this report, positive reporting is also rejected on the basis that it would magnify the problems associated [with] the accuracy and integrity of the current credit reporting system. The privacy and security risks associated with the existence of large private sector databases containing detailed information on millions of people are of major concern.[18]

Victorian Consumer Credit Review

6.23 The 2006 Victorian Consumer Credit Review dealt with comprehensive credit reporting. It should be noted that Victoria possesses its own legislation on credit reporting, which operates in conjunction with the *Privacy Act*.[19]

6.24 The Victorian Consumer Credit Review received a large number of submissions on the benefits and limitations of the current system of negative credit reporting, and in relation to proposals to institute comprehensive credit reporting. The review was predicated on a recognition that the Victorian *Credit Reporting Act* was rendered

---

13 Commonwealth, *Parliamentary Debates*, Senate, 15 August 1989, 13 (N Bolkus—Minister for Consumer Affairs).

14 Commonwealth, *Parliamentary Debates*, Senate, 2 November 1989, 2788 (N Bolkus—Minister for Consumer Affairs).

15 Parliament of Australia—Senate Legal and Constitutional References Committee, *The Real Big Brother: Inquiry into the Privacy Act 1988* (2005).

16 Ibid, [7.44]–[7.45].

17 Ibid, Rec 17.

18 Ibid, [7.46].

19 *Credit Reporting Act 1978* (Vic).

largely obsolete by the operation of the credit reporting provisions of the *Privacy Act*. With this in mind, the Victorian Consumer Credit Review posited a number of options for future action by the Victorian Government in the credit reporting area:

- retain the status quo;
- repeal the Victorian Act and monitor emerging changes;
- repeal the Victorian Act and consider alternatives to comprehensive reporting; or
- repeal the Victorian Act and consider implementing comprehensive reporting.[20]

6.25 Ultimately, the Victorian Consumer Credit Review concluded that a form of more comprehensive credit reporting should not be introduced, at least 'while substantial questions remain about whether the benefits outweigh the costs', and it suggested further research and analysis in this area.[21] In its response to the review, the Victorian Government agreed that comprehensive reporting should not now be implemented in Victoria on the ground that 'there is insufficient evidence' to show that it would be more beneficial than not to implement such a system. It went on to state that responsibility for '[f]urther research and analysis' in this area should be borne by the Commonwealth, as distinct from the Victorian Government.[22]

Deficiencies in the current system of credit reporting

6.26 As explained in Chapters 3 and 5, the *Privacy Act* contains strict limitations on the categories of personal information that may be collected and used as part of the credit reporting process. These have been strongly criticised in a number of recent submissions and reports by those advocating the introduction of more comprehensive credit reporting in Australia. This part of the chapter looks at possible deficiencies in the current regulation of credit reporting, as they are relevant to proposals to introduce more comprehensive credit reporting.

6.27 The most persistent criticism about the current credit reporting regime is that it does not do enough to allow credit providers to redress the information asymmetry between the credit providers and potential borrowers.[23] As explained in Chapter 2, 'information asymmetry' refers to the situation where, because a credit provider often cannot know the full credit history of an individual applying for credit, the individual

---

20 Consumer Affairs Victoria, *The Report of the Consumer Credit Review* (2006), 271.
21 Ibid, 280.
22 Victorian Government, *Government Response to the Report of the Consumer Credit Review* (2006), 17.
23 See, eg, ACIL Tasman, *Comprehensive Credit Reporting: Main Report of an Analysis of its Economic Benefits for Australia [Prepared for MasterCard International]* (2004), 13–14.

has more information about his or her credit risk than the credit provider. The greater the asymmetry, the harder it is for the credit provider to assess the risk premium associated with lending to the individual in question.[24]

6.28 The argument for reform of the current system of credit reporting is, in essence, that the current information asymmetry between credit providers and potential borrowers makes it unnecessarily difficult to assess the risk premium of individuals applying for credit. This, in turn, is said to cause a number of problems in assessing whether to provide credit:

- It is difficult for a credit provider accurately to assess the risk involved in lending to an individual. This paucity of information can cause the credit provider to 'select some bad borrowers' (who default in their repayments) and to 'ignore some good ones' (who would have made their repayments had credit been extended to them).[25]

- While 'good borrowers have no way of signalling their reliability' to credit providers, 'bad borrowers have no incentive' to disclose their lack of credit worthiness.[26]

- When an individual has committed 'a minor default in the previous five years [this] can prevent access to affordable and serviceable credit', even when the individual's circumstances have changed. For instance, a person who defaulted on a payment for his or her mobile phone when he or she was under the age of 18 may be refused credit at a later stage—after he or she has entered the workforce and consequently represents a much lower credit risk.[27]

6.29 After the risk assessment process is complete, there are said to be further problems, including that credit providers charge borrowers an average interest rate that takes account of their good and bad debts, and this can cause 'some good borrowers to drop out of the credit market' and thereby increase the average interest rate 'to cover the cost of loans that are not repaid'.[28]

6.30 Other problems identified with the current regime of credit reporting include that the Act's limitations of the period for which credit information may be held are

---

24 The 'risk premium' reflects the costs associated with lending to a potential borrower. See, eg, Ibid, 2.

25 Ibid, 2, 13–14.

26 Ibid, 14. See also Dun & Bradstreet, *Submission to Senate Economics Reference Committee Inquiry into Possible Links between Household Debt, Demand for Imported Goods and Australia's Current Account Deficit*, March 2005, 7.

27 Dun & Bradstreet, *Submission to Senate Economics Reference Committee Inquiry into Possible Links between Household Debt, Demand for Imported Goods and Australia's Current Account Deficit*, March 2005, 7.

28 ACIL Tasman, *Comprehensive Credit Reporting: Main Report of an Analysis of its Economic Benefits for Australia [Prepared for MasterCard International]* (2004), 14.

said to be too short,[29] and that the Act contains unreasonable restrictions on credit providers sharing credit information.[30]

Will more comprehensive credit reporting address present deficiencies?

Background

6.31 Before analysing the specific proposals for instituting more comprehensive credit reporting, one threshold question is: would such a scheme adequately address the deficiencies identified in the current system of 'negative' reporting, without causing an unwarranted infringement of individuals' privacy rights?

6.32 Addressing this question involves an analysis of the benefits and disadvantages of comprehensive credit reporting. However, the extent to which these benefits and disadvantages are likely to be realised, in the event that comprehensive reporting is permitted, would depend on a number of factors. These factors include: what specific comprehensive reporting model is adopted; what reforms, if any, are made to the overall regulatory framework for credit reporting to take account of the advent of comprehensive reporting; and how the key players in the credit reporting market react to any such changes.

Possible benefits of more comprehensive credit reporting

6.33 There are a number of possible benefits that may result from introducing comprehensive credit reporting. Some of the mooted benefits are set out below.

Reduced information asymmetry and enhanced accuracy of risk assessment

6.34 One of the most commonly claimed benefits of comprehensive credit reporting is that it would enhance the accuracy of credit risk assessment.[31] ACIL Tasman, in a report prepared for MasterCard International (the MasterCard/ACIL Tasman Report), suggested that the introduction of comprehensive credit reporting would 'increase the ability of [credit providers] to distinguish better between good and bad borrowers'. This would, in turn, reduce the rate of default by between 13% and 32% and 'increase the volume of credit that can be provided to good borrowers'.[32] Dun and Bradstreet

29 Ibid, 16.

30 Ibid, 16.

31 See, eg, Dun & Bradstreet, *Submission PR 11,* 13 April 2006, Annexure (Briefing Note), 4; Centre for International Economics and Edgar Dunn and Company, *Options for Implementation of Comprehensive Credit Reporting in Australia [Prepared for MasterCard Worldwide]* (2006), 7.

32 ACIL Tasman, *Comprehensive Credit Reporting: Main Report of an Analysis of its Economic Benefits for Australia [Prepared for MasterCard International]* (2004), 19, 21. See also Centre for International Economics and Edgar Dunn and Company, *Options for Implementation of Comprehensive Credit Reporting in Australia [Prepared for MasterCard Worldwide]* (2006), 7.

also stresses that the major benefit from introducing comprehensive reporting would be to allow credit providers to be able to assess risk more accurately.[33]

6.35 The Consumers' Federation of Australia (CFA) agrees that comprehensive credit reporting 'could … improve the accuracy of risk assessment'; however, it does not 'accept that the outcome would be a good thing for consumers'.[34]

Increased efficiency and competition in credit reporting market

6.36 A number of commentators submit that comprehensive credit reporting would enhance competition in credit markets, which would in turn encourage lower interest rates for borrowers.[35]

6.37 The MasterCard/ACIL Tasman Report observed that, following increases in the types of personal data collected and used in credit reporting in the United States in the 1980s and 1990s, there was 'a wave of new entrants into the bank credit card market'. This in turn led to 'downward pressure on interest rates and fees for bank credit cards' and 'the introduction of differential pricing in bank credit cards … with lower interest rate margins for lower risk borrowers', and an overall expansion in the credit card market.[36] The MasterCard/ACIL Tasman Report traced a 'similar expansion' in mortgages and personal loans for motor vehicles.[37]

6.38 The MasterCard/ACIL Tasman Report argued that this would also benefit the Australian economy more generally because 'the efficiency of the credit market has implications for the efficiency of virtually every sector of the economy'.[38] Some financial modelling suggests that the introduction of comprehensive credit reporting would

> generate a one-off increase in capital productivity of 0.1 per cent, which would translate to economic benefits to the Australian economy of up to $5.3 billion, in net present terms, over the next ten years.[39]

---

33 Dun & Bradstreet, *Submission PR 11,* 13 April 2006, Annexure (Briefing Note), 4.

34 Consumers' Federation of Australia, *Full-File Credit Report: Is it Really the Answer to Credit Overcommitment?* (2005) <www.consumersfederation.com/creditreporting.htm> at 2 November 2006, 6.

