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Managing the Privilege of Credit Reporting:
An Analysis of ALRC Proposals for the Credit
Reporting Provisions of the Privacy Act

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Nigel Waters

Abstract

This submission addresses these issues in greater detail and, more specifically, responds to Part G of the ALRC Discussion Paper 72 (DP72) which addresses the credit reporting provisions of the Privacy Act. The ALRC proposes that Part IIIA of the Privacy Act 1988 be repealed and that instead, binding privacy rules imposing obligations on credit providers and credit reporting agencies that differ from the default Unified Privacy Principles should be promulgated in Regulations under the Act, with some of the current binding obligations left to non-binding guidance.

The submission supports the proposal for Regulations provided they amount to an adequate replacement for Part IIIA. It follows that it would be necessary for the Regulations to be drafted and available for debate at the same time as any amendment repealing Part IIIA.

Currently Part IIIA of the Act effectively licences a particular form of ‘bundled pseudo-consent’ whereby individuals applying for credit are required to consent to secondary use and widespread disclosure, through centralised credit reference databases, of information about their financial affairs.

This submission argues that this should be acknowledged as a privileged state-sanctioned exception from normal expectations of privacy. From this starting point, it is only to be expected that there should be strict controls, limits an additional safeguards, and the onus should be on the community of lenders to justify any weakening of controls; derogations from obligations, or extension of the privilege in the form of more comprehensive credit reporting.



Cyberspace Law and Policy Centre
A Centre for the Public Interest in Networked Transactions

Managing the privilege of credit reporting: an analysis of ALRC proposals for the credit reporting provisions of the Privacy Act

*Submission to the Australian Law Reform Commission
on the Review of Australian Privacy Laws Discussion Paper 72 (DP 72)*

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Note: our submissions number consecutively following on those in our separate submissions on the Unified Privacy Principles and on Promotion and Enforcement.

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Introduction

Submission

This submission responds to Part G of the ALRC Discussion Paper 72 (DP72) which addresses the credit reporting provisions of the *Privacy Act*. It refers in places to our earlier submission on the ALRC's Issues Paper 32 on the credit reporting provisions (CLPC IP32).

We make separate submissions on Part D – the proposed Unified Privacy Principles (UPPs); Part E - the Exemptions, Part F – promotion and enforcement of the Principles, and on some other parts of DP 72.

Background – the iPP Project

Research for this submission has been undertaken as part of a Discovery project funded by the Australian Research Council, 'Interpreting Privacy Principles'. The home page for the project, and other publications relating to the project, are at <<http://www.cyberlawcentre.org/ipp/>>. The *iPP Project* is based at the Cyberspace Law & Policy Centre at UNSW Law Faculty. The principal objective of this research is to conduct over the course of the project (2006-09) a comprehensive Australian study of (i) the interpretation of information privacy principles (IPPs) and 'core concepts' in Australia's various privacy laws, particularly by Courts, Tribunals and privacy regulators; (ii) the extent of current statutory uniformity between jurisdictions and types of laws, and (iii) proposals for reforms to obtain better uniformity, certainty, and protection of privacy.

Concerning the first element, a small but rapidly growing body of cases has developed in Australia over the last few years. Around a hundred Tribunal decisions, a similar quantity of mediated complaint summaries, and relatively small number of relevant Court decisions have become available. There has been little systematic analysis of this material. The relative scarcity of Australian interpretative materials means that the objective necessitates consideration of the interpretation of similar IPPs and core concepts in the privacy laws of other Asia-Pacific countries (particularly New Zealand, which has the largest quantity of reported cases) and European jurisdictions. The *iPP Project*, as it develops this analysis, will aim to make further inputs into the ALRC's review and similar privacy reform projects at State level.

1. Overview

1.1. False assumptions

We question the widespread assumption, reflected in the ALRC chapters on the credit reporting provisions of the *Privacy Act*, that these provisions represent, overall, a *more* rigorous regime than the default National Privacy Principles.

While some of the provisions are more limiting than the NPPs, they should be seen as conditions and safeguards attached to what is in effect a statutorily licensed breach of

the use and disclosure principle.

Part IIIA of the Act effectively licences a particular form of ‘bundled pseudo-consent’ whereby individuals applying for credit are required to consent to secondary use and widespread disclosure, through centralised credit reference databases, of information about their financial affairs.

The normal application of privacy principles would allow a credit provider to make it a condition of a loan for an applicant to:

- (a) consent to the credit provider collecting information about the applicant and their other commitments, and
- (b) consent to the credit provider disclosing information about any loan it makes to other credit providers on request

However, the collection should in the first instance be from the individual themselves. Mandating verification from third parties, and even more the combined mandatory collection and verification from third parties that is inherent in the operation of centralised credit reference systems, implies a lack of trust in applicants’ willingness to provide full and truthful relevant information. While this is no doubt predicated on experience of a certain level of less than full and honest disclosure (although presumably a minority of applicants?), it does mean that *all* applicants for credit are required to surrender their normal reasonable expectation of financial privacy.

Use and disclosure privacy principles always provide for a ‘required or authorised by law’ exception to accommodate situations where other public or private interests are considered by legislatures to outweigh the privacy interests of individuals.

