21 December 2007

By email: privacy@alrc.gov.au

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Dear Commissioners

Discussion Paper 72: *Review of Australian Privacy Law*

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the above Paper prepared by the Australian Law Reform Commission (**Commission**).

Our submission focuses on some key credit reporting issues as well as some general direct marketing issues. To assist the Commission in identifying our responses to its particular proposals and questions, we have **bolded** all references to the Commission's proposals and questions throughout the submission.

1 Executive Summary

Consumer Action submits that:

(i) there are weaknesses with the current complaints handling system in relation to credit reporting that needs a more effective and seamless approach to complaint handling that utilises credit reporting agency's (**CRAs**) internal dispute resolution processes and industry-based external dispute resolution (**EDR**);

(ii) there are concerns about the effectiveness of the Office of Federal Privacy Commissioner (**OFPC**) as regulator of credit reporting and as complaints handler which must be addressed;

Consumer Action Law Centre
Level 7, 459 Little Collins Street
Melbourne Victoria 3000
Telephone03 9670 5088
Facsimile03 9629 6898
info@consumeraction.org.au
www.consumeraction.org.au

ABN 37 120 056 484 ACN 120 056 484

(iii) the use of credit reporting information to remove individuals from a selective direct marketing offer (also known as 'pre-screening) is a marketing use of credit report information, and should be prohibited;

(iv) there should be no expansion of the information held in credit reports, at least while there is a lack of consumer protection in relation to irresponsible lending and credit marketing;

(v) where the Privacy Commissioner makes, or refuses to make, a determination under section 52 of the Privacy Act, individuals should have a right to a review of that decision on its merits;

(vi) information relating to minors under the age of 18 should not be listed on credit reports;

(vii) small debts of $200 (indexed) or less should not be listed on credit reports.

This submission makes comment on the following:

Proposals 23-1 to 23-6, 43-2, 43-4, 45-1, 45-7, 50-1 to 50.3, 50-10, 51-1, 52-1 to 52-8, 53-1, 54-1, 52-4, 54-3, 54-4, 54-5, 55-2 , 55-6, 55-7.

Questions 50-2, 52-3, 52-4, 52-2.

2 Regulatory Structure and Complaints Handling (Credit Reporting)

2.1 Regulatory framework for credit reporting

Key points

- We believe that a three tier structure (legislation, regulation and enforceable industry code) could be effective, but outcomes will depend on where various matters are placed within the framework;
- The current performance of the regulator must be examined prior to implementing any reforms.

a. Legal structure

Consumer Action agrees that a structure involving principal legislation, regulations (containing provisions pertaining to credit reporting) and a binding code (covering operational issues) could be appropriate (**Proposals 50-1 to 50-3**) Of key importance is where various matters are placed within the framework. We generally support the points made by Galexia in relation to the regulatory framework[1], and we agree with the Cyberspace Law and Policy Centre that any replacement of Part IIIA and the regulations should be developed together.

[1] Galexia, *Submission to the ALRC, Credit Reporting Regulatory Framework*, for Veda Advantage, December 2007.

b. The Role of the Regulator

We agree with the Australian Privacy Foundation that the OFPC 'is not currently meeting the legitimate expectations of the community, either in relation to complaint handling or in relation to wider roles of advocacy and pro-active enforcement.' [2]

The role played by the regulator is crucial if any proposed reforms are to be effective. Of course the regulator must be prepared to take enforcement action when required, but must also play an active role in monitoring the overall credit reporting system. Increased industry involvement by way of complaints handling responsibilities and an industry code could enhance regulatory outcomes; however such a system requires an active regulator that is prepared to oversee the system, to monitor the effectiveness of industry dispute resolution, to identify whether systemic issues are being reported, and to encourage improvements.

We do not believe that the OFPC is currently in a position to effectively regulate the credit reporting system, and we believe that the solution requires more than simply increasing resources to the regulator. For example, we believe that the OFPC's complaints handling role (including the ability to make a determination) is unusual, particularly for a regulator. However, we believe that it fails to recognise this special role. For example, when it was suggested that the OFPC should publish a manual setting out its complaints handling processes, it responded that 'it does not appear to be a common practice for regulators to publish manuals which set out in great detail their complaint processes.'[3]

The OFPC also objected to the use of strict liability criminal offence provisions because 'strict liability provisions may undermine [the OFPC's] conciliation role.'[4] Again, we believe that this indicates failure to identify and address conflicts between its two key roles.

In relation to civil matters, the OFPC said 'the Office considers that there are few circumstances where the introduction of civil penalties would be appropriate.'[5] Despite its supposed support of the enforcement pyramid,[6] an attitude such as the OFPC's, that incorporates an unwillingness to take unilateral enforcement measures, is not compatible with an enforcement pyramid approach.

