

REGULATION IMPACT STATEMENT – CREDIT REPORTING REFORMS

Background, purpose and structure of the Regulation Impact Statement (RIS)

Background

In 2006 the then Australian Government asked the Australian Law Reform Commission (ALRC) to conduct an inquiry into the extent to which the *Privacy Act 1988* (the Privacy Act) and related laws continue to provide an effective framework for the protection of privacy in Australia.

In August 2008 the ALRC report *For Your Information: Australian Privacy Law and Practice* (108) (the ALRC Report) was publicly released. The ALRC Report contains 295 recommendations for reform of the Privacy Act and related legislation, including recommendations relating to reform of the consumer credit reporting provisions (Part IIIA of the Privacy Act).

Over a two year period, the ALRC released an Issues Paper and Discussion Paper to assist in informing its recommendations in the final report. In developing the consumer credit reporting recommendations, the ALRC formed a Credit Reporting Advisory Sub Committee made up of Treasury officials, consumer advocates, credit provider representatives and credit reporting agency representatives. The ALRC consulted widely with community groups and the business community, seeking written submissions and conducting a series of roundtables with individuals, agencies and organisations about consumer credit reporting.

The ALRC recommendations on credit reporting contain two significant proposals:

1. **The current consumer credit reporting regime move to a system that includes ‘more comprehensive’ consumer credit information, as follows:**
 - a. **Recommendation 55–1** The new *Privacy (Credit Reporting Information) Regulations* should permit credit reporting information to include the following categories of personal information, in addition to those currently permitted in credit information files under the *Privacy Act*:
 - i. the type of each credit account opened (for example, mortgage, personal loan, credit card);
 - ii. the date on which each credit account was opened;
 - iii. the current limit of each open credit account; and
 - iv. the date on which each credit account was closed.
 - b. **Recommendation 55–2** Subject to Recommendation 55–3, the new *Privacy (Credit Reporting Information) Regulations* should also permit credit reporting information to include an individual’s repayment performance history, comprised of information indicating:
 - i. whether, over the prior two years, the individual was meeting his or her repayment obligations as at each point of the relevant repayment cycle for a credit account; and, if not,
 - ii. the number of repayment cycles the individual was in arrears.
 - c. **Recommendation 55–3** The Australian Government should implement Recommendation 55–2 only after it is satisfied that there is an adequate

framework imposing responsible lending obligations in Commonwealth, state and territory legislation.

- d. **Recommendation 55–4** The credit reporting code should set out procedures for reporting repayment performance history, within the parameters prescribed by the new *Privacy (Credit Reporting Information) Regulations*.
- e. **Recommendation 55–5** The new *Privacy (Credit Reporting Information) Regulations* should provide for the deletion of the information referred to in Recommendation 55–1 two years after the date on which a credit account is closed.

2. A new credit reporting Code of Conduct be developed by industry, as follows:

- a. **Recommendation 54–9** Credit reporting agencies and credit providers, in consultation with consumer groups and regulators, including the Office of the Privacy Commissioner, should develop a credit reporting code providing detailed guidance within the framework provided by the *Privacy Act* and the new *Privacy (Credit Reporting Information) Regulations*. The credit reporting code should deal with a range of operational matters relevant to compliance.

Purpose

The purpose of this RIS is to determine whether the proposed policy objectives in Recommendations 55-1 to 55-5 and 54-9 should be accepted and if so, the form in which the recommendations should be accepted.

Structure

The RIS begins by providing background on the issue of consumer credit reporting and summarises previous reviews. It then provides background on the issue of a credit reporting Code of Conduct. The RIS is then broken into two parts. Part A considers comprehensive credit reform, while Part B considers a credit reporting code of conduct. The RIS examines the problems, options and impacts to determine the most effective and efficient regulatory approach in relation to both of these issues.

Background to Consumer Credit Reporting

The credit reporting system is intended to increase the efficiency of Australia's consumer credit market. As of June 2008, total consumer credit on issue, including securitisations, was \$1113.4 billion. Of this, housing credit on issue stood at \$957.9 billion and other personal credit on issue was \$155.6 billion. The largest sector of consumer credit is residential mortgages, which are estimated to account for over 86 per cent of all consumer loans.¹

Within the consumer credit market credit providers obtain credit reports from credit reporting agencies (CRAs) to assist in the assessment of credit applications with the aim of minimising the risk of customer defaults.

CRAs collect information about individuals from credit providers and from publicly available sources (such as bankruptcy information obtained from the Insolvency and Trustee Service Australia). This information is used in generating credit reporting information for credit providers. Credit providers use this information when assessing credit applications, as it augments information obtained directly from an individual's application form, the credit provider's own records of past transactions involving the individual (if any), and any other enquiries the credit provider may choose to make.

Consumer credit reporting is regulated by Part IIIA of the Privacy Act. It regulates the types of personal information that may be collected and disclosed in the course of consumer credit reporting by a defined class of CRAs and credit providers. The Privacy Act allows for the collection and disclosure of 'negative' credit reporting information. Subsection 18E(1) of the Privacy Act sets out a prescriptive list of information which may be included in a credit information file. This includes:

- a credit provider having sought a credit report in connection with an application for credit, and the amount of credit sought (inquiry information)
- a credit provider being a current credit provider in relation to the individual (current credit provider status)
- credit provided by a credit provider to an individual, where the individual is at least 60 days overdue in making a payment on that credit (default information)
- a cheque for \$100 or more that has been dishonoured twice
- a court judgment or bankruptcy order made against the individual; and
- a credit provider's opinion that the individual has committed a serious credit infringement.

In Australia there are currently three CRAs active:

- Veda Advantage (Veda)
- Dun and Bradstreet (D&B); and
- Tasmanian Collection Service

¹ National Consumer Credit Protection Bill 2009 Executive Memorandum p.363 at 10.3

Veda claims a market share of 96%² with a database of 16.5 million credit-active Australians³. It is understood that Veda has over 5000 subscribers which use its services, although these are not exclusively credit providers.⁴ The next largest CRA, D&B, claims to have data on 2.8 million individuals in Australia and New Zealand.⁵

The circumstances in which CRAs can disclose personal information contained in a credit information file are specified in section 18K of the Act. In general terms, CRAs can only disclose to credit providers (which is defined by section 6 of the Act to include mortgage insurers and trade insurers). Section 11B of the Act sets out a more detailed definition of credit providers, which includes:

- banks
- any entity which provides loans or credit cards for a substantial part of its business or allow individuals to have goods or services on credit (more than seven days)
- an entity that provides loans (including by issuing credit cards), provided the Privacy Commissioner has made a determination in respect of such a class of entity
- a government agency that provides loans and is determined by the Privacy Commissioner to be a credit provider for the purposes of the Act
- a person who carries on a business involved in securitisation or managing loans that are subject to securitisation; or
- an agent of a credit provider while the agent is carrying on a task necessary for the processing of a loan application, or managing a loan or account with the credit provider.

The definition does not include debt collectors, real estate agents, employers and general insurers. CRAs are not permitted to provide credit reports to any organisations which do not fall within the definition of a credit provider.

National Reform of Consumer Credit Law

Australian Governments are working towards the reform of consumer credit law in Australia. COAG, the Council of Australian Governments, agreed in March and July 2008 to transfer consumer credit regulation to the Commonwealth. Subsequently, COAG agreed on 3 October 2008 to a two-stage plan to overhaul consumer credit laws. The first stage of the plan includes the development of a national licensing scheme for the consumer credit industry, enacting the Uniform Consumer Credit Code as a Commonwealth law, and reforming key credit regulation laws.

On 27 April 2009 the then Minister for Superannuation and Corporate Law, Senator Sherry, released the draft National Consumer Credit Protection Bill 2009 (the NCCP Bill) for public

² 'Veda Advantage responds to ALRC Privacy Review proposal' in *Wot News*, accessed 9 July 2009, from <http://wotnews.com.au/like/veda_advantage_responds_to_alrc_privacy_review_proposal/1666111/>

³ 'Veda Advantage 'About Us'', accessed 23 July 2009, from <http://www.vedaadvantage.com/about-veda/au_our-data.dot>

⁴ ALRC report at paragraph 55.21

⁵ Dun & Bradstreet 'Company profile', accessed 23 July 2009 from <http://dnb.com.au/Header/About_Us/Company_profile/index.aspx#DB_Australia_and_New_Zealand>

comment. The NCCP Bill was introduced into the Australian Parliament on 25 June 2009.⁶ Amongst other things, the NCCP Bill proposes new responsible lending obligations for all consumer credit in Australia. ALRC Recommendation 55-3 suggested the Government only permit repayment performance history in the credit reporting system if responsible lending obligations were introduced.

The NCCP Bill introduces a set of responsible lending conduct requirements, which set a standard of expected behaviour for credit providers when they enter into a credit contract, or when they suggest a credit contract to a consumer or provide assistance to a consumer to apply for a credit contract. Compliance with the responsible lending laws will require an assessment and verification of a consumer's credit needs and financial circumstances, including that the consumer has the capacity to repay the financial obligations.

Past Reviews of Credit Reporting

The question of whether more comprehensive credit reporting (also known as positive reporting) should be introduced into Australia has been actively considered since the enactment of the credit reporting system in 1988. Following is a summary of these proposals and reviews.

Credit Reference Association of Australia (CRAA) proposal

In 1988 the CRAA stated it would augment its collection of credit reporting information by including information about the current credit commitments of individuals. The proposal was named the Payment Performance System (PPS)⁷. Under the PPS credit providers would supply CRAA with tapes containing their customers' credit accounts which would be merged with existing data every 30 to 60 days. The data would be placed in credit reports containing a complete listing of all a consumer's credit accounts, balances owing, and payment performance on every account during the previous 24 payment periods. It was proposed that payments 120 days or more overdue would automatically generate a default report.

The CRAA's proposal was rejected by the then Government on the grounds that it was a form of 'positive reporting' which was too intrusive to the privacy of individuals.

Financial System Inquiry (Wallis Report) Proposal (1997)

The Wallis Report stated that it was not in a position to assess whether the benefits of positive credit reporting outweighed the costs, but considered the potential benefits warranted a complete review of the issue. The Wallis Report recommended that the Attorney-General establish a working party to review the existing credit provisions of the *Privacy Act*.⁸ No information is available on whether the recommended review occurred.

Senate Legal and Constitutional References Committee

In 2005 the Senate Legal and Constitutional References Committee reported on aspects of credit reporting as part of its inquiry into the Privacy Act. The Committee's report, [*The Real Big Brother: Inquiry into the Privacy Act 1988*](#), found that no reform of the credit reporting

⁶Announced by the Minister at:

<http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/002.htm&pageID=003&min=ceba&Year=&DocType=0> viewed 18 September 2009.