In the credit reporting context, Part IIIA in effect provides the authorisation for a departure from the normal application of the use and disclosure principle, by expressly legitimising:

- (a) the bundling of use for assessing a credit application with disclosure for the secondary purpose of informing other credit providers via central credit reference databases;
- (b) a variation (distortion) of the normal meaning of consent; i.e. in this context it is not freely given with the option of withdrawal – rather it is merely an acknowledgement of a condition, and
- (c) the pooling of a multiplicity of bilateral information exchanges into a common centralised system, on economic efficiency grounds.

The starting point for any review of the credit reporting provisions of the *Privacy Act* should therefore be an acknowledgement that the current centralised credit reporting systems represent a privileged state-sanctioned exception from normal expectations of privacy.

From this starting point, it is only to be expected that there should be strict controls, limits an additional safeguards, and the onus should be on the community of lenders to justify any weakening of controls; derogations from obligations, or extension of the privilege in the form of more comprehensive credit reporting.

We also question two specific assumptions in this Chapter. Firstly, that information asymmetry is automatically a bad thing (DP72, [48.18-19]). Failure by an applicant to disclose aspects of their credit history is not necessarily fraudulent if the individual is not asked or if it is irrelevant (defaults will rarely if ever be irrelevant but other information included in current credit information files such as inquiries may well be). Secondly, we question the assumption that credit reporting necessarily serves the purpose of facilitating responsible lending. It *may* do so but may equally facilitate both a greater volume of lending and more irresponsible lending – without further regulation of lending practices, the actual outcome is uncertain.

Submission DP72-158: The ALRC should acknowledge in its final report the alternative perspectives from which the credit reporting regulation can be viewed, and in particular that from one perspective, rules that are more prescriptive than the UPPs can be justified on the basis that a centralised credit reporting system necessarily involves a departure from privacy norms and reasonable expectations.

Chapter 49 provides a useful factual account of the current credit reporting provisions.

2. The Approach to Reform

The ALRC proposes that Part IIIA of the Act be repealed and that instead, binding privacy rules imposing obligations on credit providers and credit reporting agencies should be promulgated in Regulations under the Act (DP72, Proposals 50-1 & 50-2).

We support these proposals, subject to the proposed Regulations providing an adequate replacement for Part IIIA. It follows that it would be necessary for the Regulations to be drafted and available for debate at the same time as any amendment repealing Part IIIA.

Submission DP72-159: If credit reporting rules are to be in Regulations instead of in the Act, then the Regulations must be available for consideration at the same time as any amendments repealing Part IIIA.

The ALRC mentions the requirement in the NZ Credit Reporting Code for mandatory subscriber agreements, but notes that there has been no call in submissions on the earlier Issues Paper (IP32) for such an approach. We feel that the ALRC should have asked for views on this. We understand that the main stakeholders in the Australian credit reporting system are in favour of binding and enforceable subscriber agreements and we favour a requirement for them.

Submission DP72-160: The Regulations should require credit reporting agencies to have a complying subscriber agreement in place before disclosing any credit information to a credit provider.

The ALRC proposes that credit reporting obligations in Regulations be additional to the UPPs, and that they be drafted so as to include only those requirements that are different from or more specific than those in the UPPs (DP72, Proposals 50-3 & 50-4).

Submission DP72-161: We support Proposals 50-3 and 50-4.

2.1. Application to wider credit worthiness information

The ALRC has noted that the existing scope of the credit reporting provisions is wider than just credit reporting information, in that s.18N expressly relates to reports being not only credit reports but also any other information relating to an individual's credit-worthiness. The ALRC acknowledges that a number of submissions to IP32 (including ours) called for this wider scope to be clarified, but the ALRC instead proposes that it be cut back to just credit reporting information (DP72, [50.84] and Proposal 50-5).

There is anecdotal evidence that the implications of s18N are not widely appreciated by credit providers, and there certainly seems to have been little pro-active enforcement of the section. However, we do not understand why the ALRC has simply dismissed the issue of the wider scope. As we noted in our earlier submission, it was clearly the intention of Parliament to regulate credit-worthiness information more generally¹. If s18N did no more than impose obligations now contained in the NPPs, there would be good reason to limit the scope of the new Regulations, but this is not the case – s18N is much more prescriptive. The onus should be on credit providers to justify why they find the s18N obligations onerous. We return to this issue in relation to Proposal 53-4.

Submission DP72-162: The proposed Regulations should apply to 'credit information', defined to mean the same as the current 'report' in s.18N(9).

The ALRC proposes that the definition of 'credit reporting business' should be amended to ensure that businesses that provide credit reporting information that is publicly available are caught by the Regulations (DP72 [50.90] and Proposal 50-6).

Submission DP72-163: We support Proposal 50-6, subject to clarification of its relationship to Proposal 52-6.

The ALRC proposes a simplified definition of 'credit provider' (DP72, Proposal 50-7), and asks two specific questions about the definition (Questions 50-1 & 50-2).

We support a simplified definition, but oppose the definition in the NZ Code, which is in our view far too wide. We favour a narrowing of the definition, including by increasing the length of qualifying deferred payment period from 7 to 30 days. Given the potential effect on individuals of adverse conclusions being drawn from credit reports, it is essential that access is limited to genuine lenders who can justify the need for credit reporting information. Businesses such as car hire firms and real estate agents, and employers, who seek to use credit reporting information for other purposes, must continue to be denied access, as must merchants accepting credit card payments who do not bear the risk of defaults.

