

**AUSTRALIAN LAW REFORM COMMISSION**

*REVIEW OF PRIVACY*

*CREDIT REPORTING PROVISIONS:*

*ISSUES PAPER 32*

**Submission by**

**Banking and Financial Services Ombudsman Limited**

**March 2007**

## Introduction

This submission is made by the Banking and Financial Services Ombudsman Limited (**BFSO**) in response to the Australian Law Reform Commission's (**ALRC's**) *Review of Privacy: Issues Paper 32 (the **Issues Paper**)*<sup>1</sup>. It has been prepared by the office of the BFSO and does not necessarily represent the views of the Board of the BFSO.

The BFSO thanks the ALRC for the opportunity to make this submission.

## About the BFSO

The BFSO is an independent dispute resolution service that considers and seeks to resolve disputes between Australian financial services providers that are members of the BFSO scheme and their individual and small business customers. The scheme is an alternative to litigation and free for individuals and small businesses. Its members include Australian banks and their related corporations, Australian subsidiaries of foreign banks, foreign banks with Australian operations and other Australian financial services providers, including one credit reporting agency.

The BFSO is approved by the Australian Securities and Investments Commission (**ASIC**) as an external dispute resolution scheme for financial services licensees under Part 7 of the *Corporations Act 2001 (Cth)*. Membership of an approved scheme is a licence requirement.

More detailed information concerning the jurisdiction, procedures and Terms of Reference of the BFSO is set out in the submission made to the ALRC in response to *Issues Paper 31* by the BFSO in conjunction with a number of other alternative dispute resolution schemes.<sup>2</sup> That submission also sets out the range of subject matter considered and the types of claims that are made to the BFSO by disputants. The BFSO also publishes its procedures, its policies (approach to particular issues raised by cases), Guidelines to the Terms of Reference and quarterly Bulletins.<sup>3</sup>

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<sup>1</sup> Australian Law Reform Commission (**ALRC**) *Review of Privacy – Credit Reporting Provisions: Issues Paper 32* (December 2006).

<sup>2</sup> Banking and Financial Services Ombudsman Ltd, Energy and Water Ombudsman (Victoria), Financial Industry Complaints Service, Insurance Ombudsman Service Ltd, Telecommunications Industry Ombudsman, *Review of Privacy- Australian Law Reform Commission Issues Paper 31 Joint Submission by Industry-Based Alternative Dispute Resolution Schemes* (January 2007) (the **Joint ADR schemes submission**) at 17-19.

<sup>3</sup> For a copy of the BFSO *Terms of Reference, Guidelines to the Terms of Reference, Policy and Procedures Manual* and quarterly *Bulletins* see [www.bfso.org.au](http://www.bfso.org.au). For a detailed description

## Disputes about credit reporting

Since the introduction of the *Privacy Act 1988* (Cth) (the **Act**), the BFSO has considered both disputes about claimed breaches of the National Privacy Principles (NPPs) and credit reporting.

The basis of BFSO's jurisdiction is contractual – members of the scheme agree that their customers may bring disputes about the NPPs and credit reporting matters to the BFSO for resolution and agree to be bound by any determination made. Participation by customers is voluntary and they are not bound by decisions of the Ombudsman.

As set out in detail in our previous submission, the Terms of Reference provide the Ombudsman with the power to:

- Award compensation for any direct financial or non financial loss suffered as the result of a breach of privacy; and
- Make the same determinations, awards, declarations, orders or directions that the Privacy Commissioner may make.<sup>4</sup>

Between 21 December 2001 and 31 December 2006, the BFSO closed 505 cases where “privacy” was the main problem type. In an additional 12 cases, “credit reporting” was recorded as a problem type at the beginning of the matter. However, we note that a problem with a credit report more commonly arises in the course of a dispute about a different subject (for example, in relation to a dispute concerning a debt owed to a financial service provider) and that this is not always captured by our data collection system if the credit reporting issue is incidental to the main issues in dispute.

In June 2002, BFSO issued *Bulletin Number 34*, setting out our approach to a number of issues that had arisen in relation to the collection of debts, including our approach to a number of credit reporting issues that we had experienced. In addition, in October 2005, BFSO issued *Bulletin Number 47*, which briefly covers some credit reporting issues in the context of debt collection practices more broadly. Further reference to our approach as stated in these Bulletins is made in answer to the questions set out in the Issues Paper and copies of both Bulletins are attached to this submission.

