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3 August 2012

House of Representatives
Standing Committee on Social Policy and Legal Affairs
Parliament House
CANBERRA ACT 2600 via email: spla.reps@aph.gov.au

Dear Committee Members,

PRIVACY AMENDMENT (ENHANCING PRIVACY PROTECTION) BILL 2012

The Australian Finance Conference (AFC), the national finance industry association, appreciates the opportunity to provide feedback for consideration by the Committee in its review of the Privacy Amendment (Enhancing Privacy Protection) Bill 2012 [the Bill]. The feedback provided has been raised separately for consideration by the Senate Legal and Constitutional Affairs Committee as part of its inquiry on the Bill.

AFC membership includes a range of credit providers, financiers, receivables managers and the three principal Australian consumer credit reporting agencies. AFC credit provider member companies provide the full range of lending financial services and have a particular interest in the credit reporting proposals both in relation to their consumer and commercial businesses. Members deal directly with their customers as well as through intermediaries (eg finance brokers). To the extent they relate to commercial financiers, our views should also be seen as reflecting the general view of AFC associated bodies: the Australian Equipment Lessors Association; the Institute for Factors and Discounters and the Insurance Premium Financiers.

MARKET / REGULATORY CONTEXT

Our Members have a long experience in balancing the competing policy tensions within the credit area: privacy, responsible and non-discriminatory lending and financial inclusion. We acknowledge that this requirement to balance the individual's right to privacy against other social and public interests has been recognised and reflected in the amendment containing the Objects of the Act (@2A). In particular, *the objects of this Act are*:

- *to recognise that the protection of the privacy of individuals is balanced with the interests of entities in carrying out their functions or activities;and*
- *to facilitate an efficient credit reporting system while ensuring that the privacy of individuals is respected.*

Our Members have since 1992, ensured a credit information-handling compliance framework that incorporates and reflects the regulation under the Privacy Act Part IIIA - credit reporting provisions. Much has changed in the consumer credit market in Australia over those twenty years. Consumer lending outstandings have increased from $ 131B in 1992 to $1,302B at present. Market participants continue to include traditional financier organisations, like banks and finance companies, but have also developed to see a range of entities engaged in the provision of consumer credit including as part of non-finance businesses (eg retailers). Competition on a global scale has also seen international entities enter the Australian market. Distribution networks have moved from direct-selling models to ones that include

intermediaries (eg finance brokers, retailers) and that utlilise electronic customer interfaces (eg via the internet). The centralisation of credit reporting information has shifted from an entity formed by industry on a mutual and collaborative basis to now include three principal commercial organisations.

Importantly in the context of the reforms contained in the Bill, Australian credit participants have looked to ensure they remain globally competitive by harnessing the benefits of technological developments and changing customer expectations. As a consequence, credit provision has moved from a largely paper-based transaction with flow on manual-type processes (including for credit assessment and record management) to be largely electronic encompassing automated processes with benefits for all participants. These include, for business, increased efficiencies, better lending decisions while minimising cost and, for customers, greater choice, better priced credit and real time availability in terms of approval and provisioning. Technological advances have also effectively removed geographic boundaries and the potential for data to be handled in more than one place at the same time.

Despite these changes, the fundamentals of consumer credit as a business remain. The customer is central to the equation. Customer personal information continues to be recognised as a valuable and significant business asset and managed accordingly in compliance both with commercial imperatives and regulatory requirements (including the Privacy Act). Credit participants, like those in any other industries, continue to strive for ways to operate efficiently and effectively while ensuring customer drivers are met, including protection and control of their personal information. The need for an accessible, centralised repository of up-to-date and accurate information relating to the credit exposure and behaviour of a customer to assist with credit-decisioning also remains.