⁷ ALRC report paragraph 52.34

⁸ ALRC report paragraphs 55.20 – 21, quoting Financial System Inquiry Committee, *Financial System Inquiry Final Report* (1997).

provisions of the Privacy Act was required. The Committee recommended against introducing positive credit reporting in Australia, stating that⁹:

the experience with the current range of credit information has shown that industry has not run the existing credit reporting system as well as would be expected and it is apparent injustice can prevail. As mentioned elsewhere in this report, positive reporting is also rejected on the basis that it would magnify the problems associated with the accuracy and integrity of the current credit reporting system. The privacy and security risks associated with the existence of large private sector databases containing detailed information on millions of people are a major concern.

The Australian Government's response to the Senate Committee's recommendation concerning credit reporting and stated that review of the credit reporting provisions would be included in the reference to the ALRC to review privacy law in Australia.

Senate Economics Committee

The Senate Economics Committee also considered the issue in its 2005 report *Consenting Adults, Deficits and Household Debt: Links between Australia's Current Account Deficit, the Demand for Imported Goods and Household Debt*. The Committee stated that it was not persuaded to take a different view to that expressed by the Senate Legal and Constitutional References Committee on the basis that¹⁰:

- credit providers were not making full use of the information available to them; and
- defaults in the credit card market and other signs of financial distress were very low and did not justify a move to positive credit reporting.

Victorian Consumer Credit Review

The 2006 Consumer Credit Review examined comprehensive credit reporting as part of a broad review of the efficiency and fairness of the operation of credit markets and the regulation of credit in Victoria. The Consumer Credit Review rejected a form of more comprehensive credit reporting on the basis that there were unanswered questions as to whether the benefits outweighed the costs. However it recommended that further research and analysis be undertaken on the effects of comprehensive credit reporting.

House of Representatives Standing Committee on Economics

In November 2008, after the publication of the ALRC Report, the House of Representatives Standing Committee on Economics' Inquiry Into Competition in the Banking and Non-Banking Sectors recommended that the Government implement the ALRC's recommendations on reforming Australia's credit reporting system. In particular, the report considered the effect of comprehensive credit reporting and concluded that adopting a comprehensive credit system would provide competitive advantages to both businesses and individuals. The report referred to The Treasury's findings which noted that the current negative credit reporting model may represent a barrier to competition as it prevents new entrants and smaller existing lenders from obtaining comprehensive information on a

⁹ ALRC report paragraph 55.23, quoting Senate Legal and Constitutional References Committee, *The Real Big Brother: Inquiry into the Privacy Act 1988* (2005).

¹⁰ ALRC report paragraph 55.25

prospective customer's ability to service a loan and that only a 'customer's existing lender...has access to the borrower's repayment history'.¹¹

Background to Credit Reporting Code of Conduct

Section 18A of the Privacy Act requires the Privacy Commissioner to issue a Code of Conduct relating to credit information files and credit reports. The Privacy Commissioner is

¹¹ House Standing Committee on Economics: Inquiry into competition in the banking and non-banking sectors <http://www.aph.gov.au/house/committee/economics/banking08/report/Fullreport.pdf> at 3.138 accessed 16/07/09

required to consult with government, commercial, consumer and other relevant bodies and organisations before issuing the Code of Conduct. The Code of Conduct should deal with:

- the collection of personal information for inclusion in individuals' credit information files
- the storage of, security of, access to, correction of, use of and disclosure of personal information included in individuals' credit information files or in credit reports
- the manner in which credit reporting agencies and credit providers are to handle disputes relating to credit reporting; and
- any other activities, engaged in by CRAs or credit providers, that are connected with credit reporting.

The Privacy Commissioner issued the *Credit Reporting Code of Conduct* in 1991. The Code supplements Part IIIA on matters of detail not addressed by the Privacy Act. Among other matters, the Code requires credit providers and CRAs to:

- deal promptly with individual requests for access and amendment of personal credit information, such as proscribing specific timeframes within which requests must be dealt with
- ensure that only permitted and accurate information is included in an individual's credit information file
- keep adequate records in regard to any disclosure of personal credit information
- adopt specific procedures in settling credit reporting disputes, and
- provide staff training on the requirements of the Privacy Act.

The Code supplements Part IIIA of the Privacy Act and creates a set of legally binding rules. Subsection 18A(4) states that the Code of Conduct is a disallowable instrument. Section 18B of the Act requires CRAs and credit providers to comply with the Code of Conduct.

The term 'credit providers' is defined in section 11B of the Privacy Act. The definition extends to an organisation that is, among other things, a:

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

The term 'loan' is defined in section 6(1) of the Privacy Act to mean a contract, arrangement or understanding under which a person is permitted to defer payment of a debt, and includes a hire-purchase agreement or an agreement for the hire, lease or renting of goods or services.

The Privacy Commissioner has issued two determinations in relation to the definition of credit provider. These are the *Credit Provider Determination No. 2006-4 (Classes of Credit Providers)* and the *Credit Provider Determination No. 2006-3 (Assignees)*. These

determinations state circumstances in which corporations are to be regarded as credit providers. They include situations where corporations make loans in respect of the provision of goods or services on terms that allow the deferral of payment, in full or in part, for at least seven days.

The operation of the Privacy Act and the Privacy Commissioner's Determinations means that the type of corporations that may be included within the definition of credit provider has been considerably expanded. Submissions to the ALRC recognised that organisations which are retailers or service providers, such as video store operators or legal and healthcare service providers, may fall within the definition of credit provider if they extend payment terms for seven days or more¹². In some situations, organisations that would otherwise be small businesses may be caught by the operation of the credit reporting provisions.

¹² ALRC Report paragraph 54.112

PART A: Comprehensive Credit Reporting

1. Problem

1.1 Greater access to independent credit information

A key objective of credit reporting is to facilitate consumer credit transactions by encouraging transparency in the market and providing access to standardised, reliable and timely information about an individual's credit risk.¹³ A significant concern in the consumer credit industry is that the existing credit reporting system does not sufficiently address the information asymmetry between credit providers and potential borrowers. Information asymmetry occurs where the credit provider does not know the full credit history of an individual applying for credit and therefore the individual has more information about his or her credit risk than the credit provider. This can result in adverse selection, where a credit provider operating in response to information asymmetry, prices credit based on the *average* credit risk of individuals.¹⁴ The credit reporting system attempts to address this information asymmetry by providing an independent source of information that can assist in the assessment of an individual's credit application.

The present credit reporting system in Australia is a negative credit reporting type of system, as opposed to the 'positive' credit reporting type of system permitted in other countries. The difference between the two systems is the type of personal information which is permitted to be collected. Negative reporting limits the collection of personal information to that which relates to an individual's credit delinquency, such as defaults on payments or dishonoured cheques, and inquiries on the credit record. Positive credit reporting permits the collection of personal information which demonstrates an individual's credit account activity, such as the timeliness of payments, account type, the credit limit and the amounts of credit liabilities. However, the terms positive reporting and negative reporting are not clearly defined and can be confusing. The ALRC uses the term 'comprehensive credit reporting' to describe the inclusion of additional information which would feature in a positive credit reporting system.

It is argued by the credit reporting industry that Australia's current credit reporting system provides insufficient credit history information about an individual. They argue this may cause credit providers to incorrectly assess the risk premium of individuals when they apply for credit, which can cause the following consequences:

- granting credit, or higher amounts of credit, to individuals who cannot afford to meet their repayment obligations
- not granting credit, or less credit than desired, to individuals who can afford to meet their repayment obligations

Industry stakeholders argue that the lack of more comprehensive information may mean they are ignorant of the fact that an individual's circumstances may have changed and therefore their ability to repay has changed. Credit providers are forced to place a lot of emphasis on current information contained in credit reports, such as default listings, which do not accurately reflect an individual's credit risk. A minor default is recorded for a period of 5 years after the event, but information about an individual's changed circumstances, such as evidence of consistent and timely repayment of debts, is not recorded. Overall, it is argued there is an information asymmetry which results in the mis-pricing and mis-allocation of credit.¹⁵ In consultations industry stakeholders have suggested that the absence of more

¹³ M Miller, *Credit Reporting Systems and the International Economy*, 2003, p 410.

¹⁴ ALRC Report paragraph 52.17

¹⁵ Dun & Bradstreet, Submission to Senate Economics Reference Committee Inquiry into Possible

comprehensive credit reporting may affect the price of credit (both in the consumer credit market as a whole and for individual consumers) which affects the availability of credit. They also argue that the lack of more comprehensive credit information may lead to more defaults, as customers who would not have qualified for credit may be able to obtain credit in the current negative credit reporting system by exploiting the information asymmetry which makes it difficult for credit providers to discover information about an applicant's true financial position.

There does not appear to be independent empirical information available about the Australian consumer credit reporting system, industry, or the implications of more comprehensive credit reporting. The lack of independent information was noted by the ALRC.¹⁶ Independent information was not available in the preparation of this RIS.

While the major purpose of credit reporting is to provide information to assist credit providers to assess applications for credit, an effective credit reporting system may also facilitate responsible lending by credit providers, helping to ensure individuals do not become financially overcommitted. The National Consumer Credit Protection Bill 2009 [which has since passed as the *National Consumer Credit Protection Act 2009*] proposes extensive responsible lending obligations which will require credit providers to ensure they adequately and responsibly assess an individual's application for credit.

1.2 Privacy concerns

Permitting access to more credit information through the credit reporting system directly affects an individual's privacy. The main concerns from consumer and privacy advocate stakeholders and some commercial stakeholders are:

- the benefit of comprehensive credit reporting does not outweigh the additional impact on an individual's privacy
- CRAs will have access to large databases of personal information
- comprehensive credit information may be used for purposes unrelated to assessing the creditworthiness of an applicant for credit, such as marketing or other unauthorised purposes, including identity fraud
- there may be an increased risk that information will be inaccurate due to the greater volume of information (reflecting existing concerns about accuracy of the currently held credit reporting information) and any inaccuracies may make it more difficult for individuals to obtain credit
- based upon evidence from overseas, there is an increased risk that the security of data held by CRA's will be compromised; and
- it would be inappropriate for CRA's to collect and report payment performance information in relation to utilities such as telecommunications, energy and water.

2. Objectives

2.1 Objectives of government action

The objective of government action is to respond to the ALRC recommendations on consumer credit reporting reform in the context of the Government's response to the wider ALRC review of privacy law. The specific objectives are to:

Links between Household Debt, Demand for Imported Goods and Australia's Current Account Deficit, March 2005

¹⁶ ALRC report paragraph 55-108

- provide consumer credit providers with sufficient information to allow them to adequately assess credit risk while ensuring the protection of personal information to the greatest extent possible; and
- encourage responsible lending.

2.2 Existing policy and regulations

Part IIIA of the Privacy Act precisely defines the categories of personal information which may be collected and disclosed for credit reporting purposes. The policy objective of the existing credit reporting system is to provide a mechanism to allow a limited amount of personal information to be collected and disclosed in the credit reporting system for the efficient operation of the consumer credit market.

