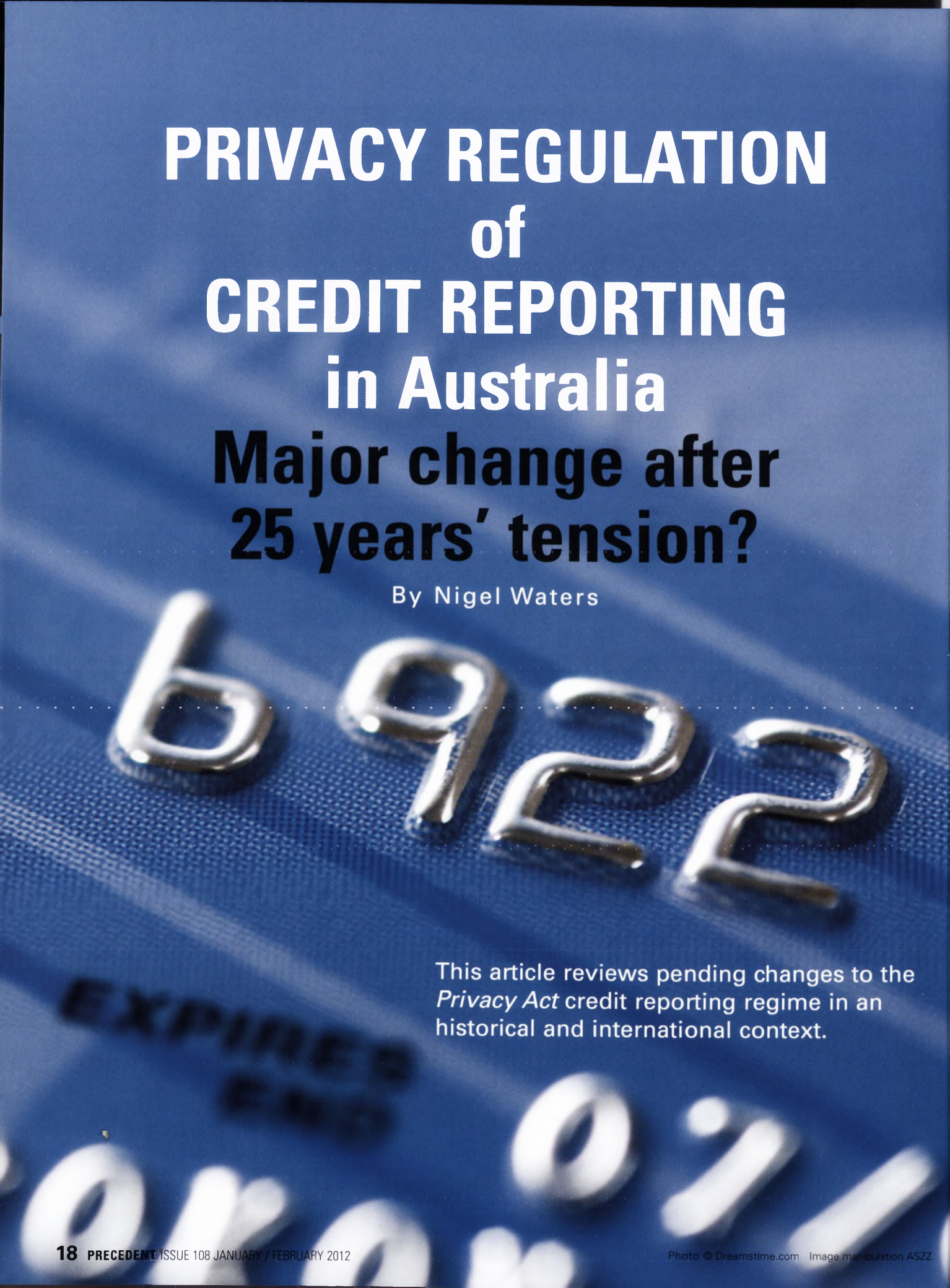
PRIVACY REGULATION of CREDIT REPORTING in Australia

Major change after 25 years' tension?

By Nigel Waters



This article reviews pending changes to the *Privacy Act* credit reporting regime in an historical and international context.