We suggest that the attitude towards enforcement that the OFPC has demonstrated[7] undermines the effectiveness of enforcement powers. An important characteristic of an enforcement pyramid is that very serious breaches of the relevant Act result in the matter immediately being dealt with at a 'high' level (for example civil or criminal proceedings). Using an enforcement pyramid model, for the most serious privacy breaches of privacy it

[2] Australian Privacy Foundation, *Review of Privacy, Answers to questions in ALRC Issues Paper 31*, January 2007, page 15.
[3] Office of the Federal Privacy Commissioner, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988*, 2005, page 151.
[4] Office of the Federal Privacy Commissioner, *Submission to the Australian Law Reform Committee Review of Privacy – Issues Paper 32 Credit Reporting Provisions, April 2007*, page 27.
[5] Office of the Federal Privacy Commissioner, *Submission to the Australian Law Reform Commission's Review of Privacy - Issues Paper 31*, February 2007, page 225.
[6] Ibid, page 225.
[7] And which may be, in part, a result of its dual role and primary complaints-handling function.

would not be appropriate to attempt conciliation, but rather to immediately deal with the serious breach at a 'high' level. The public statements of the OFPC, and its historical record, indicate that it does not have the will to approach enforcement in this way.

We believe that there is a strong argument for credit reporting to be regulated by a regulator such as the Australian Securities and Investments Commission (**ASIC**). However, we accept that introducing a new regulator into the system could create difficulties where, for example, issues involve both consumer (credit) protection as well as privacy elements.

We are therefore not proposing that credit reporting should become the responsibility of a different regulator. However, we strongly recommend that the structure and roles of the OFPC be closely examined with a view to significant change within the OFPC in advance of any regulatory reform. We support **Proposal 43-2** as going some way toward improving the organisational structure of the OFPC. We do not, however, agree that in and of itself this proposal is sufficient to reform the OFPC to the point where it would be an effective regulator.

2.2 Complaints handling

Key points

- Credit reporting presents particular complaints handling challenges due, primarily, to the three-way relationship between the consumer, credit provider and CRA (or between more parties if the debt has been sold or transferred to a debt collection agency).
- A key failure in the current system has been the handling of individual complaints by the OFPC, and the lack of any effective oversight of the way industry deals with complaints.
- The process of complaints handling needs to be reformed to provide an effective complaints handling process, which is "seamless" for consumers, requiring minimal referral on (or referral back), and helps in the identification of systemic issues.

a. Weaknesses with the existing system

There are two main weaknesses with the current complaints handling system. Firstly, the complaints handling process is fragmented, requiring consumers to make more than one complaint to more than one organisation.[8] Secondly the OFPC's role as complaints handler is not effective for consumers, nor does it appear to effectively identify systemic problems or gaps in industry complaints handling.

b. Current industry response

We have been pleased to see some significant improvements in recent years both in the role played by Veda Advantage in dealing with complaints, and in the industry body's recognition of the need for effective complaints handling. We believe that industry involvement plays a

[8] Corker, John & Bond, Carolyn, *The merry-go-round: credit report complaint handling under the Privacy Act*, [2001] PLPR 43.

key role in effective complaints handling, and have witnessed in other sectors how quality EDR can have a positive impact on the overall quality of industry complaints handling.

We generally support proposals for complaints and dispute resolution put forward by the Australian Retail Credit Council (**ARCA**), and we support the principle behind ARCA's commitment to a maximum of two consumer contacts in relation to a dispute. We strongly support **Proposal 55-6** which proposes compulsory membership of EDR for credit providers who access the credit reporting system.

The challenge will be to establish processes where gaps are unlikely to occur, and where all industry members have clear obligations that result in complaints being dealt with (rather than lost in the system), and that lead to the identification of systemic issues. The regulator will need to play a key role here, in monitoring how internal dispute resolution (**IDR**) is being handled, identifying any gaps, and in hearing complaints that are not resolved elsewhere.

We believe that a complaint should be dealt with, wherever possible, by either the CRA or the credit provider, depending on where the complaint is made. We support CRAs having a key role in the dispute resolution process, as they are often in the best position to assist consumers and deal with their members. However, we believe that credit providers should deal with complaints that are brought directly to them (and we understand that credit providers want to do this).

While our proposed process appears complex in that it contains two distinct paths for any complaint, we believe that this is preferable to consumers being referred around, and being "lost" in the process as they currently often are.

We propose one model as an example, but accept that there may be variations that also meet the requirements of effective complaints handling.

