Experian Response to the Senate Finance and Public Administration Legislation Committee Inquiry into the Credit Reporting Exposure Draft

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About Experian

Experian is the leading global information services company, providing data and analytical tools to clients in more than 90 countries. The company helps businesses to manage credit risk, prevent fraud, target marketing offers and automate decision making. Experian also helps individuals to check their credit report and credit score, and protect against identity theft.

Experian plc is listed on the London Stock Exchange (EXPN) and is a constituent of the FTSE 100 index. Total revenue for the year ended 31 March 2010 was $3.9 billion. Experian employs approximately 15,000 people in 40 countries and has its corporate headquarters in Dublin, Ireland, with operational headquarters in Nottingham, UK; Costa Mesa, California; and São Paulo, Brazil.

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Executive Summary

Experian welcomes the release of the Credit Reporting Exposure Draft and Companion Guide as a significant step in the implementation of the privacy law reforms relating to credit reporting recommended by the Australian Law Reform Commission (***ALRC***) in its report, *For Your Information: Australian Privacy Law and Practice* (Report 108, dated May 2008).

Experian appreciates the opportunity to contribute to the consultation process and thanks the Senate Finance and Public Administration Committee (the ***Senate Committee***) for inviting Experian to make a submission addressing issues in relation to the Credit Reporting Exposure Draft.

Experian commends the Senate Committee and the Australian Government for the inclusive, collaborative and consultative approach taken to the development of these significant and vital reforms to the regulation of consumer credit information in Australia.

Although Experian does not operate a credit reporting agency in Australia it does currently operate agencies in 16 other countries around the world and is qualified to comment on the optimal models and the legislative landscape that supports credit reporting operations.

Experian would ask the Senate Committee to consider that empirical experience in multiple geographies confirms that the effectiveness of a credit reporting regime is dependent on:

- Existence of a breadth of data that includes data on all products and credit lines extended by traditional and non-traditional credit providers including but not limited to banks, credit unions, telecommunications, utilities, landlords, and microfinance providers,
- Presence of a depth of data that includes full “positive data” including account information, credit limits, utilization (“balance”), and payment performance data,
- Ability for lenders & institutions to responsibly use the data to manage the credit cycle, including for lending decisions, fraud detection & prevention, customer management, and collections activities,
- Operational practices, procedures, and systems that support the accuracy, security, and privacy of personal information,
- Good governance and monitoring by legislation that is understandable and principles-based; and
- Clear and transparent credit reporting methodologies and systems.

It is through the lens of this framework and its experience in other transitioning markets that Experian has reviewed and is privileged to comment on the recently released Credit Reporting Exposure Draft.

Contents

1. Background

Credit Reporting Agencies

A credit reporting agency (***CRA***) (sometimes called a credit bureau) exists to provide a reliable source of consistent data about consumers and/or businesses in order to support financial organizations and help them make better decisions. They are necessary because:

- Applicants cannot be relied on to provide the full "picture" either because they do not keep good records or because they misrepresent themselves for fraudulent reasons
- Verifying and checking what applicants provide is costly, time consuming and open to error (and fraud)
- Manual records, as provided by applicants, are difficult to compare with each other as they do not present the information in a consistent way (they will have different definitions for items of information)
- CRAs provide data in electronically readable formats so that they can be analysed and processed efficiently and fast

CRAs operate by collecting information derived from various sources about the financial behaviour of individuals and/or businesses. They create a virtual financial curriculum vitae or reference. How rich and comprehensive the data that is contained in that file will determine the effectiveness of the system.

The primary purpose of the collection and supply of the data is to make better decisions about whether to lend or continue to lend to a consumer or business based on consistent and factual records. This information is then used to predict the likelihood of them making the expected payments on time. In the most effective models it may also be used for a range of other purposes, such as

- fraud prevention and detection,
- customer management,
- identity verification,
- statistical analysis at a macro and micro level.

As credit reporting has developed, even the most basic models have become an integral part of the ability of lenders to perform checks on the creditworthiness (including indebtedness) of applicants, leading to the granting of more quality credit and the reduction of bad debt.

It is clear that CRAs are becoming increasingly embedded in the credit granting and management processes across the world. It is for this reason that countries with limited credit reporting or minimal data models, including Australia, have reviewed their position.

Data Sharing Models

The most effective models contain both negative (default[1]) and positive information from the widest range of providers thus enabling lenders to gain a holistic, consistent and comprehensive picture of the commitments and behaviour of as many consumers and businesses as possible.

Negative v Positive data models

Negative data will generally include information on credit agreements and other obligations that are unpaid for a period in excess of at least 90 days and, usually, the subject of legal action. That may include data from courts, insolvency data and data from lenders. The term "lenders" may cover traditional lenders, such as banks, as well as more non-traditional lenders such as telecoms providers and utilities. In some countries it may also include unpaid obligations owed to the public purse, such as unpaid student loans in the UK and unpaid tax in a number of other EU states.

The negative data only model, whilst better than nothing, ***is insufficient to provide a proper view of the consumer and their creditworthiness***. It does not show levels of debt or early arrears so as to allow lenders the opportunity to engage with borrowers and encourage remedial action. At the same time, the sharing of positive data can act as an incentive for borrowers to proactively manage their credit and engage with their lenders in advance of experiencing any difficulties in meeting their obligations. In the most advanced credit reporting models, data is shared about credit agreements that are subject to special arrangements as a result of lender forbearance arrangements.