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of the BFSO and its operations, see also *BFSO Review, Background Paper* and the *BFSO Annual Report 2005- 06*, both available on the website.

<sup>4</sup> Joint ADR schemes submission, above, n 2, at 55.

## Summary of submissions

The key points made in this submission are summarised as follows:

- In the view of BFSO, only credit regulated by the Uniform Consumer Credit Code (UCCC) should be the subject of listings made on consumer credit information files;
- We are supportive of the suggestion in the Issues Paper that, in relation to disputes about listings, the burden of proof should be placed more explicitly on the credit provider, along the lines of the approach taken in the *Fair Credit Reporting Act 1970* (the **US Act**);
- In our view, all credit providers and credit rating agencies participating in the credit reporting system should be required to have transparent, efficient and effective internal dispute resolution procedures in place and to belong to an external dispute resolution scheme;
- The BFSO is also supportive of better resources being provided to the Office of the Privacy Commissioner (OPC) for the investigation of disputes and the effective conduct of audits;
- In our view, the Act and/or Credit Reporting Code of Conduct (the **Code**) should make clear provision that the amount of debt reported must be 60 days overdue at the time the listing is made. We would support, however, an amendment to the effect that further arrears that have accrued since the default notice was sent can be added, providing the majority of the amount listed has been overdue for the full 60 days;
- We consider that the Code should state that if a dispute is raised, a credit provider should be required to show that the consumer had the capacity to repay a debt that is the subject of an adverse listing at the time that the credit was extended;
- We consider that the Code should also state that if a consumer negotiates a variation of a credit contract pursuant to section 66 of the UCCC or is being assisted by a bank in accordance with its obligations under clause 25.2 of the Code of Banking Practice, the credit provider is not entitled to list the default unless the consumer fails to adhere to an agreed payment plan and was warned at the

time of the agreement that a listing would be the result of failing to adhere to the plan;

- In our view, it would be desirable to remove the ability of any credit provider to list a serious credit infringement unless fraud is proven in a court. If such an ability it retained, however, we are of the view that there should be more stringent requirements to take minimum steps to locate a person before providing the listing;
- We submit that the listing of defaults on the credit information files of under 18 year-olds should be prohibited; and
- In our view, it would be appropriate to allow current credit providers to report to a credit reporting agency the bare fact that a person has a credit facility with that provider and for that information to be kept on the credit information file, to assist in responsible lending.

## Responses to questions in the Issues Paper

The following section sets out answers to a number of specific questions in the order that they are raised in the Issues Paper. We have not addressed all of the issues raised in the Issues Paper but have limited our comments to those issues that arise in the context of our experience as a dispute resolution scheme.

### Chapter 4. The Regulatory Framework

#### **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?***

As set out above, BFSO has jurisdiction to consider complaints against its members about breaches of privacy, including complaints about credit reporting, pursuant to its Terms of Reference. BFSO cannot consider complaints that are also being or have been considered by the OPC. There is also provision in our Terms of Reference for the referral of disputes that are, in the Ombudsman view, more appropriately dealt with by the OPC.

A number of disputants have reported their experiences of the OPC to us in the course of lodging their dispute with BFSO. It is our experience that there is a perception among some of these disputants that there are delays experienced when lodging a dispute with the OPC. In our view, this suggests that the OPC requires better resources for dispute resolution.

#### **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?***

### Burden of proof: Fair Credit Reporting Act 1970 (US)

The Issues Paper suggests that the burden of proof in relation to disputed listings could be placed more explicitly on the credit provider and notes the example of the US Act.<sup>5</sup>

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<sup>5</sup> Issues Paper, above n 1, at 59.

The US Act provides that a consumer may notify the credit reporting agency directly or indirectly through a reseller of a dispute. The credit reporting agency is required, free of charge, to conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate. The investigation must be completed and any information found to be incorrect deleted before the end of 30 days from the date the agency receives the notice of dispute from the consumer. The 30 day period may be extended for 15 days if additional relevant information is received from the consumer.<sup>6</sup> The agency must also notify the provider of the information (ie the credit provider in this context) within 5 days of receiving the notice of dispute.<sup>7</sup> However, an agency may terminate a reinvestigation of information disputed by the consumer if it reasonably determines that the dispute is frivolous or irrelevant, including by reason of a failure to provide sufficient information to investigate the disputed information<sup>8</sup>. So there appears to be some obligation on the consumer to provide sufficient information to investigate. Despite this, there remains an express obligation on the credit reporting agency to investigate a dispute, seek to verify information provided by the credit provider and then delete the information if it cannot be verified.