Arguably because these fundamentals have remained static, despite the exponential technological developments including for data management which has enhanced the potential both for risk and damage flowing from mishandling, in that twenty year period, the Australian credit industry does not appear to have been the subject of customer complaint and/or review by the Regulator for significant, systemic or large-scale compliance breaches when handling customer's consumer credit information. While, over the period, there may have been instances of breach by industry participants in their compliance with the handling requirements set down in the Privacy Act, including the credit reporting provisions, these would have been minor and would not appear to provide evidence of market failure or customer risk that might justify any major policy changes to impose more stringent regulation in the credit reporting provisions, in particular. A heightened obligation both from regulation (eg the National Consumer Credit Protection Act) and prudent lending practice has provided justification for information beyond the current negative data to be made available through the credit reporting system to assist credit providers verify customer credit worthiness and capacity as a pre-condition of lending.

GOVERNMENT POLICY

In this context, the AFC commends the Government's commitment to reforming Australia's privacy laws to ensure a "*robust and adaptable privacy framework which protects our privacy while also allowing for future technological developments and other improvements that will increase efficiencies in our economy and ensure the safety of our society*."[1] In particular, given the relevance to our Membership, the AFC commends and supports a process of modernising and simplifying the regulation of the handling of credit reporting information.

[1] Australian Government First Stage Response to ALRC Report 108: FYI: Australian Privacy Law & Practice (Oct 2009)

The commitment to include five additional data sets to facilitate a more comprehensive consumer credit picture of a customer and to allow pre-screening to exclude adverse credit risks from marketing lists will build on and enhance the responsible lending processes currently undertaken by our Members (both from a prudent lender and compliant corporate entity perspective). Both customers of consumer credit and industry participants will benefit.

We acknowledge the extensive consultation that has occurred to date on the privacy reforms that has culminated in the Bill's development and introduction. While all involved with the reform process appear to support the Government's objectives, the challenge is to ensure that the Bill which is the vehicle for implementation reflects those outcomes. In this regard, we note the work of the Attorney-General's Department in drafting what is a substantial and complex piece of legislation and look forward to working with them to progress other components of the reformed laws, including the regulations. We see this process as integral to being able to resolve operational issues that may not be identified until after passage of the legislation when our Members are developing compliance frameworks to implement the amendments. We would appreciate the Committee's support for this process.

Key issues for AFC Members arising from the Bill that may not be able to be resolved through that process follow.

PART 1: GENERAL MATTERS

TRANSITIONALS & COMMENCEMENT – SCHEDULES 6 & 1

We support the Government's inclusion of transitional provisions to assist manage a legislative amendment process that reflects the dynamic nature of personal information handling (including consumer credit information) and the regulated-environment in which it is currently handled.

We note the Government's intention in the transitional provisions is to draw clear lines in compliance between pre-commencement held personal information and post-commencement collected / held information. However, while supporting the theory, in practice the effective management of electronic data and sophisticated compliance framework that such an approach may require to be implemented to be able to differentiate the compliance obligations (eg permissions determined by customer consents both for NPP and Part IIIA compliance) that have been applied to data at a given point in time that may be the subject of complaint, for example, may make it either too costly or too complex to implement, with the result compliance with the new obligations becomes the default. In turn, this raises compliance risk issues for regulated entities which may need to be managed through the obtaining of newly worded consents covering information previously collected and held by the entity as well as for future collections. In turn, this potentially raises customer management issues to quell concerns or suspicions that may arise from change regardless of the outcomes of, or basis for, that change. We note the specific regulation-making power provided in the Bill to deal with transitional matters not otherwise dealt with. For reasons given earlier, we see this as an essential component of the Bill to address operational concerns relating to transitional matters that may only become apparent as AFC Members and others move to implementing the amended provisions.