35 Centre for International Economics and Edgar Dunn and Company, *Options for Implementation of Comprehensive Credit Reporting in Australia [Prepared for MasterCard Worldwide]* (2006), 8; ACIL Tasman, *Comprehensive Credit Reporting: Executive Summary of an Analysis of its Economic Benefits for Australia [prepared for MasterCard International]* (2004), 3. ACIL Tasman, *Comprehensive Credit Reporting: Main Report of an Analysis of its Economic Benefits for Australia [Prepared for MasterCard International]* (2004), 23, 36.

36 ACIL Tasman, *Comprehensive Credit Reporting: Main Report of an Analysis of its Economic Benefits for Australia [Prepared for MasterCard International]* (2004), 31.

37 Ibid, 32.

38 ACIL Tasman, *Comprehensive Credit Reporting: Executive Summary of an Analysis of its Economic Benefits for Australia [prepared for MasterCard International]* (2004), 2–3.

39 Ibid, 3. See also ACIL Tasman, *Comprehensive Credit Reporting: Main Report of an Analysis of its Economic Benefits for Australia [Prepared for MasterCard International]* (2004), 25.

Flow-on benefits for individual borrowers

6.39 Some argue that, by ensuring greater accuracy in risk assessment and management for credit providers, comprehensive credit reporting could help reduce the cost of credit for individuals—particularly for those who are a low credit risk.[40] By allowing credit providers to assess risk more accurately, it would 'increase their scope to set interest rates to reflect the risk premiums associated with different types of borrowers'.[41] By reducing the costs associated with the risk assessment process, Dun and Bradstreet submitted that this may allow credit providers to reduce the fees they charge to the individual to recoup those costs.[42]

6.40 The MasterCard/ACIL Tasman Report also suggested that the introduction of comprehensive credit reporting would lead to 'a more equitable and transparent reporting system' and this would 'giv[e] peace of mind to … Australian families'.[43] Comprehensive reporting would 'enable identity fraud to be detected sooner, due to improved information flows'.[44] Moreover, comprehensive reporting would help alleviate 'the social costs from bankruptcy and insolvency'.[45]

Possible disadvantages of more comprehensive credit reporting

6.41 The arguments against introducing comprehensive credit reporting fall generally into three categories. The first category consists of challenges to some of the claimed benefits of comprehensive reporting. Secondly, some argue that any benefits from the introduction of comprehensive reporting are likely to be outweighed by significant detrimental side effects, including in relation to privacy. The third category of objections challenges whether comprehensive reporting is the appropriate solution to remedy the deficiencies in the current system of credit reporting.

Impact of comprehensive credit reporting on levels of indebtedness and default

6.42 One of the claimed benefits of comprehensive credit reporting is that it can reduce the levels of both over-indebtedness and individuals defaulting in their repayments. This is because a credit provider will be in a better position to gauge when

---

40 ACIL Tasman, *Comprehensive Credit Reporting: Executive Summary of an Analysis of its Economic Benefits for Australia [prepared for MasterCard International]* (2004), 3; Dun & Bradstreet, *Submission PR 11,* 13 April 2006, Annexure (Briefing Note), 4.

41 ACIL Tasman, *Comprehensive Credit Reporting: Main Report of an Analysis of its Economic Benefits for Australia [Prepared for MasterCard International]* (2004), 20.

42 Dun & Bradstreet, *Submission PR 11,* 13 April 2006, Annexure (Briefing Note), 4.

43 ACIL Tasman, *Comprehensive Credit Reporting: Executive Summary of an Analysis of its Economic Benefits for Australia [prepared for MasterCard International]* (2004), 3. See also Dun & Bradstreet, *Submission PR 11,* 13 April 2006, Annexure (Briefing Note), 4.

44 Centre for International Economics and Edgar Dunn and Company, *Options for Implementation of Comprehensive Credit Reporting in Australia [Prepared for MasterCard Worldwide]* (2006), 8.

45 ACIL Tasman, *Comprehensive Credit Reporting: Main Report of an Analysis of its Economic Benefits for Australia [Prepared for MasterCard International]* (2004), 21.

credit should be refused to an applicant who does not have sufficient means to make the repayments. However, some have challenged this proposition.

6.43 In response to the claimed link between the categories of personal information available to credit providers and overall levels of indebtedness, the Victorian Consumer Credit Review cited preliminary research carried out in 2003 by Jentzsch and San José Riestra. This research found that evidence from the European and United States markets 'does not support the argument that there is a relationship between [the existence of comprehensive credit reporting] and lower levels of indebtedness'.[46] Research to similar effect was highlighted by the Consumer Credit Legal Centre of New South Wales (CCLC).[47] If this conclusion is correct, it throws into doubt whether 'more information in a credit report' can 'assist in managing risk' or aid 'responsible lending'.[48]

6.44 Moreover, the CFA argues that, rather than comprehensive credit reporting decreasing the number of individuals defaulting on repayments, it is 'likely to increase the number of consumer credit defaults'.[49] It maintains that research by Professors Barron and Staten, which is relied on by a number of the advocates of comprehensive credit reporting, is equivocal on this point.[50] The CFA states that the conclusion of Barron and Staten's research is that comprehensive credit reporting could result in *either* greater availability of credit (with the current rate of default) *or* a lower rate of default (with a correspondingly lower availability of credit), but not both. It argues that the two results cannot be achieved simultaneously and 'the most likely outcome is more lending, rather than reduced defaults'.[51]

Increased lending

6.45 The CFA and CCLC argue that a significant consequence of the introduction of comprehensive reporting will be 'an environment where lending is dramatically increased', especially 'to lower socio-economic groups'.[52] The CFA is concerned that

---

46 Consumer Affairs Victoria, *The Report of the Consumer Credit Review* (2006), 274, citing N Jentzsch and A San José Riestra, *Information Sharing and Its Implications for Consumer Credit Markets: United States vs Europe* (2003) European University Institute <www.iue.it/FinConsEU/ResearchActivities/EconomicsOfConsumerCreditMay2003> at 8 November 2006, 13.

47 Consumer Credit Legal Centre (NSW) Inc, *Submission PR 28,* 6 June 2006, 12.

48 Consumer Affairs Victoria, *The Report of the Consumer Credit Review* (2006), 274.

49 Consumers' Federation of Australia, *Full-File Credit Report: Is it Really the Answer to Credit Overcommitment?* (2005) <www.consumersfederation.com/creditreporting.htm> at 2 November 2006, 1.

50 See J Barron and M Staten, *The Value of Comprehensive Credit Reports: Lessons from the US Experience* (2000) Online Privacy Alliance <www.privacyalliance.org/resources/staten.pdf> at 10 November 2006.

51 Consumers' Federation of Australia, *Full-File Credit Report: Is it Really the Answer to Credit Overcommitment?* (2005) <www.consumersfederation.com/creditreporting.htm> at 2 November 2006, 2. A similar point is made in Consumer Credit Legal Centre (NSW) Inc, *Submission PR 28,* 6 June 2006, 11–12.

52 Consumers' Federation of Australia, *Full-File Credit Report: Is it Really the Answer to Credit Overcommitment?* (2005) <www.consumersfederation.com/creditreporting.htm> at 2 November 2006, 2–3. See also Consumers' Federation of Australia, *Expanding the Credit Reporting System—A Summary of Consumer Concerns* (2003), 4; Consumer Credit Legal Centre (NSW) Inc, *Submission PR 28,* 6 June 2006, 12.

> consumers will be targeted with less suitable products such as store credit and credit cards, which often trap individuals in a cycle of debt rather than improving their financial choices. We question in this time of record levels of consumer debt whether this could occur without detriment to consumers.[53]

Impact on privacy and security of personal data

6.46 There is also disquiet about the impact of comprehensive credit reporting on individuals' privacy rights. Various government inquiries have expressed concern in this regard.[54] The Victorian Consumer Credit Review noted that a system of more comprehensive credit reporting would have a significant 'potential impact on privacy … particularly in relation to financial matters'.[55]

6.47 The CCLC submitted that more comprehensive credit reporting 'is fraught with privacy and security risks', particularly given that it will likely entail 'a large database of information about millions of people [being] maintained by one or more third parties'. In particular, the CCLC is concerned about the following risks:

- the errors that occur in the current system will increase in proportion to the amount of data, magnifying the above effects;
- [these] data would be potentially very valuable and the temptation to sell it for marketing and other unauthorised purpose could be difficult to resist (if only by unscrupulous employees);
- this concentration of electronically stored data could also be the target of identity fraudsters and other people with illegal intent.[56]

Alternatives to comprehensive credit reporting

6.48 The Victorian Consumer Credit Review suggested that implementing comprehensive credit reporting is not the only possible, nor necessarily the best, way of dealing with the problems of the current negative reporting regime. The Review noted that alternatives to both the status quo and comprehensive credit reporting include:

- The development of an intensive education program that encourages consumers to maintain adequate record keeping for improving accuracy and fullness on completion of loan or credit applications.
- Encouraging the timely performance of credit contracts, where failure to pay on time reflects tardiness rather than an inability to pay.
- Improving the existing negative reporting scheme in terms of its accuracy.