The trade off between privacy and data coverage is a key aspect for consideration by regulators when developing new credit reporting models. ***Accepting that a minimum level of data is required to show the levels of credit exposure through limits, utilisation, and the payment performance of those agreements across a range of lending instruments, it is disappointing that some countries are moving into first phase positive data models without even this minimum level of information.***

Implementing positive data

When data sharing has been evolving over many years, lenders and consumers themselves are more confident with the concept. It is unlikely that a new positive credit bureau can open with the range of data that might be shared in the USA or the UK, for example.

It is a reasonable strategy to develop data sharing in a phased approach with aspirations to move to the most comprehensive models over time. However, there are some data fields that should be present in the first phase of implementing a positive data model at a minimum in order that lenders, borrowers, and the economy can derive the most benefit.

1 The definition of default can vary from country to country.

Four key aspects need to be taken into account when developing a credit bureau model:

- Breadth of data
- Depth of data
- Purposes for which the data can be used
- Accuracy and security of the data

Good identification information on the data subject has to be the key dataset in order to "pin" the data to an individual and/or a business. There also needs to be data of sufficient incremental value to justify the effort and cost involved in the development of the systems both by the CRA and the lenders.

The **breadth of data** relates to the range of product types that is covered. In the most effective models, the definition of credit covers any product or service where a user has access ahead of payment. Thus, whilst it will cover traditional secured and unsecured credit such as loans, mortgages, credit and store cards, it should also cover mobile and fixed telephony services, energy and water provision and other commitments. This information would be split by product types.

The **depth of data** covers how much information is provided on each agreement. As a minimum, the associated credit commitments and payment performance need to show limits and *utilisations* (i.e. balances) in order to enable an effective creditworthiness check to be undertaken. Preferably other information, including granular data on special terms such as forbearance measures, might also be shared.

The **purposes for which the data can be used** describe how the data can be leveraged within financial management processes by businesses and consumers. **ID checks and fraud prevention and investigation** are part and parcel of a robust underwriting decision. Any credit decision, be it undertaken using external data or not, has to incorporate statutory obligations associated with the prevention of Money Laundering, as well as checks to prevent crime and fraud. Shared data can simplify, speed and dramatically improve the checking experience for both lenders and borrowers, and it makes sense to combine the activities together.

Once the loan has been written, **customer management** is a vital part of helping borrowers to manage debt. Monitoring for signs of problems and reaching out to borrowers is a legal requirement for many lenders in developed countries. By identifying changes that might be indicative of impending problems, lenders can put in place customer relationship activities aimed at helping their customers (and themselves) get back on track early in the cycle, with the associated improved likelihood of success.

Customer management should also cover collections activity, and the tracing of consumers that abscond with outstanding debts. Uncollectable debts are inherently paid for by "good" customers, so it makes sense for lenders to have the ability to efficiently collect debt. This activity acts as a

self regulating measure, incentivising borrowers to engage with lenders in times of difficulty and to avoid borrowing money they cannot afford.

The **accuracy and security of the data** refers to the assurance that the collection, transmission, and use of the data are structured to protect both data integrity and the privacy of the consumer. This includes an onus on credit lenders to obtain consumer consent before collecting data and to take reasonable steps to ensure the accuracy and integrity of collected information before submission to CRAs. This also includes an ability by the CRA to track and understand how data has been accessed, and the use of secure data transmission systems and operational protocols between credit lenders and CRAs. It also important to have a system in place to allow for the dispute of inaccurate information, whereby a consumer may contact a credit lender to correct suspected inaccuracies, as well as ability for consumers to have a reasonable form of access to bureau information such that they may regularly monitor their personal records.

Credit Reporting and Regulatory Controls

Credit reporting is designed to provide access to information that is accurate, consistent and comprehensive such that it provides a straightforward "picture" of a consumer's situation.

Without positive credit information, a consumer may have to gather together a wide range of documentation, in some cases get it certified as a true copy, and present it in person at the lender. The lender would need to assess what is presented and would undoubtedly take some time to reach a decision.

Where a comprehensive and positive credit reporting system is in place, the applicant does not need to provide anything save their permission to the lender to access their record. The consumer can check the content of their record beforehand to make sure it is accurate. They know who has looked at it because they can see that information on the credit report, and in some countries they are notified by text or email if their records are accessed or change[2]. As they have a portable reference available to show any new lender, they can more easily shop around for the best deals, and benefit from increased competition and reduced pricing. If they are not in the habit of managing their credit in accordance with the terms of the agreement, they will be incentivised to do so and will be less able to borrow money they cannot afford to repay, thereby preventing greater debt and associated stresses.

Lenders can rely on the information knowing that it is provided by the lenders concerned and is consistent and accurate, and that the system is secure and monitored periodically. The lenders can develop robust and effective underwriting and monitoring systems to ensure that they lend responsibly and efficiently. The cost of delivering credit falls as processing costs reduce and bad debt decreases, such that lenders may reduce rates while lending to more applicants overall.

[2] In the UK the Experian Credit Expert system offers this as a value added service, other UK agencies have similar products and this is also offered in the USA and a number of other countries too.

Borrowers will accept that to borrow money, some personal information must be provided and that there is a legal obligation to repay what is borrowed. Concerns might arise when information is used in ways that are unexpected or deemed to be unfair. For this reason, it is important to be transparent about what happens to any information gathered at the time of application and during the life of an agreement.

The best systems provide for clear and unequivocal notices at the time the data is collected so that the consumer or business knows what data will be collected, how it will be used, and who may use it in the future. Those activities should be fair and reasonable and be seen by the data subject to be of value to them. In order to provide for a system that is fair, reasonable, and fit for purpose, a legislative regime must be put in place that allows for sufficient data to be made available when and how it might be needed. .