We commend and support the Government's intention to facilitate early commencement (ie 9 months from assent) of the credit reporting provisions following enactment. We also commend and support a transitional approach that will add value to the reformed process by facilitating capture of information, particularly repayment history information, relating to credit accounts open in the lead up to commencement in addition to those opened thereafter. As noted in the transitional provisions, however, the handling of this information, particularly collection in anticipation of disclosure to a credit reporting body will need to comply with the

requirements of the credit reporting provisions, the regulations and the CR Code. The latter two components need to be developed building from the enacted provisions. While we anticipate this may occur in parallel, finalisation remains subject to enactment of the underlying provisions. Following industry input, the CR Code will also require approval and registration by the Privacy Commissioner; a process we anticipate may require time both for consultation and consideration. We acknowledge and commend the inclusion of a provision to facilitate CR Code development during the transitional period though note the need for sequential development as a pre-cursor to completion.

As a consequence, given implementation commencement hinges on the detail of all components of the reformed provisions being finalised, the proposed period may be much less than the 9 months envisaged by the Government. Accepting participation in the credit referencing system is not mandatory and that the inclusion of the additional datasets has been championed by the AFC and other industry participants for a number of years, we also note the significant compliance outcomes necessitated by the reformed provisions.

In short, in the lead-up to commencement of the reformed provisions, even if our Members wanted to continue to exchange information currently allowed but not yet taking up the new data sets, a substantial review and modification of current compliance (including documentation, processes and staff training) would be required both for the credit reporting provisions and the APP components of the reforms. This would be expanded should the additional datasets be factored into the compliance program.

It also occurs in an environment of a competitive market that seeks to appropriately manage compliance and risk with an eye to the bottom line (eg through the imposition of IT freezes managed in the context of competing regulatory reform requirements and priorities).

As a consequence, in order to maximise the value inherent in these reforms, we encourage the Government to provide a commencement date that would provide our Members and others impacted by the reforms a reasonable implementation period from the date final detail of the reforms has been settled (eg 12 – 18 months). Rather than adopt a fixed date or date tied to date of assent, the AFC recommends an approach that enables a commencement date to be determined by the Minister (akin to the process adopted for the Personal Property Securities Reform), may be the best means of balancing the imperatives for early enactment against inadequate lead-times for implementation. A flow-on benefit would be additional time to educate consumers about the reforms in the lead up to their commencement.

PART 2: APP MATTERS – SCHEDULE 1

PERMISSIONS RELATING TO AUTHORISED OR REQUIRED BY AUSTRALIAN LAW

As noted in our submission in relation to the Exposure Draft of the APPS (EDB APPs), the proposed inclusion of a definition to clarify the current generic reference to “law” used (eg in the NPPs) and qualification to laws of Australia is too narrow in the global context within which AFC Members operate and potential need to comply with law beyond the Australian borders while located in Australia.

While compliance with foreign laws has been recognised in the context of information handling by regulated entities or others in compliant NPP 9 / APP 8 information exchanges while those entities are not located in Australia, the position of Australian-based regulated entities with similar foreign law compliance obligations (eg an Australian-based company part of a corporate group headquartered in the USA).

To reflect global corporate relationships and international law compliance obligations which may flow, the AFC recommends expansion of the definition of law in relevant permissions covering required or authorised by law to also cover foreign laws.

APP 3.6(a) COLLECTION OF PERSONAL INFORMATION

We note that the permission in APP 3.6(a) to facilitate collection from a third party rather than from an individual, with the individual's consent or if required or authorised by law is restricted in application to an APP entity that is an agency. We are not aware of the policy justification for confining the permitted means of collection to the public sector. We submit, that this could equally be relevant to private sector organisations.

As a consequence, the AFC recommends amendment of APP 3.6(a) to enable both public and private sector entities to collect from a third party with the individual's consent or if authorised or required by law in addition to the current permission for both agency and private sector organisations which are APP regulated entities (ie APP 3.6(b) collection from a third party if it is unreasonable or impracticable to collect directly from the individual).

APP 5.2(c) NOTIFICATION OF COLLECTION – NAME OF AUSTRALIAN LAW AUTHORISING / REQUIRING COLLECTION

We note that it has been proposed to include in APP 5.2(c) a notification requirement to include the **name** of the Australian law etc which requires or authorises collection.

