Credit Reporting: Getting it right for consumers

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Part 1

Background

1 Introduction

Access to credit is important to consumers, and it is increasingly difficult to live a "normal" life in today's society without credit. Despite this, most consumers are unaware of the details of the invisible system of information exchange that has the power to greatly influence their ability to access credit – the credit reporting system. Consumer assistance agencies, such as the Consumer Credit Legal Centre (NSW) Inc ("CCLC"), financial counselling services and other similar legal services around the country, receive regular complaints from consumers who have been affected by the credit reporting system, and either do not understand the system, or feel they have been treated unfairly by the system, or both.

This report is the result of a project funded by the Victorian Consumer Credit Fund involving:

- A written survey of consumer caseworkers;
- Interviews with a small sample of industry participants including credit providers, brokers, and credit reporting agencies; and
- Analysis of material from previous consumer reports and submissions, and CCLC client experiences.

This report seeks to compile and categorise the experiences of consumers, as reported by caseworkers from consumer assistance agencies and consumers themselves, and to analyse those experiences in the context of current credit reporting practices, the law and the surrounding regulatory framework.

The report also makes recommendations about how some of these issues could be addressed. These recommendations represent the views of CCLC. In forming these views we have taken into account the opinions of other caseworkers as expressed in the survey that formed part of this project, but the final views presented are those of the CCLC only.

This report does not purport to represent the views of the credit industry in relation to any of these issues. While some industry participants generously donated their time to talk to the project officers, the purpose of those interviews was to identify or confirm some aspects of industry practice, and to seek to understand the opinions of industry on some issues, in order to ensure that the recommendations in this report are not based on misunderstandings about current practice or future directions.

The research project seeks to address each of the following questions:

- What is the consumer experience with credit reporting? Are there particular recurring problems? If so, what are they? What are some of the practical adverse effects as a result of these problems?
- To what extent can the problems be attributed to the practices of credit providers, credit reporting agencies or other factors?

- Is the present regulatory and enforcement framework sufficiently effective in dealing with these problems?
- How effective is the Office of the Privacy Commissioner in handling complaints about credit reporting, and in particular, are the remedies available adequate to address the problems which may arise from incorrect or unfair listings?
- What recommendations can we make to ensure that the credit reporting system is fair, transparent, accurate and consistent, with proportionate consequences?
- What are the minimum parameters that should be in place in terms of accountability to consumers?

This report is a document that advocates for improvements in consumer protection. It takes as a starting point that:

- Information about an individual's financial obligations, and whether or not they are able to meet those obligations, is sensitive and essentially a private, civil matter between that individual and their creditors;
- The credit reporting system operates with legislative sanction in contradiction to the above right of privacy in order to facilitate an efficient credit market by enabling credit providers to better manage risk. That legislative exception should be carefully crafted and controlled so as not to impinge unnecessarily on the essential right to privacy;
- Denying an individual access to credit is a serious matter. The credit reporting system should provide transparency, accountability, procedural fairness and sufficient flexibility as to avoid unnecessary injustice.

1.1 Parameters of Project

This project analyses the current consumer credit reporting system in Australia. "Credit reporting system" is a broad term used to encompass all aspects of credit reporting, including, but not necessarily limited to:

- practices and polices of credit reporting agencies;
- practices and polices of credit providers and other subscribers to credit reporting agencies;
- Part IIIA of the *Privacy Act*;
- the Credit Reporting Code of Conduct;
- the Office of the Privacy Commissioner ("OPC"); and
- any relevant external dispute resolution scheme ("EDR Scheme").

Despite its topical nature, this project does not purport to answer the question of whether or not the credit reporting system should be extended to include additional data prohibited under the current law ("comprehensive" or "full-file" reporting). The question of what data is necessary or suitable for the credit reporting system in the Australian context will require large-scale economic data analysis that is clearly beyond the scope of this project. While comprehensive reporting is discussed in this report, the focus of this

project is on developing basic consumer protection principles, and appropriate systemic checks and balances, that should apply regardless of the amount and type of data collected.

1.2 Structure of this report

This report has four parts. The first part sets out the background to the project including the methodology and recent developments in relation to credit reporting and its regulation. The second part presents the results of the research, including the results of the caseworkers surveys and a very broad overview of the content of the interviews with industry participants. The third part contains an in-depth analysis of the results of the research and makes recommendations. The fourth part consists of the Appendices.

2 Methodology

There is little research and literature on Australia's credit reporting system, and even less from the consumer perspective, as distinct from economics or business viewpoints. In undertaking this research project, we aimed to explore the consumer experience with credit reporting, but at the same time we sought to understand the perspectives of all other major stakeholders by interviewing lenders, credit reporting agencies, brokers, policy officers and privacy academics.

2.1 Caseworkers Questionnaires

As a financial counselling and legal advice service, CCLC was concerned about the various difficulties faced by consumers with respect to credit reporting. In 2004, sixty people contacted CCLC in the context of a survey in relation to debt collection to express their dissatisfaction with the credit reporting system. Of those callers, 29 alleged that their credit reports contained inaccuracies, and a further 23 contended their report was accurate but unfair in the circumstances. In attempting to get the inaccurate or incorrect listing removed, only 6 had made a complaint to the Office of the Privacy Commissioner, and of those, there was only 1 instance where the incorrect listing was removed.

In April 2004, CCLC released its research report into debt collection.[1] A section of the report examines the problems in relation to credit reporting in the context of debt collection. Credit reporting and the application of the *Privacy Act* are discussed in Chapter 9 of the report, but discussion of general concerns in the context of other problems also occurs elsewhere in the report. The extent of the credit reporting problems identified by the project is demonstrated by the lengthy case studies that illustrate some of the detrimental effects of credit reporting on consumers.

Since then, there have been moves by the credit reporting agencies, industry and regulators to address many of the concerns identified. For example, ASIC and the ACCC revised their debt collection guideline which now specifically refers to privacy obligations to debtors, particularly with respect to credit reports,[2] and Baycorp Advantage, a credit reporting agency, has a new policy of not listing debts below $100.00.

Accordingly, we were concerned to see whether the consumer experience of credit reporting had improved. We devised a questionnaire to send to caseworkers around Australia who deal with consumers directly either through the provision of legal advice

[1] Consumer Credit Legal Centre (NSW) Inc. *Report in relation to Debt Collection* April 2004.
[2] Australian Securities and Investments Commission and the Australian Competition and Consumer Commission, *Debt Collection Guideline: for collectors and creditors,* (2005), Part 2 section 7; Part 2 section 19.

and or financial counselling. A copy of the questionnaire is included as Appendix E. We acknowledge that the questionnaire is not designed to determine the general consumer experience with credit reporting, but rather, to ascertain in detail what sorts of problems are experienced by those consumers who do present with complaints, and the consequences. As such this report does not purport to quantify the number of problems there are overall with the credit reporting system, but merely to analyse the types of complaints that do occur and to suggest solutions to effectively address those problems.

CCLC sent out the caseworker questionnaire to 15 specific caseworkers who are known to have had significant experience dealing with credit reporting issues. The list of caseworkers included consumer credit legal service caseworkers, financial counsellors, and Legal Aid Commission solicitors. We also sent out a general request in CCLC's quarterly electronic publication, which is sent to all consumers and consumer representatives, financial counsellors, caseworkers and legal centres.

CCLC received a total of 16 responses, 13 from its targeted solicitation and 3 through the general mail-out.

2.2 Interviews with credit providers and brokers

To inform the report about the actual processes of credit reporting and how information on credit reports is used, we also arranged to interview credit providers and finance brokers. We interviewed representatives from a total of four credit providers. Each credit provider was confidentially interviewed for between one to three hours. These interviews were structured around a list of questions, which was provided before the interview. A copy of the questionnaire is included as Appendix F.

We conducted two telephone interviews with mortgage brokers contacted through the Mortgage Industry Association of Australia (now the Mortgage and Finance Association of Australia). Each interview lasted approximately 20 minutes.

2.3 Interviews with credit reporting agencies

We first contacted Baycorp Advantage (now Veda Advantage Ltd)[3] in the initial stages of planning for this project for preliminary consultation. Once we developed a comprehensive structure for our project, we then contacted both Baycorp and Dun & Bradstreet for individual interviews lasting approximately one to two hours each.

[3] In this report we continue to refer to them as Baycorp as this was their name at the time of the research, and also the name with which most people are familiar.

2.4 Interviews with privacy advocates

We consulted with two privacy advocates with vast knowledge of and experience in privacy and privacy law to contribute to our project. The interview lasted for approximately two hours.

2.5 Guiding Questions

Before commencing our research, we formulated a series of questions to help us define the scope of the information we wanted to obtain from each group of stakeholders. These questions formed the basis of our interviews and questionnaires.

2.5.1 Survey of caseworkers

- Do caseworkers have clients (or people seeking assistance from their service) who feel they have been, or may be, unfairly denied credit because of their credit report? How frequently?
- What types of problems do clients/people contacting casework services experience in relation to credit reporting?
- In the opinion of caseworkers, how successful is the general public in resolving their credit reporting issues? Why do caseworkers think people are or are not successful in this regard? On what experience/information do they base this opinion?
- What strategies do caseworkers employ to resolve credit reporting issues for their clients, or to assist the person/client in resolving a credit reporting issue?
- How successful are caseworkers in resolving credit reporting issues?
- In cases caseworkers have been involved in, which features of the current system worked/helped and which ones didn't? Which features of the current system were a hindrance?
- Are caseworkers aware of people who were unfairly denied credit on the basis of a credit report listing that is later removed? Do these people suffer a loss and are they adequately compensated?
- What changes to the credit reporting system might caseworkers suggest to improve the resolution of disputes?
- Are caseworkers aware of situations where there is no legal solution to a credit reporting problem and yet it does not seem logical or fair that the person should be denied credit? Examples?
- What changes to the credit reporting system might caseworkers suggest to ensure that the credit reporting system does not lead people being unfairly denied credit?
- Relevant case studies

2.5.2 Interviews with lenders

How does credit reporting assist in their lending decisions?

- Do lenders use the current credit reporting system, how often, and for what purposes?
- How do they access the credit reporting system (telephone, fax, computer network interface)?
- How do listings impact on their credit assessment processes (including but not limited to) credit scoring? Include queries about (i) how enquiries impact on their lending decisions, (ii) whether they distinguish between types of default listing and (iii) in what way, do they take into account customer notations etc.
- Do they take into account of direct customer explanations?
- Do they think the current credit reporting system provides useful and reliable information? Why or why not?

How do lenders make listings?

- In what circumstances do creditors make entries on a customer or potential customer's credit report?
- Do lenders always obtain consent from customers/potential customers for obtaining a copy of their credit report? Do they give notice?
- Do lenders make adverse listings without having first obtained a privacy consent or giving a privacy notice to this effect at the time the loan was entered into?
- What are the policies and procedures for accessing or amending a credit report (including any notices to the customer before or after any addition/change to their credit report)?
- Are these processes subject to any form of audit or quality control?

How do they handle complaints?

- What are the procedures for dealing with credit reporting complaints?
- How often do such complaints arise?
- How efficient is the system as it currently operates in resolving such disputes?
- What aspects of the system do lenders find helpful or obstructive in resolving credit reporting disputes?

Suggestions for improvement

- What changes to the system would lenders suggest to improve dispute resolution?
- What changes to the system would lenders suggest to improve the overall quality of lending decisions?

2.5.3 Brokers

- How does credit reporting assist or hinder brokers in their work?
- Is there any difference between the type of default on the credit report ie a loan default or a telco default in getting a loan?
- In their experience have people had many problems with their credit report?

- What are the brokers' procedures for responding to a situation where a client has a default or other negative listing on their credit report?
- Is their response any different if the person disputed the accuracy of the report?
- Does the broker access credit reports, or list defaults? If so, what are the procedures, and how would their deal with complaints?
- How often do such complaints arise?
- How effective is the current credit reporting system in supporting appropriate lending decisions?
- What recommendations for change would they make, if any?