The ALRC has recommended changes to the existing credit reporting system in order to permit more comprehensive credit reporting. Amendments would be required to Part IIIA of the Privacy Act.

3 Options that may achieve the objectives

3.1 Implementation scope

Part IIIA of the Privacy Act regulates the consumer credit reporting system. Against this background, the proposed options address the ALRC's recommendations 55-1 and 55-2 on adopting a more comprehensive consumer credit reporting system within the Privacy Act. The scope of implementation is limited to amending, or not amending, Part IIIA of the Privacy Act.

The ALRC considered options to make the current credit reporting system more effective¹⁷. These options included improving the accuracy of existing credit reporting data, requiring consumer declarations in relation to loan applications and expanding financial literacy programs. However, the ALRC did not recommend any of these options for action and accordingly this RIS does not consider these options.

Implementation of the ALRC recommendations would enable CRAs to collect additional information. However, CRAs would not be obliged to collect additional information. It is expected that CRAs will only incur any costs in collecting additional information (whether through redeveloping systems or for other reasons) if they expect the benefits of collecting more comprehensive credit information to outweigh the costs.

3.2 Option 1 – Maintain the current permitted categories of credit reporting information, retaining a negative credit reporting system (the status quo)

This option retains the current permitted categories of negative credit reporting information. No amendments would be made to Part IIIA of the Privacy Act.

3.3 Option 2(a) – Move towards a more comprehensive credit reporting system by including four additional categories of personal information

This option would permit credit reporting information to include the following categories of information, in addition to those currently permitted under Part IIIA of the Privacy Act:

- the type of each credit account opened (for example, mortgage, personal loan, credit card)
- the date on which each credit account was opened

¹⁷ ALRC Report paragraph 55.136

- the current limit of each open credit account, and
- The date on which each credit account was closed.

This option is based on Recommendation 55-1 from the ALRC Report.

3.4 *Option 2(b) - Expand the permitted outlined in Option 2(a) with the addition of including an individual's repayment history*

In addition to the four additional categories of personal information from Option 2(a), this option would also allow limited repayment history information to be included, as follows:

- whether, over the prior two years, the individual was meeting his or her repayment obligations as at each point of the relevant repayment cycle for a credit account; and, if not,
- the number of repayment cycles the individual was in arrears.

Note that the *amount* of any payments missed would not be included. This option is based upon Recommendation 55-2 of the ALRC Report, which recommends this option only be considered where there also exists an adequate legislative framework imposing responsible lending obligations on credit providers.

4. Assessment of impacts

4.1 *Impact group identification*

The groups affected by the Options are:

- individuals who apply for credit
- CRAs
- credit providers; and
- small businesses.

The Office of the Privacy Commissioner (the OPC) would remain the responsible regulator under all of the proposed options. It is expected that Options 2 and 3 would only have no, or a low, impact upon the OPC.

4.2 *Assessment of costs and benefits*

4.2.1 *Impact of Option 1 – remain with status quo*

Individuals - Benefits

The current protections in the Privacy Act limit the amount of personal data that may be collected, used and disclosed for the purpose of credit reporting. These limitations reduce the risk of data inaccuracy, misuse for marketing or other unauthorised purposes, or misuse for illegal activity, including identity fraud.

Individuals - Costs

The limited information available in credit reports may misrepresent the credit worthiness of individuals. For example, small defaults for small amounts of credit remain on a credit report for five years and may form the basis of a decision to approve credit, even where this default may be trivial in contrast to the overall credit history of an individual.

There is a risk that consumer credit may be priced at a higher rate than would otherwise be the case if more comprehensive credit information was available. There is also a risk that consumers may be denied credit or only have reduced credit made available because credit

providers may not have sufficient information to make fully effective decisions about the risks associated with the allocation of credit in the market as a whole or in relation to individual consumers.

Credit Reporting Agencies - Benefits

No requirements to change current data retention practices, business models or database technology.

Credit Reporting Agencies - Costs

Current regulation prevents CRAs from offering more comprehensive consumer credit reports which may limit the greater profitability of CRAs.

The current limited number of information categories may create competition costs by maintaining barriers to market entry for new CRA businesses. Two of the existing CRAs have large databases. Credit providers are more likely to use these CRAs as the size of the databases gives them access to the greatest potential number of consumer credit records. This may limit new entrants into the market because it is likely to take more time to develop databases of negative events like credit defaults.

Credit Providers - Benefits

No requirements to change current use and disclosure practices in relation to credit reporting information, business models or credit assessment technology.

Credit Providers - Costs

If an applicant fails to disclose credit accounts and liabilities they hold with other financial institutions, the credit provider is unable to make a fully informed lending decision resulting in the possibility of provision of credit to borrowers who are unable to meet their financial obligations.

New entrants into the credit provider market may face significant barriers to entry as a consequence of insufficient information about the credit risk of prospective credit consumers. New players or smaller credit providers are unlikely to have more comprehensive data available, while existing larger credit providers are able to access their existing customer base. This may mean knowledge of credit worthiness of individuals is inadequate which may lead to greater default rates for new and small credit providers.

Small Businesses - Benefits

To the extent that small businesses currently use the credit reporting system, they would not be required to make any changes.

Small Businesses - Costs

Small businesses may wish to use more comprehensive credit reporting information to provide greater certainty in the provision of credit to customers. Maintaining the current negative credit reporting system may place small businesses at proportionally greater risk from defaulting credit customers. No information is available on the extent of small business usage of the credit reporting system so it is not possible to quantify the possible costs.

4.2.2 Impact of Option 2(a) - Expand the permitted categories to include four additional categories of personal information

Individuals - Benefits

Permitting additional information provides the opportunity for credit providers to better understand an individual's credit history. In turn this may:

- result in lower rates of over-indebtedness and default
- allow individuals who are credit worthy to gain access to more appropriately priced credit (assuming credit providers introduce differential pricing)
- increase the availability of lending (to the extent that lenders currently limit the availability of credit due to the lack of more comprehensive credit reporting information)
- reduce the transaction costs in assessing credit applications, which could result in reduced costs to consumers if the cost savings are passed on by credit providers, and
- allow for greater automation and a faster credit decision making process, assuming credit providers change existing practices.

The extent to which price benefits (lower rates) would be realised by consumers depends in part on the level of competition in the consumer credit market - the greater the level of competition, the more likely that the benefits of comprehensive credit information would be passed on to consumers. While the magnitude of consumer benefits is uncertain, it is noted that currently there does not appear to be extensive competition in the consumer credit sector, raising some doubt that consumers would realise significant price benefits, at least over the short term.¹⁸ Consumers may, however, benefit from greater access to credit.

Individuals - Costs

Individuals who are deemed to be a poor risk based on greater transparency about credit worthiness may find that they face a higher price for access to credit (assuming credit providers introduce differential pricing).

Permitting additional categories of personal information to be collected, used and disclosed may increase the risk of data inaccuracy, misuse for marketing or other unauthorised purposes, including identity fraud. If there are no significant changes to the numbers of CRAs operating in Australia, extremely large amounts of data about individuals will be held and maintained by a small number of CRAs which may increase the risk of data security challenges and the consequences of any potential breaches. Information is not available to quantify the possible cost of data inaccuracy. In many instances, the cost to any individual that may be affected by inaccurate records will not be obvious as individuals may resolve the issue by dealing directly with the credit provider or the CRA.

Credit Reporting Agencies - Benefits

The business model and marketability of CRAs is expected to be improved by allowing them to collect, use and disclose a greater amount of data on individuals who apply for credit, in turn giving CRAs the opportunity to sell a more effective product.

¹⁸ Almost all new mortgages in July 2009 were written by the 'big four' banking groups, compared with around 60 per cent prior to the credit crisis (The Age 2009). As noted earlier, mortgages make up approximately 86 per cent of all consumer loans.

Credit Reporting Agencies - Costs

CRA's are likely to incur financial costs associated with developing systems to handle the additional information. However, CRA's can make commercial decisions about how they raise funds to invest in building systems to expand their systems and business operations and how they decide to recoup any investments they chose to make. CRA's may choose to off-set the investment costs against fees obtained from allowing credit providers to access the more comprehensive credit reporting information. For example, they may change their fee structure, market their services to a broader range of credit providers, or develop new services to market to their existing client base of credit providers. CRA's have not provided any information on the commercial decisions they may make to address any costs.

Credit Providers - Benefits

Access to more comprehensive credit reporting information is expected to allow credit providers to more accurately assess the risks involved in lending to an individual and in turn to more appropriately price credit. More information will allow credit providers to avoid lending to those who are over-committed, leading to lower rates of customer indebtedness and defaults and reducing costs for credit providers in debt recovery and write-offs.

Access to more comprehensive credit reporting information will provide a more efficient tool for credit providers to comply with responsible lending obligations under consideration in the NCCP Bill.

Access to more comprehensive credit reporting information may improve competition in the consumer credit provider market by reducing information asymmetry between credit providers, particularly between larger and smaller credit providers. Currently, large credit providers are able to access more comprehensive credit information from their own customers and use this to assess credit applications from their existing customers. In a more comprehensive credit reporting system, small credit providers may use the access to greater information to make more informed decisions about the provision of their credit which may make their businesses more competitive. It may also be the case that all credit providers may be able to reduce the transaction costs involved in assessing credit applications, creating a more efficient credit market.

Credit Providers - Costs

The systems and processes used by credit providers to assess credit applications may change to deal with access to more comprehensive information. If systems and processes change this may result in some costs for credit providers.

There may be higher costs to access credit information if CRA's choose to increase fees to off-set the costs of developing their systems. It is not possible to quantify these costs as this will be a commercial decision for CRA's and there is no information available on what choices CRA's may make to recoup any additional costs they may incur in updating their systems.

There may be a risk that the increased predictive value of the data available under this option may not be sufficient to justify the costs of implementation.

Small Businesses - Benefits

To the extent that small businesses currently use the credit reporting system, access to more comprehensive credit reporting information is expected to allow small businesses to more accurately assess the risks involved in lending to an individual. More information will allow

small businesses to avoid lending to those who are over-committed, leading to lower rates of customer indebtedness and defaults.

Small Businesses - Costs

Although there is no information available on the number of small businesses that currently use the credit reporting system, more small businesses may wish to use more comprehensive credit reporting information to provide greater certainty in the provision of credit to customers. Small businesses may face costs in developing processes to assess credit applications with access to more comprehensive information.

There may be higher costs to access credit information if CRAs choose to increase fees to off-set the costs of developing their systems. It is not possible to quantify these costs as this will be a commercial decision for CRAs and there is no information available on what choices CRAs may make to recoup any additional costs they may incur in updating their systems.