The regulations that govern the most effective systems are ***sufficiently clear and transparent such that the data subjects they are designed to support and protect can easily understand what is permitted and what is not.*** It is particularly important to ensure that regulation aimed at consumer protection is easy to understand, and that the underlying principles and process are comprehensible to consumers.

The proposed Australian model

While the Australian proposal is an improvement over current data-sharing standards, it does not include information on current balance. It includes limit data which will inevitably have to be used as a proxy for debt levels ***but the lack of current balance information will reduce the capability for identification of impending problems, and will reduce the potential for preventing over-indebtedness and helping consumers at early stages in the debt cycle***.

Furthermore the limited breadth of the data coverage and restrictions on use of performance data to lenders who are regulated under the *National Consumer Credit Protection Act 2009* will reduce the opportunity to implement a system that could really benefit the Australian economy. It is to be hoped that Australia will swiftly move forward on widening membership of the system to cover less traditional credit agreements as soon as possible.

Better decisions can be made with more comprehensive information and furthermore, because lenders have better data and make better decisions, they can also lend more responsibly to more applicants.

According to an example from the IFC –

- Over 2 years, one customer opened 72 lines of credit from various lenders
- Never made late payments, as the consumer used new loans to pay for older ones so negative information did not show on the credit bureau
- First negative information was only reported after the 72nd line of credit had been opened

- Positive information was not reported, so lenders had no idea of the breadth and extent of the consumer's indebtedness

Even if positive data was reported, without balance date and information on utilisation, lenders cannot tell if lines are being used – or how. ***Scenarios such as these can and will happen in Australia.***

Further, the draft legislation provides an apparent degree of complexity and prescription that may inhibit the potential to deliver the anticipated benefits to the Australian people. Australia needs a system that is simple, comprehensive and effective, and which takes advantage of the opportunity to put in place a world-class scheme.

The most effective systems are generally less prescriptive and more principals-based, such that the data subject has control over what happens but provides for sufficient information to be made available in order to enable robust decisions by lenders about whether to lend or continue to lend. They also allow the data to be used in other ways that are complementary to the provision of credit, such as customer management, collections, Identity confirmation, crime and fraud prevention and investigation. These are all services that most consumers see as beneficial.

In summary we refer to a 2004 campaign by the UK's Which? consumer group to put pressure on lenders to share data with CRAs in the UK. At that time they stated "If companies are to make responsible lending decisions, it's important that they all give full information to the CRAs ..."

2. GENERAL COMMENTS

Positive information

Experian is supportive of these important and timely reforms to the credit reporting regime in Australia and, in particular, the introduction of additional types of credit information ('positive' data) that CRAs will be permitted to collect under the Exposure Draft provisions.

Notwithstanding these reforms, Experian considers that it is necessary for legislators, industry participants and other stakeholders to continue giving further consideration to permitting more extensive positive data to be collected by CRAs in Australia.

The Background section of this submission discusses in detail the effectiveness of comprehensive positive data models and the specific limitations that Experian sees in the more modest extension of the current credit reporting regime towards the positive data model.

As explained in the Background section, Experian is particularly concerned about the omission of the following data types which are necessary for an effective credit reporting model:

(a) **Payment histories relating to telecommunications and utilities credit.** The inability to collect and report payment histories with non-traditional lenders such as telecommunications and utilities providers is disadvantageous to consumers, as they are often a consumer's first credit footprint and are therefore important in enabling consumers to establish a positive credit record.

(b) **Balance data.** As explained in the Background section of this submission, the inability to collect and report current balance information reduces the ability of credit providers to identify impending problems of over-commitment and therefore, reduces their capacity to implement responsible lending practices or intervene in order to assist consumers at an early stage in the debt cycle.

(c) **Forbearance information.** The availability of information about forbearance arrangements would assist in preventing over-committed consumers being approved for multiple lines of unsustainable credit. As with balance data, this information is important in the prediction or early detection of indebtedness problems and in supporting lenders' responsible lending practices in order to better protect consumers from unmanageable levels of indebtedness.

(d) **Fraud data.** The inability to collect and report fraud data reduces the ability of credit providers to predict and prevent fraud. Within an appropriate regulatory framework, this data could also be made available under specific conditions to support Government initiatives around anti money laundering, counter terrorist finance and broader financial crime prevention and detection.

Alternatively, Experian considers that the Exposure Draft provisions should be amended to unambiguously allow CRAs (or related entities) to offer fraud data services to credit providers for purposes that are not related to assessing credit worthiness, without such

activities being captured under the inclusive definition of 'credit reporting business' and therefore being regulated under the Exposure Draft provisions.

In addition, Experian notes that the **two year retention period for positive data** is very short by international standards. Experian considers that an extended retention period of five to seven years for positive data would be more appropriate and consistent with international standards. During this retention period, CRAs should be able to use historical positive data for both credit reporting services (for licensed credit providers) as well as for internal modelling purposes. Experian submits that a retention period of five to seven years strikes an appropriate balance between the value and usefulness of the data for risk assessment purposes, whilst also ensuring that CRA credit reporting databases only contain data of appropriate quality and predictive value. Extending the retention period for positive data would also allow for robust modelling by CRAs.

Transitional arrangements

Experian notes that transitional provisions are not dealt with in the Exposure Draft and that these issues will be considered at a later stage of the Senate Committee's review. However, Experian would like to take this opportunity to covey to the Senate Committee how important it will be to strike an appropriate balance regarding transitional arrangements.

