



**Australian
Privacy
Foundation**

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ASIC CONSULTATION PAPER 198

**Review of the effectiveness of an online
database for small amount lenders**

Submission to ASIC

February 2013

The Australian Privacy Foundation

The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. Since 1987, the Foundation has led the defence of the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. For further information about the Foundation and the Charter, see www.privacy.org.au

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Publication of submissions

We note that we have no objection to the publication of this submission in full. To further the public interest in transparency of public policy processes, APF strongly supports the position that all submissions to public inquiries and reviews should be publicly available, except to the extent that a submitter has reasonable grounds for confidentiality for all, or preferably part of, a submission.

Introduction

It is almost incredible that this consultation paper should pay so little attention to the privacy implications and relationship to existing privacy law affecting credit reporting. There is no indication that ASIC has consulted either with the Information law section of AGD (responsible for the credit reporting provisions of the Privacy Act 1988, including recent major amendments) or with the Office of the Australian Information Commissioner (OAIC) which is the regulator for those provisions.

We are similarly disappointed that as a major stakeholder and participant in the policy debate on regulation of consumer credit reporting for more than 25 years, the Australian Privacy Foundation was not specifically consulted earlier or specifically notified of the current consultation paper. We only became aware of it recently from colleagues in consumer NGOs.

We understand that a new database would be a valuable tool for ASIC as the regulator to monitor performance of small amount lenders and their compliance with new responsible lending obligations which take effect in March 2013. However, this benefit needs to be balanced against the privacy and consumer protection risks for individuals. Mandatory reporting to a new database would in effect be another exception or 'licensed breach' of the default privacy principle of no secondary use of personal information without free and informed consent. The existing consumer credit reporting system already represents such an exception, authorised by the Privacy Act 1988, but with a strong set of accompanying standards and safeguards.

Para 54 of the consultation paper states:

“Small amount lenders are not required to list any loans they enter into with a consumer in a database or similar system, nor with any credit reporting agency, and are currently unable to share details with other credit licensees about any credit they have entered into because of privacy law restrictions.”

This is misleading – small amount lenders would be able to share information if they subscribed to a credit reporting agency, as they are able to do. The Privacy Act creates a regulated framework for sharing of consumer credit information – established since 1989 and exhaustively debated through several subsequent rounds of proposed reforms – leading to the recent major changes, which will take effect in March 2014, and which were expressly designed to complement new responsible lending obligations. Privacy law does not therefore restrict sharing of credit information – it expressly provides for it.

While it is not expressly argued, there seems to be a presumption in the consultation paper that participation in the credit reporting system is not practicable for small loan lenders, partly because it would cost too much. But there is no detailed analysis of how a new separate database could operate, presumably on a cost recovery model, at significantly lower cost per transaction, at least if the same standards – for data quality, security, dispute resolution etc – applied, as they should. It would be completely unacceptable for the vulnerable consumers involved in small amount loans to have significantly lesser consumer and privacy protection than applies to other borrowers. At a minimum, any new database would need to be subject to the same conditions, controls and safeguards as apply under Part IIIA of the Privacy Act to mainstream consumer credit reporting, including mandatory access for consumers to independent external dispute resolution.

We draw attention to the ongoing problems with tenancy databases as an example of unacceptable 'cheap and dirty' systems open to significant abuse and consumer detriment. The major tenancy database was the subject of adverse complaint determinations by the Privacy Commissioner in 2004, but there appears to have been no subsequent pro-active monitoring of its operation (two casenotes on relevant complaints were published in 2006 and 2007 – both highlighting data quality issues, but complaints experience is an unreliable indicator given the loss of confidence by tenants and consumer NGOs in the complaint handling function of the Privacy Commissioner/OAIC). Tenant support NGOs will be able to supply evidence of the continuing problems.

If it is decided, in light of experience post March 2013, that sharing of additional information is desirable, we strongly submit that this should be arranged through the existing credit reporting systems rather than by the creation of a separate new database, with all of the overhead costs, governance and quality control issues that would present.

It may be that the information sharing needs in relation to small amount loans would justify a separate 'stream' within the existing credit reporting system. This could perhaps involve less information and streamlined processes that could reduce the per transaction cost to a level more appropriate for small loans (given that these costs are likely to be passed on to borrowers).

We can see no reason why participation in a small amount loan stream within the regulated consumer credit reporting system, regulated under the Privacy Act, could not be made a condition for small amount lenders – effectively making it mandatory (as it is for other licensed credit providers).

It is clearly impossible for a new database to be designed and brought into operation before the new 'presumption of suitability' obligations commence – and unlikely to be possible in less than 6-12 months. There will therefore be a lengthy period during which the obligations will have to be met by reference to information already available to lenders, such as bank statements supplied by applicants for loans. It would seem appropriate to see whether in practice use of these tools are sufficient before committing to a whole new system of information exchange, which may not prove to be necessary.

We submit that the consultation on this proposal be extended, and broadened to include the AGD, OAIC and relevant NGOs including APF, with far more analysis and discussion about the privacy implications, and about the obvious relationship between the proposed database and the existing consumer credit reporting system regulated under the Privacy Act. Ideally, ASIC should commission a full privacy impact assessment, as recommended by the Privacy Commissioner for major privacy intrusive projects, to properly inform policy development in this area.

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