4.2.2.1 Research on credit market efficiency and macro-economic impact of more comprehensive credit reporting

In examining the introduction of comprehensive credit reporting the ALRC considered economic analysis provided by industry stakeholders. Broadly, stakeholders in support of comprehensive credit reporting claim that empirical and macro-economic studies provide important evidence about the likely improvements to credit market efficiency and economic benefits of comprehensive credit reporting.

The ALRC did not commission any independent economic analysis on the question of the possible macro-economic impact of credit reporting systems. The ALRC noted that, on one view:

*this subject matter does not lend itself to precise modelling due to the level of complexity and the small orders of magnitude involved in terms of benefits. It is questionable whether any modelling will provide definitive answers.*¹⁹

The Treasury has confirmed the ALRC views that data constraints restrict the level of macro-economic modelling that can be done on the possible impact of more comprehensive credit reporting. However, analysis conducted by Treasury has found that the introduction of positive credit reporting would be expected to remove information asymmetries in the market and lead to some small equity and efficiency benefits for credit market participants and the Australian economy more broadly.²⁰ The Treasury supports the introduction of comprehensive credit reporting subject to sufficient privacy protections being put in place.

4.2.2.2 Empirical studies on credit market efficiency with more comprehensive credit reporting

International comparative studies

Research by Barron and Staten published in 2000 compared Australia's credit reporting rules with that of the United States (US).²¹ The research compared the accuracy of risk scoring models using the wider credit reporting information available under the US system with the more limited information available in Australia. The US model of credit reporting includes

¹⁹ ALRC report paragraph 55.108

²⁰ The Department of Treasury *Submission to the ALRC Review of the Privacy Act 1988* December 2007

²¹ J Barron and M Staten, *The Value of Comprehensive Credit Reports: Lessons from the US Experience* (2000) Online Privacy Alliance www.privacyalliance.org/resources/staten.pdf; referred to by submissions to the ALRC and viewed and cited by the ALRC report at paragraph 55.94 and 55.95.

information such as the type of account, credit limit, payment history, employer and account balance.

The findings of the research were that more comprehensive credit reporting rules resulted in fewer loan defaults while maintaining the same loan approval rate. The report found, for example, that at an approval rate of 60%, use of the credit reporting information permitted at present in Australia produced a default rate of 3.35% compared to a default rate of 1.9% in the US. At the same time, assuming that default rates were maintained at around the same rate (eg 4%), credit providers using information available in the current Australian system would extend new credit to 11,000 fewer consumers for every 100,000 applicants than would be the case in the US under their credit reporting system.

Later research by Barron and Staten, conducted in 2007 at the request of the Australian Finance Conference, compared the above findings with three other possible credit reporting models.²² The research found that at the targeted approval rate of 60%, the intermediate model (similar to Option 2(b)) produced a 2.46% default rate. The ALRC notes the assertions that the implications of the research are that consumer credit will be less available and more expensive in countries, such as Australia, where the credit reporting system omits information that would provide a more complete picture of a consumer's financial position.²³

The findings in the Barron and Staten research appear to be supported by other reports which broadly compared different credit systems in different countries. Research referring to overseas data demonstrated a lower default rate and reduced bankruptcies following the introduction of comprehensive credit reporting in several countries. For example, econometric research analysing the credit reporting regimes and credit markets in 43 countries, including the US, Australia and most other Organisation for Economic Co-operation and Development countries found that the breadth and depth of a credit market was positively associated with the extent of the credit information that was exchanged between lenders.²⁴ A number of submissions to the ALRC cited the example of Hong Kong, which appears to be experiencing far fewer loan defaults since the introduction of comprehensive credit reporting in 2002, although the ALRC also noted that it was not clear to what extent the change was due to the recovery in Hong Kong's economy that occurred at the same time.²⁵

The ALRC identified methodological limitations and assumptions made by the research²⁶. For example, the Barron and Staten modelling did not take into account issues such as the weight given to more comprehensive credit information provided by customers under the Australian model, the possibility that the assessment processes used by credit providers may differ from the research models. The research assumed that those credit reporting systems which collected more information used that information effectively. The research did not consider other economic factors, including country specific factors, which may have positively influenced the availability of credit or the impact of any broader economic factors on default levels. In addition, the research was conducted before the Global Financial Crisis.

Australian studies

²² M Staten and J Barron, *Positive Credit Report Data Improves Loan Decision-Making* (2007) Australian Finance Conference, viewed and cited by the ALRC report at paragraph 55.96.

²³ ALRC Report paragraph 55.97.

²⁴ T Jappelli and M Pagano, *Information Sharing, Lending and Defaults: Cross-Country Evidence* (2000) Centre for Studies in Economics and Finance, University of Salerno. The Jappelli and Pagano research was referred to in: MasterCard Worldwide, *Submission PR 237*, viewed and cited by the ALRC Report paragraph 55.98.

²⁵ ALRC Report paragraph 55.103 and 55.104.

²⁶ ALRC Report paragraph 55.100.

Research measuring the predictive effect of adding additional information to credit reporting databases to assess credit worthiness was conducted at the initiative of the Australian Retail Credit Association (ARCA) and sponsored by a number of credit providers.²⁷ The research considered a number of models under which additional information was collected. The models considered were identical to the options identified above (see heading 3, Options). Four major Australian banks and a number of international financial services groups participated in the research by analysing their own internal data to estimate the relative predictive effect of different information variables as identified in each option.

The research produced a percentage score to indicate how useful each option was to credit providers in collecting information to assess credit worthiness. The benchmark against which each option was assessed was a hypothetical situation where all relevant credit reporting information (including, for example, full details of repayment performance, which is not a feature of any of the options) was available. This benchmark was assigned a performance score of 100%. When the performance of each option was compared to the benchmark, the research reached the following conclusions:

- Option 1 - the permitted categories of information are unchanged - the predictive value of the information is 10%.
- Option 2(a) - the permitted categories of information are expanded to include the four additional variables – increases the predictive value of the information above option 1 by an additional 23% to a total of 33%.
- Option 2(b) - the permitted categories of information are expanded to include the four additional variables and repayment performance history - increases the predictive value of the information above option 2(a) by an additional 22% to a total of 55%.

However, the research methodology and research results are not available and have not been independently verified. The predictive scores assigned to each option are notional in the sense that they are a comparison against a benchmark that does not currently exist and there is no evidence provided to indicate how the contribution of each information element was assessed. In addition, the benchmark was not recommended by the ALRC, is not an option proposed in this RIS, and has not been proposed or supported by stakeholders, including ARCA, as an appropriate model for Australian conditions.

4.2.2.3 *Research on macro-economic benefits*

A 2004 study conducted by ACIL Tasman for MasterCard modelled the macro-economic impact of introducing more comprehensive credit reporting in Australia. The report concluded that comprehensive credit reporting would generate a one-off increase in capital productivity of 0.1%, which would translate to economic benefits to the Australian economy of up to \$5.3 billion, in net present terms, over the next 10 years.²⁸ ACIL Tasman used what was described as an ‘applied general equilibrium model’ of the Australian and world economies to quantify the benefits of more comprehensive credit reporting. In conducting the research, assumptions were made in the model which assumed that more efficient credit markets would have implications for most sectors of the economy.

²⁷ Australasian Retail Credit Association, *Submission to the ALRC*, PR 352, 29 November 2007.

²⁸ ACIL Tasman, *Comprehensive Credit Reporting: Executive Summary of an Analysis of its Economic Benefits for Australia [prepared for MasterCard International]* (2004), 3. See also ACIL Tasman, *Comprehensive Credit Reporting: Main Report of an Analysis of its Economic Benefits for Australia [Prepared for MasterCard International]* (2004), 28, viewed and cited by the ALRC Report paragraph 55.106 to 55.108.

Research conducted by Access Economics on behalf of Veda Advantage claimed that more credit reporting information would enable lenders to improve the accuracy of risk assessment, reduce defaults and debt over commitment and provide credit to those who cannot currently prove their creditworthiness. Additionally, the research found that comprehensive credit reporting would also lead to an overall increase in consumer debt levels and a related increase in consumer spending.²⁹

Advice from Treasury confirmed that comprehensive credit reporting is likely to lead to some small equity and efficiency benefits for credit market participants and the economy more broadly. However, the research is subject to similar criticisms to that made about research on credit market effects. Treasury have advised that the methodologies employed to measure the macro-economic effects have limitations. The ALRC noted that it is difficult to model precisely the macro-economic impact of comprehensive credit reporting due to the level of complexity and the small orders of magnitude involved in assessing the possible benefits. The ALRC drew the following conclusion:

It is questionable whether any modelling will provide definitive answers. For example, Australia is recognised as having a credit market that is very competitive by international standards. This may limit the potential for further competitive gains resulting from more comprehensive reporting. Equally, a macro-economic upturn seems likely to have a much greater influence on credit availability than any change to a credit reporting system.³⁰

4.2.2.4 *Research on competition in credit markets*

The credit reporting industry strongly advocates the view that comprehensive credit reporting will have a positive effect on competition in Australian credit markets. The 2004 ACIL Tasman report stated that, for example, the experience of the US in the 1990s following increases in the types of personal data collected and used in credit reporting saw a ‘a wave of new entrants into the bank credit card market’.³¹ The benefits of this competition were said to put downward pressure on interest rates and fees for bank credit cards and encourage the targeting of lower interest rates to low risk borrowers. The breadth of the credit card market also expanded. However, the report does not provide evidence to clearly demonstrate the extent to which the identified benefits were directly attributable to credit reporting changes or whether other changes in the consumer credit environment had a significant impact.

In summary, the research suggests greater economic benefits than disadvantages flowing from the introduction of comprehensive credit reporting. The economic benefits are principally found in improving interest rate pricing. The Treasury in its submission to the ALRC noted that overall comprehensive credit reporting would address information asymmetries and thereby improve the targeting of credit, and the assessment, and thus pricing, of risk.³²

²⁹ Access Economics (for Veda Advantage), *The Benefits of Broadening Access to Credit via Comprehensive Credit Reporting*, July 2008

³⁰ ALRC Report paragraph 55.108.

³¹ ACIL Tasman, *Comprehensive Credit Reporting: Executive Summary of an Analysis of its Economic Benefits for Australia [prepared for MasterCard International]* (2004), 3.

³² Department of Treasury *ALRC Review of Privacy Law Treasury Submission* December 2007

4.2.3 Impact of Option 2(b) - Expand the permitted categories to include four additional categories of personal information (Option 2(a)) with the addition of including an individual's repayment history

Individuals - Benefits

The inclusion of this additional data set will enhance the predictive value of credit worthiness which should lead to more informed lending practices and result in greater efficiency and effectiveness in consumer credit lending.

An enhanced predictive value may lead to improved pricing of credit risk which may provide more affordable credit (through, for example, reduced interest rates or transactions costs) for low risk consumers and greater access to credit for consumers who may not have been able to otherwise demonstrate an adequate credit history. However, the likely benefits to consumers will depend, in part, on the level of competition in the consumer credit market (in the same way that this issue may influence the possible benefits to individuals noted above under Option 2(a)).