A similar requirement could be a useful addition to the regulatory framework for credit reporting in Australia. In our view, it is inappropriate for a credit reporting agency to require a consumer to prove that an error has been made in order to have their credit information file altered. This is particularly so if a consumer is disputing their liability for a debt because, in legal proceedings, the burden of proof lies with the party that alleges that the debt is owed. As such, some explicit recognition that the burden of proof lies with the party that has provided the information, and a process similar to that prescribed in the US Act, would ensure that an appropriate approach is taken to the investigation of a dispute by a credit reporting agency.

#### External Dispute Resolution

In our view, it would be appropriate to require all credit providers and credit reporting agencies to have transparent, efficient and effective internal dispute resolution processes. For example, the new International Standard for internal complaints handling: *AS ISO 10002-2006* would be an appropriate standard for internal complaints handling processes.

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<sup>6</sup> § 611 15 USC §1681i Procedure in case of disputed accuracy.

<sup>7</sup> §611(2)(A).

<sup>8</sup> §611(3)(A).

In addition, it is our view that all credit providers and credit reporting agencies participating in the system should be required to belong to an external dispute resolution scheme. This would enable more timely and efficient resolution of disputes. It would also enable a broader range of remedies to be awarded to individuals, including compensation for non-financial loss.

In the financial services industry, financial services providers are required to be licensed under part 7 of the *Corporations Act 2000* (Cth) (the **Corporations Act**) and as a licence condition to become members of an external dispute resolution scheme approved by ASIC. As part of approval by ASIC, external dispute resolution schemes are required to comply with objective benchmarks set out in ASIC's *Policy Statement 139 (PS 139)* and the Commonwealth Department of Industry, Science and Tourism's, *Benchmarks for Industry Based Customer Dispute Resolution Schemes* (1997). As such, all schemes are required to be accessible, independent, fair, accountable, efficient and effective in their operations.

BFSO, in meeting these benchmarks, provides dispute resolution services that are free for consumers and do not require parties to be legally represented. The scheme is funded by industry participants through a mixture of membership fees and fees charged in accordance with the number and/or complexity of disputes. Importantly, the Ombudsman reports to a Board of Directors made up of equal numbers of industry and consumer directors and independent chairperson.

In addition to the resolution of disputes received, BFSO has the power to identify and resolve systemic issues; issues apparent from disputes that will have a material effect on a class of individuals or small businesses beyond the parties to the dispute. BFSO is also required under PS 139 to report systemic issues and serious misconduct to ASIC.

In our view, ensuring access to an appropriate external dispute resolution scheme would be both beneficial to consumers and enhance the reputation of the credit reporting industry as a whole.

Such a requirement could be effected through a licensing system and the imposition of a licence requirement that all participants in the industry implement appropriate internal dispute resolution mechanisms and become members of an approved external dispute resolution scheme, similar to the mechanism provided in the *Corporations Act* in relation to financial service providers. Any such mechanism should also provide for the resolution of systemic issues and reporting of systemic issues and serious misconduct to the OPC.

It is noteworthy that many credit providers in the banking and financial services industry are already members of BFSO or other ASIC approved schemes. It may be possible, therefore, to utilise the existing framework for external dispute resolution in the financial services sector to facilitate access to an appropriate industry-funded scheme for dispute resolution in the credit reporting industry. As noted earlier, the BFSO is already handling disputes of this nature and one credit reporting agency is already a member of the scheme. The utilisation of existing schemes in the financial services area would also avoid imposing a requirement on credit providers to become members of more than one scheme.

We note that the Parliamentary Secretary to the Treasurer, the Hon Chris Pearce MP, has recently commented in several public forums on his interest in the future “convergence” of all of the existing external dispute resolution schemes dealing with financial services and has commissioned the Commonwealth Consumer Affairs Advisory Council to research complaint handling mechanisms. In this context, it is also important that any new industry-based schemes do not duplicate the services offered by existing schemes.

***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?***

As noted in the Issues Paper, at present the Act makes provision for penalties to be imposed on credit providers and others who misuse some sections of Part IIIA of the Act but these are criminal sanctions that require proceedings to have been instituted on information of Australian Federal Police. The standard of proof in such proceedings would be the criminal standard.