---

53 Consumers' Federation of Australia, *Full-File Credit Report: Is it Really the Answer to Credit Overcommitment?* (2005) <www.consumersfederation.com/creditreporting.htm> at 2 November 2006, 3.

54 See, eg, Parliament of Australia—Senate Legal and Constitutional References Committee, *The Real Big Brother: Inquiry into the Privacy Act 1988* (2005), [7.46].

55 Consumer Affairs Victoria, *The Report of the Consumer Credit Review* (2006), 273.

56 Consumer Credit Legal Centre (NSW) Inc, *Submission PR 28,* 6 June 2006, 14.

- Providing additional incentives for credit reporting agencies to maintain accurate and complete data. For example, requiring credit reporting agencies to pay a specified amount to a consumer in each case where information is reported as inaccurate may assist in addressing current information asymmetry within the current system.
- Requiring consumer declarations in relation to loan applications.
- Expanding financial literacy programs to encourage better self-selection by consumers and shopping for credit by consumers.[57]

6.49 In its response to the Victorian Consumer Credit Review, the Victorian Government seemed to agree that there may be more effective alternatives to instituting comprehensive credit reporting, saying:

> 'Behavioural scoring', for example, is a popular tool used by larger credit providers for assessing the likelihood of payment on a credit contract (at least for existing customers). Strategies to promote responsible lending … will assist with decision-making. In addition, maintaining an active relationship with the consumer can significantly assist a credit provider in managing repayment problems on credit contracts.[58]

6.50 Others have also suggested alternative means of addressing any negative consequences arising from the current credit reporting regime. These include the following:

- Credit providers could make more inquiries about an individual's income and other financial commitments, before offering pre-approved credit limit increases.[59]
- The CCLC states that, in its experience, 'credit providers are not using information they already have to hand in risk assessment'.[60]
- The current credit reporting system could be reformed to require credit reporting agencies to take greater care in avoiding inaccuracies in the personal information they hold and disclose, and also to provide more effective means of remedying inaccuracies in an individual's credit report or credit information file.[61]

6.51 The CFA argues that part of the problem of providing credit to people without the proper capacity to repay derives from factors other than credit reporting. For

---

57 Consumer Affairs Victoria, *The Report of the Consumer Credit Review* (2006), 272.

58 Victorian Government, *Government Response to the Report of the Consumer Credit Review* (2006), 46.

59 Consumers' Federation of Australia, *Full-File Credit Report: Is it Really the Answer to Credit Overcommitment?* (2005) <www.consumersfederation.com/creditreporting.htm> at 2 November 2006, 2–3; Consumer Credit Legal Centre (NSW) Inc, *Submission PR 28,* 6 June 2006, 13.

60 Consumer Credit Legal Centre (NSW) Inc, *Submission PR 28,* 6 June 2006, 13.

61 Consumers' Federation of Australia, *Expanding the Credit Reporting System—A Summary of Consumer Concerns* (2003), 2–3. See also Parliament of Australia—Senate Legal and Constitutional References Committee, *The Real Big Brother: Inquiry into the Privacy Act 1988* (2005), [7.46].

instance, the CFA submits that credit legislation should be reformed to 'establish an obligation upon lenders to act fairly'.[62]

6.52 Baycorp Advantage submitted to the Senate Committee privacy inquiry that the major issues in credit reporting presently are enhancing 'data quality' and 'improv[ing] consumer engagement, including through development of better dispute resolution mechanisms'. It intends to 'pursue these initiatives with a higher priority than any attempt to amend the Act to allow [comprehensive] credit reporting'.[63]

Question 6–1 What deficiencies, if any, exist in the current regulatory framework for credit reporting that could be addressed by permitting more comprehensive credit reporting (also known as 'positive' credit reporting)? What are the advantages and disadvantages of more comprehensive credit reporting over the current credit reporting system in Australia?

Question 6–2 What would be the economic and social impact of introducing a system of more comprehensive credit reporting in Australia?

Regulation in other jurisdictions

6.53 As discussed above, the credit reporting provisions of Part IIIA provide an exhaustive list of the kinds of personal information that may be included in a credit information file or credit report. The collection of other kinds of information, including information about credit granted to individuals—such as credit limits or current balances—is not permitted. The following material considers how this aspect of credit reporting is regulated in other jurisdictions.[64]

New Zealand

6.54 New Zealand is another jurisdiction in which more comprehensive credit reporting is effectively prohibited. In that jurisdiction, credit reporting is regulated by a binding code issued by the Privacy Commissioner under the *Privacy Act 1993* (NZ).[65]

6.55 The *Credit Reporting Privacy Code 2004* (NZ) (the New Zealand Code) provides that a credit reporting agency must not collect personal information for the

62 Consumers' Federation of Australia, *Full-File Credit Report: Is it Really the Answer to Credit Overcommitment?* (2005) <www.consumersfederation.com/creditreporting.htm> at 2 November 2006, 4.

63 Baycorp Advantage, *Submission to the Senate Legal and Constitutional References Committee Inquiry into the Privacy Act 1988*, 16 March 2005, 8.

64 Material on the regulation of credit reporting in other jurisdictions is drawn, in part, from: Centre for International Economics and Edgar Dunn and Company, *Options for Implementation of Comprehensive Credit Reporting in Australia [Prepared for MasterCard Worldwide]* (2006).

65 *Credit Reporting Privacy Code 2004* (NZ) under *Privacy Act 1993* (NZ) s 46.

purpose of credit reporting unless it is 'credit information'.[66] Briefly, credit information is defined exhaustively and includes identification information, information about credit applications, credit default information, judgment and bankruptcy information, serious credit infringements and information from public registers.[67]

6.56 While the information permitted by the New Zealand Code is in some respects broader than that permitted under Part IIIA,[68] the permitted content of credit reports closely replicates the position in Australia. Importantly, the New Zealand Code does not permit a credit reporter to collect information about an individual's current credit commitments and facilities.

United States

6.57 In the United States, credit reporting is regulated under the *Fair Credit Reporting Act 1970* (US) (FCRA) by the Federal Trade Commission. The FCRA does not limit the permissible content of credit information files held by credit reporting agencies or the content of credit reports—although, for example, consumers must consent in writing to the disclosure of reports containing medical information.[69]

6.58 Major credit reporting agencies in the United States hold and report detailed information about individuals' credit accounts, including current balances. The information on each credit account may include the following:

Account Dates

- The date the account was opened
- The date the account was closed (if applicable)
- The date the account was paid down to zero if the last reported balance is zero
- The account verification date (the date on which information on the account was taken)
- The date the account information was recorded by the credit reporting company

Account Balances

- Account balance on the verification date (if any)
- The historic high balance (for mortgage or installment loans, this is generally the original balance)

---

66 *Credit Reporting Privacy Code 2004* (NZ) r 1(2).

67 Ibid cl 5.

68 For example, the New Zealand Code allows the collection of 'information relating to identification documents reported lost or stolen or otherwise compromised' and 'credit scores': Ibid cl 5.

69 *Fair Credit Reporting Act 1970* 15 USC § 1681 (US). Compare *Privacy Act 1988* (Cth) s 18E(2)(c), which prohibits personal information about 'medical history or physical handicaps' from being included in an individual's credit information file.

- Credit limit (the maximum amount that can be borrowed for revolving or open accounts)
- Amount past due (If the account is delinquent, this is the amount that was overdue as of the verification date)

Payment Performance

- Payment status at the last report …
- Payment status pattern for the previous 48 months …
- Dispute code (indicates if items in the account are under dispute)
- Remark codes (for example, notations for types of payment problems and reasons for closing accounts)

Account Description

- Account ownership (individual, joint, authorized user, co-signer)
- Type of creditor (commercial bank, savings institution, finance company, credit union, government entity, retailer, and so forth)
- Type of account …
- Loan purpose or type (for example, credit card, charge account, automobile loan, student loan, or FHA-insured mortgage)
- Lender subscriber code.[70]

6.59 Credit reporting agencies receive information from credit providers and others, generally every month, and update their credit files within one to seven days of receiving new information.[71]

United Kingdom

6.60 The United Kingdom (UK) represents a particularly useful comparator, given the similarity of its legal system and privacy protection scheme generally. Moreover, the Victorian Consumer Credit Review suggested that the UK's system of comprehensive credit reporting 'seems likely to have the greatest resemblance to the Australian finance sector'.[72]

6.61 In the UK, the activities of credit reporting agencies are regulated by both the *Consumer Credit Act 1974* (UK) and the *Data Protection Act 1998* (UK)—the latter being the equivalent in the UK of the Australian *Privacy Act*.

---

70 R Avery and others, 'An Overview of Consumer Data and Credit Reporting' (2003) (February) *Federal Reserve Bulletin* 47, 54.
71 Ibid, 49.
72 Consumer Affairs Victoria, *The Report of the Consumer Credit Review* (2006), 274.