The additional categories of businesses determined by the Privacy Commissioner to be credit providers should be reviewed before they are incorporated in the definition. The inclusion of assignees and telecommunications and utilities companies are

¹ IP 32 cited the Minister's Second Reading Speech in which he said "The principal purpose of this Bill is to provide privacy protection for individuals in relation to their consumer credit records."

questionable, at least as long as they are not subject to the same level of regulation as finance lenders. We also suggest that the definition issue (which determines who can have access to the credit reporting information) cannot sensibly be divorced from the issue of how much access and for what purpose – see our submission on Chapter 53.

Submission DP72-164: Any simplified definition of credit provider should not be significantly broader than the current definition provided by the Act and the Commissioner's Determinations, and the justification for the classes included by Determination should be revisited. The definition also needs to be linked to permitted uses.

The ALRC proposes to continue to exclude foreign credit from the Australian credit reporting system, but also proposes inter-governmental discussions with New Zealand. (DP72, Proposals 50-8 & 50-9).

Submission DP72-165: We support Proposals 50-8 and 50-9.

The ALRC proposes that the Regulations should apply to credit extended to individuals irrespective of purpose – removing the current distinction between commercial credit (unregulated by Part IIIA) and consumer credit i.e. 'credit for domestic, family or household purposes (DP72, Proposal 50-10).

Submission DP72-166: We support Proposal 50-10.

The ALRC proposes that there should be an industry Code dealing with operational matters.

We support the concept of some detailed operational matters being left to a Code and/or Guidelines, but consider that more work is required on the overall hierarchy of regulation (Act, Regulation, Codes and Guidance) and the 'placement' of specific obligations in the different levels of the hierarchy. There remains considerable uncertainty about the framework proposed by the ALRC – in particular the role of Codes and whether they would be mandatory and/or binding and enforceable.

Submission DP72-167: The ALRC should more clearly explain its proposed hierarchy of regulation, and ensure that it recommends placement of specific obligations in the different levels to reflect its conclusions about how 'binding' those obligations should be.

3. More comprehensive reporting

The ALRC proposes that some additional categories of information be permitted in credit information files (DP72, Proposal 51-1).

The arguments for and against this move to more comprehensive credit reporting have been exhaustively canvassed both in DP72 and in subsequent meetings of the ALRC's Credit Reporting Advisory Committee and 'Roundtable' meeting in November. We are also aware from these meetings that credit providers and credit reporting agencies will be making submissions arguing for even more information than the ALRC has proposed, including 'delinquency' information that falls outside the definition of default information in Part IIIA.

In our view there remains insufficient evidence that any extra information would be used responsibly to the benefit of individuals, and no guarantees that it will not instead be used to increase the total volume of lending, and to target different classes of borrower and loans in ways which would contribute to over-commitment and financial stress. We refer to the more detailed explanation of these concerns in the submission from the Consumer Action law centre, amongst others.

In our view, no additional information should be permitted unless there are simultaneous changes to consumer credit regulation to require responsible lending (this is currently only a requirement of the voluntary Banking Code – there is no general obligation on all lenders). We defer to the many financial counselling NGOs who have first hand experience of irresponsible and predatory lending practices for more detailed arguments for why any move to more comprehensive reporting must be conditional on other regulatory changes. We also refer to the report by Galexia which has been submitted to the ALRC for a more detailed exposition of the case for parallel regulatory reforms (GALEXIA 2007).

Submission DP72-168: No additional classes of information should be permitted in credit information files unless there are simultaneous changes to consumer credit regulation including an obligation to lend responsibly including taking into account all available information.

In relation to the ALRC proposal to allow ‘the date on which each credit account was closed’, there would need to be a definition of ‘closed’ and an obligation on lenders to close accounts when appropriate rather than just letting them ‘lapse’ but never ‘closing’ them, which we understand to be widespread current practice.

Submission DP72-169: Any inclusion in credit information files of ‘date closed’ information for credit accounts would need to define the meaning of ‘closed’.

The ALRC proposes that the industry Code should provide for access to credit information files according to principles of reciprocity (DP72, Proposal 51-2). We do not think that the ALRC should take a position on reciprocity. It is largely a commercial issue for the industry stakeholders, and any agreement would be likely to require ACCC authorisation under the *Trade Practices Act*. If anything, we would see any crude reciprocity condition as undermining what should be independent judgements about what information should go into a credit information file and what should come out, to whom and for what purposes.

Submission DP72-170: the ALRC should not take a position on whether participation in a centralised credit reporting system should be based on a principle of reciprocity.

The ALRC proposes a review of the Credit Reporting Regulations after five years (DP72, Proposal 51-3). Given the significant changes proposed both in the regulatory framework and in the substantive rules, we submit that this is too long a period.

Submission DP72-171: The Credit Reporting Regulations should be subject to an independent review after three years of operation.

4. Collection

4.1. Identity crime

The ALRC proposes that the Regulations should provide for the recording on credit information files, on the initiative of the relevant individual, that the individual has been the subject of identity theft (DP72, Proposal 52-1).

We support this proposal, but firstly suggest that a definition of ‘identity crime’ is required – theft is only one type, with fraud and impersonation being more common.

We also question why the obligation should only be triggered by the individual. A credit provider or credit reporting agency may become aware of cases of identity crime by a variety of other means – and the individual concerned may not even know at that point in time.

We understand that the industry stakeholders have questioned the value of an identity crime ‘flag’ on credit information files, as such a flag would not typically be recognised by automated credit assessment systems, and major systems changes would be required to accommodate them. We question whether this is acceptable - (and we discuss the same point in relation to file challenges in our submission on Proposal 55-1 and on proposed UPP 9).