Individuals -Costs

Individuals who have poor credit histories may have difficulty in obtaining credit or be required to obtain more costly credit (for example, from providers who lend at higher rates).

As access to this dataset may increase the number of loans issued overall, there may be a risk that there will be an increase in irresponsible lending to those unable to meet their obligations. However, the ALRC recommended repayment history information only be permitted once credit providers are subject to responsible lending obligations.

Individuals who are deemed to be a poor risk based on greater transparency about credit worthiness may find that they face a higher price for access to credit (assuming credit providers introduce differential pricing).

This option also presents similar possible costs to individuals as identified in relation to option 2(a). Permitting additional categories of personal information to be collected, used and disclosed, including the inclusion of an individual's repayment history may increase the risk of data inaccuracy, misuse for marketing or other unauthorised purposes, including identity fraud. Any inaccurate records may create restrict individuals gaining access to credit. Data is not available to quantify the possible cost. If there are no significant changes to the numbers of CRAs operating in Australia, extremely large amounts of data about individuals will be held and maintained by a small number of CRAs which may increase the risk of data security challenges and the consequences of any potential breaches. Information is not available to quantify the possible cost of data inaccuracy. In many instances, the cost to any individual that may be affected by inaccurate records will not be obvious as individuals may resolve the issue by dealing directly with the credit provider or the CRA.

Credit Reporting Agencies - Benefits

The business model and marketability of CRA's will be improved by allowing them to collect, use and disclose a greater amount of data on individuals who apply for credit, in turn giving CRA's the opportunity to sell a more effective product.

Implementing repayment history data at the same time as the other proposed data sets in Option 2(a) would significantly reduce set up costs for credit reporting agencies than if it was decided at a later date to separately implement the repayment history data set.

Credit Reporting Agencies - Costs

As noted under option 2(a), CRAs are likely to incur financial costs associated with developing systems to handle the additional information. However, CRAs can make commercial decisions about how they raise funds to invest in building systems to expand their systems and business operations and how they decide to recoup any investments they chose to make. CRAs may choose to off-set the investment costs against fees obtained from allowing credit providers to access the more comprehensive credit reporting information. For example, they may change their fee structure, market their services to a broader range of credit providers, or develop new services to market to their existing client base of credit providers. CRAs have not provided any information on the commercial decisions they may make to address any costs.

Credit Providers – Benefits

The listing of repayment history would provide credit providers with an independent and easily obtainable source of information about an individual's repayment history and may assist credit providers in identifying individuals who are under credit stress. Access to this information is viewed by credit providers as an important tool to complement any responsible lending obligations.

It is possible that the expected greater efficiencies gained by including repayment history information (in terms of improved credit delinquency predictability, which in turn reduces costs associated with defaulting customers) may offset the administrative costs involved in setting up comprehensive credit reporting under the four datasets in Option 2(a).

The inclusion of the repayment history data set in the credit reporting system at the same time as the other data sets in Option 2(a) will significantly reduce set up costs for credit providers than if it was decided at a later date to separately implement the repayment history data set.

Credit Providers – Costs

As noted under option 2(a), the systems and processes used by credit providers to assess credit applications may change to deal with access to more comprehensive information. If systems and processes change this may result in some costs for credit providers. No information is available to quantify any cost that may occur.

As noted under option 2(a), there may be higher costs to access credit information if CRAs choose to increase fees to off-set the costs of developing their systems. It is not possible to quantify these costs as this will be a commercial decision for CRAs and there is no information available on what choices CRAs may make to recoup any additional costs they may incur in updating their systems.

However, a credit provider would not be required to access comprehensive credit reporting information unless it was deemed necessary for their business and was cost effective. The regulation would simply set up a tool which credit providers could access voluntary.

Small Businesses - Benefits

To the extent that small businesses currently use the credit reporting system, access to repayment history information is expected to allow small businesses to more accurately assess the risks involved in lending to an individual. More information will allow small businesses to avoid lending to those who are over-committed, leading to lower rates of customer indebtedness and defaults.

Small Businesses - Costs

Although there is no information available on the number of small businesses that currently use the credit reporting system, more small businesses may wish to use the credit reporting system in it includes repayment history information. Small businesses may consequently face costs in developing processes to assess credit applications.

There may be higher costs to access credit information if CRAs choose to increase fees to off-set the costs of developing their systems. It is not possible to quantify these costs as this will be a commercial decision for CRAs and there is no information available on what choices CRAs may make to recoup any additional costs they may incur in updating their systems.

4.2.3.1 Research specific to the listing of repayment history

As noted above, research by ARCA found that including the repayment history of an individual significantly increased the predictive value of a credit report to 41%. This research accords with widely accepted economic theory that making more information available to credit providers will tend to increase efficiency in the market for credit. It will also assist in making credit more available to those able to repay and reduce rates of default (or both). There was no significant disagreement among stakeholders in their submissions to the ALRC Report that more comprehensive credit reporting has the potential to improve risk assessment by credit providers, even among those who expressed concern about how this improved risk assessment would be used in the credit market.

There is little evidence to demonstrate that this additional data set will subject consumers to greater burdens in terms of higher priced credit or lack of credit. Such matters will be dependent on the applicable business practices of the credit provider and the need to adequately price credit in terms of a person's risk. It is noted that in many circumstances the number 'bad risk' customers who are denied credit will effectively be balanced by those 'good risk' customers who are afforded credit under the comprehensive scheme (but would not have been under the 'negative scheme').

It should be noted that Option 2(b) is only to be implemented with the implementation of responsible lending legislation under the NCCP Bill. While the benefit that repayment history would provide credit providers in determining credit risk of individuals, there are strong concerns expressed by privacy and consumer advocates that this extra category of information does not necessarily guarantee responsible lending of credit. Advocates are concerned that the repayment history will provide credit providers with a very clear picture of a person's financial status without imposing any obligations to use this information in a responsible way. Consumer advocates in particular consider that the availability of more credit information will lead to less risk adverse decisions by credit providers (i.e. credit providers will use a good repayment history to justify providing credit to an individual even where the individual has credit burdens beyond their means). There is therefore a clear link between potential regulation imposing responsible lending obligations and the possible implementation of comprehensive credit reporting.

These concerns would be off-set by the requirement that only those credit providers that are subject to the responsible lending requirements in the NCCP Bill would be allowed to access repayment history from CRAs.

To offset privacy concerns the ALRC made recommendations that require credit providers and CRAs to enhance data quality and security requirements and provide for more effective complaint handling procedures. Chapter 58 and 59 of the ALRC Report outlines a series of recommendations regarding these matters. Recommendation 58-4 recommended that CRAs

should be required to enter into agreements with credit providers to ensure the quality and security of data and to implement controls to ensure data is accurate, complete and up to date. Recommendation 58-7 provides that credit providers may only list overdue payment or repayment performance history where the credit provider is a member of an external dispute resolution scheme recognised by the Privacy Commissioner. Additionally recommendation 59-8 requires that evidence must be provided to an individual substantiating information in a credit report within 30 days where the credit reporting information is disputed or alternatively the matter must be referred to an external dispute resolution scheme recognised by the Privacy Commissioner.

5 Consultation

5.1 ALRC Report Consultation

The ALRC consulted with a wide variety of stakeholders which included CRAs, credit providers, consumer and privacy advocates and the OPC. The ALRC found there was broad support for the implementation of some form of more comprehensive reporting, especially from CRAs and credit providers.³³

Consumer groups, privacy advocates, the OPC and the Banking and Financial Ombudsman generally opposed more comprehensive credit reporting. These stakeholders focused on alternatives and desirable pre-conditions to the possible introduction of more comprehensive credit reporting.³⁴

A number of stakeholders, including OPC, suggested that further study is required before reaching any decision to recommend the implementation of more comprehensive credit reporting, including studies which focus on the possible impact on over-indebtedness and access to affordable credit. A CRA had proposed to the ALRC that it would conduct a further study to model the effect that more comprehensive consumer credit reporting would have on the accuracy of credit providers' application risk evaluation. However, the study was not carried out, in part because of what the CRA believed to be existing restrictions under the Privacy Act.³⁵

5.2 Consultation since the release of the ALRC Report

The Government undertook extensive consultations with, and received written submissions from, relevant stakeholders on the ALRC's credit reporting recommendations. Stakeholders identified included CRAs, credit providers, relevant industry and professional organisations, academics, and consumer and privacy advocates and organisations. The Government also publicised the consultations and opened them to submissions from the public.³⁶

The Government held a number of roundtable consultations on the ALRC credit reporting recommendations in December 2008. There were 22 credit reporting industry attendees and eight privacy and consumer advocate attendees. 15 written submissions were received from the stakeholders. The Department also held a number of individual meetings with stakeholders in the first half of 2009 to discuss the application of the ALRC's recommendations.

There was broad support for the introduction of more comprehensive credit reporting. While some consumer and privacy advocates remained opposed to the ALRC's recommendations for more comprehensive credit reporting, most consumer and privacy advocates reluctantly

³³ ALRC Report paragraph 55.115

³⁴ ALRC Report paragraph 55.133

³⁵ ALRC Report paragraph 55.125

³⁶ http://www.smos.gov.au/media/2008/mr_372008.html viewed 2 September 2009.

agreed with many of the recommendations and the inclusion of repayment performance history. Those who agreed with the ALRC recommendations only supported comprehensive credit reporting to the extent that it was introduced strictly along the lines recommended by the ALRC Report. CRAs and large credit providers vigorously supported the inclusion of repayment history and strongly expressed their view that they considered this dataset to be the decisive factor in improving the credit reporting system. CRAs and credit providers expressed the view that the absence of repayment history would be likely to mean that the benefits of comprehensive credit reform would not outweigh the costs of introducing the other changes.

6 Conclusion and Recommended Option

Option 2(b) is preferred. The introduction of more comprehensive credit reporting in the form of the additional five data sets will provide consumer credit providers with the opportunity to access enhanced information to establish an individual's credit worthiness. It is expected that this will allow more robust assessments of consumer credit risk, both in the market as a whole and in relation to individual applications, which can assist responsible lending and potentially lead to lower consumer credit default rates. The economic benefits to industry and individuals alike outweigh the reduction of privacy protections to these categories of personal information. However, the extent to which consumers gain will depend, in part, on the level of competition in the consumer credit market. The inclusion of repayment history information appears to provide an appropriate increase in the predictive value of credit reporting information. Recognising the importance of this information to the ability of credit providers to make responsible lending decisions, the Government has decided to implement responsible lending obligations in the NCCP Bill.