We propose that:

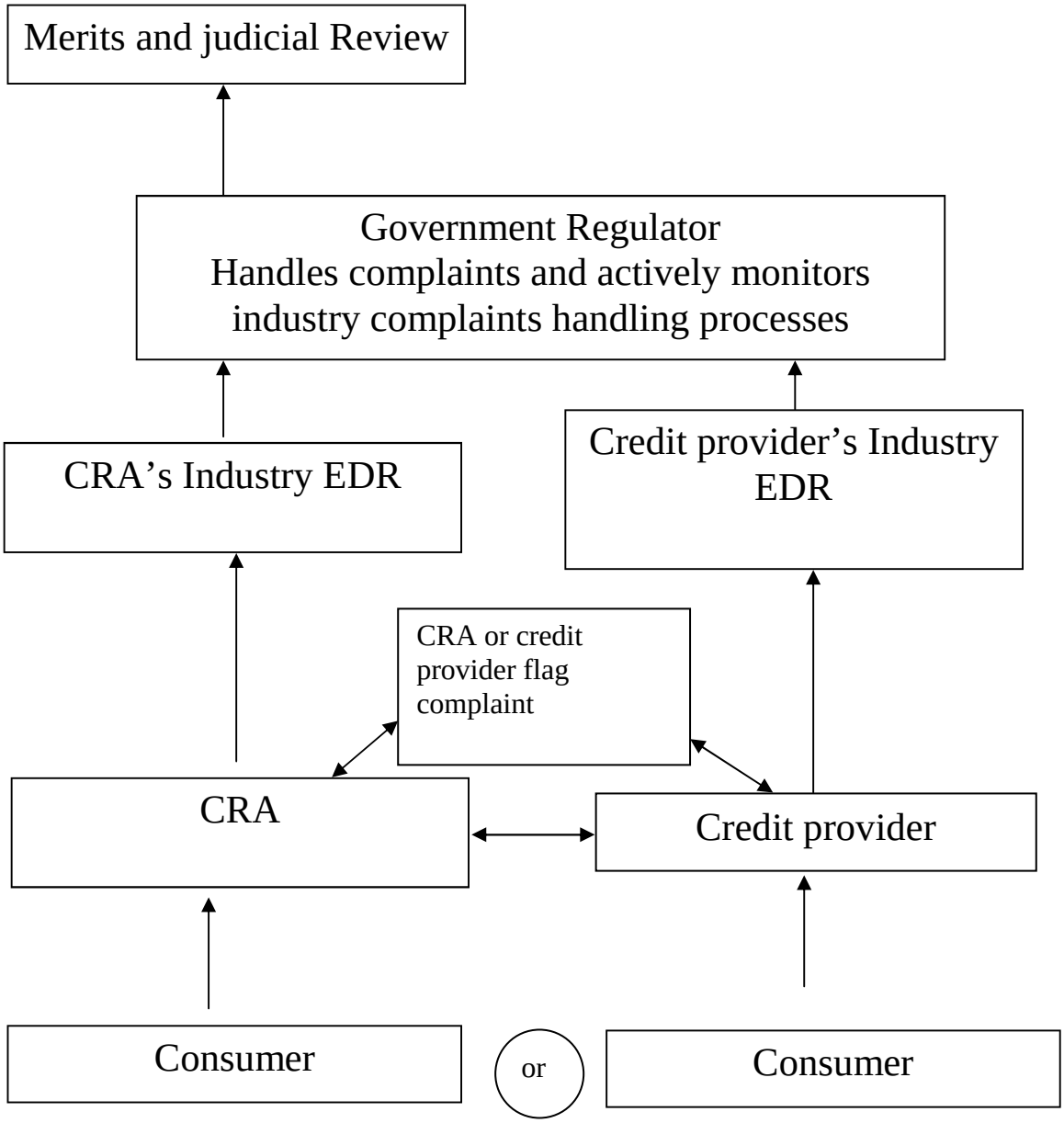
- CRAs and credit providers must have systems in place to receive complaints and respond to any complaint made to them;
- CRAs should have an obligation to communicate with the credit provider about the dispute, rather than referring the consumer to the credit provider;
- Once a consumer disputes a default listing on a credit report, the CRA must require the credit provider to prove the default within a time period (eg. 30 days)[9] after which the default is deleted unless the credit provider produces evidence proving its validity (ie, implement **Proposal 55-7**);
- Time limits should apply to other steps in the complaints handling process;
- Consideration should be given to establishing a central register (probably within a CRA) that would allow credit providers or CRAs to log that a complaint had been made, so that the other party is aware of the complaint. This may also assist CRAs to identify possible systemic problems;
- Should the matter remain unresolved, the consumer will be referred by the CRA or the credit provider to its relevant EDR scheme;

[9] Similar to the *Fair Credit Reporting Act 1970* 15 USC § 1681 (US) s 1681i (5). This subsection requires information that cannot be verified to be deleted.