AFC members and others that operate in the financial services sector have a significant range of laws which may provide a permitted basis for collection of personal information. These laws have been the subject of significant reform, particular in the last few years; reform that has included renaming.

In our view, the obligation to notify the name of the law etc imposes a compliance obligation at odds with the Government's reform objectives.

In this regard, we note that the compliance obligation to notify the matters listed under APP 5 (and therefore included APP 5.2) are tempered and should be read in the context of the the general requirements (contained APP 5.1) which contain a test of reasonableness and the adoption of means other than notification to ensure the individual's awareness of the collection matters. For example, if the collection is authorised or required by law, an entity would only be required to take such steps (if any) that are reasonable in the circumstances.

As noted earlier, given the range of relevant laws for AFC members, it may not be reasonable in the circumstances for the entity to have to name the specific law that requires / authorises collection. However, in our view, it would be preferable that this was clear through the removal of the prescriptive requirement to name the law as currently proposed in APP 5.2(c).

We are also concerned about the range of regulation that imposes a disclosure obligation on AFC members and others in the industry and the overwhelming task of presenting it for individual's to be able to comprehend its contents. The Government has encouraged industry to adopt a simple yet comprehensive approach to these disclosures to minimise the amount of documentation that is provided to individuals in compliance with these obligations. A requirement to include the detail proposed in APP 5.2(c) would appear to be at odds with this.

The AFC therefore recommends, in line with the Government's proposed reform objectives including high-level principles, omit from APP 5.2(c) the requirement to name the law etc that authorises or requires collection.

APP 8 CROSS-BORDER DISCLOSURE OF PERSONAL INFORMATION

As we understand, in broad terms, before the proposed disclosure cross border, provided an entity has taken reasonable steps to ensure that the foreign recipient does not breach the APPs in its handling of personal information (eg via a contract between the entity and the recipient requiring the compliance by the recipient with the APPs), it is not prevented from disclosing the information APP 8.1. However, regardless of where the contractual responsibility rests, the entity remains liable for any breach in compliance with the APPs of the foreign entity (@16C)[ie under the broad approach of "accountability"].

The AFC recommends confirmation by the Government that contractual imposition of compliance obligations constitutes reasonable steps for the purposes of APP 8.1.

Further, APP 8.2 provides that the entity is permitted in the circumstances specified in APP 8.2 to disclose to the foreign entity even if it has not taken the steps contained in APP 8.1– (eg the entity reasonably believes that the foreign recipient is bound in its information handling by laws etc substantially similar to the APPs and the individual can take enforcement action). If the entity discloses under APP 8.2 – it will not be liable for any breach in compliance (eg under @16C), liability rests with the foreign entity.

We understand that, in relation to APP 8.2(a), the Government in accepting the ALRC recommendation (31-6), intends to "*publish a government list of laws and binding schemes outside Australia which uphold Privacy Principles that are substantially similar to the Privacy Principles will provide guidance to agencies and organisations. Agencies and organisations will be able to use the list to assist them in forming a reasonable belief that, in the circumstances of their particular cross-border transfer of personal information, the recipient of the information will be accountable. This will include considering all relevant matters, such as whether the particular law or binding scheme in operation outside Australia provides exemptions or other limitations that would apply to the recipient*."[2] We commend the Government on this decision and look forward to the production of the list contemporaneous with the enactment of the amendments.

However, in contrast we note under APP 8.2(b) that the individual's consent alone will not be enough to permit cross-border disclosure. Further action is required by the entity as a pre-cursor to obtaining the consent; namely the entity is required to expressly inform the individual that, should the individual consent, effectively the entity will no longer be accountable for the individual's personal information once disclosed to the overseas recipient (ie APP 8.1 will not apply to the disclosure and consequently @16C would not apply so that the entity will not be accountable for acts or practices of the overseas recipient which would be a breach of the APPs). As an aside, and as recognised in our general comments on transitional matters, we note the difficulty with the application of this provision in an environment where regulated entities have already obtained consents from customers (in compliance with NPP 9) and data is being managed in a cross-border context. We submit that some form of recognition that these consents will be regarded as compliant with proposed APP 8.2(b) at least for a reasonable transitional period is appropriate.