CREDIT REPORTING AS A KEY DATA PROTECTION ISSUE

Availability of credit is almost an essential utility for consumers in more advanced economies. Credit reference databases were therefore an early focus for privacy regulation, because of the serious implications for individuals of any errors or misconstrued information. The consequences of poor quality data, or its misuse, can be extremely serious, particularly when it comes to denying credit, but also in enforcement action such as recovering alleged debts or other collateral effects – credit status is increasingly used as a proxy indicator of eligibility for other services (such as the connection of utilities and provision of mobile telephones). The privacy risks inherent in credit reporting are further compounded by the widespread use of automated assessment systems (credit scoring).

The US *Fair Credit Reporting Act* of 1976 was one of the first private sector applications of the 'fair information practices' developed by the US Privacy Study Commission, and is mirrored in the parallel development of similar privacy principles by the OECD (1980 Guidelines) and Council of Europe (1981 *Convention on Data Protection*).

As European and other countries enacted data protection or information privacy laws from the mid-70s onwards, they often contained specific provisions addressing credit reference data. The 1995 EU *Data Protection Directive*, which is the basis of all EU member state laws and which has also been influential outside Europe, refers expressly to creditworthiness in Article 15, which deals with automated decision-making.

It needs to be recognised, although it is often conveniently overlooked by the financial sector, that credit reference databases are inherently antithetical to one of the foundations of 'fair information' or information privacy principles – that of purpose limitation. This is expressed slightly differently in the various international instruments and domestic laws, but can be paraphrased as 'personal information should not be used for a purpose other than that for which it is collected, without consent'.

This explains why, in many jurisdictions, specific rules have been laid down for what is in effect a 'licensed breach' of the purpose limitation principle.

Credit reporting information is typically information that has been collected in the context of the establishment of a relationship between a borrower and a lender. Lenders have always been free to make it a condition of a loan that the applicant discloses details of their other commitments – historically, this took the form of a request for 'bankers' references – and can make it a further condition that the applicant consents to the prospective lender contacting other lenders to verify both the facts and the repayment history.

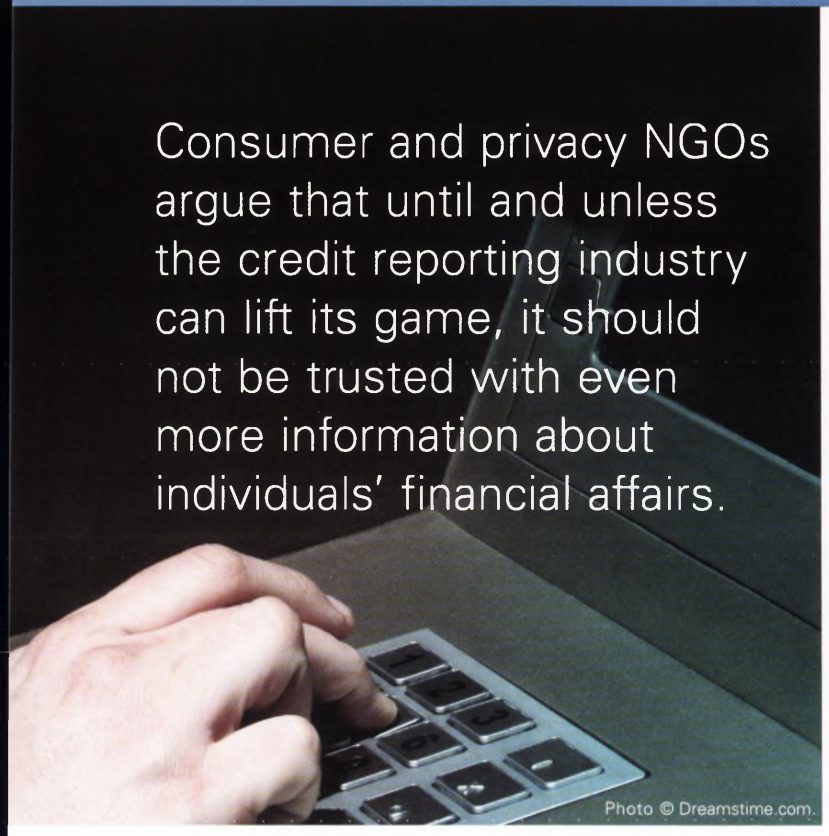
What is different about the operation of credit reference databases is that individual borrowers are given no real choice – at least a basic level of information about loans is automatically sent by contributing lenders to one or more centrally managed databases, where it is routinely made available to other prospective lenders when assessing loan applications.