The industry proposes instead that where an individual is known to be the subject of identity crime, their credit information file should be ‘frozen’ pending a resolution of the issue. We would need to see more detail of this proposal before forming a view as to whether it is an adequate substitute for a flag that can (and in our view) should be taken into account while the file continues to be in use. The extent to which it is appropriate for the file to remain in use will depend on the type of crime and stage of response to it.

Where a credit provider or credit reporting agency becomes aware of cases of identity crime, other than from the individual themselves, there should generally be a requirement to inform the individual. In some cases this may be picked up by proposed general data breach notification requirement, on which we comment in another submission (DP72, Proposal 47-1). Where it is not, the obligation should be included in the Credit Reporting Regulations.

Submission DP72-172: The Regulations should place obligations on credit providers and credit reporting agencies where they become aware, by whatever means, that an individual about whom they hold personal information has been the victim of identity crime.

4.2. Negative information

The ALRC proposes that Credit reporting agencies should only be permitted to list overdue payments of more than a minimum amount. Submissions are invited as to how and where such a threshold amount should be set (DP72, Proposal 52-2 and Question 52-1).

Submission DP72-173: We support a minimum amount and submit that it should be specified in the Regulations. We defer to the financial

counselling NGOs suggestion of \$200 as an appropriate threshold amount, but see no reason in principle why it should not vary depending on the class of credit provider and loan type.

The ALRC proposes that information about dishonoured cheques should not be permitted to be included in credit information files (DP72, Proposal 52-3).

Submission DP72-174: We support Proposal 52-3.

The ALRC makes two proposals for the Regulations to cover insolvency information better than the current regime (DP72, Proposals 52-4 & 52-5).

Submission DP72-175: We support Proposals 52-4 & 52-5.

The ALRC asks if the Regulations should allow for the listing of serious credit infringements, and if so how this concept should be defined (DP72, Question 52-2).

We believe that the Regulations should allow for the listing of serious credit infringements, but that as suggested by the ALRC in paragraph 52.63, there should be no direct replication of the item (c) from s18E(1)(b)(x) – ‘reasonable suspicion’ is too subjective. We further suggest that authority to list serious credit infringements should be contingent on membership of an approved EDR scheme (in this respect see also our submission on Proposal 55-6 concerning default listing).

Submission DP72-176: The Regulations should allow for the listing of serious credit infringements, but that the only criteria should be grounds (a) and (b) from s18E(1)(b)(x) and not (c). Credit providers should only be able to list serious credit infringements if they are members of an approved external dispute resolution (EDR) scheme.

The ALRC proposes that the Regulations should permit credit reporting information to include publicly available information (DP72, Proposal 52-6)

We support Proposal 52-6 but are concerned that in combination with Proposals 50-5 and 50-6 this would leave publicly available information in credit information files and reports effectively subject only to the UPPs, and not to the rules in the credit reporting Regulations.

Submission DP72-177: Publicly available information, whether held in credit information files or separately, should be regulated by the credit reporting Regulations if and when it is brought together with other information for the purposes of a credit report.

The ALRC proposes that the Regulations should prohibit the inclusion in credit reporting information of ‘sensitive’ information as currently defined in the *Privacy Act* (DP72, Proposal 52-7)

We support Proposal 52-7, and suggest that in its final recommendation the ALRC also confirm its view in paragraph 52.87 that the Regulations should prohibit the inclusion of information about an individual’s ‘lifestyle, character or reputation’.

Submission DP72-178: The Regulations should prohibit the inclusion in credit reporting information of ‘sensitive information’ and information about an individual’s ‘lifestyle, character or reputation’.

The ALRC proposes that the Regulations should prohibit the inclusion in credit reporting information of information about individuals the credit provider or credit reporting agency knows to be under 18 (DP72, Proposal 52-8).

We understand that credit contracts are not binding on persons under 18, but that the wider definition of credit provider in the Privacy Act means that some other debts, such as for utilities, that can lawfully be incurred can be listed when the default conditions are met. For the reasons explained more fully in submissions from financial counselling NGOs, we agree that no default information should be listed about persons under 18 years of age (including where the credit provider *should have known* the age, and that credit reporting agencies should be required to delete information about individuals under 18 upon being notified that the information was listed when those individuals were under 18.

Submission DP72-179: We support Proposal 52-8.

4.3. Notification of collection

The ALRC proposes that the Regulations should provide for notice to individuals about certain prescribed matters at or before the time credit reporting information is collected about them (DP72, Proposals 52-9 & 52-10). Submissions are invited about the specific circumstances in which this obligation should apply (Questions 52-3 & 52-4).

We support the proposed content of notices, although we note that some items replicate those in UPP 3, to which credit provider or credit reporting agency would also be subject – contrary to the principle that the Regulations should only contain rules that are different from or more specific than those in the UPPs (see DP72, Proposal 50-4)

We suggest that the Regulations need to be more prescriptive about the timing of notices. We noted in our submission on IP 32 that a representative complaint had been made to the Privacy Commissioner about the timing of consents under Part IIIA. The Commissioner has now formed a final view with which the complainant NGOs disagree, but has declined to make a formal Determination that could be challenged. (see our submission on DP72 Part F for our views on this generic problem).