In our experience, the majority of disputes concern default and serious credit infringement listings, which are claimed by the consumer to be inaccurate or inappropriate. The harm claimed is usually the inability to secure credit, either at all or at favourable rates, or the stress and embarrassment of the incorrect/inappropriate listing. Sometimes the claim is that the credit provider and/or credit reporting agency will not respond reasonably to the objections of the individual.

In our view, it would be appropriate for the Act to include a provision that credit providers and credit reporting agencies can be liable to individuals

for financial and non-financial loss that is demonstrated to have flowed from an error in listing.

It is our view that, even if there were such a cause of action, it would remain important to ensure that all credit providers and credit reporting agencies become members of appropriate external dispute resolution scheme (as set out in our response to Question 4-3 above). This is because for a vast majority of consumers, legal proceedings are prohibitively expensive.

## **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?***

### Overdue payments

#### *Calculation of debt owing after 60 days*

Disputes at the BFSO have arisen in the past in relation to the listing of all overdue payments and not only those that are 60 days overdue. For example, the minimum payment on a credit card is overdue but the listing includes all overdue payments and interest charges including those that have only become due within a short time of the listing being made.

In our *Bulletin 34* we stated our position on the issue as follows:

*'...it is our view that a credit provider is only entitled to list the amount of the payment that is overdue if the payment listed is overdue for 60 days or more and the credit provider has sent a written notice to the customer's last known address which:*

- *advises the customer of the overdue payment subsequently listed; and*
- *requests payment of the amount outstanding.'*

However, we think that some lack of clarity remains around the correct method of calculation of the amount of debt that can be reported to a credit reporting agency after 60 days.

In our submission, the Act and/ or Code should be amended to make clear provision that the amount of the debt reported must be 60 days overdue at the time that the listing is made.

BFSO would, however, support a provision to the effect that further arrears that have accrued since the default notice was sent can be added, providing the majority of the amount listed has been overdue for the full 60 days.

Where a credit provider relies on an acceleration clause in a contract to demand that the remaining loan balance be repaid by a customer, we are of the view that the Act and/or Code should clearly specify that the full amount must have been demanded by the credit provider and remain unpaid for 60 days from the date of expiry of the demand before a listing may be made.

*Overdue payments and assessing capacity to pay*

BFSO considers that if a credit provider extended credit beyond the consumer's capacity to repay the debt, a subsequent default should not be the subject of an adverse credit report. This is because if such credit had not been provided, the consumer most likely would not have defaulted. We note that, in assessing disputes where there is a claim that the loan provided to the consumer was beyond their capacity to repay, the BFSO considers whether the financial service provider engaged in maladministration. A detailed explanation of our approach to such disputes is contained in our *Bulletin No. 45*, available on our website.

In addition, it is our view that, where an individual has indicated that he or she is, at that time of the default, suffering financial hardship and has or wishes to make an application for a variation of repayments (for example, under section 66 of the UCCC) and where the credit provider agrees to a variation, we do not think any default should be listed, unless the arrangement entered into is not adhered to.

Similarly, Clause 25.2 of the Code of Banking Practice requires subscribing banks to help a customer to overcome financial difficulties with a credit facility, by, for example, working with the customer to develop a repayment plan. In our view, it would also be inappropriate for a bank to list a default where a customer is receiving such assistance.

Where an arrangement is entered into to clear arrears, if there is any intention to list if the arrangement is not adhered to, then this should be made clear prior to any agreement being made.

It is our experience that some credit providers are in the regular practice of accepting payment of a reduced sum on the condition that a default listing is made on the consumer's credit information file. In our view, such a practice poses a risk of an unfair or inappropriate listing, particularly where the consumer has a legitimate claim that there has been maladministration in lending or is in the process of negotiating a variation to a credit contract based on their financial hardship or difficulty.

While it is a matter for the parties to resolve disputes on whatever terms they are agreeable to, our concern in these cases is whether the credit provider has complied with the notice requirements contained in the Act and the Code and whether the appropriate amount is intended to be listed. In our view, an individual's consent to be listed cannot overcome the strict obligations which must be met before a listing can be made.

In our submission, the Code should state that if a dispute is raised, the credit provider is required to show that the consumer had the capacity to repay a debt that is the subject of an adverse listing at the time that it was extended. Further, that the Code should state that, if a consumer negotiates a variation under section 66 of the UCCC or is being assisted by a bank in accordance with clause 25.2 of the Code of Banking Practice, the credit provider is not entitled to list the outstanding debt unless the consumer fails to adhere to any subsequent arrangement and that this is made clear to the consumer at the time of making the arrangement.