It is in the interests of all credit market stakeholders, including consumers, that the process of transitioning to the new regime is effected as smoothly and seamlessly as possible. Experian has experience within jurisdictions that have had to adopt to significant changes in their regulatory regimes. Based on this experience, Experian notes that if transitional arrangements are not carefully managed, this can create a tightening in credit practices that can have adverse impact of the economy.

In particular:

(a) It will be necessary for CRAs to be able to receive positive data sets well in advance of the expected commencement date of the new provisions, to enable sufficient lead time for the agencies to conduct meaningful data testing and to properly manage and implement changes to internal systems, controls and procedures.

Experian supports the position advocated by the Australasian Retail Credit Association for credit providers to be able to commence giving positive data loads to CRAs for the purpose of comprehensive testing in advance of legislative ratification.

(b) The new provisions need to clearly permit credit providers to provide initial data loads of 2 year repayment histories to CRAs immediately upon the commencement date of the new provisions. This will ensure that the credit reporting system can benefit from the availability of the new positive data sets as soon as possible after commencement.

In addition, it would be appropriate for the Australian Information Commissioner to temporarily adopt a more relaxed approach to inadvertent non-compliance by entities that are genuinely making efforts to modify their systems and controls to comply with the new requirements, both

during the transitional period and for an appropriate period following commencement of the new regime.

Additional uses and disclosures

(a) **Account management.** As explained in the Background section of this submission, it is important that credit providers have access to credit reporting information throughout the life of the credit arrangement for the purpose of customer / account management.

Experian notes in this regard that the European Union will be requiring credit providers to undertake interim credit referencing checks on their customers.

(b) **Identity verification and authentication.** Although identity verification reforms do not fall within the scope of the Exposure Draft or the Senate Committee's inquiry, Experian notes that the industry is awaiting the enactment of proposed reforms to Australian anti-money laundering and privacy legislation under the *Combating the Financing of People Smuggling and Other Measures Bill 2011* (the ***Bill***).

These reforms would allow businesses regulated under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the ***AML/CTF Act***) to more effectively and efficiently verify the identity of their customers by enabling reporting entities under the AML/CTF Act to use personal information held on an individual's credit information file for the purposes of electronic verification of customer identity.

Experian notes that on 21 March 2011, the Legal and Constitutional Affairs Legislation Committee recommended that the Senate pass the Bill subject to further investigation of options for introducing 'an appropriate oversight mechanism to monitor the handling of credit information for the electronic verification of identity pursuant to the Bill'.

Experian is supportive of the principle that CRAs should be allowed to use and disclose credit reporting information for the purposes of identity verification under the AML/CTF Act and awaits the introduction of this legislation.

(c) **De-identified information.** Experian notes that section 115 of the Exposure Draft seeks to impose restrictions on the use and disclosure of 'de-identified information' by CRAs. De-identified information is, by definition, credit reporting information that is no longer personal information.

Accordingly, Experian does not consider that it is necessary or appropriate for the use and disclosure of anonymised information to be regulated by the *Privacy Act 1988*, or that any consumer protection policy objectives would be served by the imposition of the proposed restrictions under section 115. Experian submits that the imposition of such restrictions would potentially impair the ability of CRAs and credit providers to undertake appropriate statistical analysis in order to develop better credit information services and better risk assessment tools that enhance responsible lending practices.

Standards imposed on CRAs

As a general comment, Experian considers that the Exposure Draft places a number of excessively onerous standards on CRAs.

As an example, Experian notes the obligation in **section 105(2)** for the agency to have in place policies, procedures and systems that 'will ensure' that the agency complies with Division 2 of the Exposure Draft and the Credit Reporting Code.

This drafting suggests that if there were an isolated incident of non-compliance with either Division 2 or the Code, there may be an argument that the agency's entire systems have not met this standard, given that these systems did not ensure such compliance in relation to the isolated incident.

Instead, Experian submits that a CRA should be obliged to maintain policies, procedures and systems that 'are designed/intended to ensure' compliance with Division 2 and the Code.

A further example is the requirement in **section 106(7)** that a CRA only collect credit information 'by lawful and fair means'. It is not clear what the addition of a standard of fairness is intended to achieve is in this context, or how the means of collecting information by a credit agency would be assessed as fair or unfair.

CRAs generally collect credit information from credit providers and do not have relationships with the individuals to whom the data relates. Therefore, it is unclear whether the standard of fairness under section 106(7) should be measured as between the agency and the credit provider, or as between the agency and individual data subjects.

In relation to credit providers, it is difficult to see why the contractual arrangements between commercial parties (many of whom are large and sophisticated) would need to be subject to a legislative standard of fairness.

In relation to individual consumers, Experian considers that the existing consumer access, correction and dispute resolution rights under the Exposure Draft provisions achieve a fair outcome for consumers in relation to how CRAs handle, use and disclose their credit information. Experian submits that no additional policy objectives would be served by the additional imposition of a vague legislative standard of fairness relating to data collection.

Please note that Experian has made more extensive submissions in relation to additional areas of particular concern in the Specific Comments section of this submission.

Length and complexity of Exposure Draft

One of the objectives of the credit reporting reforms is to clarify and simplify the structure and drafting of the existing Part IIIA of the *Privacy Act 1988*.

In this context, as noted in the Background section of this submission, Experian has concerns about the length and complexity of the Exposure Draft. In particular, it is difficult to meaningfully follow the numerous and often overlapping defined terms used throughout the Exposure Draft,

which variously distinguish between different data sets, different permitted purposes, original/derived data, and data received from different types of entities.