7 Implementation and Review

The Government will consider the public release of the stage one Government response to the ALRC Report, which includes the ALRC's credit reporting recommendations. The Government intends to implement the Government's response to the ALRC recommendations through draft legislation which will be released for public comment. In relation to the credit reporting provisions of the draft legislation, it is anticipated that further consultations will occur with a small number of identified expert stakeholders to obtain their assistance in addressing technical issues to be covered by the drafting process. As part of this process transitional issues will be considered, which will include any necessary transitional arrangements to assist in minimising any possible negative effects to the consumer credit market from the implementation of the credit reporting reforms.

The Government has released the NCCP Bill for public comment and made announcements indicating the Government's commitment to introduce responsible lending obligations. This is consistent with the terms of ALRC recommendation 55-3, which recommended repayment history information only be made available if the Government is satisfied there is an adequate framework imposing responsible lending obligations.

ALRC recommendation 55-5 stated that the more comprehensive credit reporting information should be deleted two years after the date on which a credit account is closed. The Government will include timeframes for the deletion of information in the implementation of the Government's response to the credit reporting recommendations.

It is recommended that a review of the introduction of the additional datasets by the Government take place in five years from the commencement of more comprehensive credit reporting in accordance with Recommendation 54-8 of the ALRC Report.

PART B: Industry Developed Credit Reporting Code of Conduct

8. Problem

Non-legislative guidance should be issued to deal with a range of operational matters to ensure effective compliance with the requirements of the credit reporting provisions of the Privacy Act. The appropriate form of this guidance is the issue to be determined.

Section 18A of the Privacy Act currently requires the Privacy Commissioner to issue a Code of Conduct dealing with operational matters. The Privacy Act sets out high level obligations and does not deal with detailed operational matters. In addition, the Privacy Act does not prescribe detailed operational procedures because it would not be a flexible mechanism to deal with issues of detail. For example, it would be difficult to take into account changing technical standards and practices that may occur in the credit reporting industry and which may require the revision of the detailed guidance material.

In recommendation 54-9 the ALRC proposes that CRAs and credit providers develop an industry Code of Conduct in consultation with consumer groups and regulators. The ALRC expressed the view that an industry developed Code would form a necessary adjunct to the credit reporting provisions in the Privacy Act. The ALRC recommended that the Code be developed by industry because of the perceived need for industry to have a greater involvement in developing procedures which affect their day to day compliance with the Privacy Act.

Consistent with ALRC recommendation 48-1 on binding codes, the credit reporting Code would 'fill in the gaps' between the new credit reporting provisions and compliance with the obligations set out in the provisions. It would provide detailed guidance within the framework of the requirements of the credit reporting provisions in the Privacy Act.

In assessing the suitability of the type and structure of a credit reporting Code, it should be noted that the details of the Code's content can only be developed once the Government has settled the framework of the new credit reporting system. However, it is expected that the Code would be an appropriate mechanism to address the following matters:

- procedures for reporting repayment performance history
- data quality procedures to ensure consistency and accuracy of credit reporting information, such as:
 - o the timeliness of the reporting of credit reporting information;
 - o rules on the calculation of overdue payments for credit reporting purposes;
 - o obligations to prevent the multiple listing of the same debt;
 - o requirements to update credit reporting information; and
 - o rules around linking credit reporting records which may or may not relate to the same individual
- dispute resolution processes, and
- protocols and procedures for the auditing of credit reporting information.

9. Objectives

The objective of government action is to respond to the ALRC recommendations on the introduction of an industry led Code of Conduct in the context of the Government's response to the ALRC recommendations on the credit reporting system and the wider ALRC review of privacy law. The specific objective is to provide a mechanism to put into place standards

dealing with operational issues to assist compliance by credit reporting industry with the requirements of the new credit reporting system.

10. Options that may achieve the objectives

10.1 *Implementation scope*

The jurisdiction of the Privacy Act sets the scope for implementing a credit reporting Code of Conduct. Within this framework, the parameters of the proposed options are confined to responding to the ALRC Report's recommendations on a credit reporting Code.

10.2 *Option 1 – Maintain the present Credit Reporting Code of Conduct process*

This option would preserve the existing requirement for the Privacy Commissioner to issue a credit reporting Code of Conduct. The existing Code of Conduct will require revision to deal with operational issues raised by more comprehensive credit reporting (if accepted).

10.3 *Option 2 – Introduce a binding Code of Conduct developed by industry in accordance with the code making powers set out in Part IIIA of the Privacy Act*

Under this option:

- the Privacy Act would specifically require CRAs and credit providers to develop a Code covering a broad range of operational issues as identified in the Privacy Act and in consultation with consumer representatives and regulators
- any CRA or credit provider who intended to participate in the consumer credit reporting industry would be required to be a party to the Code
- the Code would be a legally binding Code under the Privacy Act. It would operate in addition to the credit reporting provisions and could not override or apply lesser standards than those contained in the Privacy Act
- the Code must be approved by the Privacy Commissioner, who would also have the power to review the Code; and
- a breach of the Code would be deemed to be a breach of the Privacy Act and the Privacy Commissioner or a relevant External Dispute Resolution (EDR) scheme would be entitled to determine a complaint in accordance with the provisions of the Privacy Act or Code (as appropriate).

The industry may choose to address some credit reporting issues (such as reciprocity between industry participants in the credit reporting system) which will not be regulated by the credit reporting provisions. It would be a matter for industry to determine what, if any, additional issues should be included. As these matters would fall outside the credit reporting provisions they would not require approval by the Privacy Commissioner.

10.4 *Option 3 – Permit a non-prescribed voluntary industry Code of Conduct*

Under this Option:

- the Privacy Act would not set out any requirements for the existence or contents of a Code of Conduct
- the Code would not be binding under the Privacy Act
- it would be a matter for the credit reporting industry to determine whether to develop a Code and the contents of the Code

- any Code developed by industry would be a non-prescribed voluntary industry code of conduct under the *Trade Practices Act 1974*. Depending on the contents of the Code, it may be authorised by the Australian Competition and Consumer Commission (ACCC) for certain conduct on public benefit grounds that may otherwise be proscribed by the Trade Practices Act
- Any Code would establish standards which would be voluntarily agreed by its signatories. The Code would be a contractual arrangement; and
- the Code would be enforceable where CRAs and credit providers have agreed to be bound by the Code and established dispute resolution procedures in the Code (such as an EDR service). The terms of the Code would not be enforceable by the Privacy Commissioner or the ACCC.

11. Assessment of impacts

11.1 *Impact group identification*

The groups affected by the Options, in the order of the magnitude of the impact, are:

- CRAs
- Credit Providers
- OPC
- Small businesses; and
- Individuals.

11.2 *Assessment of costs and benefits*

11.2.1 *Impact of Option 1 – maintain the present Code of Conduct process*

Credit Reporting Agencies – Benefits

While the existing Code would need to be revised if more comprehensive credit reporting is introduced, it is likely there would be minimal costs in complying with a revised Code. CRAs would be consulted in the development of the Code to ensure business practices are adequately considered. To the extent that CRAs decide to collect more comprehensive credit reporting information, compliance with the revised Code could be built into the development of any new systems and procedures required by the adoption of more comprehensive credit reporting. Where existing requirements of the Code are unchanged, there would be no compliance costs as CRAs would already be in compliance with these requirements.

Credit Reporting Agencies – Costs

The current Code of Conduct does not deal in detail with some of the operational and procedural steps used within existing industry practices, which may lead to less clarity and consistency within the industry. Further detail could provide more precise guidance to CRAs on current industry practices, assisting CRAs to comply with the credit reporting provisions.

While CRAs would be consulted by the OPC in any Code revision process resulting from the reforms to the credit reporting provisions, they would not have a central role in amendments to the Code of Conduct. This reduces the ability of CRAs to form and direct changes in the Code of Conduct, such as in situations where technological developments may mean changes to operational practices that could benefit from guidance in the Code of Conduct. CRAs would not be able to take the initiative in developing and proposing revisions to the Code, but instead would need to convince the OPC to initiate a review of the Code. A lack of clear

guidance may restrict future developments in the industry, which may result from the adoption of new technologies or the identification of new opportunities to use or manage data. This may have the cost of reducing possible economic opportunities and benefits. Evidence is not available to quantify any possible costs.

The purpose of the Code is to provide practical guidance to CRAs to assist compliance with the requirements of the Privacy Act and it is expected that detailed compliance information will be of significant assistance to the CRA industry. However, there is a slight possibility that the existence of the Code may discourage new CRA industry entrants. New entrants may prefer to establish alternative procedures and processes that comply with the requirements of the Privacy Act but do not match the detailed guidance contained in the Code. In addition, new entrants would not have had the opportunity to contribute to the Code development process.

Credit Providers – Benefits

While the existing Code would need to be revised if more comprehensive credit reporting is introduced, it is likely there would be minimal costs in complying with a revised Code. Credit providers would be consulted in the development of the Code to ensure business practices are adequately considered. Compliance with the revised Code could be built into the development of any new systems and procedures required by the adoption of more comprehensive credit reporting. Where other existing requirements of the Code are unchanged, there would be no compliance costs as credit providers would already be in compliance with these requirements.

Credit Providers – Costs

Similar issues exist for credit providers as those identified for CRAs. The current Code of Conduct does not deal in detail with some of the operational and procedural steps used within existing industry practices, which may lead to less clarity and consistency within the industry. Further detail could provide more precise guidance to credit providers on current industry practices, assisting credit providers to comply with the credit reporting provisions.

Credit providers would not have a central role in amendments to the Code of Conduct, although they would be consulted by the OPC in any Code revision process resulting from the reforms to the credit reporting provisions. This reduces the ability of credit providers to form and direct changes in the Code of Conduct, such as in situations where technological developments may mean changes to operational practices that could benefit from guidance in the Code of Conduct. The credit industry would not be able to take the initiative in developing and proposing revisions to the Code, but instead would need to convince the OPC to initiate a review of the Code. A lack of clear guidance may restrict future developments in the industry, which may result from the adoption of new technologies or the identification of new opportunities to use or manage data. This may have the cost of reducing possible economic opportunities and benefits. Evidence is not available to quantify any possible costs.

The purpose of the Code is to provide practical guidance to credit providers to assist compliance with the requirements of the Privacy Act and it is expected that detailed compliance information will be of significant assistance to credit providers. However, there is a slight possibility that the existence of the Code may discourage new credit providers. New credit providers may prefer to establish alternative procedures and processes that comply with the requirements of the Privacy Act but do not match the detailed guidance contained in the Code. In addition, new credit providers would not have had the opportunity to contribute to the Code development process.

Office of the Privacy Commissioner – Benefits

This option would ensure that OPC retains complete control over the development and promulgation of the Code. OPC would continue to be required to consult with stakeholders in revising the Code, but it would be a matter for OPC to decide when to review the Code and what elements of the Code require revision.