6.62 Neither the *Consumer Credit Act* nor the *Data Protection Act* specifically limits the permissible content of credit information files. The *Consumer Credit Act* deals only with individuals' rights of access to and correction of credit information about them.[73] Under the *Data Protection Act*, a 'data controller' (which may include a credit reporting agency) must comply with the data protection principles (DPPs) set out in the Act. These include DPP 3, which provides that 'personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed'.[74]

6.63 The information held by credit reporting agencies in the UK and included in credit reports includes: data about the date accounts are opened; the credit limit or amount of the loan; payment terms; payment history; and payment arrangements entered with the credit provider.[75] Unlike in the United States, information on credit account balances is not collected.

Other jurisdictions

6.64 A 2006 report prepared for MasterCard Worldwide (the MasterCard/CIE/EDC Report) summarised the key features of the regulatory systems for credit reporting in more than a dozen countries.[76] All the countries studied, with the exception of France, were said to permit more comprehensive credit reporting than in Australia.

6.65 A comparison was made of the kinds of information held by credit reporting agencies in Australia, the United States, the United Kingdom, Germany, Canada, Japan, Hong Kong and Singapore.[77] This showed that in all countries except Australia, credit reporting agencies collect information about individuals' credit limits and payment history. In addition, credit reporting agencies in the United States, Japan and Hong Kong also hold information about individuals' credit account balances.

6.66 In the last few years, some jurisdictions have moved from reporting only negative information, such as overdue payments, to more comprehensive credit reporting. For example, in 2003, Hong Kong implemented comprehensive credit reporting. The MasterCard/CIE/EDC Report stated:

---

73 *Consumer Credit Act 1974* (UK) ss 157–160.

74 *Data Protection Act 1998* (UK) sch 1, pt 1.

75 Centre for International Economics and Edgar Dunn and Company, *Options for Implementation of Comprehensive Credit Reporting in Australia [Prepared for MasterCard Worldwide]* (2006), 79; United Kingdom Government Information Commissioner's Office, *Data Protection: Credit Explained* (2006), 8, 13.

76 Centre for International Economics and Edgar Dunn and Company, *Options for Implementation of Comprehensive Credit Reporting in Australia [Prepared for MasterCard Worldwide]* (2006). The countries reviewed included the United States, Canada, the United Kingdom, Germany, France, Italy, Belgium, South Africa, Japan, Hong Kong, South Korea, Singapore, Mexico and selected countries in central and South America.

77 In some of these jurisdictions, credit reporting information is held by public credit registries rather than private sector credit reporting agencies. Public credit registries are operated by governments, usually banking and finance industry regulators similar, for example, to the Australian Prudential Regulation Authority: see Ibid, 9–11.

> This was because the levels of both delinquency and bankruptcies in recent years had reached crisis levels and lenders and other stakeholders saw the move to positive credit reporting as part of the solution.[78]

6.67 The Hong Kong Monetary Authority considered that the sharing by banks of more comprehensive information—through credit reporting agencies and subject to information privacy legislation—would help to promote a more effective banking system.[79]

Lessons for Australia

6.68 Some caution must be exercised in drawing lessons for Australia from the credit reporting practices in other jurisdictions. It is worth noting, for instance, that while most other comparable jurisdictions permit credit reporting agencies to collect a broader spectrum of information than is permitted in Australia, this is not universally true. A number of jurisdictions—such as France, Spain and New Zealand—possess comparable restrictions to Australia in relation to the types of information that may be collected and used in credit reporting.[80]

6.69 Some caution also needs to be exercised when predicting the impact of more comprehensive credit reporting in Australia, when basing this prediction on the experience of other countries. For example, although apparently supportive of the introduction of a credit reporting system on broadly similar lines to that operating in the United States, the MasterCard/ACIL Tasman Report noted the 'significant differences in the size, structure and organisation of the credit markets in the US and Australia'.[81]

6.70 While warning that this means that the scope for competition in the United States market may be higher than in Australia, the MasterCard/ACIL Tasman Report nevertheless concluded that the introduction of credit reporting would increase competition, and bring attendant benefits to credit providers and individuals, in Australia.[82] More generally, the Report concluded that, 'after due allowance is made for other factors that could affect the results', the evidence 'consistently shows that comprehensive credit reporting regimes are economically superior to those that are restricted to negative credit reporting'.[83]

---

78 Ibid, 112.
79 Ibid, 112.
80 Ibid, 12; J Peace, 'Knowing Your Customer: An Advantage for Business and Individuals?' (Paper presented at 28th International Conference of Data Protection Commissioners, London, 2 November 2006).
81 ACIL Tasman, *Comprehensive Credit Reporting: Main Report of an Analysis of its Economic Benefits for Australia [Prepared for MasterCard International]* (2004), 33.
82 Ibid, 34.
83 Ibid, 36.

Regulatory framework for more comprehensive credit reporting

6.71 The remainder of this chapter considers some of the more detailed questions relating to the possible introduction of more comprehensive credit reporting. This analysis is carried out in the knowledge that the selection of an appropriate framework or 'model' of comprehensive reporting may be fundamental to the threshold question whether comprehensive credit reporting should be introduced at all. Indeed, this point is anticipated by one of the advocates of more comprehensive reporting, Dun and Bradstreet, which argues that some of the stated concerns about comprehensive reporting are likely to be alleviated by the particular model of comprehensive credit reporting that it proposes.[84]

6.72 The lack of consensus regarding a preferred model of comprehensive reporting has long been a feature of the debate and has been noted in previous inquiries.[85] In its response to the Victorian Consumer Credit Review, the Victorian Government observed that this makes it difficult to determine whether more comprehensive credit reporting would in practice 'enhance decision making' by credit providers.[86]

6.73 In the absence of a single preferred model by those advocating comprehensive credit reporting, the remainder of this chapter goes through the various aspects of regulation that would need to be addressed in formulating a comprehensive reporting framework.

New information to be included in credit reporting

6.74 Dun and Bradstreet avoided some of the features of the more permissive regime of credit reporting in the United States; instead, it prefers 'a modified, fairer version that provides more limited but valuable data'.[87] It submitted that 'four additional data elements' to those currently permitted under the *Privacy Act* should be permitted in credit reporting:

1. The name of each current credit provider;
2. The type of each current credit account;
3. The date on which each current credit account was opened;
4. The limit of each current credit account.[88]

6.75 The MasterCard/ACIL Tasman Report did not explicitly state what model of comprehensive reporting is preferred, nor did it state which overseas model of

---

84 Dun & Bradstreet, *Submission PR 11,* 13 April 2006, Annexure (Briefing Note), 5.
85 See, eg, Consumer Affairs Victoria, *The Report of the Consumer Credit Review* (2006), 273.
86 Victorian Government, *Government Response to the Report of the Consumer Credit Review* (2006), 46.
87 Dun & Bradstreet, *Submission PR 11,* 13 April 2006, Annexure (Briefing Note), 5.
88 Dun & Bradstreet, *Submission to Senate Economics Reference Committee Inquiry into Possible Links between Household Debt, Demand for Imported Goods and Australia's Current Account Deficit*, March 2005, 8. See also Dun & Bradstreet, *Submission PR 11,* 13 April 2006, 2.

comprehensive reporting is the preferred comparator.[89] It stated that its analysis 'quantifies the likely outcome of allowing the provision of comprehensive credit information on individual borrowers to be accessed by prospective lenders without comprising individual privacy'.[90] Nevertheless, it should be noted that the Report most frequently drew lessons from Australia's system of credit reporting from the practices in the United States. It may be inferred that the United States model represents—at least in general terms—the type of structure that the Report's authors had in mind.

Question 6–3 Should Australian law be amended to expand the categories of personal information that may be collected and used in credit reporting? If so, what categories of personal information should be permitted?

Consequential changes if more comprehensive credit reporting introduced

6.76 This part of the chapter asks whether it would be necessary to make other changes to the way in which credit reporting is regulated, in the event that some form of more comprehensive credit reporting is introduced in Australia. Specifically, the ALRC asks whether it would be necessary to make changes in respect of the way that personal information is collected; how credit reporting is regulated; who should be able to access that information; and whether any additional privacy safeguards should be introduced.

Types of 'credit reporter'

6.77 Assuming that more comprehensive credit reporting is adopted in some form, a question arises as to whether it would be necessary to make consequential changes to the way in which personal information is collected, and what kind of body should be permitted to act as a credit reporter.[91] Currently, personal information may be collected for credit reporting purposes by credit reporting agencies, and they charge credit providers a fee in return for disclosing some of that information in a credit report. As explained in Chapters 2 and 3, there are limitations on who can act as a credit reporting agency, but those currently operating in Australia are private enterprises that carry out a business for profit.

---

89 Similarly, no specific model is suggested in Centre for International Economics and Edgar Dunn and Company, *Options for Implementation of Comprehensive Credit Reporting in Australia [Prepared for MasterCard Worldwide]* (2006).

90 ACIL Tasman, *Comprehensive Credit Reporting: Executive Summary of an Analysis of its Economic Benefits for Australia [prepared for MasterCard International]* (2004), 2.

91 For present purposes, a 'credit reporter' is a body that collects and maintains a central database of personal information for credit reporting purposes.