Experian considers that these shortcomings in the drafting and structure of the Exposure draft detract from the 'clear and simple' objectives of the Exposure Draft provisions. This is of particular concern given that the focus of the provisions is upon enhancing the protection of consumers from misuse of their personal information. Consumers and non-lawyers are unlikely to understand or engage with such a lengthy and complex document and this diminishes its potential usefulness and effectiveness in educating consumers about their rights under the credit reporting regime, and encouraging them to engage with and periodically check the information on their credit files.

3. SPECIFIC COMMENTS

Pre-screening determinations

Sections 110 and 111 permit a CRA to use particular credit information for the purpose of preparing a pre-screening determination.

Experian welcomes the introduction of these provisions. It is a positive outcome for all stakeholders that CRAs will be able to use credit information in order to identify and exclude adverse credit risks from a credit provider's direct marketing list, according to the credit provider's own eligibility criteria but without disclosing credit reporting information to the credit provider or others.

This important provision allows credit providers to reduce the volume of their direct marketing campaigns, and reduce the likelihood that persons to whom additional credit should not be extended will be targeted with further offers of credit.

Ban periods and identity fraud

Section 113 imposes a prohibition on the use or disclosure of credit information by a CRA during a consumer-initiated 'ban period'. This mechanism would allow an individual to make his or her credit reporting information inaccessible to any credit provider.

Section 134 prohibits a credit provider who has provided credit to such an individual during a ban period (or a person purporting to be the individual) from providing that information to the CRA whilst the ban period is in force, unless the credit provider has taken reasonable steps to verify the individual's identity.

Experian does not consider that permitting an individual to place a ‘freeze’ on credit reporting information should be the preferred mechanism for addressing potential fraud or identity theft.

Experian submits that a system which allows an individual to require the CRA to insert a fraud 'flag’ on the individual's file that notifies recipients of the credit information that the individual may be a victim of fraud or identity theft would be preferable to a system than one that is based on 'freezing' the use of the individual's credit file. Such 'flagging' systems are permitted and operate successfully in other jurisdictions in which Experian has experience.

A 'flagging' system would also allow the CRA to only mark specific disputed credit reporting information wherever possible, whilst leaving non-disputed credit reporting information to continue to circulate throughout the credit reporting system.

The 'freezing' of an individual's credit reporting information during a ban period would not prevent persons fraudulently obtaining credit in the individual’s name, nor would it satisfactorily alert credit providers to potential identity fraud associated with the individual. Instead, under the current drafting, it appears that credit providers would simply receive a nil result from any searches performed on that individual. Accordingly, this system may be vulnerable to abuse by individuals

who are genuine adverse credit risks that wish to deliberately conceal poor credit histories from prospective credit providers.

In addition, Experian considers that a number of aspects of the proposed provisions would be unworkable in practice.

(a) First, it is unclear what evidence of identity theft should be required by the CRA in order for the obligation to freeze the individual's credit file to arise. Establishing that the individual has a belief 'on reasonable grounds' that they have or are likely to be a victim of fraud would require the agency to properly examine details of the alleged or suspected fraud or identity theft. The amount of time involved may ultimately be to the consumer's disadvantage in genuine cases of identity theft.

Experian submits that the relevant policy objectives are better achieved by a system that involves the CRA promptly placing a fraud 'flag' on a file at the request of the individual concerned. This would promptly alert any prospective credit provider who has received a credit application in the individual's name to the need for them undertake further enquires to verify the identity of the applicant.

(b) It is also unclear whether the exception to the 'freezing' regime under section 113(2)(a), which depends on the individual giving their express consent, will be workable in a context where the CRA is aware that there is uncertainty about the individual's identity. It would be difficult from the CRA's perspective to be sure that the right person has given such express consent.

(c) Under the current formulation of section 113, there is potential for the ban period to continue indefinitely and/or for a CRA to be required to repeatedly expend time and resources in evaluating the merits of an unlimited number of applications to extend a ban period.

Experian submits that a maximum ban period and/or a maximum number of extensions should be prescribed in the Exposure Draft provisions, in order to give CRAs greater certainty about the extent of their obligations under section 113.

The imposition of maximum timeframes would not be contrary to the interests of individuals who genuinely consider they are or may be victims of fraud or identity theft, as it would be in their interests to promptly take action to rectify or resolve the suspected identity theft and correct any inaccuracies in their credit file.

(d) Finally, Experian is concerned about the barriers imposed under section 134 to a CRA continuing to receive (although not use or disclose) updated credit information during the ban period. Under section 134, the credit provider is not required to take any steps to ensure that the new credit information is able to be provided to a CRA.

Such restrictions could result in the quality of information in individual credit files that have been subject to an extended ban period degrading to a point where they are of limit usefulness or reliability. This is not consistent with the overarching imperative to ensure that credit files maintained by agencies are accurate, up-to-date, complete and relevant at all times.

Experian submits that it would be preferable for the Exposure Draft provisions to provide for continuity of information flows to CRAs during ban periods, but for new data to be marked private or restricted until the ban period has expired. The new or updated information would then be available for circulation the ban period expires, subject to any correction of such information sought by the consumer under section 121. Experian operates in jurisdictions where a similar approach is taken.

Regular audits of contractual arrangements

Section 116(3) imposes an obligation on CRAs to ensure that regular audits are conducted by an independent person to determine whether its agreements with credit providers are being complied with. The CRA must identify and deal with suspected breaches.

Experian submits that the imposition of specific obligations on CRAs to obtain regular audits of compliance under credit provider contracts (of which there may be many in number) would unnecessarily place an excessive and costly compliance burden on CRAs.