Financial institutions prefer centralised credit reference systems because the costs of checking a loan applicant's credit history is significantly reduced by comparison with the legacy system of bankers' references. They argue that consumers benefit from the ease and low cost of automated credit checks, and that with the increased prevalence of credit in society, any alternative is inefficient at best, if not impracticable.

Lenders also argue that credit checking is also consensual, in that applicants are typically asked to give written consent both to the input of their personal information to credit reference databases and to any checks against such databases. Unfortunately, the provisions of most privacy laws relating to consent in general, and to credit information in particular, have confirmed that this is technically true (under the *Australian Privacy Act* 1988, for instance, lenders are required to obtain written consent for credit checks from loan applicants). The fact that individuals are essentially being asked merely to acknowledge that credit checks will occur, rather to really consent, is obscured by loose drafting.

HISTORY OF CREDIT REPORTING REGULATION IN AUSTRALIA

The Credit Reference Association of Australia (CRAA) was established as a financial industry 'mutual' association in 1967. In the late 1980s, CRAA proposed to move from simple 'default' reporting to a more comprehensive exchange >>



of commitment and repayment history information, marketed by the finance industry as 'positive reporting'. This wider system was already in place in the US, and in some other countries.

The federal *Privacy Act* had been enacted in 1988, largely as a response to growing concerns about government intrusion into individuals' privacy, which had come to a head in the 'Australia Card' debates of 1986-87. Following the Commonwealth government's abandonment of this national identity card proposal, the privacy legislation was seen as a necessary safeguard to accompany the introduction of a new national Tax File Number (TFN), designed to achieve some of the objectives of the Australia Card but without the controversial symbol of a mandatory ID card.

The *Privacy Act* 1988 covered the Commonwealth public sector, and also, to address specific privacy concerns about the TFN system, applied to private sector entities which collect and hold TFNs (an essential part of the scheme design, to report income to the Tax Office). The government expressly chose not to attempt to otherwise regulate private sector businesses' use of personal data, despite a growing trend internationally to introduce privacy laws covering all sectors.

However, the CRAA's proposal for so-called 'positive' credit reporting was perceived by the then minister responsible for the privacy law – Labor attorney-general, Nick Bolkus – as requiring an immediate political response. This view was partly informed by a number of high-profile cases of individuals having been disadvantaged by erroneous credit information. Amendments to the recently enacted *Privacy Act*, inserting a new part dealing expressly with credit reporting, were rushed into Parliament in 1989, with only minimal consultation, despite the newly appointed Privacy Commissioner.[1]

The new Part IIIA was enacted in 1990,[2] and as well as prohibiting the proposed 'positive reporting', it also strictly regulated the existing 'negative' reporting systems, operated not only by CRAA[3], but also by a small regional database operated by the Tasmanian Collection Service.[4] A third business, Dun and Bradstreet, entered the consumer credit reporting market in 2002,[5] and a fourth, Experian, in 2011,[6] and further competition is likely.[7]

There have been minor changes to Part IIIA since 1990, and the Privacy Commissioner has also exercised powers under Part IIIA to develop and issue a Credit Reporting Code of Conduct,[8] and to issue Determinations that significantly affect the regime – in terms of who is covered by the term 'credit provider', what identifying particulars can be used, and the detailed rules applying to both credit-providers and 'credit reporting agencies'.

The Privacy Commissioner has periodically conducted audits of credit reporting agencies and credit providers for compliance with Part IIIA and the Code of Conduct, and reported on general findings (in recent years without naming individual organisations) in Annual Reports. There has also been a steady flow of credit reporting complaints to the Commissioner,[9] all of which have been closed without a formal determination.[10] However, it is clear from the Commissioner's reports of both complaints[11] and audits that there are significant and recurrent problems of poor data quality and of non-compliance with other provisions. The practical implementation of access and correction rights has also been contentious, with credit reference agencies perversely unwilling to advertise the statutory free options as clearly and prominently as value-added 'fee for service' options.