We also note that the approach adopted in APP 8, though reflecting the Government's response, is substantially different to what was recommended by the ALRC and from the current NPP 9 principle.

[2] Australian Government First Stage Response to ALRC Report 108: FYI: Australian Privacy Law & Practice (Oct 2009) – Rec 31-6: Government Response

We submit that as a matter of policy and drafting APP 8 when combined with @16C fails to achieve the key objectives of the Government (eg high level principles, simple, clear and easy to understand and apply) of the reforms. It also shifts the risk balance heavily to the entity and we query the individual interest justification to support that. We also note global developments, in particular, Australia's commitment to the APEC Cross-border Privacy Enforcement Arrangement (CPEA) which will effectively assist to remove country boundaries in the enforcement of privacy protections and query the need for the approach adopted in APP 8 when combined with @16C.

The AFC recommends that APP 8 be re-drafted to better achieve the underlying policy objectives of the reform including provide appropriate levels of privacy protection and access to enforceability mechanisms by the individual while balancing other equally relevant social and public interests including business functions being carried out efficiently and effectively. An approach similar to that originally proposed by the ALRC in UPP 11 would in the AFC view better achieve these aims.

PART 3: CREDIT REPORTING MATTERS

We note and support the work of the Australasian Retail Credit Association (ARCA) in its facilitation of the operational component of the amended Part IIIA, the revised Credit Reporting Code. AFC was extensively involved in the drafting of the original Code and we are represented on ARCA's Code Industry Council (CIC) charged with this task on this occasion. We acknowledge that a prime responsibility of ARCA with CIC oversight is a framework that continues to facilitate access by relevant participants while operationally maintaining data quality including through formalisation of the data-sharing arrangement underpinned by reciprocity and a single data standard.

We understand that ARCA has considered implications of the Bill for the industry from an operational context and a submission covering this detail is being made. Noting that some AFC Members are also ARCA Members, our intention (below) is to emphasise shared key issues and raise matters with a broader impact for credit providers beyond the retail market.

CLEAR COMPLIANCE FRAMEWORK

The AFC recommends clarification of two definitional matters that are fundamental to determining the compliance framework of the credit reporting provisions.

Credit Reporting Business Definition

We acknowledge and support measures adopted by the Government to minimise unintended outcomes flowing from the reformed provisions. In particular, the clarification in the Explanatory Memorandum that the permitted exchange of credit information between credit providers is not intended to see them captured within the definition of a credit reporting business and potentially subject to obligations as a credit reporting body. While acknowledging this outcome, we suggest that in the interests of compliance certainty post-commencement and in recognition of the principles of statutory interpretation that see Courts only look to extrinsic materials (eg Explanatory Memorandum) when the legislative provision is unclear, that it would be valuable to see that policy reflected in the definitions themselves.

The AFC recommends amendment of the credit reporting business definition @6P to specifically clarify that the handling by way of collecting, holding, using or disclosing of information about the credit worthiness of an individual by a credit provider in compliance with Part IIIA Divisions 3, 4 or 5 does not constitute them engaging in credit reporting business for the purposes of the Act.

CRB / CP Derived Information

We reiterate our concerns that the inclusion of the concepts of CRB / CP **derived** information [@6(1)] introduces complexity and compliance uncertainty in the absence of justification. In our view, the heightened compliance obligations imposed on credit reporting information is appropriate where that information is directly linked through the interface between the credit reporting body and the credit provider. Once the information is part of the credit provider's record, however, we suggest that a compliance framework beyond the APPs that builds from a contagion effect from how an element of that information is characterised rather than a consumer protection concern that has been identified with its handling by the credit provider may be difficult to justify.