6.78 Some overseas models, like the United States and UK, adopt a similar approach to Australia's, by allowing private enterprises to act as credit reporting agencies. On the other hand, some other jurisdictions permit more comprehensive credit reporting but have a different structure for the collection and dissemination of personal information in credit reporting. Some alternative models include the following:[92]

- In Germany, there are several industry-owned credit reporters that operate on a not-for-profit basis.[93]

- Argentina has a government-operated database of personal credit information that may be accessed by certified credit reporting agencies.[94]

- A hybrid model that is being considered in the UK involves a not-for-profit body that is owned by industry and maintains a central database of personal credit information. The body then contracts with private sector credit reporting agencies and credit providers to provide this information for credit reporting.[95]

6.79 Lastly, if more comprehensive credit reporting were introduced in Australia without altering the current rules on credit reporting agencies, this would have a significant impact on the credit reporting market. For instance, it is said that this would enhance the capacity for competition between credit reporting agencies.[96] This would make it easier for relative newcomers in the Australian credit reporting market to increase their market share more rapidly.

Regulator

6.80 In the event that some form of more comprehensive credit reporting is adopted, a further question arises as to whether changes need to be made to the way in which credit reporting is regulated. Currently, the Privacy Commissioner has primary responsibility for the regulation of credit reporting.[97]

6.81 One proposal by MasterCard International is that the Privacy Commissioner's jurisdiction with respect to credit reporting should be removed and replaced with 'a credit reporting industry ombudsman', who would have the power to

---

92 This summary is drawn largely from Centre for International Economics and Edgar Dunn and Company, *Options for Implementation of Comprehensive Credit Reporting in Australia [Prepared for MasterCard Worldwide]* (2006). Few other stakeholders have commented in detail on this issue.

93 Such a system operates presently in Germany. It has been said that this model is 'not well suited' to Australia 'due to the lack of competition, and thus unlikely to result in the services innovation and operational efficiency required to meet the needs of an evolving credit market': Ibid, 66.

94 Ibid, 66.

95 This was described in the MasterCard/CIE/EDC Report as 'the best model for implementation locally, especially with respect to improving data integrity and ensuring appropriate competition': Ibid, 67.

96 Ibid, 20. See, generally, ACIL Tasman, *Comprehensive Credit Reporting: Main Report of an Analysis of its Economic Benefits for Australia [Prepared for MasterCard International]* (2004), 36.

97 The role of the Office of the Privacy Commissioner, as the regulator in credit reporting, is explained in Ch 4.

review customer complaints, to make enforceable rulings binding on credit reporting agencies as well as lenders, and administer sanctions for breaches of a credit reporting code of conduct.[98]

Access and additional privacy safeguards

6.82 Some argue that, if more comprehensive credit reporting were introduced, it would be logical also to make at least some personal information in credit reports available to a broader spectrum of people than currently qualify under the *Privacy Act*. Conversely, it may be that with more personal information being made available to credit reporting agencies and credit providers, there needs to be further protection of individuals' privacy rights.

Question 6–4 If Australian law is amended to permit more comprehensive credit reporting:

(a) What changes, if any, should be made to the way in which personal information is collected and disseminated for the purposes of credit reporting?

(b) Should changes be made to the way in which credit reporting is regulated? For example, should the Privacy Commissioner remain the primary regulator in this area? Would powers and penalties need to increase?

(c) Would it be desirable to make personal credit information available to a broader or narrower spectrum of individuals and organisations than may currently access such information? Should any additional safeguards be introduced to protect the privacy of personal information?

(d) Should there be differential levels of access to personal information that is collected under such a system?

98 MasterCard International, *Submission to the Consumer Affairs Victoria Consumer Credit Review*, 29 July 2005, 4.

7. The Approach to Reform

Contents

Introduction 135
Structural approaches to reform 135
Reform of the credit reporting provisions 136
Regulation under the general provisions of the *Privacy Act* 137
New credit reporting legislation 141
Consumer and industry perspectives on reform 143
Changes in the credit sector and credit reporting system 145
Other reform considerations 146
Trans-Tasman harmonisation 146
The regulatory burden 146

Introduction

7.1 This Issues Paper has raised a range of concerns about the regulation of credit reporting under Part IIIA of the *Privacy Act 1988* (Cth) and related provisions. In addition to possible major or minor changes to the current law on credit reporting—for example, in relation to the permitted content of credit reports—there are important structural issues concerning reform of privacy regulation for credit reporting. These structural reform issues are discussed in this chapter.

7.2 The chapter also considers a number of background factors relevant to reform of the credit reporting provisions generally. These include changes in the credit sector and credit reporting system; the desirability of consistency across the trans-Tasman financial services market; and the regulatory burden of existing or new legislation.

Structural approaches to reform

7.3 There appear to be three available approaches to reform of the credit reporting provisions.

- Credit reporting could continue to be regulated under Part IIIA of the *Privacy Act* and its related provisions.

- Part IIIA and its related provisions could be repealed, and credit reporting regulated under the general provisions of the *Privacy Act* and the National Privacy Principles (NPPs).

- Credit reporting could be regulated by new sectoral legislation dealing specifically with the privacy of credit information files and credit reports.

Reform of the credit reporting provisions

7.4 Credit reporting could continue to be regulated under Part IIIA of the *Privacy Act* and its related provisions, subject to any amendments ultimately recommended as part of this Inquiry. In addition, if the current credit reporting provisions were to be retained in the body of the *Privacy Act*, the provisions may benefit from a comprehensive redraft to simplify and clarify them.

7.5 For example, one possible focus for simplification is the varying definitions of 'credit information file', 'credit report' and 'report'.[1] As discussed elsewhere, credit information files are maintained by credit reporting agencies, and credit reports are a subset of the information these files contain. A 'report' refers to any information (except a credit report or a record of publicly available information only) that relates to credit worthiness. These definitions contribute significantly to the complexity of the obligations placed on credit reporting agencies and credit providers under Part IIIA.

7.6 Part of the reason for the length and complexity of some terms used in the credit reporting provisions—including 'credit reporting agency' and 'credit provider'—may have been to ensure compliance with the *Australian Constitution*. Some terms may be able to be defined more simply, without risking that the legislation will ultimately be found to be unconstitutional.[2]

7.7 Part IIIA provides rights and obligations applicable to credit reporting agencies, credit providers and individuals. The obligations of each of these parties, however, are dispersed throughout Part IIIA. For example, provisions dealing with the obligations of credit providers to list an overdue payment only in certain circumstances[3] are contained in s 18E, which deals with the permitted contents of credit information files held by credit reporting agencies—with additional requirements set out in the *Credit Reporting Code of Conduct*. Part IIIA could be drafted more simply by separating the provisions that apply to credit reporting agencies, credit providers and individuals respectively.[4]

7.8 Another approach might be to apply statutory obligations only to credit reporting agencies and not credit providers. In New Zealand, the credit reporting activities of credit providers are regulated indirectly by contract (through subscriber agreements with the agency) and through compliance obligations imposed on credit reporting agencies.

---

1 *Privacy Act 1988* (Cth) ss 6(1), 18N(9).
2 The constitutional basis of the *Privacy Act* as a whole is considered in Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006), Ch 2.
3 See *Privacy Act 1988* (Cth) ss 18E(1)(vi), 18E(8).
4 The *Credit Reporting Code of Conduct* follows such a structure.

7.9 Finally, the *Privacy Act* contains a range of provisions intended to ensure that an entity that is both a credit provider or credit reporting agency and an 'organisation' must comply with both the NPPs and Part IIIA. However, the relationship between the NPPs and the obligations in Part IIIA could be articulated more clearly.

Regulation under the general provisions of the *Privacy Act*

7.10 Another option for reform would be to repeal the credit reporting provisions of the *Privacy Act* and leave credit reporting to be governed primarily by the NPPs.[5]

7.11 The credit reporting provisions are the only provisions in the *Privacy Act* that deal in detail with the handling of personal information within a particular industry or business sector. One credit reporting agency has observed that Part IIIA of the *Privacy Act* is a 'significantly more prescriptive legislative regime than applies to other arguably more sensitive sectors of the private sector'.[6]

7.12 While it may be argued that credit reporting presents a suite of privacy issues that are uniquely deserving of specific regulation, the reasons for this anomaly are to some extent historical in that the credit reporting industry was made subject to privacy regulation before the rest of the private sector.

7.13 In 1990, when the credit reporting provisions were inserted into the *Privacy Act*, the Act had very limited application to the private sector.[7] While further privacy regulation was anticipated,[8] comprehensive coverage of the private sector was not implemented until 2000, with the enactment of the *Privacy Amendment (Private Sector) Act 2000* (Cth). The *Privacy Amendment (Private Sector) Act*, which came into effect on 21 December 2001, established NPPs that apply to the handling of personal information in the private sector.

7.14 The history of credit reporting regulation in Australia may be contrasted with that in New Zealand where credit reporting regulation followed the enactment of the *Privacy Act 1993* (NZ), which applied information privacy principles across the public and private sectors.

---

5 The NPPs are examined in more detail in: Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006), Ch 4.

6 Baycorp Advantage, *Submission to the Senate Legal and Constitutional References Committee Inquiry into the Privacy Act 1988*, 16 March 2005.

7 The *Privacy Act* provided guidelines for the collection, handling and use of individual tax file number information in the private, as well as public, sector: *Taxation Laws Amendment (Tax File Numbers) Act 1988* (Cth).

8 For example, the second reading speech stated that the credit reporting provisions were 'the next step' in the Government's program to introduce comprehensive privacy protection: Commonwealth, *Parliamentary Debates*, Senate, 16 June 1989, 4216 (G Richardson).