- If the consumer rejects a determination made by the EDR scheme, the consumer could bring the complaint to the OFPC;
- There should be the right to merits review and procedural review of any decision of the OFPC, including refusal to investigate a matter or refusal to make a determination.

The diagram overleaf illustrates our proposed process for complaints handling of credit report disputes.

Suggested model for complaints handling of credit reporting disputes



3 Marketing

3.1 Direct marketing generally

Key points

- An 'opt out' model of regulating direct marketing must be clear and simple to use so that consumers can elect not to be contacted by direct marketers (similar to the *Do Not Call Register*).
- Marketers should be obliged to inform individuals, on request, of the source of the individual's personal information.

Consumer Action supports the Commission's proposals regarding direct marketing (**Proposals 23-1 to 23-6**). While we believe there is a strong consumer argument for an 'opt-in' model, any 'opt out' model of regulating direct marketing must be clear and simple to use and should ensure that consumers who do not want to be contacted by direct marketers are not so contacted.

We continue to receive consumer complaints about the conduct of direct marketers as well as direct sellers. Consumers are often frustrated by companies failing to tell them where they obtained their personal information.

We note the Commission's discussion of sector specific privacy protection relating to marketing, including the *Do Not Call Register Act* and the *Spam Act*. We agree with the Commission's analysis that the general requirements relating to direct marketing should be set out in the *Privacy Act* and that these requirements should be able to be displaced by more specific sector specific legislation. We also believe that the current sector specific legislation can be enhanced and that consideration should be given to a more comprehensive 'opt out' regime, similar to the *Do Not Call Register*, so that consumers can opt out of all direct marketing (including door-to-door marketing) via a central register.

3.2 Selective direct marketing or "pre-screening"

Key points

- Using credit-reporting databases to refine direct marketing lists involves using credit reports for marketing purposes.
- We do not support allowing "pre-screening", which we believe primarily makes direct marketing of credit more attractive for credit providers.

We do not believe that credit providers should be permitted to use credit reporting information to "pre-screen" credit offers (**Question 53-2**). We understand that 'pre-screening' involves the use of credit reporting databases to aid direct marketing campaigns by

screening out from mailing lists individuals who are not suitable for the provision of credit (for example due to defaults or bankruptcy) or for any other purpose.[10]

It is probably correct that "pre-screening" would lead to quite different outcomes than a general permission to access credit reports for marketing purposes, and we note that industry agree that credit providers should be precluded from supplying criteria to a CRA for the purposes of extracting customer records fitting any particular profile to then solicit business.[11] However, we believe that it is artificial to distinguish between 'selecting out' and 'selecting in'.

Regardless of the type of marketing or promotion (unless the offer is actually "pre-approved"), consumers who are interested in the credit product on offer will submit an application for credit. At this point, the credit provider can access the consumer's credit report, and use this in combination with other data, to assess risk and decide whether or not to approve the application.

Therefore, we fail to see why a prohibition on pre-screening could cause credit to be provided to consumers who have negative information on their credit reports.

Rejecting credit applications made by consumers who have received personally addressed invitations to apply, may cause some consumers to be annoyed. Nevertheless, we do not believe that credit reporting information should be used for the purpose of reducing negative impacts that direct marketing may have on the credit provider's image or brand.

While we understand that many "pre-approved" offers are only conditionally approved, rejection of such offers would pose a higher reputational risk for the credit provider, and we suspect that pre-screening would be even more desirable for credit providers in relation to these offers – particularly when being made to consumers who were not current customers.

However, consumer groups such as ours have concerns about the practice of offering "pre-approved" credit, where from a psychological point of view, consumers seem to be placed in a position of deciding whether to "reject" credit that is already "theirs", in circumstances where the consumer has often had no need or desire to obtain credit. We do not support the use of credit reporting information to assist in the making of these offers, or to make the offering of "pre-approved" credit more attractive to credit providers.

It is too simplistic (and probably wrong) to argue that pre-screening reduces direct marketing offers. Pre-screening may reduce the number of offers in a particular campaign, but overall it could actually increase direct marketing of credit, if it makes such campaigns more attractive to credit providers, and therefore leads to more direct marketing campaigns. It may be that some campaigns would not be viable, or would be less viable, without the capacity to screen potential offerees.

[10] According to the Australian Direct Marketing Association (**ADMA**) website, it may be possible to use pre-screening to determine the amount of credit offered in an unsolicited 'pre-approved' limit increase.
[11] ARCA, *Response to Review of Australian Privacy Law Discussion Paper 72*, Appendix 4.

Credit providers can undertake a risk assessment (and accept or reject any credit application) based on a credit report and other data once an application is made, and a prohibition on pre-screening will not change this.