This compliance failure is a key reason why non-government organisations (NGOs) representing financial sector consumers[12] have been so resistant to the introduction of 'positive reporting'. Based on their casework experience of the harm that can result from inaccurate credit reports or unfair use, these NGOs have taken the view that until and unless the credit reporting industry can lift its game and demonstrate that it can handle and use credit information better, it should not be trusted with even more information about individuals' financial affairs, obtained without genuine consent. Underlying this lack of trust is a strong belief, again based on experience, that more information will primarily be used to increase the amount of lending; and more sophisticated targeting (as has occurred in the US with more information) will lead inevitably to more defaults and other harms, and to discrimination against vulnerable consumers.

The financial services industry, by contrast, argues that more comprehensive information will increase its ability to lend responsibly, as well as making the entire lending system more efficient, which is seen as benefiting all consumers, and the economy overall.

MAJOR CHANGES FINALLY AGREED IN PRINCIPLE

In its review of Australian Privacy Law and Practice, the Australian Law Reform Commission (ALRC) accepted many

submissions about the credit reporting provisions, both in favour of and opposed to allowing so called 'positive reporting'. In its 2008 final report, the ALRC adopted a cautious position, recommending a partial form of what it described as 'more comprehensive' reporting – allowing four additional categories of personal information[13] without reservation, and a further specific category of repayment history information (more limited than the industry would have liked), on condition that complementary 'responsible lending' obligations were also imposed on credit-providers.

It should be noted that there have been similar developments in other overseas jurisdictions, including New Zealand, where the Privacy Commissioner has just issued a revised Credit Reporting Code (in September 2011) providing for a more comprehensive reporting regime from July 2012, and Hong Kong, whose Privacy Commissioner has also progressively allowed 'positive reporting' in a Code of Practice on Consumer Credit Data first issued in 1998, and revised for a third time in April 2011.[14]

The federal government broadly accepted the ALRC's recommendations in relation to credit reporting, for inclusion in a first tranche of amendments to the *Privacy Act*. It has, however, preferred to keep the detailed rules in the Act itself rather than in transferring them to Regulations as the ALRC had recommended, and the proposed Code of Practice will now play a somewhat different role. Secondary uses of credit reporting data are more tightly regulated than the ALRC recommended, although there is continued uncertainty about the issue of 'pre-screening' (see below). The 'condition' of responsible lending obligations has been at least partially met with the introduction of a Uniform National Credit Code in 2010.[15] The government also accepted, and has already partly implemented, the recommended requirement that credit providers be members of a recognised external dispute resolution (EDR) scheme – those lenders that are licensed under the National Credit Code are now required to belong to an EDR scheme, and the same requirement will apply to other *Privacy Act* credit-providers under the proposed amendments.

After further consultations with interested parties, an Exposure Draft Bill was published in January 2011, and referred to the Senate Finance and Public Administration Committee (as part of its overall reference to review the different parts of the first tranche amendments). The Committee published its report on the credit reporting provisions in October 2011.[16] It broadly supports the government's proposed amendments, but with 30 specific recommendations, in some cases for significant changes – see below.

CONTENTIOUS ISSUES

Non-government organisations with an interest in credit reporting[17] have had to accept that the 25-year rearguard action against so-called positive reporting has been largely lost, although some significant improvements in other aspects of the regime have been won as the 'price' of this major change. A number of contentious issues will need to be settled either in the final legislative amendments, in subsequent Regulations or Code of Conduct, or in the practical interpretation of the credit reporting regime by the Privacy Commissioner (and maybe, and hopefully, ultimately by the courts).

Relationship between the credit-reporting provisions and the Australian Privacy Principles

The Exposure Draft Bill reflects the government's acceptance of the ALRC recommendation that the credit reporting provisions should deal only with those matters that were additional to, or more specific than, the default privacy principles applying to other private sector organisations (currently the National Privacy Principles or NPPs, but proposed to be the Australian Privacy Principles or APPs). The Senate Committee has recommended the completely different option of making the credit reporting provisions self-contained, including all relevant obligations arising from the default principles.[18] This would not only require a substantial redraft, but would be a radical departure from the existing scheme of the *Privacy Act*, and it seems unlikely that it will be accepted by the government.