2.5.4 Consultation – Credit reporting agencies

- What dictates the operation of the credit reporting system apart from the *Privacy Act* and the Credit Reporting Code of Conduct?
- To what extent does the system ensure that credit reports contain consistent, comprehensive (from all credit providers) and up-to-date information?
- Are there any limits on the size and age of alleged debts which can be the subject of adverse default listings?
- What is the breakdown of types of business which have access to the credit reporting system? Is there any distinction between types of members and types of access?
- What is the breakdown of types of business which make listings?
- What incentives/disincentives are there for credit providers to provide information, to follow appropriate procedures and to ensure that information is accurate and up-to-date?
- How often do credit providers use the provision in the *Privacy Act* which allow them to note on a person's credit report that they are a "current credit provider"?
- Are there any areas of the law or the Credit Reporting Code of Conduct which they feel hinders their ability to meet their objectives without providing any substantial protection to consumers?
- Would they suggest any changes to the law or other aspects of the regulatory framework to improve their ability to meet the needs of consumers while continuing to deliver outcomes for their customers?

3 Recent Developments

The regulatory framework for Australia's credit reporting system is discussed in detail in Appendix A. The operation and enforcement of federal and state privacy legislation and codes of conduct have been the subject of multiple recent and continuing reports and reviews. These inquiries have focused on the practical realities of those provisions, in particular Part IIIA of the *Privacy Act* and the Credit Reporting Code of Conduct 1991 which was made pursuant to s18A(1) of the *Privacy Act*.

3.1 Review of the Private Sector Provisions of the Privacy Act

In 2004, the Attorney General requested that the Federal Privacy Commissioner review the operation of the private sector provisions of the *Privacy Act*. As a result **"Getting in on the Act: The Review of the Private sector Provisions of the *Privacy Act* 1988"**[4] was released by the Office of the Privacy Commissioner ("OPC"). Private sector provisions, also referred to as National Privacy Principles ("NPPs"), operate alongside the Part IIIA provisions. The terms of reference of that review excluded credit reporting under Part IIIA of the Act, and the credit reporting provisions were reviewed only insofar as they related to the private sector.

Amongst its deliberations, the report discusses the following of relevance to credit reporting:

- the lack of stringent penalties for potential breaches of the obligations set out in the NPPs including those that relate to the handling of personal information in the credit reporting sector. The report contrasts this with the existence of specified offences in Part IIIA of the *Privacy Act* for breaches of one of the credit reporting provisions. One such provision that was highlighted is s18K, which limits disclosure of personal credit information by the private sector.[5]

- the less rigorous enforcement of the private sector provisions including those related to credit reporting. The OPC noted that the private sector provisions were meant to be a "light touch", and as such their enforcement did not comprise of the standard auditing and other related powers of the OPC that are relevant to the enforcement of the public sector provisions.[6] Notably, the OPC does not at present have auditing power in relation to the private sector provisions.[7]

[4] Office of the Privacy Commissioner, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988* (2005).
[5] Ibid 125.
[6] Ibid 128.
[7] Ibid 157.

- the concerns regarding systemic problems surrounding the complaints handling process of the OPC. Issue was taken with the strong emphasis of both the OPC and to an extent the *Privacy Act* itself with individual-based complaints. As many academics and stakeholders stated, this has served to severely limit the ability of the OPC to identify and attend to the common systemic issues. The inability of the OPC to address the fundamental problems, including those relating to the credit reporting sector have meant that there is still no incentive for credit providers to correct systemic flaws in their handling of private information about individuals.[8]

- the compounded and related effect of the OPC failing to extensively use its statutorily conferred powers to deal with these systemic issues as they relate to the credit reporting sector and in other areas of the privacy law framework. The most relevant provision is the own motion investigations pursuant to s40(2) of the Act.

- the need to increase the extent to which consumers are aware of their rights in relation to complaints processes and how to exercise them. The report made note of the Credit Reporting Code of Conduct paragraph 3.7 which requires organisations to make their consumers aware of their right to complain to the OPC if the credit reporting agency is unable to resolve the dispute. This was contrasted with the lack of any such requirement under the NPPs. Such requirements are needed to improve systemic issues.

- the number of submissions to the OPC that pointed to a lack of appropriate safeguards to prevent the inaccurate listings reported to credit reporting agencies by credit providers. The submissions particularly pointed to past examples in the credit reporting industry that revealed systemic problems with inaccuracy and detriment to consumers.[9]

The OPC review of its own complaints handling process was reflective of its approach in handling complaints. The large proportion of matters were closed on the basis of s41(2)(a), that is that the respondent has adequately dealt with the matter. The final determination powers have only been used by the Commissioner in two cases in the last 12 years. The OPC noted that the s52 powers were designed to prohibit certain acts or direct the organisation to act in a particular manner.[10] The report noted that as a consequence it has left other provisions of the *Privacy Act* such as s55A untouched. Section 55A enables complainants to approach the Federal Court or Federal Magistrate's court to seek a new hearing.

[8] Ibid 135.
[9] Ibid 267 – 268.
[10] Ibid 318.

3.2 OPC budget increase

Following on from the review report, the OPC will be focused on improving its complaints handling procedures, particularly in reducing the complaints backlog, making greater use of determinations to settle complaints earlier in the complaints process[11] and implementing or improving its complaints handling manual. The OPC also intends to initiate more own motion investigations.

The OPC will be receiving an extra $8.1 million in funding over next four years under the 2006/07 Federal Budget.[12] As a result, the OPC intends to improve complaints handling processes and is increasing its staff levels to facilitate this process.[13] This includes the creation of a "Senior Manager" role in compliance and complaints handling, and an increase of seven or eight positions in the OPC's complaints handling and compliance departments to bring the total to 26 or 27. A specialised team for the handling of systemic complaints will also be convened.

There are also plans to improve the interface of the OPC website to make it more user-friendly.

3.3 Senate Inquiry into the *Privacy Act*

Following the Privacy Commissioner's Review, the Senate Standing Legal and Constitutional Reference Committee conducted an inquiry into the Privacy Act, and the report "The real Big Brother: Inquiry into the *Privacy Act* 1988" ("the Inquiry")[14] was tabled on 23 June 2005. The Inquiry noted the limited scope of the Privacy Commissioner's report.[15] Notably, this Inquiry included within its ambit the credit reporting provisions contained in Part IIIA. The Committee reiterated the functions of provisions in Part IIIA of the *Privacy Act* as limiting the type of information that can be held by credit reporting agencies, the persons who can access credit files, and limitations on the uses of the credit file.

The Inquiry reported significant concerns regarding key issues such as accuracy and dispute resolution both under the *Privacy Act* and through OPC's regulatory activities, including:

[11] Office of the Privacy Commissioner, *Privacy Matters,* Vol 1, Issue 1 Spring 2006, 2.
[12] Ibid 6.
[13] Ibid 6.
[14] Senate Legal and Constitutional Committee, Parliament of Australia, Canberra, *The real Big Brother: Inquiry into the Privacy Act 1988* (2005).
[15] Ibid 57.

- Criticism of the federal government's decision to exclude from the OPC's review the main body of provisions relating to credit reporting as contained in Part IIIA of the Act.
- The OPC being ill-equipped to deal with complaints. The report quotes consumer advocates' claim that the OPC's complaints handling process is "inconsistent, inefficient and lacks transparency and procedural fairness, with the result that large numbers of individuals drop out of the system … it can take six months or more before complaints can be heard by the OPC, and affected individuals may be unable to access credit during this period".[16]
- The failure of sufficient regulatory oversight offers no incentive to comply with regulations.
- The lack of individual consent prior to disclosure of their credit files, the issue of 'bundled consents' and secondary consent whereby consent for access by one organisation is turned into consent for access by multiple organisations and agencies[17]. The need for mandating privacy and consent clauses to resolve this issue was opposed by industry submissions.
- Inaccurate records on credit reporting agency databases was an issue acknowledged by both consumer advocates and industry. Inaccurate records are in contravention to the obligations in s18G of the *Privacy Act* that requires organisations to ensure that records kept on their databases are accurate, complete and not misleading.[18]
- Consumers generally are not aware of inaccuracies on their file until they are denied credit. Consumers are therefore not able to correct any adverse information contained on their file. Although a service is available through Baycorp whereby consumers are able to obtain free copies of their file, that service is not being adequately utilised.[19]
- Drafting of the Information Privacy Principles, the principles that regulate the use of personal information under Part IIIA, was described as poor by various submissions. This in conjunction with a poorly structured complaints handling process was one of the reasons cited as to why consumers do not check or correct the inaccurate information recorded on their credit files. Submissions also pointed to a lack of bargaining power or awareness of consumers of the means of redress that they can avail themselves of in light of an inaccurate listing.
- Several reforms were put forward namely that, only agencies with proven effective internal dispute resolution processes or participation in external dispute resolution processes could access consumer record files; debts only above a certain amount can be recorded on credit files; and the operation of an industry funded dispute resolution scheme.[20]

[16] Ibid 105.
[17] Ibid 102.
[18] Ibid 103. Privacy principles also require that before record keepers can use information they must take steps to ensure the information is correct.
[19] Ibid 104.
[20] Ibid 104.

- The issue of positive reporting was discussed. Benefits and disadvantages of expanding the range of personal information contained were canvassed. Industry argued that it was in the best interest of the economy that in order for industry to make better and informed decisions on monetary lending that more information should be available to them.[21] Consumer advocates pointed to a lack of correlation between extension of the current credit reporting framework and decreased incidence of bad debt,[22] citing the low default levels in Australia and the nature of the lending practices. The Committee rejected the proposal of positive credit reporting citing security reasons and the inaccuracy and lack of integrity of information that would result.[23] The committee concluded that "…experience with the current range of information has shown that industry has not run the system as well as would be expected and it is apparent that injustice can prevail".[24]

3.4 Victorian Consumer Credit Review

A third related review was conducted in 2006 by Consumer Affairs Victoria into existing consumer credit laws and the credit market.[25] The review documents significant issues surrounding the operation of the consumer credit markets.

Although the review focused predominantly on Victorian legislation, the investigation also examined whether the federal credit reporting framework should switch from negative to positive reporting. One of the options discussed was the possibility of improving the current inaccuracy and integrity of the credit reporting system by integrating aspects of positive reporting.[26] The review decided against implementing positive reporting and rather said that the adverse results of inaccurate records could be addressed by strengthening the existing framework including complaints handling and integrity of agency reporting.[27]

In its response, the Victorian government agreed that there was insufficient evidence to demonstrate that the benefits of introducing positive credit reporting clearly outweigh the costs, and recommended that further research and analysis should be undertaken by the Commonwealth.[28]

[21] Ibid 108.
[22] Ibid 109.
[23] Ibid 110.
[24] Ibid 109.
[25] Consumer Affairs Victoria, *The Report of the Consumer Credit Review* (2006).
[26] Ibid 9.
[27] Ibid 64.
[28] Parliament of Victoria, *Government Response to the Report of the Consumer Credit Review* (2006).

3.5 Australian Law Reform Commission review of the *Privacy Act*

On 31 January 2006, the Australian Law Reform Commission was asked by the Attorney-General to conduct an inquiry into the extent to which the *Privacy Act* and related laws continue to provide an effective framework for privacy protection in Australia. Issues Paper 31 was released early October 2006 and feedback was invited from all stakeholders. While the terms of reference for the inquiry do not specifically mention credit reporting, the ALRC has released a second issues paper focussing on credit reporting issues.

3.6 The Australasian Retail Credit Association

The Australasian Retail Credit Association (ARCA) is a group of credit providers, including banks, credit unions, telecommunications companies. It is an industry-driven association whose objectives include obtaining agreement on improving data quality, data supply, data definitions, data matching and consistency in the credit reporting system, either in the form of service agreements with the credit reporting agencies, or through a set of compliance and complaints procedures or a code of conduct. The formation of the principles is still occurring.

3.7 Recent Baycorp Developments

In the last few years there have been a number of developments being undertaken by Baycorp Advantage to address some of the issues of concern raised by consumer groups. It has engaged with consumers and consumer representatives to improve accuracy of listings, and to improve complaint-handling procedures. To that end, in December 2005 Baycorp became a non-bank member of the Banking and Financial Services Ombudsman scheme, which will be able to consider consumer disputes with Baycorp in relation to credit listings. In response to concerns about the 63% increase of default listings for telecommunications or internet bills, Baycorp changed the minimum debt required for a default listing from $20 to $100.