#### *Definition of credit*

In our view, there is also a need to reconsider what comes within the definition of "credit" for the purposes of credit reporting. At present, the Code states that overdrawing on savings accounts can be reported, providing adequate notice is given. This is contrary to the intention of the Act, which restricts listings to credit-related defaults. In cases of transaction accounts overdrawn due to fees being charged to the account over time, it is difficult to see why this should be able to be reported as a credit default. Similarly, it is difficult to see how a dishonoured cheque can fall within the definition of credit.

#### *Serious credit infringements*

The listing by a credit provider of a serious credit infringement has serious ramifications for the individual concerned. The listing remains on file for seven years and the prospect of the person obtaining further credit during that time is greatly reduced. It is our experience that an individual with a

serious credit infringement listing may not be able to obtain credit from any mainstream lender while the listing is in place.

The process for reporting a serious credit infringement listing is much simpler than that for reporting a default. While the default listing requires the debt to be 60 days or more overdue and for recovery action to have commenced, no such requirements exist for serious credit infringements.

We understand that the industry practice provides that a person can be considered to have committed a serious credit infringement if the credit provider is unable to contact that person, regardless of the period of time that repayment is overdue. The listing appears to have become over-used for debtors who are unable to be contacted, even temporarily.

By way of example, BFSO has received disputes as follows:

- from an individual who had a serious credit infringements listed on his credit information file while away from home on an eight-week work-related trip. During that time, the individual was listed as a “clearout” in relation to a credit card account that remained unpaid for approximately two months. The listing was not amended or removed when the individual returned to his home and paid the account. He remained unaware of the listing for approximately two years, despite having applied for (and in each case, was declined) eight loans;
- about a listing made by a mercantile agency which purchased a debt four years after the last contact between the credit provider and the individual. The listing was made 18 months after the purchase of the debt, on the basis that mail sent to the address at which the individual had held five and half years earlier had been returned to sender. No attempt was made to locate the individual at any other address, by looking at telephone directories, electoral rolls or similar. The Scheme member advised that such steps to try to locate the debtor were not considered necessary; and
- from an individual who had recently moved but had failed to notify the credit provider at the time. The overdue amount was less than 60 days overdue and no recovery action had commenced.

The Act defines serious credit infringements as:

- “... an act done by a person:
- (a) that involves fraudulently obtaining credit, or attempting fraudulently to obtain credit; or

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

In our view, none of the above examples satisfies any of the above definitions.

It is the understanding of BFSO that at least one credit reporting agency will not list acts in which any fraud is claimed (that is, infringements falling within paragraphs (a) and (b)), due to the risk of defamation.

In the view of BFSO, it is not appropriate for any listing to be made claiming fraud unless the individual has been found guilty of a fraud offence by a court. Further that, due to the serious nature of a claim of fraud, it is not appropriate for such listings to be grouped under the same "heading" as cases where the credit provider forms the view that the individual has indicated an intention to no longer comply with credit obligations.

In relation to listings indicating that the credit provider has formed the view that the individual no longer intends to comply with credit obligations, it is the view of BFSO that simply being unable to locate an individual cannot form the basis of a "reasonable opinion" that the individual has indicated an intention to no longer comply with the credit contract.

At present, it is the understanding of BFSO that, if an objection is made by the individual, the credit provider is contacted by the credit reporting agency to advise the basis on which the listing was made. However, if the credit provider maintains that the listing is correct, then it will not be removed or amended. It is also our experience that the information on which this view is based may simply be the return of mail. In our view, this approach appears to be inconsistent with the need for such a listing to be based on what "a reasonable person" would consider an indication to no longer comply with credit obligations and is, instead, subjective.

It is the view of BFSO that it is desirable to remove the ability of any credit provider to list a serious credit infringement and for listings to be limited to cases where fraud has been proven in a court.

If the Act retains the ability of a credit provider to make such notification, then the Act and the Code need to be amended to make clear the minimum steps to be taken before making such a claim in relation to an individual.