Should the Commission be inclined to recommend that "pre-screening" is permitted, it would be essential that "pre-screening" be very narrowly defined. Particularly, if the Commission also recommends an extension of the type of information that can be held, "pre-screening" could be used in a variety of ways, to screen-out various factors, to determine "pre-approved" limits and to offer differential interest rates – and it could be used by a larger range of lenders than it is currently (including fringe and sub-prime).

While the process of pre-screening does not involve credit providers directly accessing individuals' credit reports, we do not believe that this addresses the privacy concerns. Consumers would generally be surprised, and concerned, to find that their personal information was being used in this way.

4 Expanding credit reporting information

Key points

- We understand there is general agreement that more credit reporting information would lead to an overall increase in the level of consumer debt. This could lead to an increased number of consumers in default (whether or not there is an overall increase in default rates).
- We agree that access to additional information in credit reports would improve lenders' ability to assess risk, however we fear this could be used as much to increase irresponsible and exploitative lending as it would to achieve "responsible lending" objectives.
- Appropriate regulation of credit marketing and irresponsible lending in Australia could minimise the negative effects of expanding credit reporting information. However this would need to be implemented before consideration is given to expanding credit reporting information.

We recognise that the Commission has proposed a compromise in relation to the level of information that can be held on credit reports (**Proposal 51-1**) and the ARCA have suggested some additional information should be added to this. Regardless of the type of additional information, Consumer Action does not support changes to credit reporting regulation that would allow more kinds of information to be disclosed on credit reports.

We recognise that this review does not encompass consideration of current lending and credit marketing practices. However, in considering whether additional information should be included in credit reports, the Commission is required to make some assessment of whether the impact of access to more personal information is likely to be of overall community benefit.

a. Overall increase in consumer credit.

While, in theory, comprehensive reporting could reduce levels of over-indebtedness, comprehensive credit reporting is likely to lead to an increase in consumer debt (and, in particular, credit card debt). As is the case with real estate mortgage-debt (that has also been growing quickly), credit card debt has risen very quickly over the last 20 years.[12] Unlike mortgage-debt which is characteristically incurred in an investment context, credit card debt is characteristically consumptive, and used to purchase consumables rather than for investment. Credit can help consumers to increase wealth, particularly where credit is used to purchase a home. However, expensive interest bearing credit cards can be a trap for many consumers, and can decrease the consumer's ability to build wealth (for example, the ability to purchase a home).

Key concerns with an increase in consumer debt relates to the types of consumer debt that are likely to increase, and whether the overall numbers of consumers in default will increase (even if default rates decrease or remain constant).

b. Responsible lending

Industry argues strongly that more credit reporting information would lead to more "responsible lending". However, we are not sure what industry means by "responsible lending". While high levels of default would tend to indicate irresponsible lending practices, default levels are not the only indication of consumer harm. For example, the ANZ Financial Literacy Survey in 2005, found that 17 per cent of respondents who have borrowings said they fluctuate between being 'in control' and 'out of control'[13] and a small group of Australians (around 2% of people) who have borrowings feel out of control most or all of the time.[14] Consumers who feel overcommitted, or out of control, with credit may not necessarily default. Debt may be consolidated or refinanced, home equity may be depleted to refinance debts, or individual goals (such as home ownership, study or having a family) may be delayed.

We believe that industry's general approach to "responsible lending" is to aim to remove higher risk consumers from irresponsible credit granting and marketing practices, rather than to address those practices. In fact, we believe that the loud industry call for comprehensive credit reporting to improve "responsible credit provision"[15] is an attempt to divert attention from undesirable marketing and lending practices. Some lending practices that we consider irresponsible include:

- offering "pre-approved" credit limit increases that do not require income information or a full credit report check;
- encouraging consumers who currently maintain high credit card balances to further increase their limits;
- giving a credit card limit of many thousands of dollars (at a high interest rate) to consumers who have only requested relatively small amounts of interest free credit;

[12] Debelle, Guy, *Household debt and the macroeconomy*, BIS Quarterly Review, March 2004, p 52.
[13] ANZ, *Survey of Adult Financial Literacy*, November 2005, p 12.
[14] ANZ, *Media Release*, *Survey of Adult Financial Literacy*, November 2005
[15] ARCA Charter.

- actively marketing to consumers with defaults (particularly those who have equity in their home);[16]
- offering cheap "teaser" rates on expensive credit cards where other balances are transferred, designed to attract consumers who are likely to retain high balances;
- failing to assess capacity to pay when loans are based on the value of house/land; and
- promotions that claim to be "pre-approved", or provide mock cheques or credit cards to encourage consumers to take up more credit.

While additional assessment tools may help lenders to remove some consumers from these offers, they could be used (and are likely to be used) to extend the use of these types of marketing strategies. This would not result in an overall decrease in irresponsible lending.