Part 2

Research Results

4 Caseworker Questionnaire Results

4.1 The questionnaires

The caseworker questionnaire was conducted between May and September 2006. This survey was designed to ascertain how the credit reporting system is perceived by people who advocate for individual consumers on a day-to-day basis. A copy of the questionnaire is contained in the Appendix E.

4.2 Participation

Responses to the caseworker survey were solicited in two ways. Firstly, CCLC drew from its extensive network of contacts with consumer centres, community legal centres and financial counselling services and targeted 15 specific caseworkers who were known to have experience dealing with credit reporting issues. As CCLC operates an extensive financial counselling and advice service, and a more limited casework service, a CCLC solicitor was asked to complete a survey representing the advice and casework experience of CCLC as part of the targeted solicitation.

Secondly, responses were solicited through CCLC's quarterly publication which is sent to consumer representatives, financial counsellors, caseworkers and legal centres.

4.3 Summary of results

4.3.1 Part 1 – About you

CCLC received a total of 16 responses, 13 from its targeted solicitation and three through the general mail-outs. The organisations which took part in the survey are the Consumer Law Centre ACT, the Australian Consumers' Association/CHOICE, Care Financial Counselling Service (ACT), Eastern Access Community Health – Financial Counselling Team, Lismore and District Financial Counselling Service, Creditline (Northern Beaches), Kempsey Financial Counselling Service, Consumer Credit Legal Service (Vic), Consumer Credit Legal Service (WA), Redfern Legal Centre, Illawarra Legal Centre, Hobart Community Legal Service, Legal Aid NSW, Legal Aid QLD, and CCLC.

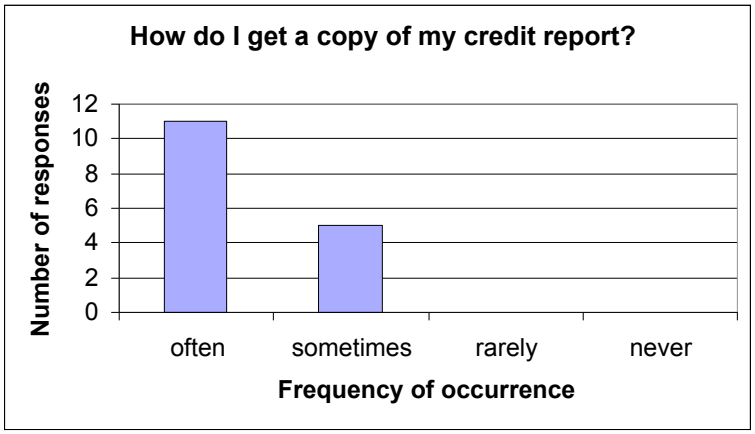
4.3.2 Part 2 – Preliminary

4.3.2.1 Question 5 – How often do you receive calls from consumers who may have inquiries or complaints about credit reports?

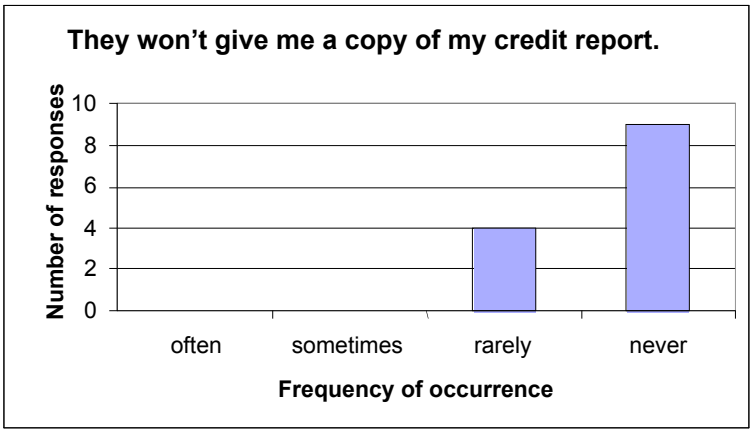
Due to the selection of the respondents to the survey, all of the respondents have received requests for assistance from people with inquiries or complaints about credit reports. 25% of respondents encountered these inquiries more than once a week, 18.75% once every 1-2 weeks, 37.5% once per month and 18.75% once every few months.

4.3.2.2 Obtaining a copy of my credit report

Firstly, the vast majority of caseworkers were often asked how consumers could obtain a copy of their credit report. 68.75% of respondents received these inquiries "often", and the remaining 31.25% encountered this inquiry "sometimes". None of the respondents "rarely" or "never" came across this issue.

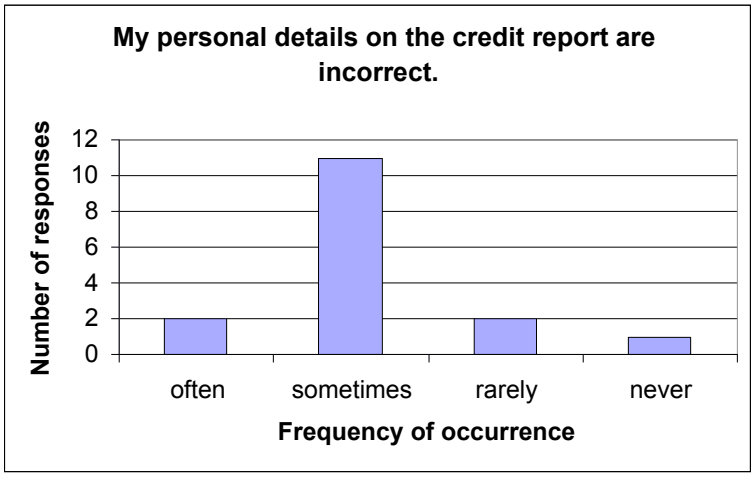


However, it was clear that the majority of consumers do not encounter problems with obtaining a copy of their credit report. In relation to contact from consumers being refused access to their credit report, 69.23% of 13 caseworkers who responded to this question never came across this issue, and the remaining 30.77% have only encountered it "rarely". Although the questionnaire did not ask for detail in relation to this issue, it seems the most likely reason a person would have trouble accessing their report would be if they did not or could not provide adequate identification.

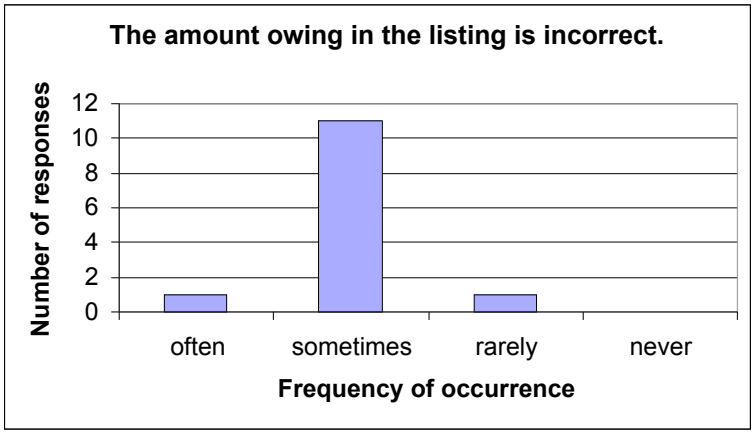


4.3.2.3 Incorrect details

Secondly, the majority of caseworkers encountered complaints from consumers that their personal details on credit reports were incorrect.



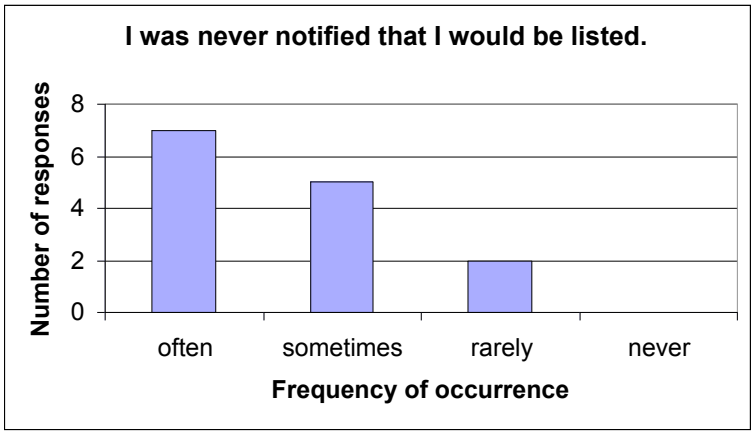
The caseworkers also responded that where there is a listing on the person's credit report, the amount owing in the listing was incorrect "sometimes" or "often". The overwhelming majority (84.61%) of the caseworkers who responded to this question "sometimes" came across a listing where the amount owing was incorrect. 7.69% were faced with this issue "often", and 7.69% "rarely":



It is difficult to know how many of these cases involved inaccuracy and how many were due to other factors such as failure on the consumer's part to fully comprehend the effects of compounding interest, or the non-recording of partial payments towards an outstanding debt after the listing is initially made.

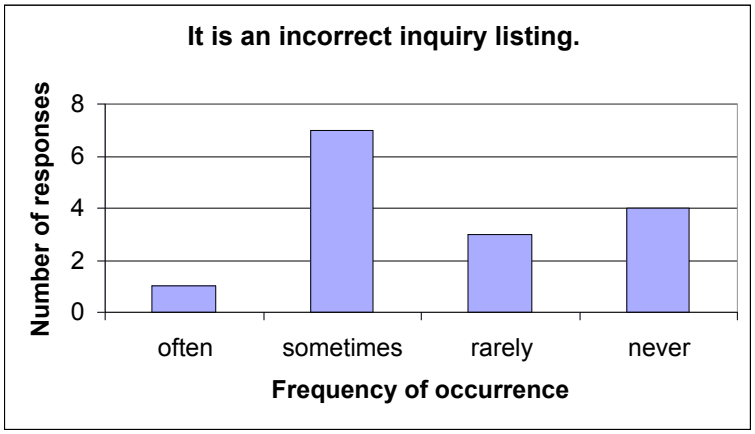
4.3.2.4 Notification of listing

However, more often than not, the consumer stated that they were never notified that they would be listed. All caseworkers encountered consumers who said that they had not been notified that they would be listed. Out of 14 responses, 50% of caseworkers encountered this issue "often", 35.71% "sometimes" and 14.29% "rarely".

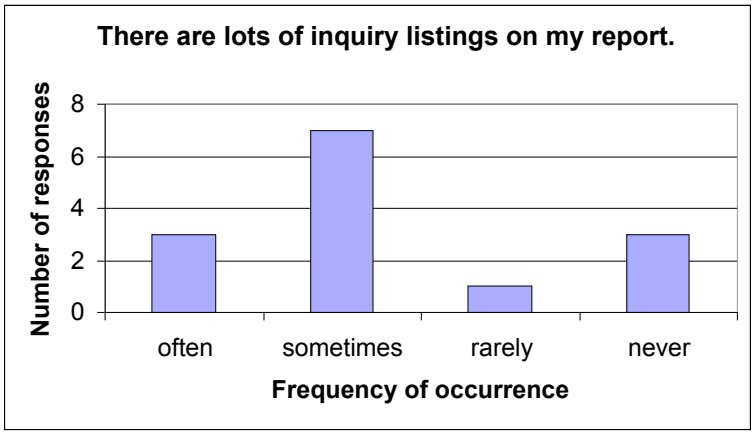


4.3.2.5 Inquiry listings

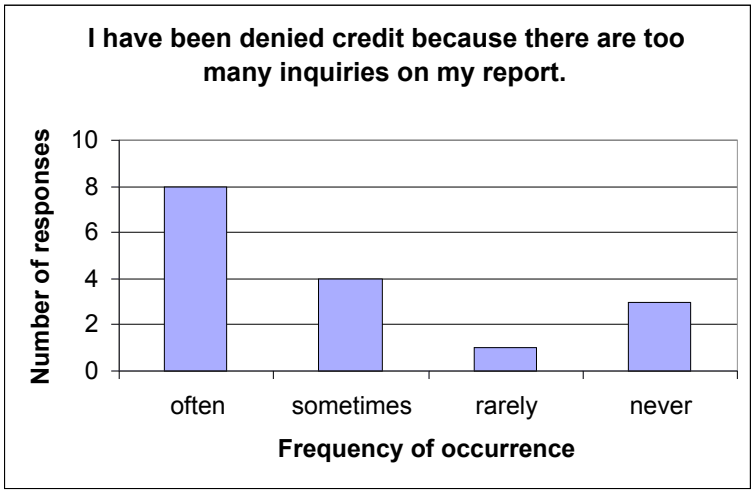
The issue of inquiry listings was also of prominence. Out of 15 responses, incorrect inquiry listings were encountered "often" by 6.67% of caseworkers, "sometimes" by 46.67%, "rarely" by 20% and "never" by 26.67%:



Caseworkers had contact with consumers facing the issue of multiple inquiry listings on credit reports "often" 21.43%, "sometimes" 50%, "rarely" 7.14% and 21.43% of caseworkers "never" encountered the issue. This was out of a total of 14 responses:



Consumers being denied credit due to too many inquiries were encountered "often" by 50% of caseworkers, "sometimes" by 25%, "rarely" by 6.25% and "never" by 18.75%. All 16 caseworkers responded to this question.