Treatment of 'serious credit infringements'

The Senate Committee acknowledged the concerns raised by consumer NGOs,[19] and it is to be hoped that the final regime will be less punitive, at least in relation to unintentional >>

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defaults, such as many of those that arise in the context of utilities and telecommunications.

Provisions relating to identity crime

There are alternative views about how best to address the needs of consumers, and of lenders, in cases where an individual has been the victim of identity crime such as theft or fraud. It will be interesting to see how the government responds to the Senate Committee's recommendation to ensure that the intent of these provisions is achieved.[20]

Treatment of hardship cases

The Senate Committee came down in favour of requiring so-called 'hardship flags' on credit information files to distinguish cases where individuals have entered into schemes of arrangement.[21] The government will no doubt be lobbied further on this by business stakeholders.

Treatment of 'pre-screening' of credit marketing material

This has been proposed supposedly to eliminate bad risks. The ALRC had accepted arguments that it was too difficult to define 'pre-screening' in a way that would prevent it being used as a backdoor method of direct marketing (which it is agreed should be a prohibited use of credit reporting data). The government's proposed amendments attempt to do just this, but privacy and consumer NGOs remain highly sceptical about whether and how this will work in practice. The Senate Committee considered the issue at length and recommended that the government consider allowing pre-screening only on an 'opt-in' rather than an 'opt-out' basis.[22]

Treatment of 'de-personalised data'

The Coalition Senators on the Committee rightly pointed out[23] that the provisions relating to de-personalised data set an odd precedent in the *Privacy Act*, which aims to protect only identified or identifiable personal information. However, this reflects both uncertainty and disagreement about both the meaning, and the practical implementation, of 'de-personalisation'. This is a common and much wider area of debate about privacy law both within Australia and internationally, and it is arguably better to include these provisions rather than risk an unintended and undesirable adverse outcome from the unregulated use of credit reporting data for research purposes.

One or more Codes – telecommunications and utilities

There has been an assumption throughout the discussion of the ALRC recommendations and government response that there would be only one Code of Conduct, and the Exposure Draft reflects this in its language. An industry body, the Australian Retail Credit Association (ARCA)[24] was formed in 2004 and has been working towards a draft Code, in consultation with consumer NGOs. However, despite ARCA's efforts to involve other categories of business that are technically 'credit providers' under the *Privacy Act*, the telecommunications sector in particular has been reluctant to participate. In the Senate Committee hearings, its representative body, the Communications Alliance, appeared to be assuming that it could develop a second Code for itself, and the position of major utilities is also unclear. This needs to be resolved – multiple Codes would add to the complexity and confusion.

Overall, consumer and privacy NGOs remain concerned that too much of the regulation of credit reporting will be left to guidance to be included in the Code of Conduct, or to guidelines to be issued by the Privacy Commissioner, rather than being unambiguously defined in the Act. They have, however, welcomed the government decision that the Code will be binding.

Some of these issues reflect the inherent tension between the financial sector's desire for objective data, which suits high-volume automated processes, and consumers' interest in having their individual circumstances taken into account with an appropriate element of subjective human judgement (and compassion).

The government will hopefully accept those of the Senate Committee's recommendations that aim at reducing the complexity of the provisions. However, it is clear that the new credit-reporting provisions will regrettably not meet the objective, shared by all stakeholders, of greater clarity and simplicity. This was probably always unachievable, given the lack of trust between consumer and industry stakeholders and the consequent perceived need for the law to be quite prescriptive, with only a few matters left to a collaboratively developed Code or to the discretion of credit-reporting agencies and credit-providers. The continued complexity of the regime makes it difficult to explain both to lenders and to consumers, although the small number of specialist credit reporting agencies will have no excuse for not understanding and complying with the requirements.

The Senate Committee majority report rejected some of the more radical submissions for simplification on the basis that '... this would involve a major re-drafting of the Exposure Draft and does not reflect the current business model of the credit reporting sector'. But as the Coalition Senators

commented: 'the fact that redrafting legislation ... would be time-consuming is not a sufficient response to these legitimate concerns', and neither does the 'existing business model' argument seem very strong if the objective is a better regulatory regime.