5 Others issues raised in the discussion paper

5.1 Defining Credit Providers

While we appreciate the desire for simplicity, we do have some concerns with the broad definition of credit provider in **Question 50-2**. Our view is that the number of days allowed for payment is not the key issue, but the amount of risk being taken by the business. For example, allowing 60 days to pay a small account may present little risk, while allowing 5 days to pay for, say, a vehicle that has already been delivered would be a significant risk.

Some entities that would be considered credit providers face minimal risks and arguably do not have a need to access the system. For example, Consumer Action recently saw a letter threatening to list a default in relation to a consumer who had not made their monthly payments to a gymnasium. While we are aware that memberships are often sold on an annual basis, we cannot accept that the risks faced by such a business could justify access to personal credit information (although they would probably fit within the current credit provider definition). Even if the particular gym was a member of a CRA (and it is quite possible that the company was bluffing) we suspect that the benefits of membership would arise to the company from simplifying debt collection (*ie*, by simply threatening listing) than by access to the system to assess risk.

However, it may be impractical to define credit providers on the basis of the level of risk. Therefore issues relating to, what is likely to be, broad access to the system may need to be addressed by ensuring adequate consumer protections that take into account the different practices and problems relating to different types of "credit providers". The current system was not, for example, designed to cover utilities.

Particular issues arise in relation to utilities. Billing disputes, for example, are more likely with utilities than with loans or credit cards – 39 per cent of complaints to the Energy and Water Ombudsman (Victoria) (**EWOV**) related to billing. Billing errors are often caused by

[16] A recent Australian websearch of "consolidation" and "defaults" identified 10,300 results – many of these were finance brokers offering credit to those who had a "bad credit rating", sometimes including "unpaid defaults".

new or defective billing systems, or occur when consumers change address. Even where the consumer does advise their utility of a change of address (usually by telephone), bills are often sent to the old address. This happened to a Consumer Action staff member, and we understand has been the basis of some complaints to EWOV. The impact of an error (even if it is the error of the company) can result in a negative report that can remain for years, often without the knowledge of the consumer.

It is vital that the regulations take into account key differences between types of credit providers that can access the credit reporting system.

5.2 Investigating Privacy Complaints

Consumer Action does not oppose the recommendation in **Proposal 45-1** that the OFPC be given explicit powers to not investigate (or not investigate further) complaints that have been withdrawn and complaints where the complainant has not responded to the OFPC following a request for response.

However, Consumer Action has serious concerns in relation to subsection (c) of Proposal 45-1. We have some concerns about the OFPC refusing to investigate complaints, even complaints that raise potentially serious and systematic questions about credit reporting data quality. Our recent experience in making a representative complaint to the OFPC illustrates this problem.

In June 2006, we made a complaint to the OFPC about systematic inaccurate default listings in relation to Telstra debts that had been bought from Telstra by Alliance Factoring. The OFPC took 13 months to reply to our complaint.[17] In its reply, the OFPC decided not to investigate the complaint on the basis that there had been no interference with the individuals' privacy.[18] This decision was based on the OFPC's interpretation of a section of the Privacy Act, relating to the key issue of notification – an interpretation that Consumer Action disagreed with. In response to the OFPC's reply, Consumer Action requested that they make a formal determination under section 52. The OFPC refused this request, stating that as no formal investigation had been initiated no determination would be made.

It is a significant regulatory failure, that the regulator's interpretation of a key provision of the law, is simply reflected by a decision not to investigate. This incident highlights the problems with the OFPC's right to refuse to investigate complaints or to make determinations. [19]

The most likely response of the OFPC is to refuse to conduct even a preliminary investigation of the complainant's complaint. For the financial years 2004/2005, 2005/2006, and 2006/2007, the OFPC has refused to make preliminary investigations of 62%, 60% and

[17] The OFPC's first response, letter dated 24 May 2007, is attached to this submission in Appendix A.
[18] *Privacy Act (Cth) 1988* section 41 (1) (a).
[19] Despite identifying in its 2004/2005 Annual Report that it would review its complaints handling process to consider circumstances in which it would be appropriate to make greater use of its determination-making power in s. 52, the OFPC has noted in its last two annual reports that it has made no determinations. See, Office of the Federal Privacy Commissioner, *Annual Report 2004/2005; Annual Report 2005/2006; Annual Report 2006/2007*.

52% of complaints respectively.[20] Thus, in the majority of cases, the OFPC summarily dismisses the complaint. Of the remainder of complaints, the vast majority is subjected to a preliminary investigation (such as occurred in relation to our representative complaint outlined above) but the complaint is closed with no action taken.