4.3.2.6 Type of Lender

Telecommunications companies were vastly complained against with all caseworkers encountering this issue either "often" (42.86%) or "sometimes" (57.14%). Out of 14 responses, no caseworker had "never" or "rarely" encountered the issue.

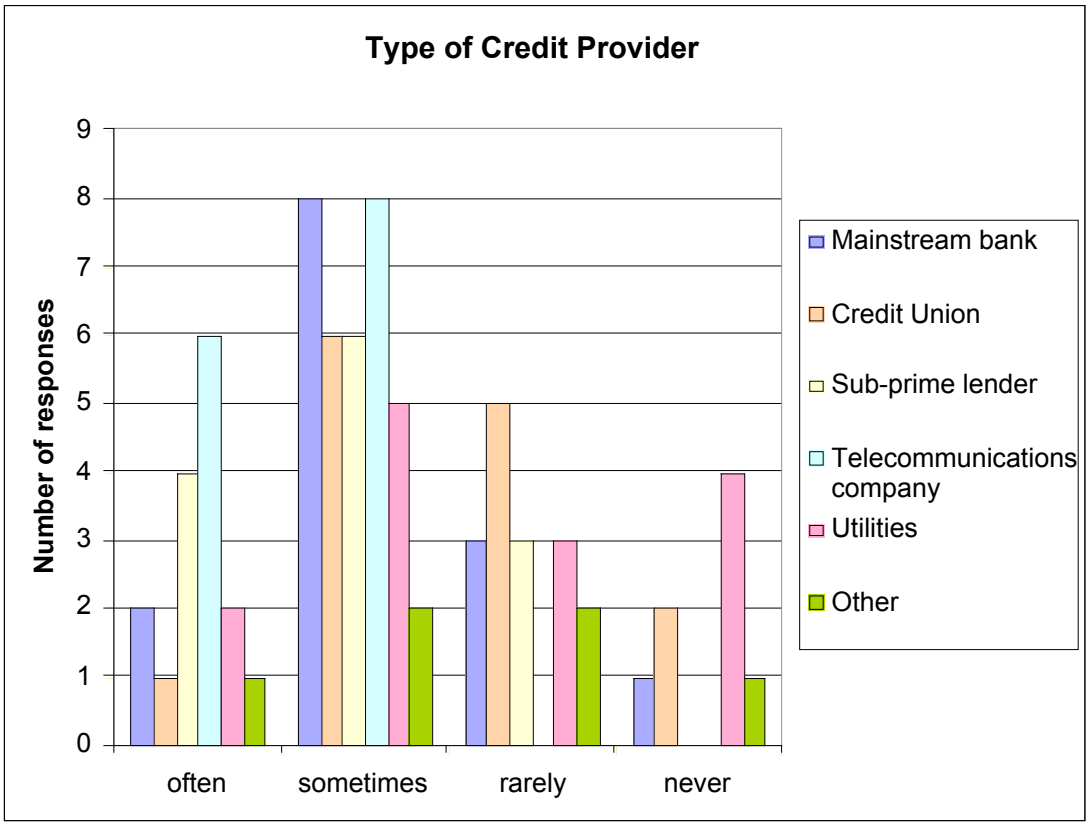
Complaints against mainstream banks were encountered "often" by 14.28% of caseworkers, "sometimes" by 57.14%, "rarely" by 21.42% and "never" by 7.14% of caseworkers. This was out of a total of 14 responses.

Complaints against credit unions arose "often" for 7.14% of caseworkers, "sometimes" for 42.86%, "rarely" for 35.71% and "never" for 14.29%. This was out of a total of 14 responses.

Sub-prime lenders were the subject of complaint encountered "often" by 30.77% of caseworkers, "sometimes" by 46.15%, "rarely" by 23.8%. All 13 caseworkers who responded to this question had come across this issue. This was a surprising result because this is not something frequently encountered by CCLC caseworkers.

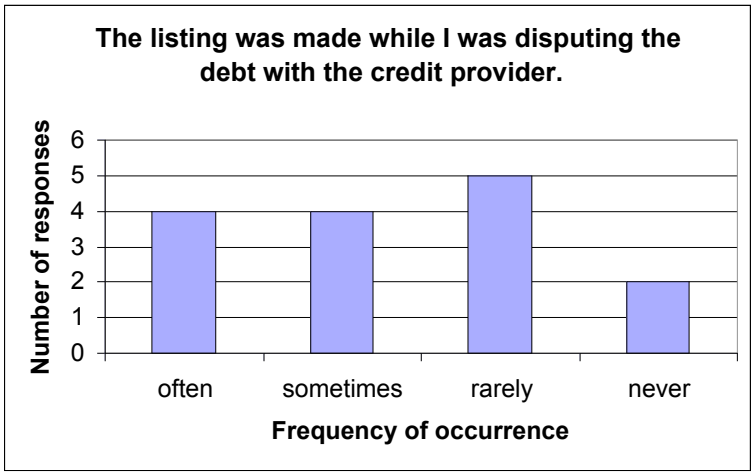
Complaints against utilities arose "often" for 14.29% of caseworkers, "sometimes" for 35.71%, "rarely" for 21.43%, and "never" for 28.57%, out of 14 responses.

Only six caseworkers responded to the question about complaints against other companies. Of those who responded, 16.67% encountered these complaints "often", 33.33% "sometimes", 33.33% "rarely", and 16.67% "never".

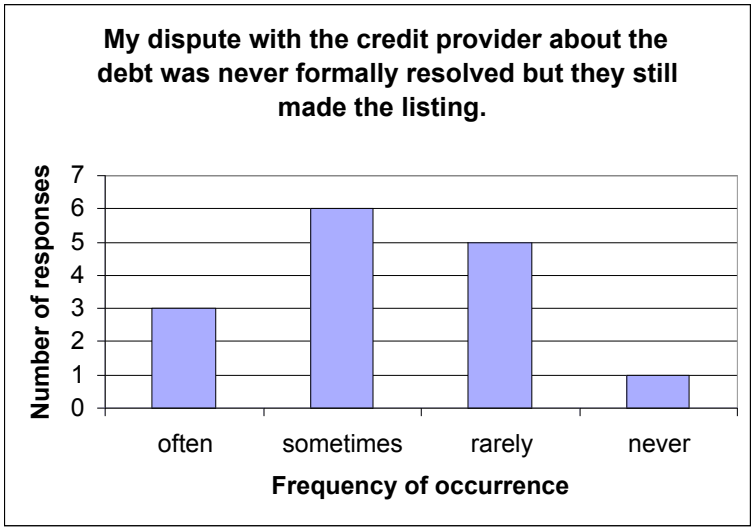


4.3.2.7 Disputes

The frequency of caseworkers' contact with people who have had listings made while they were disputing the debt with the credit provider is fairly evenly dispersed. 26.66% encountered this issue "often", 26.66% "sometimes", 33% "rarely" and 13.33% "never".



The issue of listings made while a person's dispute was never formally resolved were frequently occasioned by caseworkers. It was encountered "often" by 20% of the caseworkers who answered this question, "sometimes" by 40% of caseworkers, 33.33% "rarely" and 6.67% "never".



A caseworker made the following comments:

> *The main problem is a dispute with a trader / supplier that the client understands something is "resolved", usually by claim being withdrawn, but the trader / supplier does not notify the credit reporting agency. (Caseworker Survey)*

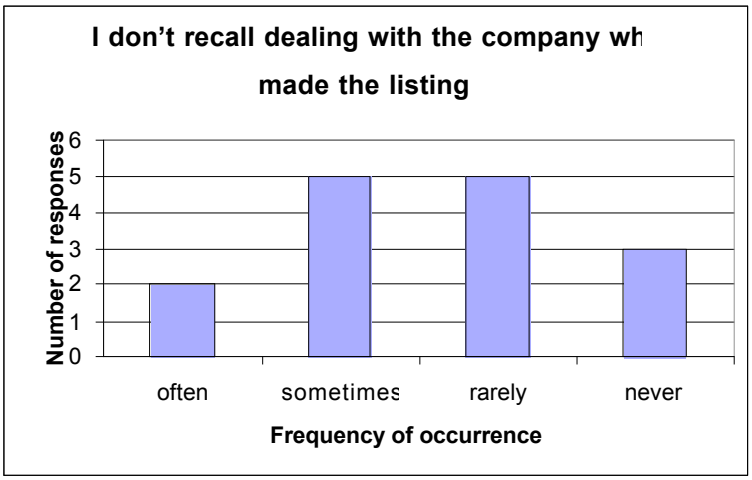
4.3.2.8 Listings by entities unknown to the consumer

Out of the 15 responses in relation to a client not remembering dealing with the company who made the listing, 13.33% encountered this issue "often", 33.33% "sometimes",

33.33% "rarely" and 20% "never". Unfortunately, however, this question in our questionnaire did not make clear whether it was because the default listings were made by debt collectors or assignees of the debt, or whether the consumer did not remember dealing with the company making the listing because there was mistaken identity, identity fraud or other error.

A caseworker said:

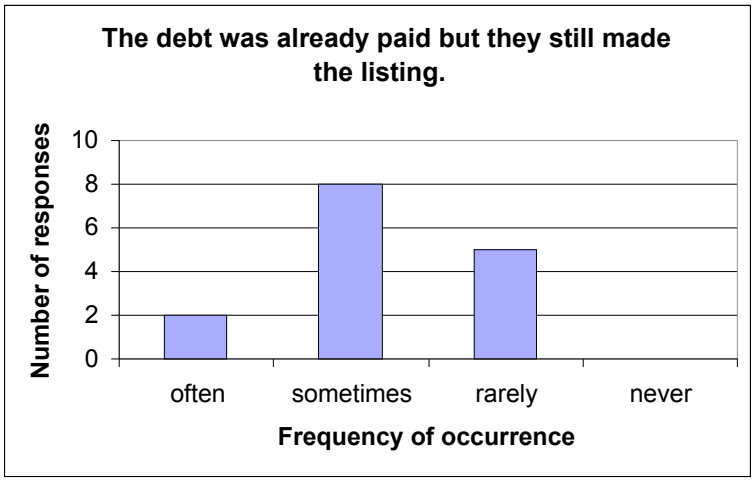
> *Many clients do not recognise a debt because it is listed in the name of a debt collector, not the original credit provider*



4.3.2.9 Paid Debts

In CCLC's casework experience, a common complaint we encounter is default listings being made when the debt was already paid. In our questionnaire we wanted to find out whether or not other caseworkers had a similar experience. Unfortunately, however, in our questions we did not make a clear distinction between whether or not the debt was paid before it was 60 days overdue (and therefore rendering the listing inaccurate), or whether or not it was paid after the 60 days but before the listing was made.