Credit bureau businesses have commercial imperatives to establish appropriate internal systems and controls for regulating and filtering the credit information provided by credit providers, and to undertake appropriate monitoring of the quality of such information. These obligations are also already embodied in a non-prescriptive form in the general obligation imposed under section 116(1), which requires CRAs to take reasonable steps to ensure that the information collected is 'accurate, up-to-date and complete'.

Experian submits that it is not appropriate for particular controls to be prescribed under the Exposure Draft provisions. Experian considers that these provisions should only require CRAs to have reasonable systems and controls in place, and to undertake reasonable monitoring and audit of those systems in a manner that is consistent with their general obligations under section 116(1).

Guidance notes issued by the Australian Information Commissioner could outline specific regulatory expectations regarding the auditing of these systems.

However, if the obligations set out in section 116(3) are to be retained within the Exposure Draft provisions, Experian submits that the formulation of these obligations requires further clarification.

(a) Experian notes that there is potential for vastly different interpretations of the meaning of 'regular' independent audits. A clearer formulation of what would be practically required of a CRA is needed in this regard.

(b) Materiality thresholds should be imposed upon the scope of the auditor's role and the responsibility of a CRA to identify and deal with suspected breaches. These thresholds should be commercially reasonable and focussed on the objective of ensuring good credit reporting outcomes for consumers, rather than process-based objectives.

For example, the auditor should not be tasked with undertaking an exhaustive review of every transaction with a credit provider. Instead, the auditor's role should be confined to considering significant instances of non-compliance or unusual credit provider activity

identified by the CRA's internal systems and controls, and whether there is evidence of any material systemic weaknesses in those controls.

In addition, breaches of commercial terms of credit provider contracts that do not relate to data quality or regulatory compliance should not be the subject of rectification obligations imposed under the Exposure Draft provisions.

Access seekers

Sections 119 and 146 provide for the direct access by 'access seekers' to certain credit information held by CRAs or credit providers free of charge. Permitted 'access seekers' broadly include persons authorised in writing by the individual. There is a short list of entities that are cannot be authorised as access seekers, including other regulated entities (credit providers, mortgage or trade insurers), employers, insurers and real estate agents.

Experian supports the inclusion of specific exceptions to the entities that may be authorised as access seekers. However, Experian submits that these exceptions alone do not place sufficiently stringent constraints on the types of entities that can obtain access to credit information on the basis of authorisation by the individual.

The ALRC Report 108 recognises that third party access regimes are vulnerable to being used as a 'backdoor' means for allowing entities who are prohibited from obtaining credit information to get indirect access to such information for non-credit related purposes. The Australian Government's first stage response to the ALRC Report also emphasises the need for stringent controls to "assist in ensuring that credit reporting information does not become accessed for non-credit related purposes which would in turn undermine the role of credit reporting regulation" (page 125).

Experian submits that to the Exposure Draft provisions should enable CRAs and credit providers to distinguish between applications by third parties who are genuinely assisting the individual in obtaining access to their credit information, and those where the third party is seeking to obtain access to information for its own purposes.

Timeframes for the provision of default information

Section 132(2)(e) permits a credit provider to provide default information about an individual to a CRA after a reasonable period has passed since the provider notified the individual in writing of its intention disclose the information to the agency.

It is noted that, at the point in time that the written notice is given under section 132(2)(e), the payment will already be at least 60 days overdue and the credit provider will have already sought payment of the overdue amount from the individual.

In this context, Experian submits that credit providers should be able to provide the default information to a CRA promptly after having notified the individual of its intention to do so. A

specific timeframe within which the credit provider must do so should be prescribed under the Credit Reporting Code of Conduct.

A prescribed timeframe will achieve greater certainty – both for CRAs (about the prompt receipt of default information flows) and for consumers (in understanding when this default information will be passed to a CRA for the purpose of making any access and correction application).

In addition, imposing a timeframe prescribed by Code is consistent with the overarching data quality obligations imposed on CRAs and, in particular, ensuring that the credit reporting information used and disclosed by the CRA is accurate, up-to-date, complete and relevant.

Civil penalty provisions

There are approximately twenty five civil penalty provisions directly applicable to CRAs under Division 2, in addition to the criminal penalty provision under section 117(1). Civil penalty provisions do not require any wrongdoing or 'fault elements' (such as intention or recklessness) by the agency in connection with the contravention. Under Division 7, the Australian Information Commissioner may apply to the court for a civil penalty order at any time within 6 years of the entity contravening a civil penalty provision.

Experian notes that within the credit reporting industry, the role and activities of CRAs depend to a large extent on the actions of other industry participants, most notably credit providers.

In relation to their data collection activities, CRAs are dependent on information providers ensuring that the information they disclose to the agency is of appropriate data quality, has been provided within the legislative parameters and that the credit provider complies with its data correction and updating obligations.

In relation to their credit reporting activities, CRAs maintain internal systems and controls that are designed to minimise unlawful access to credit information, including by supervising database transactions and monitoring usage of the database for unusual patterns or activities. However, to a large extent, agencies rely on declarations given by credit information users that the information is being sought in circumstances that are permitted under the Exposure Draft provisions.

In this context, if a credit provider (or other regulated entity) is transacting with a CRA in a manner that is knowingly or recklessly in contravention of the entity's own obligations under the Exposure Draft provisions, this places the agency at risk of incurring penalties in relation to inadvertent 'flow-on' contraventions.