In our view, this outcome points to the need for clearer rules about the timing of notices – in particular that it is too late for individuals to be told about the possibility of a default listing only when they default or when a debt is assigned. For the notice requirement to have its intended effect, it needs to apply at the time an individual is still in a position to walk away from the transaction i.e. at the time of initial application for credit. It should however *also* apply at key subsequent events such as prior to default listing and on assignment. The requirement to notify should apply to all relevant parties, even if this means some duplication – credit providers and credit reporting agencies should be able to agree on combined notices to avoid duplication.

Submission DP72-180: The Regulations should prescribe both the content and timing of notices by all relevant parties.

5. Use & Disclosure

5.1. Permitted purposes

The ALRC proposes that the Regulations should provide a simplified list of permitted uses and disclosures (DP72, Proposal 53-1), but that they should also allow use or disclosure for related secondary purposes (DP72, Proposal 53-2).

The ALRC highlights the divergent views about whether disclosure to a credit reporting agency can be seen as a directly related secondary purpose within reasonable expectations (DP72, [53.9-53.10]). In our view this demonstrates the need for a more prescriptive regulatory regime for the use and disclosure of credit information – it would clearly be unsatisfactory to rely solely on generic privacy principles (such as the proposed UPP 5). For the same reason it is unacceptable to import the related secondary purpose exception from UPP 5 into the Credit Reporting Information Regulations.

Submission DP72-181: The Regulations should list permitted uses and disclosures of credit reporting information, but should not also provide a ‘related secondary purposes’ exception.

Insurers

The ALRC asks if the Regulations should allow credit providers (but not credit reporting agencies) to disclose credit reporting information to a mortgage or trade insurer (DP72, Question 53-1) – in effect confirming that these insurers are not permitted direct access to credit reporting agencies.

Submission DP72-182: We support a provision allowing indirect access to credit reporting information to a mortgage or trade insurer, via the credit provider.

Debt collection

The ALRC has considered submissions relating to access to credit reporting information for debt collection. It is clear that this is an area of significant concern to financial counselling services, and has been the subject of a number of complaints to the Privacy Commissioner under the existing regime.

Submission DP72-183: We support the ALRC’s view that there is no compelling reason for change to the rules governing access to credit reporting information for debt collection, being primarily via credit providers, and not direct access to credit reporting agencies.

Direct marketing

The ALRC concludes that the Regulations should prohibit the use or disclosure of credit reporting information for direct marketing (DP72, Proposal 53-3).

Submission DP72-184: We support Proposal 53-3.

Pre-screening

The ALRC asks if the prohibition on direct marketing should extend to the practice known as ‘pre-screening’ (DP72, Question 53-2), but assesses that there are no compelling reason why it should not. We agree with this assessment. If pre-screening could be quarantined to ‘screening out’ it could contribute to responsible lending, but this does not seem to be possible – ‘screening out’ on any criteria is in effect also ‘screening in’. As long as direct marketing of credit is allowed, pre-screening would allow selective marketing, thereby completely undermining the prohibition on direct marketing which the ALRC has concluded should be confirmed.

Pre-screening would effectively get round the current limitation that a credit report can only be drawn in relation to an actual application. The wider issue of whether unsolicited direct marketing of credit should be allowed and if so under what conditions² needs addressing in consumer credit legislation. However, as with the proposals for more comprehensive credit reporting discussed above, we submit that there should be no relaxation of the controls on use and disclosure of credit reporting information for marketing or so-called pre-screening without compensating lending reforms.

Submission DP72-185: The Regulations should prohibit the use or disclosure of credit reporting information both for direct marketing and for the practice known as ‘pre-screening’.

Identity verification

The ALRC discusses the issue of the use or disclosure of credit reporting information for the purposes of verification under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML-CTF Act), and invites views (DP72, Question 53-3). As is clear from the submissions received on IP32, this is only one aspect of a much broader policy debate about identity verification for a wide range of purposes beyond credit assessment.

Submissions that any use of credit reporting information for wider identity verification need not involve disclosure – only a yes/no confirmation, miss the point – it is arguable that there is still a ‘disclosure’ of information and in any case there is clearly a ‘use’.

The ALRC notes that the use of credit reporting information for identity verification is provided for under the existing *Financial Transaction Reports Act 1988* (the predecessor to the AML-CTF Act) but this is confined to credit providers who have access under Part IIIA. The ALRC does not comment on the fact that this use relies on ‘forced consent’ – a major flaw in the privacy regulatory framework on which we comment in our submission on Chapter 48 above and also in our submission on the UPPs (DP72, Part D).

Submissions that prohibition on the use of credit reporting information for wider identity verification is inconsistent with government policy and that other sources of

² We note in this context that that in India, regulations prohibit the marketing of personal loans and credit cards to individuals registered on their equivalent of the Do Not Call Register, which the ALRC discussed in Part J of DP72.

information are not regulated in the same way are also beside the point. We note that despite many submissions in relation to the draft AML-CTF legislation, the previous government chose not to accommodate any relaxation of or exemption from the *Privacy Act* controls in the AML-CTF Act and Regulations. In our view it is not appropriate for ALRC to recommend a solution to this wider policy issue in context of a privacy review.

Submission DP72-186: The ALRC should not take a position in relation to wider use of credit reporting information for identity verification outside the context of credit assessment, other than to recommend that it be considered in the context of wider identity management strategies.

5.2. Credit worthiness information

The ALRC proposes that there should be no equivalent in the Regulations to s18N of the *Privacy Act*, limiting the disclosure by credit providers of all personal information relating to credit worthiness (DP72, Proposal 53-4).