Because of the OFPC's current failure to investigate so many complaints, Consumer Action does not support extending this power by allowing the OFPC to refuse to investigate a complaint were investigation 'is not warranted having regard to all the circumstances.' The OFPC already has the power to not investigate complaints that are frivolous, vexatious or lacking in substance.[21] This is more than sufficient to allow unworthy complaints to be summarily disposed of. Giving the OFPC wide discretion to refuse to investigate complaints is inadvisable considering the OFPC's history of using section 41 to refuse to investigate complaints.

5.3 Appeal rights where the OFPC refuses to investigate a complaint or refuses to make a determination.

As outlined above, the OFPC often summarily refuses to investigate complaints, and where it does not summarily refuse, it usually makes a preliminary investigation and refuses to make a formal investigation or determination. For example, even if the consumer is dissatisfied with an offer of resolution made by the credit provider, the OFPC can simply cease to investigate (rather than make a determination) on the basis that it believes the offer is appropriate. In this way, the OFPC makes a decision on appropriate compensation, for example, but is "saved" from that decision being subject to appeal.

Consumer Action agrees with **Proposal 45-7**, but notes that this proposal should be expanded and clarified. Consumers should not be disadvantaged by the OFPC's refusal to investigate their complaint. Therefore, we recommend that merits review be made available in circumstances in which the OFPC refuses to investigate a complaint based on a section 41 ground.

Giving individuals the right to merits review of a section 52 determination, but not the right to merits review of a refusal to make a section 52 determination, is self-defeating. If the OFPC has refused in to make determinations in the past, when its decisions were only partially subject to merits review, it is likely to do so when Proposal 45-7 is implemented, and its determinations are more widely subject to merits review. Proposal 45-7 should give individuals the right to merits review in circumstances where they have requested the OFPC to make a section 52 determinations and the OFPC has refused to do so.

5.3 Minors under 18

Consumer Action supports **Proposal 52-8** prohibiting the collection of credit reporting information about individuals the credit provider or CRA know to be under 18. This should be extended to where a credit provider "ought to know" that the individual is 18. Consumer

[20] Office of the Federal Privacy Commissioner, *Annual Report 2004/2005*, page 43; *Annual Report 2005/2006*, page 36; *Annual Report 2006/2007*, page 49.
[21] *Privacy Act (Cth) 1988* section 41(1)(d).

Action recommends that a further recommendation be made requiring CRAs to delete information about individuals under 18 upon being notified that the information was listed when those individuals were under 18.

5.4 Data quality

Consumer Action supports **Proposals 54-4** and **54-5**. Proposal 54-4 should be expanded to impose an obligation on credit providers and CRAs to report systemic errors. These reports should be lodged with the government regulator. Reporting could include information about the credit provider's (or CRA's) response to the errors, and subsequent reporting of the action taken. Failure to report systemic issues should lead to significant penalties, as we suspect that otherwise there would be little incentive to make such reports. Similar obligations to report significant breaches of regulatory obligations to the regulator in the financial services sector has contributed to many systemic issues being identified and addressed by industry in a timely manner.[22]

5.5 Investigative powers

Part V of the Privacy Act outlines the OFPC's investigative powers, and includes the power to obtain documents and examine witnesses. The Commission has proposed that the OFPC's enforcement powers be expanded. Enforcement powers are only effective if the enforcement body has sufficient investigative powers to allow it to gather the necessary information to take enforcement action. If the OFPC were given greater enforcement powers, it would be wise to review its investigative powers, to see whether further powers are needed. The powers given to ASIC under the ASIC Act[23] are far more expansive than those currently given to the OFPC. Considering ASIC's very wide regulatory remit, it may be justified for a privacy regulator to have more limited powers. However, it may be appropriate for the Commission to review the ASIC Act with a view to using the powers granted to ASIC as a template for how further powers could be given to the OFPC.

5.6 Listing of small debts

Consumer Action supports **Proposal 55-2** recommending that there be a provision allowing a minimum value of debts that can be listed. We suggest that this should be $200, and that this amount is indexed. We have two concerns with the listing of small debts. Firstly, there have been significant problems in data accuracy where small utility/telecommunication debts are sold to debt collectors, resulting in systematic errors in credit reports. The small amount of these debts means debt collectors are less likely to pursue consumers vigorously or to commence litigation before listing the debt, with the result that consumers are less likely to become aware of a debt being sought from them erroneously. The result of this is that data errors for small debts are less likely to be detected.

Secondly, our experience is that the threat of listing small debts is used as a debt collection tactic (often in circumstances where the debt is disputed). Legal Aid Queensland notes that

[22] *Corporations Act 2001* (Cth), section 912D

[23] *Australian Securities and Investments Commission Act (Cth) 2001*, Part III.

industry has admitted using credit reporting, as an alternative enforcement method to court action, as a debt collection method.[24]

The disadvantage consumers suffer from inaccurate listings of small debts, and the threat of listing a small debt as an enforcement tactic to force consumers into paying a disputed debt, outweigh the benefit of allowing listing.