7.15 In New Zealand, credit reporting is regulated under a legally binding code issued by the Privacy Commissioner under the Act.[9] Many basic elements of the *Credit Reporting Privacy Code 2004* (NZ) are similar to regulation in Australia. It is said, however, that while Australian regulation is a complex mix of statute, code of practice and determinations, the New Zealand code is virtually self-contained, making regulation much easier to understand.[10]

Regulation of credit reporting under the NPPs

7.16 Regulating credit reporting under the NPPs alone could, in some respects, be seen as downgrading the privacy protection afforded to personal information held by credit reporting agencies and credit providers. A brief comparison of some of the NPPs and the credit reporting provisions illustrates this point:

- Under NPP 1, an organisation must not collect personal information unless the information is necessary for one or more of its functions or activities. This broad test of necessity can be contrasted with the detailed provisions of s 18E, which prescribe the permitted content of credit information files held by credit reporting agencies. Even if other categories of information can be shown to be necessary for credit reporting under NPP 1, collection is prohibited (even if the individual consents) under s 18E.

- Under NPP 2, an organisation must not use or disclose personal information about an individual for a purpose other than the primary purpose of collection unless the secondary purpose is related or within the reasonable expectations of the individual concerned. In addition, NPP 2.1(c) permits, in some circumstances, the use of information for the secondary purpose of direct marketing—including by related bodies corporate.[11] In contrast, ss 18K and 18N limit the disclosure of personal information by credit reporting agencies and credit providers respectively to an exhaustive list of specific circumstances.

- Under NPP 3, an organisation must take reasonable steps to ensure that personal information it collects, uses or discloses is 'up-to-date'.[12] However, there is no equivalent of s 18F, which provides for the deletion of personal information in credit information files after the end of maximum permissible periods for the keeping of different kinds of information.

- Under NPP 6, individuals have rights to access to personal information about them. Unlike the equivalent rights under s 18H, NPP 6 specifically allows organisations to charge for access and contains an extensive list of exceptions, permitting access to be refused under certain circumstances.

---

9 *Credit Reporting Privacy Code 2004* (NZ) under *Privacy Act 1993* (NZ) s 46.

10 New Zealand Government Privacy Commissioner, *Credit Reporting Privacy Code: Frequently Asked Questions* (2006) <www.privacy.org.nz/privacy-act/frequently-asked-questions> at 21 September 2006.

11 *Privacy Act 1988* (Cth) s 13B.

12 A similar obligation applies to information in credit information files and credit reports: Ibid s 18G(a).

7.17 In some more minor respects, the NPPs can be seen as imposing a higher level of privacy protection than the provisions of Part IIIA. For example:

- Under NPP 1.3, when an organisation collects personal information about an individual from the individual, the organisation must take reasonable steps to ensure that the individual is aware of: the identity of the organisation and how to contact it; the fact that he or she can access the information; the purposes of collection; the organisations to whom the organisation usually discloses information of that kind; any law that requires the particular information to be collected; and the main consequences for the individual if the information is not provided. No equivalent obligation applies under the credit reporting provisions.[13]

- Under NPP 2.1, an organisation must not use or disclose personal information about an individual for a purpose other than the primary purpose of collection, except in certain defined circumstances. Part IIIA does not directly regulate the secondary use of credit information files by credit reporting agencies, or the secondary use of information relating to credit worthiness by credit providers.

7.18 At present, credit reporting agencies and credit providers must comply with the NPPs as well as the credit reporting provisions of Part IIIA, at least where they are 'organisations' for the purposes of the *Privacy Act*.[14] A credit provider, however, may be exempt from obligations to comply with the NPPs because, for example, it is a small business operator.[15] If credit reporting were to be regulated under the NPPs, consideration would have to be given to ensuring that all credit providers are covered—for example, by promulgating regulations to that effect under s 6E.

7.19 Such a course has been proposed in relation to residential tenancy databases (RTDs), which are electronic databases operated by private companies that contain information about tenants and their rental history.[16] RTDs raise privacy issues similar to those raised by credit reporting.

7.20 In 2005, the Office of the Privacy Commissioner's (OPC) review of the private sector provisions of the *Privacy Act* (OPC Review) recommended that the Attorney-General consider regulations to ensure that the *Privacy Act* applies to all small

---

13 Although a credit provider must not give a credit reporting agency personal information relating to an individual if the credit provider did not inform the individual that the information might be disclosed to a credit reporting agency: Ibid s 18E(8)(c).

14 See Ch 3.

15 *Privacy Act 1988* (Cth) s 6C. However, a credit reporting agency cannot be a small business operator because credit reporting agencies disclose personal information for a benefit, service or advantage: ss 6C; 6D(4).

16 The purpose of such databases is to enable real estate agents to assess 'business risk' on behalf of the property owner, see: Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006), Ch 7.

businesses operating RTDs.[17] A joint Ministerial Council on Consumer Affairs/Standing Committee of Attorneys-General Working Party report on RTDs later recommended that regulations be promulgated under s 6E of the *Privacy Act* to prescribe RTDs as organisations for the purposes of the Act.[18] On 30 October 2006, the Attorney-General of Australia, the Hon Philip Ruddock MP, announced that the Government would extend the *Privacy Act* by regulation to cover all RTD operators.[19]

Privacy Codes

7.21 The credit reporting provisions of the *Privacy Act* are complex and prescriptive. If credit reporting were to be regulated effectively under the NPPs, a code would be needed to incorporate at least some of this level of detail and, more generally, to tailor the NPPs to the specific conditions of the credit reporting industry. Models of credit reporting privacy codes include those in New Zealand[20] and Hong Kong.[21]

7.22 The *Privacy Amendment (Private Sector) Act* was intended to encourage private sector organisations and industries to develop privacy codes of practice.[22] The Act introduced Part IIIAA of the *Privacy Act*, which allows private sector organisations and industries to develop and enforce their own privacy codes.[23]

7.23 An approved privacy code must incorporate all the NPPs or set out obligations that, overall, are at least the equivalent of the NPPs.[24] Once the Privacy Commissioner approves a privacy code, it replaces the NPPs for those organisations bound by the code.[25] In contrast, the existing *Credit Reporting Code of Conduct*, issued under s 18A, supplements the credit reporting provisions of Part IIIA of the *Privacy Act* on matters of detail not addressed by the Act, but does not displace them.[26]

7.24 Subscription to an approved privacy code by an organisation is voluntary—that is, only organisations that consent to be bound by a code are bound.[27] The *Credit Reporting Code of Conduct* differs in that, once issued by the Privacy Commissioner, it is binding on all credit reporting agencies and credit providers.

---

17 Office of the Privacy Commissioner, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988* (2005), Recs 9, 15, 52.

18 Ministerial Council on Consumer Affairs/Standing Committee of Attorneys-General Residential Tenancy Database Working Party, *Report on Residential Tenancy Databases* (2005), [4.2.2].

19 P Ruddock (Attorney-General), 'More Protection for Tenants' Privacy' (Press Release, 30 October 2006).

20 *Credit Reporting Privacy Code 2004* (NZ).

21 Office of the Privacy Commissioner for Personal Data Hong Kong, *Code of Practice on Consumer Credit Data* (1998).

22 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 April 2000, 15749 (D Williams—Attorney-General).

23 To date, only four codes have been approved by the Privacy Commissioner. Privacy codes are discussed in more detail in: Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006), Ch 6.

24 *Privacy Act 1988* (Cth) s 18BB(2)(a).

25 Ibid s 16A.

26 See Ch 4.

27 *Privacy Act 1988* (Cth) s 18BB(2)(c).

7.25 To retain the coverage of present credit reporting regulation, the Privacy Commissioner may require power to formulate and impose a binding code on the credit reporting industry, for example, under a modified version of s 18A.[28] In this context, the OPC Review recommended that the *Privacy Act* be amended to provide the OPC with a power to make binding codes.[29] The OPC also suggested that, assuming such a power were granted, the Privacy Commissioner should issue a binding code that applies to RTDs.[30]

Other considerations

7.26 One issue that would have to be resolved if credit reporting were to be regulated under the NPPs is whether personal information of the kind contained in credit information files or credit reports should be defined as 'sensitive information' and receive the higher level of protection provided by NPP 10. Most importantly, under NPP 10.1(a) an organisation must not collect sensitive information about an individual unless the individual has consented.

7.27 Another issue concerns the fact that the *Privacy Act* includes powers of the Privacy Commissioner relating specifically to credit reporting. These include the power to conduct audits of credit information files and credit reports,[31] and to report to the responsible minister about the failure of a credit reporting agency or credit provider to respond to the Privacy Commissioner's recommendations following an own-motion investigation.[32] If Part IIIA were to be repealed and replaced by the NPPs and a privacy code, consideration would have to be given to whether these provisions should be retained.

New credit reporting legislation

7.28 An alternative approach to reform of the credit reporting provisions of the *Privacy Act* would be to repeal those provisions and enact new sectoral legislation dealing specifically with the privacy of credit information files and credit reports. A range of advantages and disadvantages of this approach can be identified.

---

28 IP 31 discusses broader issues concerning whether the Privacy Commissioner should have power to formulate and impose binding codes, including as one way to address systemic issues in privacy compliance: Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006), [6.162]–[6.164].

29 Office of the Privacy Commissioner, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988* (2005), Rec 7.

30 Ibid, Rec 16. See also Ministerial Council on Consumer Affairs/Standing Committee of Attorneys-General Residential Tenancy Database Working Party, *Report on Residential Tenancy Databases* (2005), [4.2.2].