In support of this position, the ALRC has quoted selectively from the Explanatory Memorandum to the original *Privacy Amendment Bill* (DP72, [53.92]). It has not referred to another extract from the same Explanatory Memorandum which we cited in our earlier submission (CLPC IP32 Submission, p.4), which we repeat here:

“The principal purpose of this Bill is to provide privacy protection for individuals in relation to their *consumer credit records*.” (our emphasis)

We have already commented on this issue in our response to Chapter 50, and Proposal 50-5 in particular. We re-iterate our position that in light of this clear legislative intent, the ALRC should not so casually dismiss an entire area of regulation. The ALRC suggests that the reason for the wider coverage pre-dated the general extension of the *Privacy Act* to the private sector in 2000, and that the introduction of the NPPs renders s18N redundant (DP72, [53.94]). We disagree – in our view many (although not all) of the arguments for more specific regulation of credit related personal information which we set out in our response to Chapter 48 above apply with equal force to both credit reporting information and credit reports as defined in s18N.

The ALRC also suggests that the provisions of s18N may not be well-known (or widely observed by financial institutions and other credit providers (DP72, [53.96])). With respect, this is an argument for greater education and enforcement activity, not for abandoning the regulation, without a more convincing case.

We refer to our submission DP72-160 in response to Proposal 50-5.

5.3. Bundled and true consent

We refer to our view at the beginning of this submission (1.1) that a centralised credit reporting system necessarily involves a form of bundled consent. Apart from not recognising this fundamental starting point, the ALRC has provided a useful discussion of the other aspects of ‘bundled’ and ‘true’ consent in the context of credit reporting (DP72, [53.104-53.117]). The ALRC expresses some sympathy for the views we and others provided in our earlier submissions, and suggests that the drafting of the Regulations consider if notification should replace consent (DP72,

[53.116]). However, the ALRC makes no firm proposal to this effect, which we see as an important omission.

Submission DP72-187: The ALRC should recommend that before the Regulations are drafted, further consultations take place as to whether some of the consent requirements be replaced with notification requirements.

6. Security & Quality

6.1. Data quality

The ALRC notes that the existing Credit Reporting Code of Conduct³ provides for credit reporting agencies to notify credit providers of any inaccuracies and request a review of other files that may be subject to similar errors (DP72, [54.7]). We cannot see any proposal in this Chapter that would result in this obligation being carried over into the Regulations, and submit that the ALRC should make such a recommendation.

Submission DP72-188: The Regulations should include obligations similar to those in clause 1.4 of the Credit Reporting Code of Conduct.

6.2. Default reporting - timing

We disagree with the ALRC that issues of timing can be left, at least initially, to an industry code (DP72, [54.17]) – we submit that a maximum time be set in the Regulations. Twelve months has been suggested and we suggest that this be adopted unless there are compelling submissions to the contrary.

Submission DP72-189: The Regulations should provide that a default must be listed within twelve months.

The ALRC notes a proposal supported by Mastercard that the requirement for deletion of a default listing after a set period of time should relate to the time of the event rather than the time of listing (as is currently provided for in s18F(2)) (DP72, [54.30]). We support this proposal.

Submission DP72-190: the Regulations should require the time period within which a default listing must be deleted to commence from the event rather than from the time of listing.

6.3. Multiple listings

We similarly disagree with the ALRC that the issue of multiple listings can be left to an industry code (DP72, [54.25-26]) – we agree with the Privacy Commissioner and others that the Regulation should allow updating of an existing listing to avoid multiple listing of the same default.

Submission DP72-191: The Regulation should provide for updating of an existing listing to avoid multiple listing of the same default.

6.4. Statute-barred debts

The ALRC proposes that the Regulations should expressly prohibit the listing of any statute-barred debts. (DP72, Proposal 54-1).

Submission DP72-192: We support Proposal 54-1.

6.5. Schemes of arrangement

The ALRC proposes that the Regulations should provide that ‘new arrangements’ can be listed for five years (DP72, Proposal 54-2).

We defer to the financial counselling NGOs in relation to any submissions they might make, based on their experience, in relation to schemes of arrangement, but submit that any support for this proposal be contingent on a clear definition of such schemes.

Submission DP72-193: If Proposal 54-2 is adopted, the Regulations should include a definition of ‘scheme of arrangement’.

6.6. Data quality obligations

The ALRC proposes that the Regulations should require credit reporting agencies to enter into agreements with credit providers containing specified obligations in relation to data quality (DP72, Proposal 54-3).

We support Proposal 54-3.

We disagree with the ALRC that most data quality requirements can be left to an industry code (DP72, [54.77]). Experience to date shows that there are a range of known data quality problems in credit reporting which the existing regulatory framework has been unable to resolve. While there has been significant progress on some of these issues through a voluntary industry-consumer consultations, we submit that more of the known issues need to be addressed in the Regulations.

Submission DP72-194: We support Proposal 54-4 for a data quality obligation in the Regulations to include ‘not misleading’ but it should also include ‘and relevant’ to make it as consistent as possible with the equivalent proposed UPP 7.

We support the suggestion by the Consumer Action law centre that there should be an obligation on credit providers and credit reporting agencies to report systemic data quality problems, similar to obligations in other areas of financial regulation. Reporting (in this case to the Privacy Commissioner) should include information about the credit provider’s or agency’s response to the problem, followed by subsequent reporting of the action taken and its effect. Failure to report systemic issues should lead to significant penalties.