**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?***

In our view, mandatory reporting of defaults and serious credit infringements is undesirable. While the commercial value of information on a credit file may be diminished, consumer protection issues and the impact of an adverse listing outweigh those commercial considerations. For example, mandatory reporting would remove discretion on the part of credit providers in relation to listing and diminish the effectiveness of important provisions such as clause 25.2 of the Code of Banking Practice which requires a subscribing bank to try to help customers overcome difficulties with a credit facility.

**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?***

*Notification of the possibility of a default being reported*

It is the view of BFSO that overdue payments should not be listed unless the credit provider has commenced recovery action and has simultaneously warned the debtor that failure to pay may result in the default being recorded on the individual's credit file. This view is set out in BFSO *Bulletin No. 34* as follows:

'The view of this office is that, as a matter of good practice, a financial services provider must warn the consumer at the time of demand that failure to pay may result in a credit listing.'

We refer to the OPC's Explanatory Note 54 which states that:

'Where an individual becomes overdue in respect of credit given by a credit provider, the credit provider may not report the overdue payment to a credit reporting agency unless the credit provider has

first notified that individual that the credit provider may lodge a report about the overdue payment against the individual with a credit reporting agency.'

It would be useful if there was a more explicit regulatory requirement in either the Act or the Code requiring a credit provider to notify a consumer as part of the debt collection process that it intends to list a debt on the consumer's credit information file and the time frame. Such a requirement should state that the notification of the possibility of a default being recorded must be made at the time that the demand for the debt is made. This notification should be additional to any information provided about the right to list a debt at the time the consumer made an application for credit.

Further, the individual should be advised of the name of the credit reporting agency (or if more than one is to be notified, details for each) to be informed.

**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?*

#### Multiple Listings

The Issues Paper highlights the problem of multiple listings being made in relation to the same debt. It is our view that it is preferable to create a mechanism for updating a listing than having multiple listings appearing on an individual's credit information file. In particular, where a repayment arrangement is entered into or settlement made in relation to an outstanding debt, this information should be updated and included against the original listing.

**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?*

Baycorp's own estimate, as reported in the Issues Paper at 5.47, suggests an unacceptably high level of incorrect information on credit information files and credit reports. Other information in this section of the Issues

Paper (particularly information provided by the Telecommunications Industry Ombudsman) suggests there is a problem with accuracy.

It may be appropriate to have more formal procedures in place to require credit providers to demonstrate the accuracy of reports made to credit reporting agencies and a mechanism to enable the barring of companies from the credit reporting system if they have an unacceptably high rate of error in the provision of information until they have passed an audit by the OPC. On this issue, we note that the Issues Paper suggests that audits by the OPC are limited currently by the lack of resources available to that office. In our view, this is an important function that should be appropriately resourced.

As noted earlier, it would also be appropriate to provide for compensation for financial and non-financial loss flowing from an inaccurate listing.

Finally, in our view, better access to an industry-based external dispute resolution scheme to resolve disputes about inaccurate listings would both facilitate consumer redress where errors are made and encourage improvements in the industry as whole.

**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?*

In practice, in the context of a dispute in relation to the alteration or removal of a listing, it can appear that the current system is weighted in favor of the credit provider. It is our understanding that, when there is a dispute a credit reporting agency refers it back to credit provider but if the credit provider maintains the listing is accurate there is little further investigation of the matter and the listing generally remains.

This practice highlights the need for greater clarification of what "reasonable steps" are required in relation to the verification of information on a credit information file. In this regard, we again note the potential application of a mechanism similar to that under the US Act, referred to in our response to question 4-3 above.

**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)?*

The Privacy Commissioner's Credit Provider Determination No. 2006-4 (Classes of Credit Provider) (the **2006-4 Determination**) provides a wide range of corporations with the ability to be considered as "credit providers" for the purposes of the Act. In our view, this creates a number of problems that compromise the reliability and trustworthiness of the credit reporting system.

For example, we understand that an adverse listing may be made in relation to debts incurred that do not appear to relate to the provision of credit at all, such as the late return of videos to a video library. The wide range of corporations given the ability to list also seems related to the problem of adverse listings being made in relation to relatively small debts where such listings have disproportionately serious consequences for consumers.

This problem is exacerbated because the regulatory framework does not currently limit access to the system to credit providers providing credit that is regulated under the UCCC. Without the protection of the UCCC, consumers who experience financial hardship have no legislative right to negotiate a variation to the terms of their agreement in relation to the provision of credit. In addition, as noted on page 92 of the Issues Paper, there are protections for consumers in the UCCC including notice requirements that must be met in relation to enforcement proceedings.