The AFC recommends that once the information is on record with the credit provider, that the APPs provide the level of privacy protection that appropriately balances the individual's privacy right with commercial imperatives.

COMMERCIAL CREDIT PROVIDERS – IMPACTS FOR SMALL & OTHER BUSINESS CUSTOMERS – MANDATORY EDRS

In the context of unintended outcomes, we also note the impact of compulsory EDR Scheme membership for our Members that operate only in the commercial finance market. For example, as a matter of standard, prudent finance practice, is it is usual for a commercial financier to seek access (with consent) to the consumer component of the credit file of a corporate customer (eg the consumer file of the directors as part of obtaining guarantees to secure the lending).

That access does not usually entail manipulation of the information on the credit file merely access to assist determine credit worthiness and risk.

However, the Bill will have the effect of the mandating membership of an EDR Scheme as a pre-cursor to collection / disclosure between a credit provider (including a commercial credit provider) and a credit reporting body of credit reporting information. Given the criteria for the Information Commissioner to recognise an EDR Scheme reflects the same criteria that ASIC needed to consider before approving EDR Schemes for the purposes of legislation it manages (eg Corporations Act; National Consumer Credit Protection Act) we anticipate that the ASIC-approved schemes (ie the Financial Ombudsman Scheme [FOS] and the Credit Ombudsman Service [COSL]; will also be recognised by the Information Commissioner for the purposes of the Privacy Act.

Based on the experience of our Members' operating in the consumer market with ASIC-approved EDR Schemes (eg FOS / COSL), regardless of whether a customer uses the EDR Scheme, our Member is required to pay a significant annual membership cost. For example, the annual fee has a component (ie the base levy) based on relative size of loan portfolio compared to other FOS members albeit capped at $10,000. This fee is payable annually regardless of whether a complaint is lodged with the EDR Scheme or not.

Membership of the EDR Scheme also opens the financier to the jurisdiction of the Scheme, not confined to privacy disputes with their customers. We also note that the current delays being experienced with resolution by these EDR Schemes may operate to the detriment of commercial customers (eg through equity erosion). For example, as published in its annual report (Annual Report on Operations (2010-11), COSL has indicated that on average it takes 128 days [4 months] for a consumer complaint to be resolved). We question the appropriateness of these timeframes for commercial financiers and their customers. We also note the potential for even greater delays in the event of the significant expansion of FOS / COSL membership to facilitate commercial financier membership in response to the Bill's requirements, without additional resourcing by these Schemes.

Should the Government remain committed to blanket EDR Scheme membership as a pre-cursor to access by commercial financiers to the consumer component of information held by a credit reporting body, these costs may see financiers look to other ways of managing risk than consumer credit information access. In turn, this may impact on the accessibility and / or cost of commercial finance, of particular relevance to small business customers.

To minimise this outcome, which we believe is unintended by the Government and does not reflect the ALRC recommendation that underpinned this part of the reforms, we recommend that an appropriate regulation be made to modify the requirements for accessibility to consumer credit information so that it is not contingent on EDR Scheme membership for financiers only involved with commercial finance that do not disclose data for CRB collection (eg by listing defaults or disclosing repayment history information). The link between EDR Scheme membership as a pre-cursor to disclosure of this information should appropriately be confined to be a pre-cursor for those that list defaults or repayment performance history information.

COMPLAINTS PROCEDURE & TIMEFRAMES

The AFC recommends an approach in the provisions dealing with complaint handling that provides an option of alternate compliance to the procedure outlined in the Bill, to compliance with an equivalent standard recognised by the Information Commissioner. This would then facilitate a seamless compliance process for consumer credit providers that, as part of their licensing obligations, were required to implement complaint-handling processes set down by ASIC (eg in its Reguatory Guide 165). A similar approach could also be adopted for broader participants in the industry that are credit providers for the purposes of Part IIIA including the telecommunications industry.