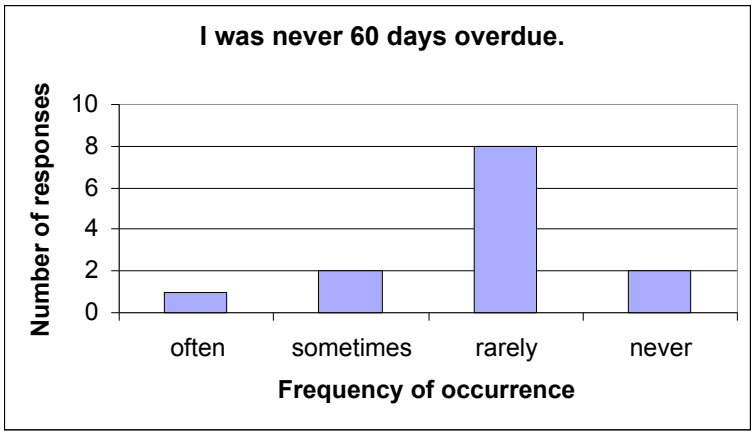
In relation to listings made for debts which had already been paid, each of the 15 caseworkers who responded to this question encountered this issue – 13.33% "often", 53.33% "sometimes" and 33.33% "rarely".



A related issue is where clients pay a debt after a listing has been made, either in response to the listing or for some other reason (such as finding out that the debt is owed, or simply as a result of an improvement in their financial position), and are disappointed when the debt is not removed:

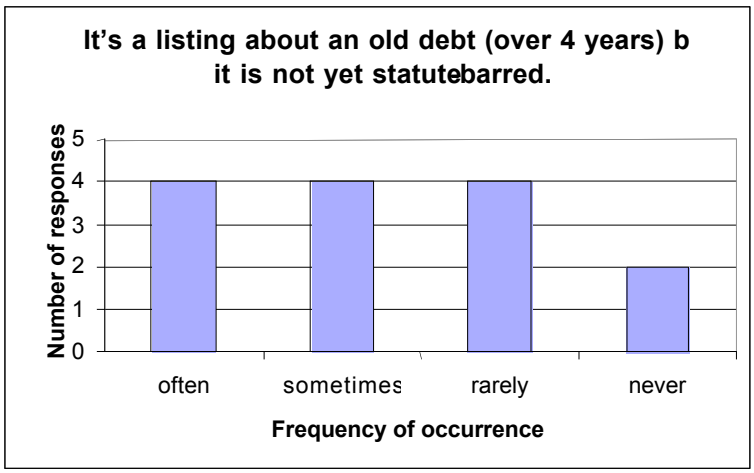
> *They also do not understand that paying a debt does not remove the listing – only "updates" it. (Caseworker Survey)*

In relation to clients who were never 60 days overdue, 7.69% of caseworkers came across this issue often", 15.38% "sometimes", 61.54% "rarely" and 15.38% "never" out of 13 responses. The lower reported frequency of this problem suggests that the previous question may include consumers who paid the debt after the 60 days had expired. Some of these consumers may never have known they had already been listed and others may have been under the impression the listing would be removed or avoided as a result of payment.

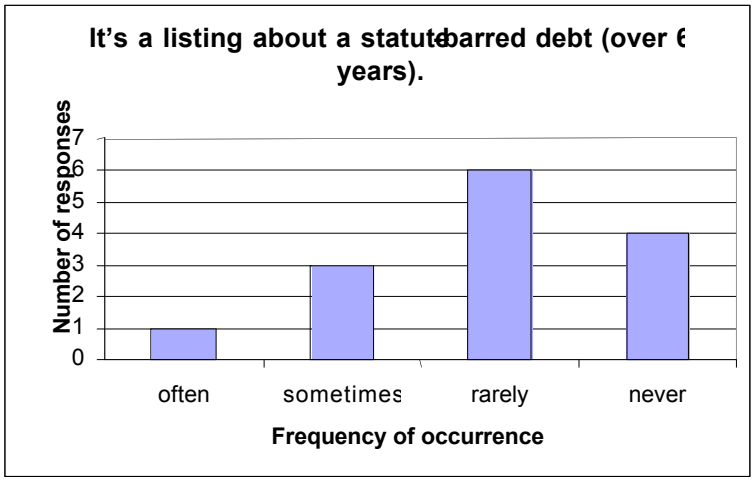


4.3.2.10 Old debts

Caseworker's contact with matters involving listings of old (over four years) but not statute barred debts was fairly common. 57% of caseworkers came across this issue sometimes or often and a further 28.57% rarely. Only 14.3% of caseworkers had not come across this issue at all. This was out of a total of 14 responses.

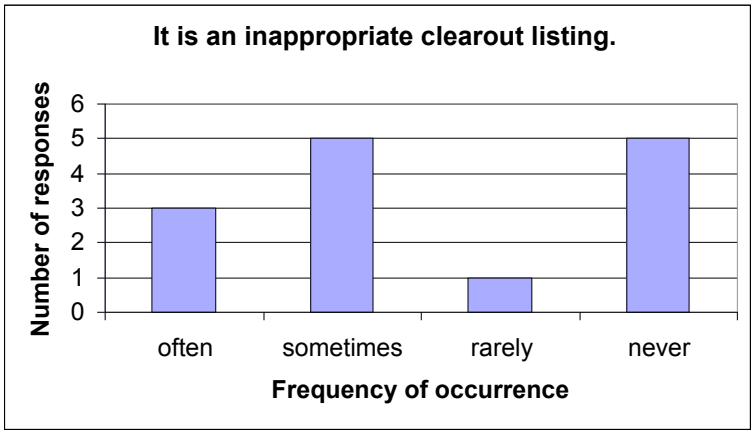


Listings of statute barred debts were encountered less frequently, but were encountered "often" by 7.14% of caseworkers, 21.43% "sometimes", 42.86% "rarely" and 28.57% "never", out of 14 responses.



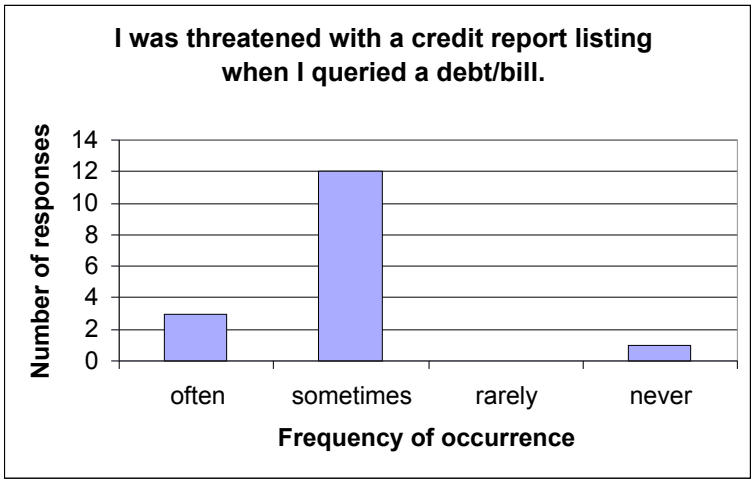
4.3.2.11 Inappropriate clearout listings

Inappropriate clearout listing issues arose "often" for 21.43% of caseworkers, "sometimes" for 35.71%, "rarely" for 7.14 % and "never" for 35.71%, out of a total of 14 responses.

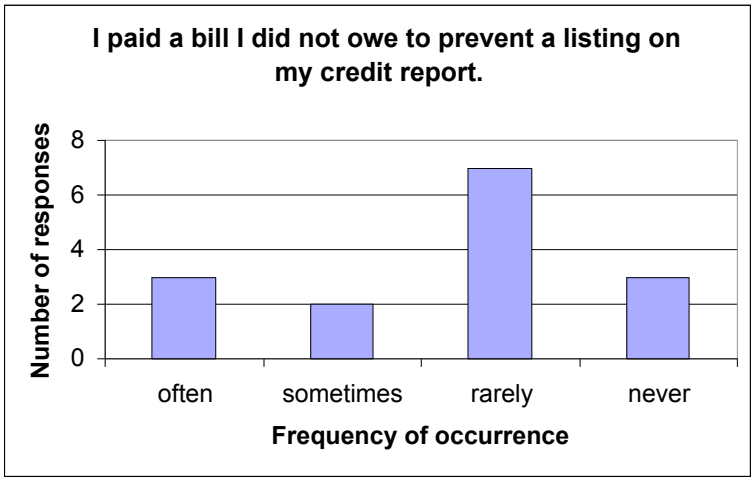


4.3.2.12 Credit reporting and debt collection

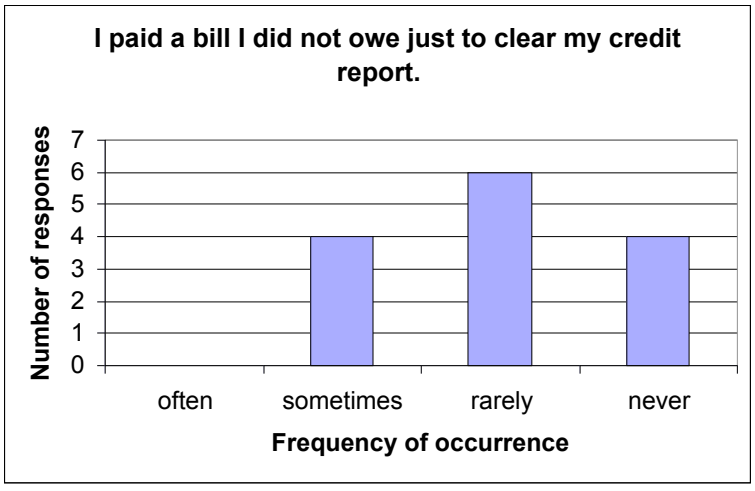
In the context of debt collection, many caseworkers reported that they were "often" or "sometimes" contacted by consumers who were threatened with a credit report listing when they queried a debt or a bill. Caseworkers who encountered clients who had been threatened with credit listings when querying a bill did so "often" 18.75% of the time, 75% "sometimes", 0% "rarely" and 6.25% "never". All 16 caseworkers responded to this question.



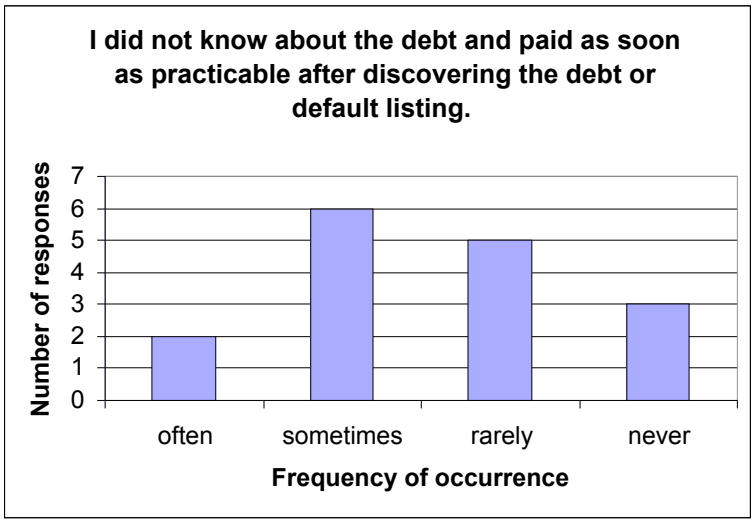
Consumers who paid bills they did not owe to prevent a credit listing were encountered "often" by 20% of caseworkers, 13.33% "sometimes", 46.67% "rarely" and 20% "never". A total of 15 responses were received.



Consumers who paid bills just to clear their credit report were not encountered "often", but 28.57% of caseworkers encountered them "sometimes", 42.86% "rarely" and 28.57% "never". A total of 14 responses were received:



Consumers who were unaware of the debt and paid as soon as practicable after discovering the debt or default listing were encountered "often" by 12.50% of caseworkers, 37.50% "sometimes", 31.25% "rarely", and 18.75% "never". All 16 caseworkers responded to this question.



4.3.2.13 Other frequent complaints

In the "other" section, caseworkers also identified the following as important:

- *Clients do not seem to understand what a good credit rating is – they think the more things you pay out the better the rating. They think in "positive" credit reporting terms*

- *Credit repair companies are becoming more prominent – claim to be able to fix credit rating.*

4.3.3 Part 3 – Resolving Disputes – Self-Help

4.3.3.1 Questions 7-9. In your opinion, is the general public successful in resolving their credit reporting issues? Why do you think people are successful/not successful in this regard? On what experience/information do you base this opinion?