31 *Privacy Act 1988* (Cth) s 28A(1)(g).

32 Ibid s 30(4).

7.29 Some of the possible advantages include the following.

- The credit reporting provisions of the *Privacy Act* can be considered anomalous. The *Privacy Act* would be significantly simplified by the excision of the provisions.

- Given the detailed nature of credit reporting privacy regulation, it may be easier to regulate through sectoral legislation than within general information privacy legislation.

- Related non-privacy consumer protection issues could be dealt with in credit reporting legislation that is designed to operate consistently with the *Consumer Credit Code*.

7.30 The possible disadvantages include that:

- Banks, finance companies and other credit providers would have to deal with two statutory privacy regimes—that is, specific rules in relation to credit reporting and the NPPs in relation to other aspects of handling personal information.

- Specific credit reporting legislation may add to problems caused by inconsistency and fragmentation in privacy law, including complexity of privacy regulation, varying levels of privacy protection, and regulatory gaps.[33] Moreover, it may be that this would alter the constitutional basis of the credit reporting provisions.[34]

7.31 The OPC already has some functions under legislation other than the *Privacy Act*.[35] Nevertheless, if credit reporting regulation were to be located outside the Act, questions may arise about whether the OPC remains the appropriate regulator. For example, credit reporting could conceivably be regulated as a financial services consumer protection law by the Australian Securities and Investments Commission.

7.32 Overseas jurisdictions take differing approaches to the location of credit reporting legislation and the nature of the regulator. In the United States, credit reporting is regulated under the *Fair Credit Reporting Act 1970* (US) by the Federal Trade Commission. However, in this context, it may be noted that the United States does not have a federal information privacy commissioner.

---

33 See Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006), Ch 7.

34 The constitutional basis of Part IIIA is discussed later in this chapter.

35 Including under the *Data-matching Program (Assistance and Tax) Act 1990* (Cth); *National Health Act 1953* (Cth); *Telecommunications Act 1997* (Cth); and *Crimes Act 1914* (Cth): see Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006). IP 31 notes that one issue for consideration by the Inquiry is whether these functions should be consolidated under the *Privacy Act*.

7.33 In the United Kingdom, the activities of credit reference agencies are regulated by both the *Consumer Credit Act 1974* (UK) and under privacy legislation. However, the United Kingdom Information Commissioner (the equivalent of the OPC) deals with credit reporting complaints, and credit reference agencies are bound by the *Data Protection Act 1998* (UK).

7.34 New Zealand and Canada more closely follow the Australian position. Credit reporting is regulated by these jurisdictions' privacy commissioners under the *Privacy Act 1993* (NZ) and the *Personal Information Protection and Electronic Documents Act 2000* (Canada) respectively.

Question 7–1 Should Part IIIA and related provisions of the *Privacy Act* dealing specifically with credit reporting:

(a) continue to regulate credit reporting, with appropriate amendment;

(b) be repealed, and credit reporting regulated under the *Privacy Act*, National Privacy Principles and a privacy code;

(c) be repealed, and credit reporting regulated under new sectoral legislation outside the *Privacy Act*; or

(d) be repealed, and credit reporting regulated by a self-regulatory scheme?

Consumer and industry perspectives on reform

7.35 The ALRC is interested in consumer and industry perspectives on reform of the credit reporting provisions. Comments from the Senate Legal and Constitutional References Committee inquiry into the *Privacy Act*[36] (the Senate Committee privacy inquiry) and the ALRC's initial consultations illustrate some of these perspectives.

7.36 The Senate Committee privacy inquiry highlighted a range of specific criticisms of the credit reporting provisions, many of which are discussed in Chapter 5. Review and reform of credit reporting regulation were generally favoured by consumer groups.

7.37 The Senate Committee noted, however, that some representatives of the credit reporting industry did not see a need for further review or legislative reform. In its submission to the Senate inquiry, Baycorp Advantage stated that it did not support a

36 Parliament of Australia—Senate Legal and Constitutional References Committee, *The Real Big Brother: Inquiry into the Privacy Act 1988* (2005).

general review of Part IIIA or the *Credit Reporting Code of Conduct* because it could divert energy and resources from other developments to enhance data quality and improve consumer engagement. Baycorp also expressed support for an increase in resources for the OPC to support the regulator's functions, especially in dispute resolution.[37]

7.38 As discussed in Chapter 6, there is active support within the financial sector promoting review of the credit reporting provisions of the *Privacy Act* primarily in order to permit the introduction of a more comprehensive reporting system.[38]

7.39 The Consumer Credit Legal Centre (NSW) (CCLC) submitted that the credit reporting system—as regulated by Part IIIA of the *Privacy Act*, the *Credit Reporting Code of Conduct*, and the NPPs—presents many problems that need to be addressed.

> While the above regulations provide some safeguards, consumers do not enjoy their full benefit because industry players may follow the letter (at best) but not the spirit of the law. Many credit providers who use the system do not do so responsibly, and there is little incentive for them to do so.[39]

7.40 The Australian Consumers Association (ACA) has called for a wide-ranging review of the credit reporting system (and regulation of debt collection). In the ACA's view, there are 'serious, systemic flaws which are leaving increasing numbers of Australian consumers vulnerable to defamation, mismatching and harassment'.[40]

7.41 Other commentators have criticised the credit reporting provisions for being overly complex and prescriptive.[41] Such is the complexity of the provisions, and the definitions in particular, that it has been suggested they should be rewritten even if the substance of regulation is to remain largely unchanged.[42]

7.42 It has also been suggested that the credit reporting provisions operate as a barrier to new entrants into the credit reporting market and may hinder competition.[43] The reasons for this view include that it takes a long period of time to develop databases of 'negative' events, such as defaults on loans; and complex and prescriptive legislative requirements increase the cost to a new entrant of developing the information technology infrastructure needed to conduct consumer credit reporting. On the other hand, the credit reporting provisions were the result of significant parliamentary

---

37 Baycorp Advantage, *Submission to the Senate Legal and Constitutional References Committee Inquiry into the Privacy Act 1988*, 16 March 2005.
38 Dun & Bradstreet, *Submission PR 11,* 13 April 2006.
39 Consumer Credit Legal Centre (NSW) Inc, *Submission PR 28,* 6 June 2006.
40 C Wolthuizen, 'Reporting on the Credit Reporters' (2004) (Autumn) *Consuming Interest* 6.
41 N Waters, *Consultation PC 17*, Sydney, 2 May 2006; Law Council of Australia Privacy Working Group, *Consultation PC 32*, Sydney, 12 July 2006.
42 D Giles, *Consultation PC 6*, Sydney, 2 March 2006.
43 Law Council of Australia Privacy Working Group, *Consultation PC 32*, Sydney, 12 July 2006; Baycorp Advantage, *Consultation PC 2*, Sydney, 24 February 2006.

deliberation and may be viewed as having operated since 1991 without fundamental problems.[44]

Changes in the credit sector and credit reporting system

7.43 Reform of the credit reporting provisions must take into account the changing nature of the credit sector in Australia and developments in the role and uses of the credit reporting system. For example, the OPC has identified 'the recent growth and development of the debt collecting industry' as one such change.[45] As discussed in Chapter 5, a debt collection agency that has purchased debts from a credit provider may qualify as a credit provider for the purposes of the credit reporting provisions.

7.44 Technological change more generally—such as the increasing use of the internet in financial transactions—also may be a relevant consideration in reform of credit reporting regulation. The ALRC is interested in comments on aspects of the credit reporting provisions that may require change to take account of technological or other developments.

7.45 Developments in the uses of personal information by credit reporting agencies also may require new regulatory responses. One such development concerns the provision of anti-fraud or identity verification services and products to credit providers. These services maintain databases of personal information provided on credit and similar application forms that have been identified as suspicious. These databases are used to compare details on new credit applications (such as name, address and drivers' licence numbers) with those from previous suspect applications and provide a report back to the credit provider. These anti-fraud services may conduct a 'credit reporting business' for the purposes of Part IIIA—but this may not be widely appreciated.

7.46 In a related vein, the ALRC understands that credit reporting agencies commonly link files that are considered to relate to the same individual—for example, an individual who may have used a different combination of names or an alias. Linking means that when an individual makes a credit application and the credit provider requests a credit report, all the linked files may be accessed—even though the files may, in fact, relate to different individuals who may not be aware of the linkage. The linking of credit information files is not specifically authorised by Part IIIA.

7.47 New secondary uses of credit information files by credit reporting agencies may require further consideration. While Part IIIA contains detailed provisions placing limits on the disclosure of personal information in credit information files by credit

---

44 G Greenleaf, *Consultation PC 5*, Sydney, 28 February 2006.

45 Office of the Privacy Commissioner, *Report on the Review of the Credit Provider Determinations (Assignees and Classes of Credit Providers)* (2006), 22.

reporting agencies,[46] it does not directly regulate the use of credit information files. In addition to use in generating credit reports for credit providers, personal information in credit information files may be used for secondary purposes including in data mining and generating credit scores.[47] While NPP 2.1 places limits on the secondary use of personal information there may be a need for provisions relating specifically to the secondary use of personal information in credit reporting information.[48]

Other reform considerations

Trans-Tasman harmonisation

7.48 The desirability of trans-Tasman harmonisation in credit reporting regulation is a relevant consideration. The Australian and New Zealand banking and financial services markets are highly integrated and many credit providers (and both major credit reporting agencies) operate on both sides of the Tasman.