Traditional credit providers providing credit regulated by the UCCC are more likely to have appropriate systems in place to ensure accuracy and comply with relevant laws and codes. This is particularly important if, as suggested in the Issues Paper, the OPC does not have adequate resources to audit credit providers on a regular basis. Further, as noted in the Issues Paper at 5.84-5.87, the 1991 Determination extended the definition of credit providers well beyond that originally intended by the Act.

For these reasons, BFSO would support an amendment the 2006-4 Determination and/or the Act to provide that access to the credit reporting system is not allowed unless the credit that has been provided is regulated credit, as defined in the UCCC.

This would also ensure that only those credit providers who are obliged to properly assess a consumer's capacity to repay a debt under the UCCC are able to subsequently list a default with a credit reporting agency.

**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)?*

Currently, assignees are deemed by the Privacy Commissioner's Credit Provider Determination No. 2006-3 (Assignees) (the **2006-3 Determination**) to become the credit provider, with all the rights that attach, including the right to list a default on an individual's credit information file.

In our experience, problems can arise where a debt has been sold some years after the last contact between the credit provider and the individual, because the individual has moved address. An assignee may send a letter to last known address and then list either a default or serious credit infringement if there is no response. It appears, in some circumstances, that the listing is used as a way to "draw out" the debtor, so that the debt can then be collected.

In our view, it would be desirable to amend the Act to ensure that no default or serious credit infringement can be listed until the individual is located and made aware that the debt (a) has been assigned and (b) is being demanded and that an adverse listing may be made.

**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?*

See our comments made in answer to question 5-10 above.

**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?*

As noted in our response to question 5.10 above, we agree that credit providers, as defined for the purposes of the Act, should be required to

comply with the UCCC in order to participate in the credit reporting system.

In our view, however, regulation could permit different levels of access to information in a report, in accordance with the type of credit that has been provided. For example, provided that appropriate consent is provided, if the credit provider is providing credit regulated under the UCCC and is a member of an external dispute resolution scheme, it could have full access to the credit reporting system, including the right to list a default on an individual's credit information file. In contrast, if a lender is not providing credit regulated under the UCCC, it could, with the consent of the individual, still be able to access the files in order to assess credit worthiness but, for the reasons set out in answer to question 5.10, it should not be able to list defaults and serious credit infringements.

***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?***

In our view, bundling of consent to disclose information to a credit reporting agency in with other agreements and consents is not appropriate. We do not think that consumers can be made properly aware of their rights if consent for these purposes is bundled together with other consents. In our view, all privacy notifications should be clear and separate from other contractual provisions and consent for privacy purposes should not be bundled with consent for other purposes.

The Issues Paper refers to a conflict highlighted by finance industry representatives between the NPPs and Part IIIA of the Act . BFSO does not see any conflict between the NPPs and Part IIIA of the Act with respect to credit providers giving information to credit reporting agencies. In our view, there is no need to find that the disclosure is a "secondary related purpose" (although we consider that it is), because NPP 2 permits disclosure which is "required or authorised by or under law". Disclosure to credit reporting agencies is authorised under the Act, providing the conditions in Part IIIA of the Act are met.

Further, the BFSO does not view a bank's disclosure as a breach of the duty of confidentiality in the Code of Banking Practice. This is because disclosure in these circumstances is usually in the interests of the bank and the bank should have obtained a signed acknowledgement and consent from the individual for the disclosure.

**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?*

In our view, notification of adverse credit reports is highly desirable. However, BFSO's experience is that in some cases, credit providers who decline applications do not always notify the applicants of the adverse credit report that is the reason for credit being declined. This can result in individuals making numerous applications, unaware of an adverse listing.

As noted above, it is our view that there needs to be a clearer obligation on credit providers to notify consumers of their intention to make a listing at the time that the debt is being collected. However, it is also important that individuals be notified that an adverse listing has been made. Such a notification would:

- enable the consumer to check record and seek correction of any inaccurate information; and
- minimise the embarrassment of applying for credit and being refused (which is usually the point at which individuals become aware of the listing in our experience).

Ideally, the credit reporting agency would notify the individual each time a default or serious credit infringement listing is made or altered, including when any publicly available information such as a court order or bankruptcy is added to the credit information file.

**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?*

In our view, it is undesirable for debt collectors to gain access to the credit reporting system. We note again the problems that we have observed in relation to assignees set out in response to question 5-11 above.