Based on their experience of dealing with consumers in relation to credit reporting issues, caseworkers were generally of the opinion that the general public, unassisted, are not successful. While one caseworker suggested that there are generally no problems with having minor details corrected "particularly in relation to inaccurate personal details because of course this assists lenders", the process of resolving disputes regarding accuracies in the default, challenging default listings, objecting to unauthorised inquiries or the inappropriate use of clearouts "favours lenders, particularly when the consumers are challenging the listing at the time they are seeking to obtain credit". A solicitor said

that "usually they are pressured into resolving it against their interests as the problem usually arises at a time when they need credit urgently."

Some caseworkers suggested that this is because "consumers generally do not have the skills and/or the persistence to stay in a frustrating and complex process – they lose interest in pursuing the issue" because "it just gets too hard fighting the unfair listing" or because "it takes too long". Another caseworker suggested that consumers "don't know how to proceed with the process and often don't understand the reports"; another thought that consumers were unaware of the law and their rights", or "they lack the ability to argue their case"; and yet another caseworker suggested that "the poor and illiterate are disadvantaged and listed when they dispute because they do so verbally." A financial counsellor felt that "success is experienced for those who keep records".

Others believed that the lack of knowledge was compounded by "the general unhelpfulness of credit reporting agencies and credit providers". A solicitor said that consumers "get the run-around from the credit provider who listed them," and that "Baycorp tend to refer people back to creditor to amend listing".

Further, caseworkers also believed the regulator to be unhelpful. A solicitor said, "Dispute resolution procedures are lacking in the Office of the Federal Privacy Commissioners," and that he had "run a number of complaints through the OPC in the past and found the response to be very slow." According to another solicitor, most consumers lose at the OPC, adding that they give up also because the OPC takes a year or more to investigate. She also said that in her experience, disputes taken to the OPC and the Telecommunications Industry Ombudsman are decided against the consumer with no fairness taken into account.

A caseworker said:

> *Many consumers initially dispute the correctness of a default listing, however it often turns out that the listing is lawful. In this respect, clients generally feel they are unsuccessful in resolving their credit reporting issues as they have very few options to improve their credit information file and thus ability to obtain credit in the short term. If a default has been listed erroneously, clients who seek assistance generally resolve their disputes successfully. However the general public is generally unaware that there are organisations that can assist them or are unsure how to get in touch with them. Clients who have attempted to resolve credit reporting issues on their own prior to contacting us generally indicate frustration and confusion.*

4.3.4 Part 4 – Resolving Disputes – caseworker-assisted

4.3.4.1 Question 10. What strategies do you employ to resolve credit reporting issues for your clients, or to assist them in resolving a credit reporting issue?

The caseworkers use a variety of strategies to resolve credit reporting complaints for their clients. Many of them mentioned that "they provide them with relevant information about credit reporting, and information as to how to resolve their own problems"; others advise their clients that "they are entitled to free copies of their reports", and "what steps can be taken to correct inaccurate information".

Depending on the circumstances of the client, the caseworkers may also assist with "reviewing documents that they have"; "drafting queries or requests for documents"; "advise what documents to attach to substantiate the need for rectification"; or "seek substantiation or rectification". Others will also write directly to the credit reporting agency and negotiate on their client's behalf.

The following is an overview of the strategies used by a solicitor:

> *Initially we request evidence of the debt and investigate whether there are any compliance issues (notice requirements etc have been complied with). We also establish whether there are any limitation issues.*
>
> *If the default has been listed lawfully, we discuss ways of avoiding credit reporting problems in the future with the client.*
>
> *If we are of the opinion that the default has been listed erroneously, we initially try to resolve the dispute with the creditor. In some cases, involving a third party can result in a speedy resolution of a dispute. In appropriate cases, we will make it a term of a settlement offer to remove any default listed.*
>
> *In some circumstances, we would take the dispute directly to the credit reporting agency. For example, a client was having difficulty accessing credit because he was mistakenly listed as a director of a company. We accessed ASIC records and faxed them to Baycorp. These showed that the client had a similar name but was not a company director. Baycorp removed the listing the same day.*
>
> *If we cannot resolve the dispute through the credit provider or Baycorp, we would apply to the Privacy Commissioner as a last resort. However we have waited over 18 months in the past for the Privacy Commissioner to allocate a case manager, so this process can be unsatisfactory for the client.*

Many of the caseworkers would also encourage or assist the consumer to approach an independent alternate dispute resolution scheme "early on in the course of the dispute":

The best strategy is to file a dispute with an External Dispute Resolution ("EDR") scheme (if there is one). Dealing with the credit provider is completely useless. The credit provider just says they cannot remove the listing, particularly Telcos. Banks are better at dispute resolution. However the majority of credit reporting disputes are with Telcos.

Where the entity is not a member of an EDR scheme, the caseworkers would encourage the consumer to take the complaint to the OPC. Some caseworkers have made representative complaints in relation to systemic issues. One specific strategy used by a solicitor was to "bundle the listing dispute with issues and complaints with the lending and fairness of contracts", in other words to seek rectification of the credit report as part of the resolution of a wider issue about the substantive contract which led to the default.

4.3.4.2 Question 11. How successful are you in resolving credit reporting issues?

The responses to this question varied considerably. Some caseworkers said that they don't know whether or not they are successful because "clients lose interest in pursuing the issue or I lose contact with them", or because there is only "minimal involvement beyond brief advice sessions though clients don't tend to reappear with same query so hopefully that means advice/assistance was helpful".

Some caseworkers said that they were "fairly successful when bundled in larger issues", or "reasonably so". A financial counsellor said that they are "usually successful if the client has documents and are able to demonstrate the case". Other caseworkers said that they were "not very" successful; "sometimes but not often enough"; or that "it is unclear, likely they [clients] compromise to their disadvantage".

However, the caseworkers who declare that they come across credit reporting complaints more often than others were less optimistic:

- *If the dispute is with a bank the dispute resolution is better – both IDR and EDR. So if there is a meritorious argument the credit reporting dispute is usually resolved quickly. In contrast disputes with telcos go like this – Telco has little or no IDR, cannot even comprehend a meritorious argument due to poor training and always say no at IDR level. Unfortunately the experience at the TIO is not much better. The TIO tends to back up poor arguments from the telco. Eventually after much argument the telco gives in and removes the listing still denying merit to our claims (when there is merit). Then there are CPs not in EDR at all. The CP has no IDR is always obstructive and the matter goes to the OPC who tends to decide in favour of CP and interpret the very ambiguous Part IIIA in favour of the CP as well.*

- *Very difficult to resolve as all processes take a substantial amount of time and given the general urgency of the complaints makes the processes of very little practical value to clients at least in the short term.*

- *Most complaints also take an enormous amount of resources that mean from a practical level it's rarely feasible for the consumer to pay for private representation objecting to the listing.*

Other caseworkers commented on the lengthy process for disputing erroneous reports and the disproportionate effects on the consumer of some lawfully listed defaults:

- *Not that successful, given that the law allows for considerable detriment to flow (i.e. unable to obtain any credit for 5 or 7 years) from what may be a very minor debt. Where such a situation arises it is often not possible for us to assist because the law does not provide the client with remedies.*

- *Generally, if a default has been listed erroneously we have been successful at having it removed, however this can be a protracted process. It should be noted that the majority of clients that contact us about credit reporting disputes have limited options if the default has been placed lawfully.*

- *Generally reasonable outcome for the people who use the service (considering where they are when we first see them). But poor compared to where they really should be.*

4.3.4.3 Question 12. In cases you have been involved in, which features of the current credit reporting system worked/helped and which ones didn't? Which features of the current system were a hindrance?

For this question, the vast majority of answers focussed on the hindrances, with only two caseworkers mentioning that the features that helped were the "ability to write and correct entries on files", the "ability to obtain a copy of the file free of charge", and the fact that it "supplies details of older debts without rolling through creditors' file". However, one caseworker candidly said, "What helped: nothing that I can think of"; and another caseworker said that she was "not very impressed with current system at all".

Some of the features that were mentioned as hindrances included:

- "No concept of fairness"

- "Ambiguous un-detailed legislation"
  This comment was agreed on by another solicitor:

The drafting of the Privacy Act as far as it concerns credit reporting is turgid and possibly in fact contradictory. At any rate, I find it very difficult to understand.

- "Detailed guidelines - Credit Reporting Code of Conduct totally inadequate"

- "OPC"
  It was felt that the OPC were a hindrance because there are "no overriding principles to guide FPC in interpretation", they "decline to investigate", and there is "no transparent decision making with procedural fairness".

- "Totally inadequate compensation for consumers or penalties for credit providers for inaccurate listings"

- "No deterrents for credit providers (such as penalties) for inaccurate listings"

- "Listings"

- "The hindrance is that the original creditor usually supplies the credit reporting agency with inaccurate details eg. wrong name, address, phone number, account, thus resulting in a history suggesting failure to respond, double identities and other mistaken entries."

- "Limited capacity for lenders/telcos to put updates other than one word."

- "Ability to list debts with no proof."

- "The fact that inquiries can be held against a consumer is a shocker."

- "Dispute resolution process"
  This was also the experience of another solicitor:

  In our opinion, the credit reporting process requires a more prominent and structured dispute resolution process. Clients have expressed frustration and confusion when dealing directing with Baycorp. Clients are often told that Baycorp cannot investigate and that they must resolve the dispute with the credit provider. The delay involved in case allocation at the Privacy Commissioner is also a hindrance. Clients are often reluctant to apply for assistance due to the delay.

  However, two caseworkers were optimistic about the fact that Baycorp has recently joined as a member of the Banking and Financial Services Ombudsman:

  The BFSO is likely to be a help, but I haven't run a credit reporting problem through it yet

Not aware of a complaints process as such but since Baycorp joined the BFSO I'd go straight there – haven't had any cases since then.

4.3.5 Part 5 – Effect of credit reporting listings

4.3.5.1 Question 13 What are the consequences of an inaccurate or otherwise unlawful credit report listing for your clients?

Many responses in the caseworker questionnaires commented on the consequences of an inaccurate or otherwise unlawful credit report listing and the inherent lack of fairness in the process. A caseworker was particularly concerned that consumers are potentially being denied access to credit due to defaults listed in relation to debts owed to such "credit providers" as medical professionals, or veterinarians. Generally, they all agreed that an inaccurate listing would lead to the person being rejected unfairly for credit. This can range from a minor annoyance to the collapse of a person's financial situation, including loss of home or business. Consumers with an inaccurate listing may encounter difficulties with refinancing, or getting a mobile phone.

An added difficulty is that most of the time, consumers would only become aware of an incorrect listing when they apply for credit. As one caseworker stated:

This can cause maximum inconvenience. For example, a client had signed a contract to buy a motor vehicle that was not subject to finance. He was rejected for finance on the basis of an erroneous default listing on his credit information file. The car dealership indicated that it would pursue the client for damages of 15% of the purchase price of the vehicle. The client resolved the dispute with the car dealership by purchasing a car of lesser value with money borrowed by family, however the erroneous listing nearly caused him substantial financial loss.

It was interesting to note that from the experience of the caseworkers, there are also two types of consequences flowing from this unfair rejection based on an inaccurate listing.

Firstly, it may be a source of shame or emotional distress: an inaccurate listing is regarded by some as defamation and this can be very upsetting. An unfair denial of credit based on an inaccurate listing can make them feel embarrassed, stressed, or annoyed about the inaccurate listing that was made through no fault of their own. A solicitor pointed out that a person is likely to feel annoyance or frustration regarding the injustice and being prevented from getting ahead via the use of credit. A financial counsellor also stated that it sometimes causes friction and disharmony in new relationships when applying for a joint loan.

Secondly, and more seriously, a person unfairly, or even fairly rejected for credit may find themselves facing few options when it comes to credit. A solicitor stated that a

person rejected for mainstream credit "can only obtain finance from third tier lenders where interest rates are as high as 1600% per annum; can only obtain housing finance from companies such as Bluestone or Liberty or private mortgages where interest rates are substantially higher [than mainstream housing credit]." She went on to say that a "3% difference in an interest rate on a mortgage of $300,000 equates to $9,000 of extra interest each year," and that lenders who target consumers with questionable credit reports offer finance that seeks to avoid regulation by the Consumer Credit Code. Worse still, some rejected consumers may only be able to obtain finance from illegal loansharking operations.