In the context of dispute resolution, the AFC shares concerns raised previously about the appropriate party with primary responsibility for resolution. Where that party has a direct relationship with the matter the subject of dispute, we have no concern. However, as presently drafted, the complaint-handling provisions may see that responsibility have a broader potential for application to others that become involved merely by handling credit information that includes information the subject of the dispute.

ACCESS & CORRECTION RIGHTS – EXCEPTIONS TO ACCESS - CP

The AFC recommends an exception to access equivalent to APP 12.3(j) should be included in @21T to give a credit provider a discretion to deny access should by doing so it would reveal evaluative information generated within the entity in connection with a commercially sensitive decision-making process. The omission potentially invites opening a credit provider to risk of fraud or customer manipulation of credit application data should the credit provider be obliged to reveal commercially sensitive components of its lending decisioning process.

USE OR DISCLOSURE OF DE-IDENTIFIED INFORMATION BY CREDIT REPORTING BODIES

As reflected in the Explanatory Memorandum, the AFC understands that the genesis for @20M is implementation of the Government response to ALRC recommendations 57-1 and 57-2. In short, the Government acknowledged that a key concern for both credit reporting bodies and credit providers is the ability to conduct research (including statistical modeling and data analysis) in relation to credit reporting information where it related to the assessment and management of credit and was for the benefit of the public. In response, the Government committed to permitting use and disclosure of de-identified credit reporting information for research purposes in the public interest. @20M reflects this policy of permission.

A provision that deals with de-identified information; that is information which no longer would meet the definition of personal information regulated by the Privacy Act currently or as revised by the Bill would appear to be outside the policy ambit of the regulation. However, when viewed in the context of the Government's recognition of the legitimacy and value of the research practice and commitment to facilitate its continuation following enactment of the reforms, its inclusion appears sound. It also aligns with the Government's approach in relation to similar practices for another sub-set of sensitive information, namely health information, where similarly permission for research utilising de-identified information has been provided.

While reflecting the Government's policy on the broad level, we note the significant level of compliance that has been included to give effect to the permission (eg @20M(3)(4)). In contrast, the health sector permission does not appear to have similar compliance requirements. We question the basis for this divergence in approach, particularly given the greater challenge for de-identifying health information where the characteristics of the group of persons whose information is being handled might be so unique as to make extremely difficult the task of de-personalising sufficiently toprevent identification.

The justification for the prescriptive approach in @20M appears to reflect the concerns expressed in the Explanatory Memorandum about the effectiveness of methods used to de-identify the personal information and risk of subsequent linkage to individuals to personalise that information. In response, we note the act of de-personalisation and re-personalisation does not carve out that information from the broad definition of personal information under the Privacy Act. As a consequence, as soon as it has been linked to information to personalise it, it would meet the definition of personal information and from that point its handling would be subject to the Privacy Act requirements. We also note again in contrast to the health sector the particular characteristics of the individuals whose information is to be de-identified for credit research purposes are less likely to be so unique as to raise the same challenges of whether it is possible to fully de-identify the information.

The inclusion of a permission in @20M also raises the potential for the regulation by implication effectively prohibiting other legitimate and valuable commercial practices of credit industry participants. We appreciate that these potential adverse economic consequences are unintended by the Government.

Therefore, while acknowledging the Government's efforts to assist the credit industry through the inclusion of the permission in @20M, given the matters raised particularly the potential for adverse and unintended consequences flowing from its inclusion, the AFC recommends that the status quo of omission reflected in the current Privacy Act be maintained going forward.

CROSS-BORDER PROHIBITION - CREDIT REPORTING INFORMATION BY CRBs TO FOREIGN CREDIT PROVIDERS– UNINTENDED CONSEQUENCES

We note and support the Government's intention to, in the future, develop the reforms to facilitate credit reporting information exchange with NZ. Given the dynamic nature of transit by Australian and NZ citizens across the Tasman and the significant privacy protections in place in both countries, the ability for credit reporting bodies and credit providers to easily access relevant consumer credit information of these citizens regardless of border is supported.