Accordingly, Experian submits that there should be appropriate thresholds placed around the penalties that may be imposed on CRAs under the Exposure Draft provisions. Regard should be had to whether the contravention was caused by the wrongful actions of other third parties that are outside the control of the agency, or whether the agency had in place reasonable and appropriately robust systems and controls designed to minimise the occurrence of such contraventions. The imposition of civil penalties on the agency in these circumstances would be both costly to the agency's business and would have adverse implications for the agency's reputation and its relationship with regulators.

Experian submits that there should be appropriate recognition of this in the Exposure Draft provisions, and that many of the civil penalty provisions applicable to CRAs should incorporate a pre-requisite of fault or wrongdoing by the agency. This could be achieved by requiring that such contraventions have been committed knowingly or recklessly, or that they resulted from inadequacies in the agency's systems, policies and procedures for ensuring compliance with the relevant provision.

In addition, Experian submits that the Australian Information Commissioner should be required to prepare and publish guidelines setting out the criteria upon which decisions to pursue civil penalty orders under Division 7 will be made.

Destruction of certain unsolicited information

Section 107(4) is a civil penalty provision that requires a CRA to destroy unsolicited credit information as soon as practicable after determining that it could not have lawfully collected it under section 106.

The remaining provisions of Division 2 already have the effect of prohibiting a CRA from *using or disclosing* such credit information. These provisions, which include civil penalty provisions, are adequate to constrain the agency from dealing further with such credit information.

Experian submits that the additional obligations in section 107(4) regarding the destruction of such information are unnecessary, nor should this carry civil penalty consequences.

Notification of corrected information

Where a CRA corrects an individual's personal information on the application of the individual, section 122(2) imposes an obligation on the CRA to give each previous recipient of information written notice of the correction. Section 122(4) provides that such notice need not be given if it is impracticable for the agency to give the notice.

Although section 122(4) provides an exception on the grounds of the impracticality of notifying previous recipients, Experian considers that a further exception should apply based on the likely relevance of the corrected information to previous recipients. Where a significant period of time has elapsed since the receipt of the original information, Experian submits that the corrected information will have little relevance to the recipient unless it needs to specifically reconsider the individual's credit arrangements, in which case an updated credit report would be sought.

Accordingly, Experian submits that the obligation to notify previous recipients of corrected information should have an express time limit applied to it. Experian suggests that an appropriate limit would be where the recipient received the original information more than 3 to 6 months prior to the correction being made.

Alternatively, the obligation to notify previous recipients of the corrected information should be at the request of the individual, based on their views as to which previous recipients are relevant.

The imposition of limits based on relevance is consistent with the Australian Government's first stage response to the ALRC Report 108, which notes in this regard that CRAs be required to take steps to advise other *relevant* CRAs who may have listed the information, of the corrections (page 126).

4. Evidence from Other Markets

Benefits of Positive Data-Sharing

The World Bank carries out an annual survey of the progress of credit bureau developments[3] across the world which shows that support for greater levels of data sharing is a common theme as governments seek new and better ways to control and manage their credit markets following the global financial crisis. Indeed, never has it been so important to put robust and comprehensive systems in place, for as economic activity increases as countries climb out of recession, the dependence on access to credit to fuel growth could lead to inflationary pressures and potentially dangerous build ups of unsustainable debt. Furthermore, fraud and identity theft are an increasing global problem, one that often funds organised crime and terrorism.

To this end many governments around the world have explored the potential for the creation or extension of credit reporting mechanisms within their own economies. The evidence shows that consistent data (of reliable quality and definition) from a third party source can make a significant difference to the quality of the decision a lender might make. The quality of that decision improves still further if the data covers not just data on poor performance, such as defaults and missed payments, but data on commitments and available credit as well.

This is borne out by evidence from the National Bank of Belgium[4] which operates the Belgian credit register:

The Belgian experience since creating a positive bureau in 2003

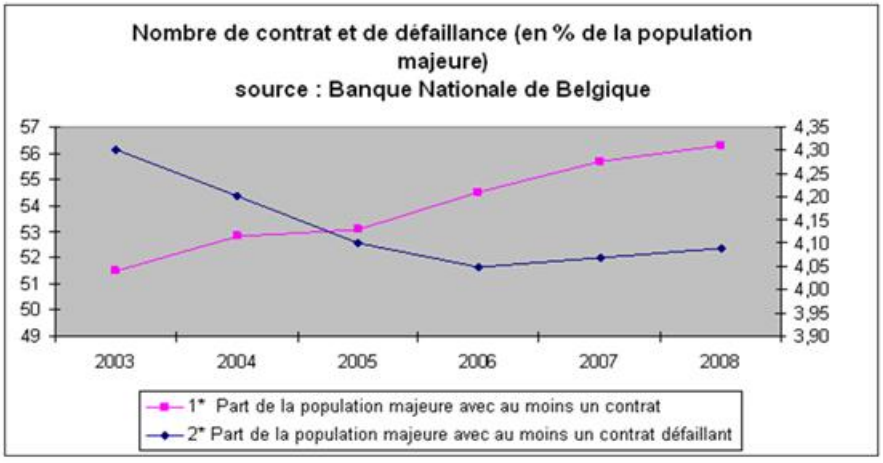
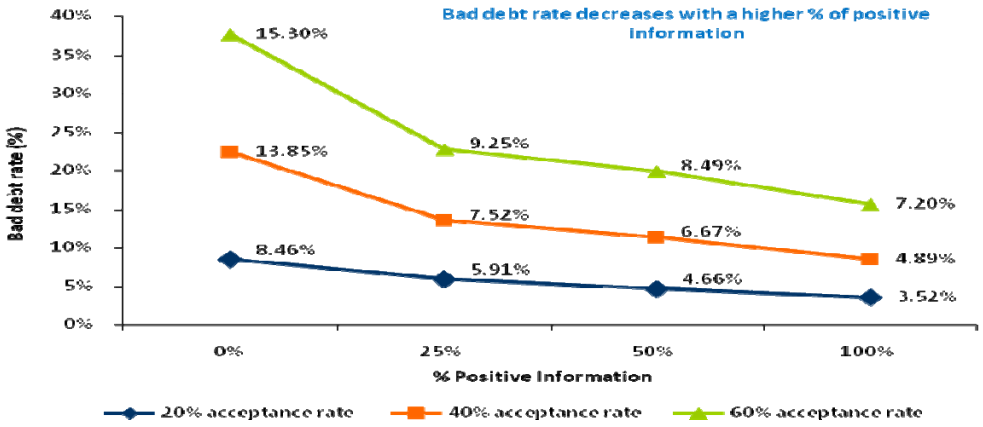