A financial counsellor stated that a recent client of hers had a few inquiry reports on their credit report and had given up hope of getting a loan from a mainstream lender.

4.3.5.2 Question 14 Are you aware of clients who have obtained compensation as a result of an inaccurate credit report listing?

Of the 15 caseworkers who responded to this question, only 3 of them were aware of consumers obtaining some sort of compensation for an inaccurate credit report listing. However, in all three instances the compensation was obtained directly through negotiations, rather than being awarded by the OPC.

> *Yes. In one case which took about five years to obtain and ultimately was an offer by the other party to settle that the consumer thought was manifestly inadequate, but the Privacy Commissioner had indicated that they would not investigate the matter further if the amount was not accepted so technically it wasn't an order of compensation.*

> *We have had clients that have obtained compensation directly from the other party as a result of an erroneous credit listing, however I am not aware of any clients that have obtained compensation directly from the Privacy Commissioner in recent times.*

> *Lender gave client "comp" of "$100" as gesture of goodwill. Sadly $100 came in form of Myer gift certificates and client's core issue is she was [vulnerable to unsustainable] shopping sprees resulting from bi-polar!*

One solicitor recalled that compensation was awarded by the Banking and Financial Services Ombudsman on one occasion only. However, she was not aware of compensation from OPC or the Telecommunications Industry Ombudsman:

> *The TIO never awards compensation (unlike all other EDR schemes) and the OPC won't even consider compensation. I have been told (by OPC), unless the consumer has been rejected for credit due to an inaccurate listing. So the OPC takes the view that inaccuracy (including defamation) is not enough for compensation.*

4.3.5.3 Question 15 Are you aware of clients who, in your opinion, should have been entitled to compensation but did not get compensation?

Approximately half of the respondents were aware of clients who should have been entitled to compensation but did not get compensation. A solicitor said that "anybody who has an inaccurate credit report should be entitled to compensation even if it is nominal". She went on to say that she had "had a number of clients with inaccurate credit reports and not one has received compensation".

Many caseworkers said that consumers should be awarded compensation for lost opportunities, for example for a car or home loan; for small loans or debts that were repaid; or in circumstances where the debts are paid but "the listing stopped the consumer from accessing mainstream low-cost finance options". A financial counsellor said that he was aware of "numerous instances of clients being greatly inconvenienced and (losing deposits sometimes) because of a listing which was thought to be withdrawn".

The following cases were also provided as consumers deserving of compensation but did not get it:

- *A person's credit report was accessed without authority and subsequently the consumer was contacted because of the information contained in the credit report. The OPC did not award compensation, and the caseworker obtained the impression that they thought it was not seen as a particularly noteworthy breach of privacy.*

- *It was clearly established that the consumer had legitimately cancelled a sales and finance contract but a listing was made on his credit report. The consumer was unable to obtain finance because of the listing but no compensation was ordered.*

- *A client wanted to purchase a vehicle for employment reasons but was rejected for finance from several financial providers. He requested a copy of his credit information file and discovered that many details, including his name, were incorrect. Baycorp had merged two files of similar sounding names (of foreign descent). The client lost employment opportunities as a result of the dispute. The Privacy Commissioner found that Baycorp had erred but it was a human error and it had put processes in place to ensure this did not happen again. It refused to make any further orders.*

4.3.5.4 Question 16 Are you aware of situations where a credit report listing may be technically correct and lawful and yet could have consequences that are unfair in all the circumstances?

The caseworkers gave a number of examples of situations where a listing may be technically correct and lawful and yet could have unfair consequences. Some of the examples cited include:

- *The law allows for considerable detriment to flow (ie unable to obtain any credit for 5 or 7 years) from what may be a very minor debt;*
- *Old debts where the listing is made at the time of default, and then many years later legal action is taken and the debt is then listed as a judgment debt, effectively meaning that instead of having a listing for 5 years they end up with a listing for as long as 12 years;*
- *An excellent example is the clearout listing. According to the Credit Reporting Code of Conduct to list a clearout you only have to write a default letter to the last address and not get a response and a clearout can be listed. This can be so unfair. The consumer may have moved address, had a family death or crisis, be overseas and still be a clearout.*
- *Yes. Those that show a debt was paid but through an arrangement.*
- *Yes. We have had clients that have experienced a rigid application of credit reporting legislation and have been denied the opportunity to repay a debt in a reasonable manner. For example, one client made a verbal arrangement to pay off a large dentist's bill. However, after 60 days the dentist placed a default listing on the client's credit information file, despite having paid most of the bill.*
- *Yes. Where the consumer disputes liability for the account. The approach taken by the PC on the definition of an amount due for the purposes of sending a notice is extremely broad.*

There were two types of listings which were mentioned by at least 3 separate caseworkers as being unfair. The first type of listing is small debts. One solicitor said that the lowest listed amount that she had come across was for an amount of 50 cents. Another solicitor suggested that listings made for less than $100 debts owed to telcos were unfair, because "telcos seem to credit list first, ask later". It was also suggested that it was unfair where a "small debt listing [results] in inability to refinance debts to lower percentage rate lenders leaving clients trapped with high cost, fringe credit providers".

The other common complaint was inquiry listings. A solicitor said that she did not believe the listing of inquiries alone should be included in credit reports. The effect was thought to be detrimental, and the circumstances of listing are always unclear. She added, "Application may have been withdrawn or credit refused but outcome not clear to future creditors – seems irrelevant to [the] question of credit 'rating'" A caseworker also said that inquiries shown without proper indication of withdrawal of request for credit "creates an environment of suspicion as to why it was not proceeded with".

Another caseworker said that "Inquiries can be detrimental when you're canvassing options for a loan but the inquiry listing works against client."

A solicitor also gave the following example:

> *In a recent example the lender alleged that an amount was outstanding after the net proceeds of sale of a vehicle were insufficient to payout the amount owing on the vehicle. The consumer never received an accounting for the proceeds of sale and when they subsequently requested after the listing was made, the lender said that the vehicle was sold to a third party and that an amount of $6,000 remained owing but they had agreed to discount the amount to $1,000 when the PC became involved they then gave evidence that the vehicle was sold to a 3rd party with $1,000 remaining after sale. The third party that they sold it to was a related entity and the sale was made a mere day after the "purported" repossession. The PC refused to consider whether there was a legitimate sale of the vehicle and whether the amount alleged as owing advising us that the matter of liability would better be assessed through the legal system. However the lender had never taken action beyond sending a letter advising of intention to list against the consumer. This effectively meant that the consumer was in the position of having to take legal action to prove that the debt was not due to remove the listing.*

4.3.6 Part 6 – Recommendations for change

4.3.6.1 Dispute resolution

The caseworkers made a number of suggestions for change in relation to dispute resolution:

> *The current dispute resolution is totally inadequate. It takes years! It is not procedurally fair. The OPC can decline to investigate so they never have to make a decision. Decisions aren't published. No detailed guidelines. So what needs to change – legislation appointing EDR or EDR scheme(s) to make decisions with all members of the credit reporting systems members of an EDR scheme.*

A caseworker said that the dispute resolution system "definitely needs to be streamlined and be a lot more user-friendly". A solicitor also made the following comments:

> *The current system provides little guidance as to how to proceed to resolve a dispute. A more prominent and structured dispute resolution process needs to be implemented to assist consumers to resolve disputes prior to applying to the Privacy Commissioner. Dispute resolution needs to be perceived as fairer. Unreasonable delay in case allocation at the Privacy Commissioner also requires attention (although I am aware of an increase in funding).*

A solicitor suggested that all credit reporting agencies have to have an internal dispute resolution scheme that meets Australian Standards and must be regularly audited; they should also belong to an ASIC-approved alternate dispute resolution scheme that meets the requirements of Policy Statement 139, and that all credit reporting subscribers should not be able to access the credit reporting database unless they agree to bind themselves to the decisions of the approved EDR scheme.

In relation to the OPC, it was suggested that it needs to "continue to have a role if the matter is not resolved to the consumer's satisfaction through the above process or in cases where time limits make it imperative to raise the complaint with the PC". It was also felt to be important "that if the matter is referred to the PC, the PC make a determination and not take the avenue of refusing to investigate further if the consumer is dissatisfied with the PC's proposed settlement to enable consumers to judicially review decisions." It would then be important that "the Privacy Commissioners or similar government [regulator] have adequate resources to fulfil its enforcement function and actually take enforcement action".

A financial counsellor suggested that there should be a right to challenge any listings. Further, where a consumer disputes the listing, there is an onus on the company to show on the balance of probabilities that the debt is owing, with an opportunity given to the consumer to rebut that evidence. In the meantime, the listing should be removed where reasonable dispute has been raised pending the outcome of the investigation.

Other suggestions included making it easier for consumers and caseworkers to make representative complaints; and ensuring that people are informed of the existence of any dispute resolution mechanism and how to access it.

4.3.6.2 Accuracy of listings

Many caseworkers recognised that accuracy was a major issue. A solicitor commented that "there appears to be poor data quality in credit reporting databases".

> *Major problem. Many people don't even know about inaccurate listings – only find out when they are rejected for credit. Many experiences of listings against wrong person.*

A financial counsellor felt that accuracy is particularly important for consumers of non-English speaking backgrounds:

> *Accuracy of listings is an issue with non-English speaking clients especially within some nationalities where a brother may have very similar first and middle name or cousins who may have the same first and family name but they don't have a middle name.*

Where there is inaccurate information on a person's credit report, it was felt that "there is a disproportionate onus on the consumer to prove an incorrect default listing". A solicitor suggested that:

> *Debtor should be contacted by credit reporting agency to verify details prior to listing and to be given opportunity to dispute personal details, amount etc given by creditor. Given impact listing can have on circumstances, lack of consultation creates imbalance in favour of lenders without scrutiny of lending practices.*

Another solicitor suggested that the original credit provider should supply proper details first, and having provided those, the agency should contact the debtor to confirm or be given an opportunity to respond, before listing.

A caseworker suggested that there should be penalties for inaccurate listings to deter bad behaviour: there should be compensation awarded to consumers who have had inaccurate listings made against them. She also recommended that consumers be able to access their credit report for free online with good privacy controls and security.

It was also suggested that there should be "detailed guidelines and efficient procedures for the urgent removal of inaccurate listings", and "the listing should be removed where reasonable dispute proved pending outcome of the investigation". A financial counsellor thought that "more often listings should be removed completely rather than an annotation being added".

It was also suggested that there should be more detailed rules regarding when a clear-out listing is justified:

> *At the moment the parameters are nebulous and can easily result in incorrect usage of the term.*

4.3.6.3 Listing of inquiries and possible link to unfair denial of credit

The majority of caseworkers commented on the ineffectiveness and disproportionate impact of inquiry listings. Many of them suggested that they should no longer be listed as they "prohibit or punish consumers for shopping around":

> *The listing of inquiries seems pointless. Effective immediately it should not be recorded pending investigation into a more reasonable and accurate system.*

Five of the caseworkers thought that inquiry listings punish people for shopping around:

> *Inquiries should not be listed as negative. Prudent financial literacy should mean a number of inquiries to seek best deal. In a 'market economy' the listing of*

inquiries as a negative is a restraint of trade on the customer. Listing should only be about 'actual' liabilities.

A proposed solution was for inquiry listings to be accompanied with information as to whether the application was successful.

There was also a suggestion that inquiry listings may be helpful to consumers, by showing that the credit provider made insufficient inquiries into a consumer's capacity to repay a loan. However a distinction was made between "credit inquiries made over a short period of time for similar amounts" and "numerous credit inquiries for differing amounts over an extended period of time".

Another caseworker suggested it would be beneficial for consumers to see inquiry listings, but not the creditors.

4.3.6.4 Improvement of lending practices

A significant number of caseworkers did not perceive lending practices as part of the credit reporting system, and do not believe "any changes to the credit reporting system will reduce overcommitment in any large degree" or have much impact on responsible lending.

However other caseworkers viewed the failure of credit providers to lend responsibly as a primary cause of default listings. They proposed that credit providers should engage in more detailed inquiries into a person's ability to repay loans and give more detailed information to loan applicants about the consequences of default. A particular focus of these criticisms for one caseworker was the activities of sub-prime lenders.