**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?*

While an individual may wish a notation to be made to the effect that he or she has been the victim of identity theft, based on our experience, there is a possibility that such a notation would mean that the individual is refused credit by wary credit providers. As such, any record of an identity fraud should only be made at the request of the individual concerned.

**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?*

In our view, it is highly undesirable that listing be allowable for under 18 year-olds. In most cases, credit provided to minors is unenforceable because of a lack of capacity to enter into a legally binding contract. This means that it is contrary to law to describe a minor as being in default if the contract is unenforceable. In this regard, such a listing would be analogous to collecting a statute barred debt. Even in the very limited circumstances where a young person is bound by a contract, listings are highly detrimental in circumstances where the responsibilities of credit may not be understood and where the minor may have been vulnerable to targeted marketing practices because of their age.

In our view, the listing of debts incurred by young people is particularly undesirable in cases where there has not been an adequate assessment as to the ability of the individual to service the debt. As the current credit reporting system is open to credit providers providing credit that is not regulated under the UCCC, there is not always a regulatory requirement to ensure that young people do have the capacity to repay a debt before entering into a contract for credit. Our submission is that the listing of defaults on the credit information files of under 18 year-olds should be prohibited.

## 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?*

In making comments on the questions asked we are mindful of the careful consideration that has been given to this question in the past, in particular in the recent Senate Committee Inquiry and the Victorian Consumer Credit Review. The comments made are in the context of our experience of resolving disputes in relation to credit reporting rather than in an overall economic context and are in the nature of observations which might be of assistance rather than advocacy for or against more comprehensive credit reporting.

### Information Asymmetry

In a number of disputes concerning credit card over-commitment we have observed the problems that occur when an applicant for a credit card does not disclose other credit card accounts held. This has meant that credit has been offered in circumstances where it probably would not have been if the credit provider had been aware of the number of credit cards already held by the applicant. It is an example of the information asymmetry referred to in paragraph 6.27 of the issues paper.

Allowing current credit providers to report that bare fact – that the person has a current credit facility with that provider - would alert a credit provider considering an application to the existence of other current credit facilities and enable it to make inquiries of both the applicant and the relevant credit providers as to the state of the account.

It has to be emphasised that this would only be of assistance in reducing over-commitment caused by an applicant's non-disclosure, whether deliberate or inadvertent, and the problem could be addressed in other ways such as:

- Asking for details of all current credit facilities as part of the application process and requiring consumer declarations as to the accuracy of the information; and/or

- Potential lenders being able to make inquiries of credit providers listed on an applicant's credit report as having made inquiries: to ask whether there was a current facility in place.

### Identity Theft

Identity theft is currently a serious problem and a recent dispute received by us illustrates problems that occur when an individual's banking arrangements and credit report are accessed in the course of an identity attack.

D had advertised a car for sale in a newspaper and in response to an expression of interest from a third party had provided his address so that the car could be inspected and the name, BSB and account number of one of his bank accounts so that a deposit could be paid. Within half an hour of providing this information, the third party had successfully identified himself by telephone to D's bank and had changed the internet banking password. Although D was alerted by email, as a routine matter, that his password had been changed and was able to reverse the position, a further identity attack occurred, mail was stolen and the third party changed D's current address, as listed on his credit report.

D has been able to correct the address on his credit report, change his bank account numbers and has taken other precautions such as opening a post-office box and redirecting mail to it. He remains concerned however that further attacks might take place.

One of the ways in which bank customers may be identified for the purposes of telephone banking or internet banking in the absence of a password is by being asked what other accounts they currently have and whether those accounts are in joint names or a single name. There would be appear to be a risk that including information such as account descriptions, balances and account ownership (individual, joint etc) in a credit report would increase the risk of successful identity attacks by persons able to obtain access to the report.

### General comments

Introducing a more comprehensive credit reporting regime would not address some of the deficiencies in the current regime such as the relatively high level of error, the absence of a comprehensive dispute

resolution regime and the ability to report unregulated credit. These would appear to be the more immediate priorities.

In our view, the need for appropriate information to appear on a credit information file must be balanced against the rights of individuals to conduct their financial affairs privately. While we are of the view that additional basic information on an individual credit information file (limited to the names of current credit providers) would enhance good lending practices, in our view, the appearance of any further information such as account descriptions and current balances would be an unnecessary and excessive imposition on the right to privacy.