Submission DP72-195: The Regulations should require credit providers and credit reporting agencies to report systemic data quality problems, and the remedial action taken, to the Privacy Commissioner.

Submission DP72-196: We support Proposal 54-5 for an industry code to deal with residual data quality issues, but note that several of the matters listed should, in our submissions above, be included in the Regulations.

The ALRC proposes that the data quality issues be included in the review which they have previously recommended should take place after five years (DP72, Proposal 54-6). As indicated in our submission on Proposal 51-3, we favour the review taking place after three years.

6.7. Deletion

We disagree with the ALRC that there is no compelling case for any major change to existing retention periods (DP72, [54.87]). We are surprised that the ALRC has rejected firm views to the contrary not only from consumer NGOs but also from the Privacy Commissioner.

Submission DP72-197: We support Proposal 54-7 for the Regulations to include retention periods but submit that the periods currently in s18F need to be reviewed.

Submission DP72-198: We support Proposal 54-8 for the deletion of information on insolvency arrangements after five years.

6.8. Data security

The ALRC proposes that the Regulations not contain any data security obligations on the grounds that these will be adequately covered by proposed UPP 8 (DP72, Proposal 54-9).

Submission DP72-199: We support Proposal 54-9

7. Access, Complaint Handling & Penalties

Access and Correction

The ALRC asks if the Regulations should provide for free access for individuals to credit reporting information about them (DP72, Question 55-1).

We submit that they should – not just in the interests of the individuals – by encouraging access, it would also contribute significantly to data quality and security against ID fraud – both of which are in the public interest.

Submission DP72-200: We support a provision requiring credit reporting agencies to provide free access for individuals to credit reporting information about them.

The ALRC also asks if the Regulations should provide an equivalent to s18H(3) allowing for access on behalf of an individual by an ‘authorised individual’ (DP72, Question 55-2).

Submission DP72-201: We support provision in the Regulations for ‘authorised person’ access but submit that it needs to be drafted so as to prevent as far as possible ‘forced access’ for third party purposes. This is a generic problem about consents which we have raised in the context of other principles.

The ALRC proposes that the Regulations provide rights of access and correction based on those in ss 18H and 18J of the *Privacy Act* (DP72, Proposal 55-1)

We support Proposal 55-1, subject to concerns about the practical value of file annotations where correction requests are disputed. We comment on this in our relation to UPP 9 (CLPC DP72 Submission, section 12.6).

Submission DP72-202: We support Proposal 55-1.

We note the ALRC’s suggestion that rights of review of automated decision-making could be covered in an industry code (DP72, [55.48]). We refer to our submission on this generic issue in our submission on the UPPs (CLPC Submission DP72-124).

Submission DP72-203: The ALRC should recommend inclusion of provisions relating to automated credit assessment and decision-making in an industry code.

The ALRC proposes that the Regulations provide rights to be notified where a credit provider refuses an application for credit based wholly or partly on credit reporting information, based on s18M (DP72, Proposal 55-2).

Submission DP72-204: We support Proposal 55-2.

The ALRC proposes that the Regulations provide for the information given to include any credit score or ranking, with explanations (DP72, Proposal 55-3).

Submission DP72-205: We support Proposal 55-3.

Complaint handling

The ALRC proposes that the Regulations should require credit providers and credit reporting agencies to meet specified standards in relation to both internal and external dispute resolution (IDR & EDR) (DP72, Proposals 55-4, 55-5 and 55-6)

Submission DP72-206: We support Proposals 55-4, 55-5 and 55-6, but note that their efficacy will depend, in part, on improvements in the complaint handling policies and procedures of the Office of the Privacy Commissioner, on which we comment in our separate submission in response to DP72 Part F.

The ALRC proposes that the Regulations should provide that credit providers have an obligation to provide evidence to individuals and dispute resolution bodies to substantiate disputed credit reporting information, and that if the evidence is not provided within 30 days, the credit reporting agency must delete the information on request of the individual concerned (DP72, Proposal 55-7).

Submission DP72-207: We support Proposal 55-7, subject to the Regulations specifying when the 30 days commences – presumably and

preferably the time the complaint or challenge is first made. The proposed industry code should address the issue of what happens to the listing during the 30 day challenge period.

Penalties

The ALRC proposes that the criminal offence provisions currently in Part IIIA be removed, and replaced with a civil penalty regime for serious or repeated breaches of the Regulations (DP72, Proposal 55-8).

We support Proposal 55-8, on the basis that the burden of proof required for criminal prosecutions is so high that they are a 'hollow threat'. A civil penalty regime, with its lower burden of proof, and simpler and quicker processes, should be a more effective sanction and therefore also a better deterrent, provided that it is vigorously enforced. We comment further on enforcement issues in our submission on DP72 Part F.

Submission DP72-208: We support Proposal 55-8.



References

CLPC IP32 - Waters, N, January 2007, 'Implementing privacy principles in credit reporting' - Submission to the Australian Law Reform Commission on the Review of Privacy, Issues Paper 32, Credit reporting provisions

GALEXIA 2007 – Credit Reporting Regulatory Framework – a report for Veda Advantage, December 2007.

Index of Submissions

Note: our submissions number consecutively following on those in our separate submissions on the Unified Privacy Principles and on Promotion and Enforcement.