Office of the Privacy Commissioner – Costs

The OPC does not have the necessary industry knowledge to provide specific guidelines on operational and procedural issues. While the OPC is required to consult stakeholders and can obtain extensive information through the consultation process, the OPC would be required to devote resources to reviewing the Code and developing amendments. The proposed introduction of more comprehensive credit reporting means that the OPC will be required to review the Code. It is not possible to estimate the total expected cost of a full review of the Code and there have been no comprehensive reviews of the Code on which to base estimates of possible costs.

Small Businesses – Benefits

Some small businesses may be credit providers depending on whether they offer goods or services on terms that involve credit. It would be expected that any review of the Code by the OPC would include consultation with small business representatives as stakeholders in the review. Businesses are not required to participate in the credit reporting system and, where small businesses chose not to do so, they would not be affected by a revised Code.

Small Businesses - Costs

A revised Code will deal in detail with operational matters arising from the adoption of more comprehensive credit reporting. To the extent that small businesses decide to participate in the credit reporting system and use more comprehensive credit reporting information, they will need to comply with the requirements of the Code, including, for example, requirements to participate in EDR services. It is not possible to quantify the possible compliance costs for small businesses as there is no information available on the number of small businesses likely to use more comprehensive credit reporting.

Individuals – Benefits

Individuals would benefit from consistent operational standards for industry practices. Individuals would be concerned to ensure that the Code achieved an appropriate balance between the protection of personal information and the operational needs of the credit reporting industry. As the OPC has responsibility for the development and review of the Code, individuals can rely on the OPC to ensure their interests in the effective protection of personal information are protected.

Individuals would also benefit from the legal status of the Code to ensure their rights are enforced. The Code would remain a disallowable instrument, which means that a breach of the Code could be the subject of a complaint to the Privacy Commissioner.

Individuals – Costs

A Code is intended to ensure consistency and certainty in operational practices throughout the credit reporting industry. There are no obvious costs for individuals.

11.2.2 Impact of Option 2 – Introduce a binding Code developed by industry in accordance with the code making powers set out in Part IIIAA of the Privacy Act

Credit Reporting Agencies – Benefits

This option requires the credit reporting industry to develop a Code that would be binding under the Privacy Act. Credit industry control of the code making process would:

- allow the industry to apply detailed knowledge of industry practices to determine the best procedures to ensure practical compliance with the requirements of the Privacy Act
- provide the industry with the flexibility to review the Code and develop necessary changes to the Code (subject to OPC approval) as required by changes in industry standards; and
- ensure the credit reporting industry adopts best standard practices which have been developed in consultation with all industry participants, improving the overall reliability of industry practices and enhancing the operation of the credit reporting system.

The ability of the credit reporting industry to develop (in consultation with stakeholders, including consumer advocates) and adhere to a binding Code may assist the industry build greater trust by individuals in the operational standards and reliability of credit reporting practices.

Credit Reporting Agencies – Costs

The code making process would require the cooperation of all industry participants to develop specific operational and procedural requirements. The process of developing the Code may involve costs to the industry, such as:

- the time taken to develop a binding Code may be significant as industry groups must come to agreement about the provisions of the Code and take into account that the OPC will also need time to approve the Code
- costs associated with drafting the Code
- costs involved in consulting with stakeholders, both within the credit industry as well as with consumer and privacy advocates and regulators; and
- possible costs associated with any future review of the Code.

It is not possible to estimate the actual costs that may be incurred. Many of these potential costs are unlikely to be incurred because the credit industry has already begun work on the development of a Code. The Australian Retail Credit Association (ARCA) is developing a draft Code on a range of operational matters that could be readily modified to include additional matters raised by the introduction of more comprehensive credit reporting. The ARCA Code is discussed below in section 11.2.4.

It is expected that detailed compliance information will be of significant assistance to the CRA industry. However, there is a slight possibility that the existence of the Code may discourage new CRA industry entrants. New entrants may prefer to establish alternative procedures and processes that comply with the requirements of the Privacy Act but do not match the detailed guidance contained in the Code. In addition, new entrants would not have had the opportunity to contribute to the Code development process.

Credit Providers – Benefits

This option requires the credit reporting industry to develop a Code that would be binding under the Privacy Act. Credit industry control of the code making process would:

- allow the industry to apply detailed knowledge of industry practices to determine the best procedures to ensure practical compliance with the requirements of the Privacy Act
- provide the industry with the flexibility to review the Code and develop necessary changes to the Code (subject to OPC approval) as required by changes in industry standards; and
- ensure the credit reporting industry adopts best standard practices which have been developed in consultation with all industry participants, improving the overall reliability of industry practices and enhancing the operation of the credit reporting system.

The ability of the credit reporting industry to develop (in consultation with stakeholders, including consumer advocates) and adhere to a binding Code may assist the industry build greater trust by individuals in the operational standards and reliability of credit reporting practices.

Credit Providers – Costs

The code making process would require the cooperation of all industry participants to develop specific operational and procedural requirements. The process of developing the Code may involve costs to the industry, such as:

- the time taken to develop a binding Code may be significant as industry groups must come to agreement about the provisions of the Code and take into account that the OPC will also need time to approve the Code
- costs associated with drafting the Code
- costs involved in consulting with stakeholders, both within the credit industry as well as with consumer and privacy advocates and regulators; and
- possible costs associated with any future review of the Code.

It is not possible to estimate the actual costs that may be incurred. Many of these potential costs are unlikely to be incurred because the credit industry has already begun work on the development of a Code. The Australian Retail Credit Association (ARCA) is developing a draft Code on a range of operational matters that could be readily modified to include additional matters raised by the introduction of more comprehensive credit reporting. The ARCA Code is discussed below in section 11.2.4. However, ARCA appears to represent large organisations in the credit industry. If ARCA takes a leading role in developing the Code, it is possible that smaller credit providers which are not members of ARCA may not be in a position to influence the code making process to the same extent as ARCA members. This may mean, for example, that industry practices which suit larger organisations are incorporated into the Code as industry standards, disadvantaging smaller industry participants that do not use the same practices.

The purpose of the Code is to provide practical guidance to credit providers to assist compliance with the requirements of the Privacy Act and it is expected that detailed compliance information will be of significant assistance to credit providers. However, there is a slight possibility that the existence of the Code may discourage new credit providers.

New credit providers may prefer to establish alternative procedures and processes that comply with the requirements of the Privacy Act but do not match the detailed guidance contained in the Code. In addition, new credit providers would not have had the opportunity to contribute to the Code development process.

Office of the Privacy Commissioner – Benefits

A Code would create certainty for the OPC that a breach of the Code is a breach of the Privacy Act and it would also provide the OPC with industry standards by which to apply the credit reporting provisions. Industry standards would give greater clarity about the application of the Act to the industry and should result in more efficient complaint resolution, resulting in less confusion as to whether a breach of the code is an interference with privacy. Approval from the OPC would ensure the OPC is satisfied with industry's interpretation of the credit reporting provisions.

Office of the Privacy Commissioner – Costs

It is expected that the OPC would face minimal costs when compared with Option 1. The OPC would not face costs in the development of the Code, but would be required to incur some costs in approving the Code. It is not possible to estimate the costs of approving the Code until a draft Code is developed.

Small Businesses – Benefits

Some small businesses may be credit providers depending on whether they offer goods or services on terms that involve credit. In the development of a Code the credit reporting industry would be required to consult with affected stakeholders. It is expected that this consultation process would include a mechanism for small businesses to contribute to the development of the Code, including through consultation with representative organisations. As the Code would require authorisation by the OPC, it would be expected that the OPC would consider whether effective consultation had occurred, including with small business stakeholders. Businesses are not required to participate in the credit reporting system and, where small businesses chose not to do so, they would not be affected by a Code.

Small Businesses - Costs

A Code will deal in detail with operational matters arising from the adoption of more comprehensive credit reporting. To the extent that small businesses decide to participate in the credit reporting system and use more comprehensive credit reporting information, they will need to comply with the requirements of the Code, including, for example, requirements to participate in EDR services. It is not possible to quantify the possible compliance costs for small businesses as there is no information available on the number of small businesses likely to use more comprehensive credit reporting.

Individuals – Benefits

Complaints by individuals would be subject to a clear EDR process. As the Code would be enforceable by the OPC, adherence with the Code to the protection of individual's privacy would be stronger as a breach of the Code would be a breach of the Privacy Act.

Individuals would benefit from consistent operational standards for industry practices. Individuals would be concerned to ensure that the Code achieved an appropriate balance between the protection of personal information and the operational needs of the credit reporting industry. As the OPC has responsibility for the development and review of the Code, individuals can rely on the OPC to ensure their interests in the effective protection of personal information are protected.

Individuals would also benefit from the legal status of the Code to ensure their rights are enforced. The Code would remain a disallowable instrument, which means that a breach of the Code could be the subject of a complaint to the Privacy Commissioner.

Individuals – Costs

A Code is intended to ensure consistency and certainty in operational practices throughout the credit reporting industry. There are no obvious costs for individuals.

11.2.3 Impact of Option 3 - Introduce a voluntary Code developed by industry

Credit Reporting Agencies – Benefits

This option would not require the credit reporting industry to develop a voluntary Code. It would be a matter for the industry to decide whether or not to develop a voluntary Code. Any costs involved in the development of a Code would not be imposed by regulation but subject to commercial decisions about the costs and benefits by the industry.

If the credit reporting industry chooses to develop a voluntary Code, the industry would remain in control of the development process. Industry control over the code making process would:

- allow the industry to apply detailed knowledge of industry practices to determine the best procedures to ensure practical compliance with the requirements of the Privacy Act
- provide the industry with the flexibility to review the voluntary Code and develop necessary changes as required by changes in industry standards; and
- allow the credit reporting industry to determine whether it needed to adopt standard practices.

A voluntary Code would not require approval from the OPC, potentially reducing costs and delays in implementation. However, approval from the ACCC may be required depending on whether the Code required consideration under the Trade Practices Act.

A voluntary Code would not impede new CRAs entering the market as it would be a commercial decision whether or not the new CRA subscribed to the voluntary Code.

The ability of the credit reporting industry to develop and adhere to a voluntary Code may assist the industry build greater trust by individuals in the operational standards and reliability of credit reporting practices.

Credit Reporting Agencies – Costs

The code making process would require industry cooperation to develop specific operational and procedural requirements. This is expected to involve costs to the industry in the preparation of the voluntary Code, including a cost to develop and draft the voluntary Code. However, ARCA has already drafted a Code and it is expected that the Code could be readily modified to form the basis of the voluntary Code, substantially reducing any costs in the development of a voluntary Code.

A voluntary Code would be required to comply with the ACCC's guidelines for developing effective voluntary industry codes of conduct. The voluntary Code may also require authorisation by the ACCC if it contravenes a provision of the Trades Practices Act, which may extend the time required to develop the voluntary Code.

CRAAs would not be required to be members of the voluntary Code. This may lead to inconsistencies in the credit reporting system in ensuring common compliance with the credit reporting provisions.