We further note the Government policy in the interim, as reflected in it response to the ALRC recommendation 54-5, namely:

to make clear in the credit reporting provisions that credit reporting agencies cannot:

- *maintain information about foreign credit and foreign credit providers; or*

- *disclose credit reporting information to foreign credit providers.*

The prohibition was seen as necessary "*as any benefit that would be obtained in creating greater transparency about an individual's credit risk would be outweighed by the inability of the Privacy Commissioner to enforce effectively the credit reporting provisions against foreign entities*".

In the Exposure Draft of the credit reporting provisions this policy was implemented by scoping the operation of the credit reporting provisions so that they only apply to credit that is provided or applied for in Australia (EDB CRP s. 101) and defining "Australia" (in EDB CRP s. 180) to refer to geographical limits include external territories.

However, we understand that as a result of concern that this may not have been sufficient to clearly implement the Government's decision and a revised approach has been adopted in the Bill's credit reporting provision. The revised approach includes a qualification both in terms of geographic Australian-link in the location of the application for credit, but goes further to include the geographical Australian link with particular entities specifically against various points in the information handling flows. Further this applies to both credit reporting bodies and credit providers.

We understand the Government's policy intention is to ensure that data that includes credit reporting data originating from a credit reporting body in the hands of the credit provider so as to ensure the prohibition of credit reporting information to foreign credit providers (ie those without an Australian link) continues to follow the information and trigger the prohibition in line with the Government policy. However, we are concerned that the drafting approach adopted in the Bill relating to credit provider disclosure (eg @21G) has unintended consequences in light of the Government's policy and potentially intrudes beyond prohibitions on flows of credit reporting information to foreign credit providers to detrimentally impact on legitimate commercial arrangements between a credit provider and a third party service provider that they may utilise in managing their loans (including in relation to account recovery / debt collection) where that entity may be located outside Australia but is not a credit provider. We have confirmed with the Attorney-General's Department that this was unintended and does not reflect an expansion to the Government's policy on this matter.

The interpretative issue is further coloured by the important deeming provision that sees entities engaged as an agent of the credit provider to manage loans, for example, being regarded as a credit provider while engaged in the process (@6H). Should a credit provider look to manage risk of compliance of a third party service provider by contractually creating a relationship of principal and agent, this would result in that entity being regarded as a credit provider while acting in its capacity of an agent and, if the entity did not have an Australian link may mean that, unless the information exchange between it and its principal were regarded as a use by the principal (which has the Australian link) would otherwise be prohibited.

The AFC recommends that the Government review the credit reporting provisions to ensure their scope is targeted to its underlying policy.

Further, we note the revised approach to personal information in the cross-border context for non-credit reporting information that sees regulation based on accountability (eg under APP 8 and @16C). Such an approach facilitates information flows while maintaining avenues for control and enforceability. Of note, this approach appears to be the default for handling health information which, like credit reporting information, generally is recognised as requiring a more-prescriptive approach to regulation because of the greater potential for harm to the individual from misuse. It would appear an absurd result that sees Government enacting a framework to allow foreign service providers to Australian-health sector entities

able to be utilised in management of health information [subject to compliance with APP 8 and potential accountability risk consequences of @16C] but credit providers prohibited from adopting a similar business model for information they handle which may include a component obtained from a credit reporting body. We accept the position remains the same where the contagion of information (eg through inclusion of information originating from a credit reporting body) has not occurred.

We would be happy to provide further detail to the Committee to assist with its review of the Bill. Please feel free to contact me via email [redacted] or our Corporate Lawyer, Helen Gordon, via [redacted] or both via phone through 02 9231 5877.

Kind regards.

Yours truly,

[redacted]

Ron Hardaker
Executive Director