CONCLUSION

Credit-reporting reform has been vigorously debated for more than 20 years, and intensely during and since the ALRC Report. It remains both substantively important for the privacy of millions of credit customers and a symbolic touchstone of how far privacy protection principles should be bent to accommodate prevailing and emerging commercial business models.

While it is now clear that a new regime involving more comprehensive reporting is now on the near horizon, the exact details, and some important parameters, have yet to be agreed. The government's response to the recent Senate Committee Report is awaited by both business and consumer stakeholders, any of whom may then lobby for further changes. The final outcome will depend on positions taken firstly by the Opposition and potentially then by the Greens in the Senate, when the new provisions are debated as part of the first tranche of *Privacy Act* amendments. ■

Notes: **1** The author declares an interest as the Head of the Privacy Branch of the Human Rights and Equal Opportunity Commission at the time of the amendments. **2** *Privacy Amendment Act* 1990, No. 116 1990, s13 et al. **3** CRAA was demutualised in 1998, becoming Data Advantage, then Baycorp Advantage, renamed Veda Advantage in 2006. See http://www.veda.com.au/home/. **4** Still operating – see http://www.tascol.com.au/. **5** See http://dnb.com.au/Credit_Reporting/index.aspx. **6** See http://www.experian.com.au/corporate/experian-credit-services.html. **7** Also in 2011 a fifth business, the DMS group, appears to have entered the market – see http://news.dmsgroup.net/2011/08/credit-application-checks-australia-nz.html , although the Group website suggests that it actually started offering credit reports on individuals in 2002; http://www.dmsgroup.net/home/dms-group-profile. **8** Approved as subordinate legislation in 1991 and last amended in 1996 – see http://www.privacy.gov.au/materials/types/codesofconduct/view/6787. **9** The complaints statistics in the Privacy Commissioner's Annual Reports are difficult to follow, but it appears that in the last year reported (2009-10) there were some 229 credit reporting complaints received, and some 246 closed. In recent previous years, credit reporting has accounted for between 10 and 20 per cent of all complaints, which have totalled between 1,000 and 1,500 in recent years. **10** Non-government organisations have been very critical of successive Commissioners for not being willing to make formal complaint determinations under the Act, preferring conciliation instead, even where the complainant seeks the vindication of a 'finding' concerning compliance. See the Australian Law Reform Commission's final report on Privacy in 2008 for summaries of these concerns; http://www.alrc.gov.au/publications/report-108 , and NGO submissions to the more recent Senate Committee inquiry into the Exposure Draft Credit Reporting Amendments; http://www.aph.gov.au/senate/committee/fapa_ctte/priv_exp_drafts/submissions.html. **11** The Commissioner publishes a few anonymised complaint case studies each year (Case Notes at http://www.privacy.gov.au/materials/a-z/c), and there are usually a handful of credit-reporting cases included. **12** These include the Consumer Credit Legal Centre (NSW), Consumer Action Law Centre (Victoria), Queensland Legal Aid, Financial Counselling Australia, Financial and Consumer Rights Council Inc and Care Inc – the Consumer Law Centre of the ACT. **13** Type of account, date opened, current limit and date closed. **14** See http://www.pcpd.org.hk/english/publications/code_pra_ex.html. **15** The *National Consumer Credit Protection Act* 2009 (Cth) and the *National Consumer Credit Protection Act Amendment (Home Loans and Credit Cards) Act* 2011 (Cth) imposed some new obligations on lenders, although these do not go as far as consumer NGOs would have liked. **16** See http://www.aph.gov.au/senate/committee/fapa_ctte/priv_exp_drafts/report_part2/index.html. **17** Those consumer NGOs already noted (see note 12) and the Australian Privacy Foundation. **18** Recommendation 4; see source cited in note 16. **19** Recommendation 8. **20** Recommendations 9 & 10. **21** Recommendation 11. **22** Recommendation 15. **23** Comments from Coalition Senators following the main Committee Report. **24** See http://www.arca.net.au/.

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