5.7 Advisory committee

Consumer Action largely supports **Proposal 43-4**. We have little knowledge of the effectiveness of the current Advisory Committee, however, we note that an Advisory Committee is only effective if it comprises individuals with the appropriate range of expertise, and if the regulator is prepared to genuinely consider the advice. The existence of such a committee gives the public impression that the regulator takes advice from a range of experts. It is important that such a Committee is not simply "window dressing". Proposal 43-4 should recommend that at least one member of the Privacy Advisory Committee be drawn from the consumer sector.

5.8 Identity theft

In relation to **Proposal 52-1,** we believe that the option for a consumer to "freeze" the credit report, as proposed by Veda and ARCA, may be more effective than placing a flag on the credit report, as long as the consumer retained the right to "unfreeze" the report.

5.9 Serious credit infringement

A serious credit infringement should be clearly defined, and should only include fraud if fraudulent conduct has been proved. The current definition is too broad, in that there can be a severe impact on a consumer based on a credit provider's opinion. Despite Veda limiting such a listing to where a consumer has failed to give forwarding address, there are still problems with these listings. For example, failure to provide a forwarding address immediately, even if one is provided weeks later, could potentially lead to a consumer having a "clearout" listing for 7 years. This is most likely to occur with utilities, where it can be easier to overlook notifying change of address. Therefore, the definition should be applied differently depending on the type of debt involved.

5.10 Use and disclosure of credit reporting information

We agree with **Proposal 53-1**, that the (Credit Reporting Information) Regulations should provide a list of circumstances where credit reporting information can be disclosed or used. We would be concerned about any extension of circumstances that allowed access at times other than when the consumer made an application, apart from limited uses in relation to debt collection by the credit provider. Any ability to access credit reports of current

[24] Kreet, Loretta and Uhr, Catherine, *Letter to the Office of the Federal Privacy Commissioner dated 9 June 2006: Review of credit provider determinations concerning Assignees and Classes of Credit Providers*, Consumer Protection Unit, Legal Aid Queensland, page 11.

customers, other than at the time of application, could enable the use of credit reports for targeted marketing to current customers.

5.12 Informing individuals about credit report listings

In addition to being informed about the use of personal information at the time of making a credit application, consumers should be informed whenever significant information, such as a default or serious credit infringement, is added to their credit report and whenever a debt is assigned (**Question 52-3, 52-4**). We are not sure of the best mechanism to do this, but it may be that credit providers are in the best position to provide this information. In relation to an assignment, we suggest that the credit provider that is assigning the debt would be best placed to have this obligation. However, some monitoring would be required to ensure that this information was provided to consumers.

5.13 Business purpose credit

We are aware that ARCA disagrees with **Proposal 50-10**. We understand ARCA's concerns about covering business suppliers (that may not provide any credit for consumer purposes) but would have concerns about excluding information relating to credit advanced to an individual for a business purposes loan from the regulation. This information is, we understand, often used to assess individuals for consumer credit. An individual denied consumer credit on the basis of this information, should have the same rights and protections as if the decision had been effected by information relating to credit for consumer purposes.

5.14 Statute barred debts etc

We agree with **Proposal 54-1**. Anything other than this prohibition would enable credit reporting to be used to enforce payment where payment couldn't be enforced through the Courts.

5.15 Repayment arrangements

Care must be taken in relation to reporting overdue payments relating to new arrangements (**Proposal 54-2**). This could place a consumer who enters into an arrangement to pay (who may already have a default listed) in a worse situation than a consumer who doesn't enter into such an arrangement, in that the consumer with the arrangement could have two default listings for the same debt and may have a negative credit report for a longer period. If a default has previously been listed, it may be preferable to note that there is a payment arrangement on foot, and remove that note if the arrangement fails.

5.16 Credit reporting agency obligations

We support **Proposal 54-3**. However, they key to the effectiveness of these regulations will be how they can be enforced. As well as having an obligation to enter into particular agreements with credit providers, credit reporting agencies should have an obligation to enforce compliance with those agreements. Some auditing (internal and/or external) by credit reporting agencies, and a requirement to report to the regulator could be an efficient

way of monitoring some aspects of compliance by the credit provider, as well as the credit reporting agency.

5.17 Obligations re accurate and up-to-date information

We agree with **Proposal 54-4**; however this appears similar to current obligations which seem difficult to enforce. There is a need for interpretation of "reasonable steps" for example, and for clear disincentives such as penalties for failure to comply – even if the failure is unintentional.

Should you have any questions about this submission, please contact us on 03 9670 5088.

Yours sincerely
CONSUMER ACTION LAW CENTRE

Carolyn Bond
Co-CEO