Introduction

1. Overview

Submission DP72-158: The ALRC should acknowledge in its final report the alternative perspectives from which the credit reporting regulation can be viewed, and in particular that from one perspective, rules that are more prescriptive than the UPPs can be justified on the basis that a centralised credit reporting system necessarily involves a departure from privacy norms and reasonable expectations.

2. The Approach to Reform

Submission DP72-159: If credit reporting rules are to be in Regulations instead of in the Act, then the Regulations must be available for consideration at the same time as any amendments repealing Part IIIA.

Submission DP72-160: The Regulations should require credit reporting agencies to have a complying subscriber agreement in place before disclosing any credit information to a credit provider.

Submission DP72-161: We support Proposals 50-3 and 50-4.

Submission DP72-162: The proposed Regulations should apply to 'credit information', defined to mean the same as the current 'report' in s.18N(9).

Submission DP72-163: We support Proposal 50-6, subject to clarification of its relationship to Proposal 52-6.

Submission DP72-164: Any simplified definition of credit provider should not be significantly broader than the current definition provided by the Act and the Commissioner's Determinations, and the justification for the classes included by Determination should be revisited. The definition also needs to be linked to permitted uses.

Submission DP72-165: We support Proposals 50-8 and 50-9.

Submission DP72-166: We support Proposal 50-10.

Submission DP72-167: The ALRC should more clearly explain its proposed hierarchy of regulation, and ensure that it recommends placement of specific obligations in the different levels to reflect its conclusions about how 'binding' those obligations should be.

3. More comprehensive reporting

Submission DP72-168: No additional classes of information should be permitted in credit information files unless there are simultaneous changes to consumer credit regulation including an obligation to lend responsibly including taking into account all available information.

Submission DP72-169: Any inclusion in credit information files of 'date closed' information for credit accounts would need to define the meaning of 'closed'.

Submission DP72-170: the ALRC should not take a position on whether participation in a centralised credit reporting system should be based on a principle of reciprocity.

Submission DP72-171: The Credit Reporting Regulations should be subject to an independent review after three years of operation.

4. Collection

Submission DP72-172: The Regulations should place obligations on credit providers and credit reporting agencies where they become aware, by whatever means, that an individual about whom they hold personal information has been the victim of identity crime.

Submission DP72-173: We support a minimum amount and submit that it should be specified in the Regulations. We defer to the financial counselling NGOs suggestion of \$200 as an appropriate threshold amount, but see no reason in principle why it should not vary depending on the class of credit provider and loan type.

Submission DP72-174: We support Proposal 52-3.

Submission DP72-175: We support Proposals 52-4 & 52-5.

Submission DP72-176: The Regulations should allow for the listing of serious credit infringements, but that the only criteria should be grounds (a) and (b) from s18E(1)(b)(x) and not (c). Credit providers should only be able to list serious credit infringements if they are members of an approved external dispute resolution (EDR) scheme.

Submission DP72-177: Publicly available information, whether held in credit information files or separately, should be regulated by the credit reporting Regulations if and when it is brought together with other information for the purposes of a credit report.

Submission DP72-178: The Regulations should prohibit the inclusion in credit reporting information of 'sensitive information' and information about an individual's 'lifestyle, character or reputation'.

Submission DP72-179: We support Proposal 52-8.

Submission DP72-180: The Regulations should prescribe both the content and timing of notices by all relevant parties.

5. Use & Disclosure

Submission DP72-181: The Regulations should list permitted uses and disclosures of credit reporting information, but should not also provide a 'related secondary purposes' exception.

Submission DP72-182: We support a provision allowing indirect access to credit reporting information to a mortgage or trade insurer, via the credit provider.

Submission DP72-183: We support the ALRC's view that there is no compelling reason for change to the rules governing access to credit reporting information for debt collection, being primarily via credit providers, and not direct access to credit reporting agencies.

Submission DP72-184: We support Proposal 53-3.

Submission DP72-185: The Regulations should prohibit the use or disclosure of credit reporting information both for direct marketing and for the practice known as 'pre-screening'.

Submission DP72-186: The ALRC should not take a position in relation to wider use of credit reporting information for identity verification outside the context of credit assessment, other than to recommend that it be considered in the context of wider identity management strategies.

Submission DP72-187: The ALRC should recommend that before the Regulations are drafted, further consultations take place as to whether some of the consent requirements be replaced with notification requirements.

6. Security & Quality

Submission DP72-188: The Regulations should include obligations similar to those in clause 1.4 of the Credit Reporting Code of Conduct.

Submission DP72-189: The Regulations should provide that a default must be listed within twelve months.

Submission DP72-190: the Regulations should require the time period within which a default listing must be deleted to commence from the event rather than from the time of listing.

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Submission DP72-192: We support Proposal 54-1.

Submission DP72-193: If Proposal 54-2 is adopted, the Regulations should include a definition of 'scheme of arrangement'.

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Submission DP72-202: We support Proposal 55-1.

Submission DP72-203: The ALRC should recommend inclusion of provisions relating to automated credit assessment and decision-making in an industry code.

Submission DP72-204: We support Proposal 55-2.

Submission DP72-205: We support Proposal 55-3.

Submission DP72-206: We support Proposals 55-4, 55-5 and 55-6, but note that their efficacy will depend, in part, on improvements in the complaint handling policies and procedures of the Office of the Privacy Commissioner, on which we comment in our separate submission in response to DP72 Part F.

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References

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