table based on the Belgian experience of their CB positive data (created in 2003):
- the blue line is for the part of the population with, at least, one default credit
- the pink one is for the part of the population with, at least, one credit

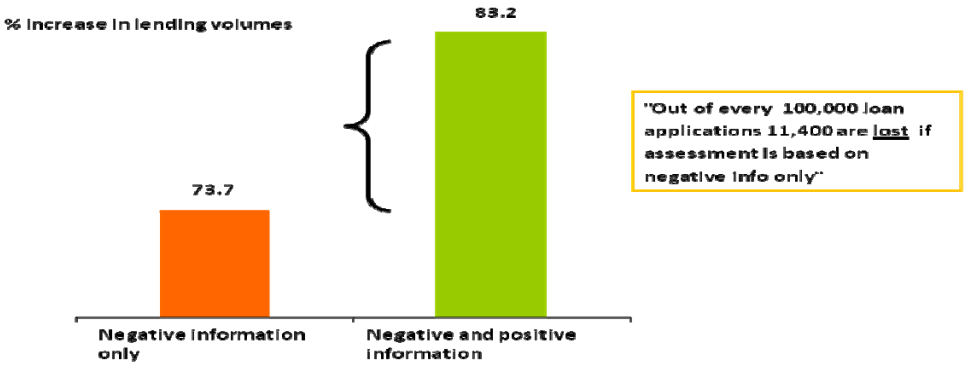
[3] Doing Business survey http://www.doingbusiness.org/
[4] The Central Bank which operates the Belgian credit register

Similar experiences are recounted elsewhere and typical results suggest that arrears fall significantly even whilst lending volumes can increase when third party data is deployed responsibly:



Source The Benefits of Voter Participation in Full-file Credit Reporting in Latin America and the Costs of the Status Quo PERC, April 2007

However, in order to drive benefits such as are described above, comprehensive data across a range of product types needs to be shared and used. Indeed, in the UK following a series of high profile cases of severe over borrowing (and lending) on revolving credit cards, the Government supported even greater levels of data sharing to better understand how credit cards were being used and paid. That initiative led to significantly better controls on credit card debt in order to prevent "cross firing," whereby consumers withdraw credit from one instrument to settle the monthly payment on another.



Source: Barron and Staten (2000). Note: Figure shows the simulated acceptance rate assuming a default rate of 4% overall

Further, there is widespread acceptance that data from across the spectrum of credit is critical in order to make the system effective. This is borne out by the recent work undertaken by the NBB in Belgium on the correlation between telephony arrears and traditional credit arrears as outlined in their press release on 03 March 2011. Similar benefits are reported from the engagement of utility organisations as well and in the UK, British Gas is the largest energy supplier and first adopter of positive data sharing from within the sector. Other utility providers are have followed suit.

Data-Sharing Systems

The World Bank Doing Business annual survey and the ACCIS/ECRI survey[5] both highlight the variations in reporting levels and legislation around the world.

When CRAs are first implemented there is often a concern voiced that they will become a "Big Brother" system, holding vast amounts of highly sensitive and personal data that is readily accessible to a wide range of parties who may view the information at will and without restriction.

There is no system that operates in this way anywhere in the world. In reality, whether or not the model is operating in the EU under strict Data Protection legislation, or in another country under unique privacy rules, there are always controls and restrictions on what data may be collected and how it may be used. The controls and restrictions will vary according to local practices and norms, but will always exist and will be enforced in order to provide confidence in the system.

It is significant that the current review of the Data Protection Directive in the EU is resulting in a range of views around the categorisation of data between personal and sensitive data, where currently a list is in place. The UK's Information Commission has proposed that a fairer and more engaging model would be based on the purpose for which data is to be processed and used, rather than the type of data itself[6]. ***Thus the temptation to provide a list of data that is relevant for a particular purpose (such as making credit decisions) and embedding that in legislation may result in an outcome that does not deliver the anticipated benefit or may reduce the level of value.***

It is clear that the value of a rich source of information in providing and monitoring credit, as well as identifying and preventing fraud, is an important benefit of developed credit reporting systems. It helps lenders structure more effective lending, monitoring, and forbearance solutions, and allows consumers to more proactively manage personal credit and benefit from increased lending competition and more transparent decision-making.

[5] Hwww.doingbusiness.orgH, Hhttp://www.ecri.eu/new/node/228H

[6] Hhttp://www.ico.gov.uk/news/current_topics/~/media/documents/library/Data_Protection/Detailed_specialist_guides/european_commission_dp_strategy_response.ashxH page 7