7.49 Starting from their similar legal and commercial backgrounds, New Zealand and Australia have already achieved a significant degree of coordination and cooperation in a number of areas of business law (including in fair trading and other consumer protection law), and the countries are committed to further development of business law coordination.[49] There may be important benefits in maintaining harmonisation between Australian and New Zealand law and practice in the area of credit reporting.

The regulatory burden

7.50 The Terms of Reference for the current Inquiry require the ALRC to consider 'the desirability of minimising the regulatory burden on business'. As discussed in *Review of Privacy*, Issues Paper 31 (IP 31),[50] business has identified the pervasive nature of privacy requirements as an important contributor to the cumulative regulatory burden it faces.[51]

7.51 The ALRC is interested in hearing from credit reporting agencies, credit providers and others about the compliance burden or cost of the credit reporting provisions and the likely burden or cost of reform, in general or in relation to specific reforms.

---

46 See *Privacy Act 1988* (Cth) s 18K.

47 Data mining is discussed in Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006), Ch 11.

48 Including in relation to the secondary use by credit providers of reports of information relating to credit worthiness as defined in *Privacy Act 1988* (Cth) s 18N(9).

49 *Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of Business Law* (2000) Department of Foreign Affairs and Trade <www.dfat.gov.au/geo/new_zealand/anz_cer/memorandum_of_understanding_business_law.html> at 26 September 2006.

50 See Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006), Ch 7.

51 Regulation Taskforce 2006, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, Report to the Prime Minister and the Treasurer (2006), 54.

7.52 The ALRC notes that more detailed feedback on the compliance burden or cost of reform will only be practical (and would be most useful to the ALRC) after the release of the Discussion Paper in this Inquiry. The Discussion Paper, scheduled for publication in mid-2007, will indicate the ALRC's current thinking in the form of specific reform proposals.

Question 7–2 Should the credit reporting provisions of the *Privacy Act* be amended to take account of the following (and if so, how):

(a) developments in technology;

(b) changes in credit reporting practices; or

(c) any other considerations?

Appendix 1. List of Abbreviations

2000 Senate Committee inquiry	Parliament of Australia—Senate Legal and Constitutional Legislation Committee, *Inquiry into the Provisions of the Privacy Amendment (Private Sector) Bill 2000* (2000)
ACA	Australian Consumers' Association
ALRC	Australian Law Reform Commission
BFSO	Banking and Financial Services Ombudsman
CCLC	Consumer Credit Legal Centre (NSW)
CFA	Consumers' Federation of Australia
Code of Conduct	Office of the Federal Privacy Commissioner, *Credit Reporting Code of Conduct* (1991)
CRAA	Credit Reference Association of Australia
DPPs	Data Protection Principles (UK)
EFTPOS	Electronic Funds Transfer at Point of Sale
FCRA	*Fair Credit Reporting Act 1970* (US)
IP 31	Australian Law Reform Commission, *Review of Privacy*, IP 31, (2006)
IPP	Information Privacy Principle
MasterCard/ACIL Tasman Report	ACIL Tasman, *Comprehensive Credit Reporting: Main Report of an Analysis of its Economic Benefits for Australia [Prepared for MasterCard International]* (2004)
MasterCard/CIE/EDC Report	Centre for International Economics and Edgar Dunn and Company, *Options for Implementation of Comprehensive Credit Reporting in Australia [Prepared for MasterCard Worldwide]* (2006)
NPP	National Privacy Principle

OECD	Organisation for Economic Co-operation and Development
OPC	Office of the Privacy Commissioner
OPC Review	Office of the Privacy Commissioner, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988* (2005)
PPS	Payment Performance System
Privacy Act	*Privacy Act 1988* (Cth)
RTDs	residential tenancy databases
Senate Committee privacy inquiry	Parliament of Australia—Senate Legal and Constitutional References Committee inquiry into the *Privacy Act 1988* (Cth)
Senate Standing Committee	Senate Standing Committee on Legal and Constitutional Affairs
TIO	Telecommunications Industry Ombudsman

Reports of the Australian Law Reform Commission

(Not including Annual Reports)

ALRC 1 Complaints Against Police, 1975
ALRC 2 Criminal Investigation, 1975
ALRC 4 Alcohol, Drugs and Driving, 1976
ALRC 6 Insolvency: The Regular Payment of Debts, 1977
ALRC 7 Human Tissue Transplants, 1977
ALRC 9 Complaints Against Police (Supplementary Report), 1978
ALRC 11 Unfair Publication: Defamation and Privacy, 1979
ALRC 12 Privacy and the Census, 1979
ALRC 14 Lands Acquisition and Compensation, 1980
ALRC 15 Sentencing of Federal Offenders (Interim), 1980
ALRC 16 Insurance Agents and Brokers, 1980
ALRC 18 Child Welfare, 1981
ALRC 20 Insurance Contracts, 1982
ALRC 22 Privacy, 1983
ALRC 24 Foreign State Immunity, 1984
ALRC 26 Evidence (Interim), 1985
ALRC 27 Standing in Public Interest Litigation, 1985
ALRC 28 Community Law Reform for the Australian Capital Territory: First Report: The Community Law Reform Program. Contributory Negligence in Fatal Accident Cases and Breach of Statutory Duty Cases and Funeral Costs in Fatal Accident Cases, 1985
ALRC 30 Domestic Violence, 1986
ALRC 31 The Recognition of Aboriginal Customary Laws, 1986
ALRC 32 Community Law Reform for the Australian Capital Territory: Second Report: Loss of Consortium and Compensation for Loss of Capacity to do Housework, 1986
ALRC 33 Civil Admiralty Jurisdiction, 1986
ALRC 35 Contempt, 1987
ALRC 36 Debt Recovery and Insolvency, 1987
ALRC 37 Spent Convictions, 1987
ALRC 38 Evidence, 1987
ALRC 39 Matrimonial Property, 1987
ALRC 40 Service and Execution of Process, 1987
ALRC 42 Occupiers' Liability, 1988
ALRC 43 The Commonwealth Prisoners Act, (Interim) 1988
ALRC 44 Sentencing, 1988
ALRC 45 General Insolvency Inquiry, 1988
ALRC 46 Grouped Proceedings in the Federal Court, 1988
ALRC 47 Community Law Reform for the Australian Capital Territory: Third Report: Enduring Powers of Attorney, 1988
ALRC 48 Criminal Admiralty Jurisdiction and Prize, 1990
ALRC 50 Informed Decisions About Medical Procedures, 1989
ALRC 51 Product Liability, 1989
ALRC 52 Guardianship and Management of Property, 1989
ALRC 55 Censorship Procedure, 1991
ALRC 57 Multiculturalism and the Law, 1992
ALRC 58 Choice of Law, 1992
ALRC 59 Collective Investments: Superannuation, 1992
ALRC 60 Customs and Excise, 1992
ALRC 61 Administrative Penalties in Customs and Excise, 1992
ALRC 63 Children's Evidence: Closed Circuit TV, 1992
ALRC 64 Personal Property Securities, 1993
ALRC 65 Collective Investments: Other People's Money, 1993
ALRC 67 Equality Before the Law: Women's Access to the Legal System, (Interim) 1994
ALRC 68 Compliance with the *Trade Practices Act 1974*, 1994
ALRC 69 Equality Before the Law: Justice for Women, 1994
ALRC 70 Child Care for Kids: Review of Legislation Administered By Department of Human Services and Health, (Interim) 1994
ALRC 72 The Coming of Age: New Aged Care Legislation for the Commonwealth, 1995
ALRC 73 For the Sake of the Kids: Complex Contact Cases and the Family Court, 1995
ALRC 74 Designs, 1995
ALRC 75 Costs Shifting: Who Pays for Litigation, 1995
ALRC 77 Open Government: A Review of the Federal *Freedom of Information Act 1982*, 1995
ALRC 78 Beyond the Door-Keeper: Standing to Sue for Public Remedies, 1996
ALRC 79 Making Rights Count: Services for People With a Disability, 1996
ALRC 80 Legal Risk in International Transactions, 1996
ALRC 82 Integrity: But Not By Trust Alone: AFP & NCA Complaints and Disciplinary Systems, 1996
ALRC 84 Seen and Heard: Priority for Children in the Legal Process, 1997
ALRC 85 Australia's Federal Record: A Review of *Archives Act 1983*, 1998
ALRC 87 Confiscation That Counts: A Review of the *Proceeds of Crime Act 1987*, 1999
ALRC 89 Managing Justice: A Review of the Federal Civil Justice System, 2000
ALRC 91 Review of the *Marine Insurance Act 1909*, 2001
ALRC 92 The Judicial Power of the Commonwealth: A Review of the *Judiciary Act 1903* and Related Legislation, 2001
ALRC 95 Principled Regulation: Federal Civil & Administrative Penalties in Australia, 2002
ALRC 96 Essentially Yours: The Protection of Human Genetic Information in Australia, 2003
ALRC 98 Keeping Secrets: The Protection of Classified and Security Sensitive Information, 2004
ALRC 99 Genes and Ingenuity: Gene Patenting and Human Health, 2004
ALRC 102 Uniform Evidence Law, 2005
ALRC 103 Same Crime, Same Time: Sentencing of Federal Offenders, 2006
ALRC 104 Fighting Words: A Review of Sedition Laws in Australia, 2006