A voluntary Code would not be enforceable by the OPC. This may be seen by stakeholders (including consumers) as undermining the reliability of the voluntary Code and the enforceability of any consumer rights or industry obligations imposed by the voluntary Code. This may detract from stakeholder trust in the reliability of the credit reporting system.

It is unlikely that the existence of the voluntary Code would discourage new CRA industry entrants. As it will be voluntary, new industry entrants would retain the discretion of not participating in the voluntary Code. They would be able to establish their own alternative procedures and processes that comply with the requirements of the Privacy Act but do not match the detailed guidance contained in the voluntary Code.

Credit Providers – Benefits

This option would not require the credit reporting industry to develop a voluntary Code. It would be a matter for the industry to decide whether or not to develop a voluntary Code. Any costs involved in the development of a Code would not be imposed by regulation but subject to commercial decisions about the costs and benefits by the industry.

If the credit reporting industry chooses to develop a voluntary Code, the industry would remain in control of the development process. Industry control over the code making process would:

- allow the industry to apply detailed knowledge of industry practices to determine the best procedures to ensure practical compliance with the requirements of the Privacy Act
- provide the industry with the flexibility to review the voluntary Code and develop necessary changes as required by changes in industry standards; and
- allow the credit reporting industry to determine whether it needed to adopt standard practices.

A voluntary Code would not require approval from the OPC, potentially reducing costs and delays in implementation. However, approval from the ACCC may be required depending on whether the Code required consideration under the Trade Practices Act.

A voluntary Code would not impede new credit providers entering the market as it would be a commercial decision whether or not the credit provider subscribed to the voluntary Code.

The ability of the credit reporting industry to develop and adhere to a voluntary Code may assist the industry build greater trust by individuals in the operational standards and reliability of credit reporting practices.

Credit Providers – Costs

The code making process would require industry cooperation to develop specific operational and procedural requirements. This is expected to involve costs to the industry in the preparation of the voluntary Code, including a cost to develop and draft the voluntary Code. However, ARCA has already drafted a Code and it is expected that the Code could be readily modified to form the basis of the voluntary Code, substantially reducing any costs in the development of a voluntary Code.

A voluntary Code would be required to comply with the ACCC's guidelines for developing effective voluntary industry codes of conduct. The voluntary Code may also require

authorisation by the ACCC if it contravenes a provision of the Trades Practices Act, which may extend the time required to develop the voluntary Code.

Credit providers would not be required to be members of the voluntary Code. This may lead to inconsistencies in the credit reporting system in ensuring common compliance with the credit reporting provisions.

A voluntary Code would not be enforceable by the OPC. This may be seen by stakeholders (including consumers) as undermining the reliability of the voluntary Code and the enforceability of any consumer rights or industry obligations imposed by the voluntary Code. This may detract from stakeholder trust in the reliability of the credit reporting system.

It is unlikely that the existence of the voluntary Code would discourage new consumer credit industry entrants. As it will be voluntary, new industry entrants would retain the discretion of not participating in the voluntary Code. They would be able to establish their own alternative procedures and processes that comply with the requirements of the Privacy Act but do not match the detailed guidance contained in the voluntary Code.

Office of the Privacy Commissioner – Benefits

The OPC would face minimal, if any, costs when compared with Option 1. The OPC would not have a role in the voluntary Code making process, although the industry may choose to consult the OPC for guidance, and the OPC would not have a role in reviewing or authorising the voluntary Code. In any enforcement actions the OPC would not need to consult the voluntary Code in interpreting the credit reporting provisions.

Office of the Privacy Commissioner – Costs

The OPC would not have control over directing the credit reporting industry to develop a voluntary Code or the content of the voluntary Code. As the development of a voluntary Code would not be linked to the Privacy Act, the OPC would not be able to interpret specific credit reporting provisions by referring to the voluntary Code for practical assistance. This may lead to a fragmented approach to the operation of the credit reporting provisions, which may result in increased enforcement costs for the OPC, particularly if individual consumer complaints increased. It may also lead to increased business education costs for the OPC if it was necessary to encourage and educate the industry to ensure greater compliance with the requirements of the credit reporting provisions. It is not possible to quantify these potential costs as they would depend on the nature and severity of any problems which may be encountered.

Small Businesses – Benefits

Some small businesses may be credit providers depending on whether they offer goods or services on terms that involve credit. Businesses are not required to participate in the credit reporting system and, where small businesses chose not to do so, they would not be affected by a voluntary Code. Where small businesses choose to participate in the credit reporting system, participation in the development and implementation of a voluntary Code would provide them with greater certainty about the operation of the system and may increase consumer trust in their compliance with the credit reporting provisions.

Small Businesses - Costs

A voluntary Code would deal in detail with operational matters arising from the adoption of more comprehensive credit reporting. To the extent that small businesses decide to participate in the credit reporting system and use more comprehensive credit reporting information, they would need to consider complying with the requirements of the voluntary

Code. It is not possible to quantify the possible compliance costs for small businesses as there is no information available on the number of small businesses likely to use more comprehensive credit reporting.

Individuals – Benefits

Individuals would benefit from consistency in the type of practices engaged in by credit reporting industry participants. Development of a voluntary Code would provide consumer certainty around the practices of participating industry members.

Individuals – Costs

A voluntary Code may not build consumer trust in the practices of the industry or the dispute resolution procedures. Breaches of the voluntary Code would not be enforceable by the OPC. If the voluntary Code requires authorisation by the ACCC, there may be consumer confusion around the appropriate regulator for dispute resolution. It may be the case that not all CRAs or credit providers participate in the voluntary Code, which may create inconsistency and uncertainty for individuals in their dealings with the industry and in resolving consumer complaints.

11.2.4 Further notes relevant to Options 2 and 3: the ARCA Code

ARCA is currently preparing an industry Code to provide safeguards for business-to-business transactions involving consumer credit information. Amongst other matters, the industry Code is intended to regulate the operational processes by which credit providers receive data from CRAs, as well as provide requirements for how credit providers deal with customers on credit reporting issues. The current members of ARCA are ABACUS (Australian Building and Credit Union Societies, known as Australian Mutuals), American Express, ANZ Bank, Bank of Queensland, Bank of Western Australia, Citibank, Commonwealth Bank of Australia, GE Money, HBOS Australia, HSBC Bank, National Australia Bank, St George Bank, Telecom New Zealand, Westpac Bank, Dun and Bradstreet, and Veda Advantage.

ARCA has released a draft Credit Reporting Code of Conduct (the ARCA Code) which it has prepared as a voluntary contractual Code between members along the lines outlined in Option 3. However, the draft ARCA Code provides that membership is mandatory for any CRA with operations in Australia and for any credit provider who wishes to use or disclose credit reporting information. The ARCA Code would require all CRAs to ensure that organisations that seek access to credit reporting information are signatories to the Code or are otherwise bound by the Code provisions (e.g. via contract or terms and conditions of access). It would also allow regulators to require organisations to be bound by the Code (for example as a condition of obtaining a licence).

ARCA's work in developing a Code on behalf of the industry means that much of the work required to create a code has been commenced/satisfied. ARCA has undertaken a consultation process and invited submissions from interested parties in April 2009. It is understood that ARCA is currently in the process of considering those submissions and revising the draft Code. Whether the ARCA Code forms the basis for a voluntary Code under Option 3 or a binding Code under Option 2, the document would need to undergo an approval process by the appropriate regulator (the ACCC for Option 3 or the OPC for Option 2).

12 Consultation

12.1 ALRC Report Consultation

The ALRC consulted with a wide variety of stakeholders which included CRAs, credit providers, consumer advocates and the OPC. There was broad support for the implementation of a new credit reporting code. CRAs and the representative body ARCA were strongly in favour of a new code, and as already demonstrated, ARCA is preparing a draft credit reporting code. The OPC was also in favour of a new code. In terms of legislative design, in their submissions to the ALRC, the CRAs and ARCA originally supported a binding code under Part IIIAA as outlined in Option 2.

Consumer groups and privacy advocates generally favoured a binding code approved by the Privacy Commissioner. Matters which were of high importance for these groups were to ensure greater certainty about data accuracy, security and appropriate EDR procedures and processes.

12.2 Consultation since the release of the ALRC Report

The Government undertook extensive consultations with, and received written submissions from, both the credit reporting industry and advocates on the credit reporting recommendations.

The Government held the public roundtable consultations in December 2008. There were 22 credit reporting industry attendees and eight privacy and consumer advocate attendees. 15 written submissions were received from the stakeholders. The Department also held a large number of one-on-one meetings with stakeholders in the first half of 2009 to discuss the application of the ALRC's recommendations.

The views of privacy and consumer advocates remained largely unchanged since the publication of the ALRC Report, and they reinforced their support for a mandatory credit reporting code approved by the OPC. One large credit provider similarly stressed that there should be only one regulator responsible for enforcement of the code.

The position of ARCA and CRAs in relation to the design of a code changed from their original submission to the ALRC. They have submitted that that code should not be binding under the Privacy Act as under Option 2 and favour instead the adoption of a contractual code similar to Option 3.

13 Conclusion and Recommended Option

Option 2 is preferred. Unlike Option 1, Option 2 provides the consumer credit industry with sufficient flexibility and discretion to ensure that the requirements of the Code adequately address industry practice, while at the same time providing the Privacy Commissioner with the power to determine (through the approval process) whether the Code is consistent and compliant with the requirements of the Privacy Act. Option 2 provides for a legally binding Code, which will allow the Privacy Commissioner to ensure an appropriate balance between the privacy needs of individuals and the operational needs of the consumer credit industry. This is not available under Option 3. The requirement under Option 2 for any organisation which wants to participate in the credit reporting system to be a member of the binding Code will ensure consistency in practices across the consumer credit industry. Furthermore, a binding code under the jurisdiction of the Privacy Act (in contrast to a contractual code under Option 3) allows the OPC to interpret specific credit reporting provisions with reference to the Code. This will aid in efficient and consistent complaint resolution for individuals, whether the complaints deal with matters regulated directly by the Privacy Act or by the Code. In addition, the likely costs for industry in complying with a Code developed under

Option 2 are expected to be reduced. The consumer credit industry has already developed and complies with the ARCA Code, which it is expected would form the basis for the new industry developed Code of Conduct under Option 2. The use of the ARCA Code is also likely to reduce the costs to industry in developing a voluntary Code under Option 3. However, the voluntary Code would not be binding on industry and would not establish the same level of certainty around industry practices and consumer complaint resolution procedures as an industry developed Code under Option 2.

14. Implementation and Review

The Government will release a public response to the ALRC Report. The Government has announced that the first step in the implementation of the Government response will be to release exposure draft legislation for public comment.

The ALRC recommended the Government initiate a review of the new credit reporting provisions five years after their commencement.³⁷ The Government will consider this recommendation in the Government response to the ALRC report.

³⁷ ALRC Report recommendation 54–8