One caseworker stated that banks should rely less on a person's credit report and more on an "accurate assessment of the applicant's situation".

Another caseworker also criticized proposals from the credit industry about implementing a positive credit reporting system, arguing lack of evidence to support assertions that positive credit reporting can improve lending practices.

4.3.6.5 Preventing unfair denial of credit (proportionate consequences)

When asked what recommendations they would make that would prevent unfair denial of credit or ensure that consequences are proportionate, a few caseworkers suggested that there should be a minimum listing amount, for example, $200 or $500, and at least 4 caseworkers suggested that the removal of the listing of inquiries would minimise the problems. Listings should be checked by introducing safeguards such as informing the person before any listing is about to take place and give them at least 14 days to respond.

It was also suggested that the onus should be placed on the credit provider to prove that "on the balance of probabilities the debt is owing, with an opportunity given for the consumer to rebut that evidence".

In response to the recent One-Tel incident in which the company did not keep track of whether thousands of listed debts had been paid, one caseworker suggested that listings made by liquidated companies should "automatically be removed for all consumers unless the entity can produce evidence that an amount was due and owing for each individual consumer".

Another caseworker proposed that there should be "detailed guidelines and efficient procedures for the urgent removal of inaccurate listings".

Only one caseworker questioned how severely the impact denial of credit has on people's lives, "unless it propels them to pay-day lenders".

4.3.6.6 Improving consumer access and control

There is general consensus among caseworkers that there is a "definite need" for improvements in this area. A wide variety of suggestions were proposed by caseworkers.

Two caseworkers suggested that access to credit reports could be improved by credit reporting agencies providing secure internet access to credit reports, or at a minimum allowing consumers to apply for their credit reports online.

A particular concern was raised about the layout of the Baycorp website. One caseworker heavily criticized Baycorp for advertising access to credit reports "for 'only $24.95' or whatever it is on their website, and then burying in the fine print the fact that you can get your credit report free of charge":

> *It's misleading conduct. Many people would be led to believe that you must pay for the privilege of getting a copy of your credit report.*

Another proposal was that detailed information about how to access a credit report should be provided to consumers when they sign up to a loan, and that "an independent debt inquiry line be provided by creditors even for small amounts so that debtors can seek advice prior to signing credit contracts".

Caseworkers were further concerned about the impact of a listing continuing during lengthy dispute processes, with two caseworkers proposing that disputed listings be removed pending resolution of the dispute:

It is grossly unfair to leave an alleged inaccurate listing on a credit report for 2 years while the OPC investigates.

Two caseworkers suggested that all 'fully' paid or finalized debts should be removed when settled.

There was also an issue arising from a perceived reluctance of credit providers to make amendments to credit reports, given that they do not have an interest in the outcome of that change. One solicitor proposed that debtors be allowed to "amend personal details and/or amounts on the provision of adequate documentation to credit reporter", with the credit reporting agency acting as an intermediary to confirm the change with the credit provider.

4.3.6.7 Other

The main concerns in this area surround the operation of the privacy law. One solicitor argued for a full review of the legislation, stating that the existing *Privacy Act* is "hopeless, ambiguous and fails to protect consumers at all from abuses of the credit reporting system by credit providers".

Another solicitor criticised the broad definition of "credit provider" under the Privacy Commissioner's Determinations, which allows service providers (such as trades people, video stores and doctors who give consumers time to pay) access to the credit reporting system:

- *This raises real questions about the legitimacy of the debts, the companies' general privacy compliance, amounts of debt and the serious consequences for consumers if the credit provider gets it wrong.*

- *In addition it is clear that when legislation was first enacted in late 1980's, there was a clear intention by Parliament to restrict access to sensitive financial information of consumers. Because of that they specifically excluded entities such as insurance companies and government agencies. What has happened since that time is that increasing types of entities have obtained access to the credit reporting system.*

- *For example utility and telecommunications companies were government agencies and had no access to credit reporting and even though now those entities provide the same services they appear to have obtained access to the credit reporting system simply because they are no longer government entities – without any consideration as to the policy reasons behind why parliament thought it necessary to deny access in the first place.*

One caseworker also expressed concerns that listings were hampering the consolidation of loans:

The majority of our clients have multiple debts and any listing by one creditor may affect all their financial positions, especially if they have the assets and capacity to apply for consolidation of debts and they are denied because of the listing and the listing creditors refuses to remove the listing even when they are likely to benefit from the consolidation.

Another caseworker also suggested that credit providers should be able to completely remove listings in certain circumstances.

4.3.6.8 Question 18 Do you have any other comments?

The two suggestions arising from this question was that there be greater discussion about the advantages and disadvantages of the present credit reporting system, and that there be more community initiatives to educate people about credit reports.

4.3.6.9 Question 19 Case studies provided by caseworkers

Unfair clearout listing

Mr A was a recent immigrant to Australia. He bought a fridge interest-free in Adelaide. He moved to Sydney to get work. He rang the credit provider about making payments but was told he had to pay in person. He then got a demand letter from a debt collector and was listed as a clearout. The OPC found that all the credit provider had to do was send a letter to Mr A and if there was no written response then Mr A could be listed as a clearout. Mr A then paid out his entire contract ahead of time but could not do anything about the serious credit infringement on his credit report.

Unresolved dispute

The lender alleged that an amount was outstanding after the net proceeds of sale of a vehicle were insufficient to payout the amount owing on the vehicle. Mr B never received an accounting for the proceeds of sale and when they subsequently requested it after a listing was made on Mr B's credit report, the lender said that the vehicle was sold to a third party and that an amount of $6,000 remained owing but they had agreed to discount the amount to $1,000. When the OPC became involved they then gave evidence that the vehicle was sold to a 3rd party with $1,000 remaining after sale. The third party that they sold it to was a related entity and the sale was made a mere day after the "purported" repossession. The OPC refused to consider whether there was a legitimate sale of the vehicle and whether the amount alleged in fact owed. It advised that the matter of liability would better be assessed through the legal system. However the lender had never taken action beyond sending a letter advising of intention to list against the

consumer. This effectively meant that Mr B was in the position of having to take legal action to prove that the debt was not due to remove the listing.

Disputed listing, consequences of passing of time, unfair clearout

Ms C discovered that she had a "clear out" default listing with Baycorp in December 2004 in relation to an overdue amount of $175.00 owed to a gas retailer when she completed a mobile phone application and was refused. The overdue account was in relation to a property that she had not resided in for three years.

Ms C went overseas in 2001 and her friend who lived at that address had continued to pay the account for three years until she was evicted due to the building being sold and renovated. Her friend contacted the gas retailer to advise of the eviction and to cancel the account however the gas retailer would not close the account as she was not the account holder.

The gas retailer advised that it does not have a record of any contact with her friend back in 2001. The gas retailer does not believe that the default has been listed in error and it maintains that it has followed the necessary procedures in listing the debt as a "clear out" with Baycorp.

Throughout an ADR scheme's investigation of the complaint, Ms C provided substantiation of her version of events by way of a Statutory Declaration provided by her friend. The gas retailer has indicated that this is not substantial in order to show that the default rating has been listed in error. The ADR scheme has requested further documentary substantiation from Ms C including a copy of lease documentation to show that her friend was the leaseholder during the relevant period. Given that these events occurred approximately five years ago, it has been difficult for Ms C to provide satisfactory documentation to the gas retailer and her friend is no longer in possession of the lease documentation. The matter remains subject to investigation by the ADR scheme.

Disputed listing

Ms D was on a disability pension. She needed a mobile phone as she is in a wheelchair and needs to use taxis to get around.. She had been a Telstra customer in her present home for over a year, and at various other addresses for many years. When applying for a mobile phone account with Telstra it was denied due to a poor credit record. This was on the basis of a file held by Baycorp. Enquiries revealed that it related to an incident in 2002. Ms D moved into a unit in Bayswater in July 2002 and opened another Telstra fixed line account.

After about a month she discovered that someone was stealing her mail, tampering with it, and returning some to the sender. Other residents knew of the problem and knew who was the culprit. The police and Australia Post were contacted but nothing official could

be done unless the person was caught in the act, however the person was confronted and the problem stopped. Shortly after Ms D received a demand from Baycorp for $161 owing to Telstra. She phoned both Telstra and Baycorp a couple of times to explain the situation and paid the debt. No more was heard of the matter until her application for a mobile account was denied. Calls to Telstra revealed that their records show that the debt was cleared, but they said to take up the matter with Baycorp, and they still refused to allow the account. This is despite having a current fixed line account with no payment problems. Calls to Baycorp revealed that they cleared the debt on 4th October 2002 but they refused to delete the record until sometime next year. Other phone companies also refused an account because of the Baycorp record and Ms D recently discovered that she couldn't change credits cards for the same reason. She recently tried to change cards to one with a lower interest rate at a different bank but was refused due to her credit report.

Correct but unfair listing

Ms E was coerced by her ex-partner into signing loan contracts with a finance company. The debt was then sold to a debt collector. She managed to get her name off the contract, but they are not prepared to remove the default listing from her credit report because they said she signed the contract. The debt collector has confirmed that they will remove the Ms E's name on the account, but they said that they still hold her liable but won't pursue her.

Disputed or correct but unfair listing, serious consequences

Mr F has a default listing on his credit report in relation to a car/personal loan. The loan was regularly paid via direct debit. He arranged for his insurance to pay off the rest of the loan so that he no longer had the direct debit operating. However, the insurance claim was not completed until after a default was placed on his file and that is why there is now a default. Mr F was very upset the listing because it had a dramatic impact on his life. He thought that because he had completed the loan arrangement that he would be considered a "good risk", and in part, this was a motivating factor in taking a loan in the first place. He had been consistently rejected for credit over the last four years because of the incorrect listing on his credit report, dating back to at least January 2003. However, no credit provider had ever advised him that the default listing was the reason for the rejections. He felt that if he had been told, there would have been no need for him to have applied for so many loans from different lenders, which in turn added to his inquiry listings and made matter worse.

As a direct result of no available credit in any form, his business failed directly due to a lack of funds, a string of very sub-standard vehicles have been his only option for transport, and generally his standard of living went from a relatively comfortable corporate business environment in the CBD to that of a minimum wage factory worker in the outer suburbs.

When he disputed the debt, the bank realised the error and subsequently listed the default as paid, and invited Mr F to have the default removed by way of written request.

Inaccuracy

A client received a phone call regarding an unpaid loan with a credit provider, but she never had a loan with them. She was contacted as many as 7 times per day. She was forced to switch to a private telephone number, and then also found out about a default listing on her credit report. Later the credit provider confirmed that the trace was inaccurate and that the person was not responsible for the debt. The listing was removed. She has made a complaint to the Privacy Commissioner seeking compensation.

Wrong debtor

A caller was rejected for a credit card and then found out that there was a default listing. She was told that she had an unpaid phone bill and that correspondence had been sent to an address where she has never lived and with which she has no association.

4.3.7 Alliance Factoring Case Studies

In around 2002, Telstra sold a large tranche of debt to Alliance Factoring, which led to a sharp rise in complaints to consumer assistance agencies. The common theme of most of these cases is that the wrong debtor has been targeted, as a result of either mistaken identity (mismatched data) or fraud on the part of the original applicant for the telecommunications account. The original error was then compounded by unresponsive dispute resolution systems on the part of the debt collector. The existence of the default listing effectively reversed the onus of proof for these consumers, resulting in the requirement that they "prove" that they did not owe the amount owed, or pay it regardless of their liability. CCLC and the then Consumer Credit Legal Service (Vic) have lodged two representative complaints with the Office of the Privacy Commissioner in relation these debts.

Mr. H complained to a debt collection agency that the "debt" they were claiming had been incurred fraudulently and had been resolved with the phone company some time ago. When Alliance continued to pursue him for payment, Mr. H asked for a copy of the contract. After two months, Alliance advised that they did not have a copy of the contract but suggested that Mr. H. go to the original phone dealer to request a copy. As Mr. H never opened the account, he had no idea who the original dealer was.

Mr G contacted Alliance regarding a debt assigned by Telstra that had accrued in his name, having become aware of a default listing. Mr G concedes that he was suffering from mental illness during the period in which the debt accrued and hence has only a vague recollection of events, but was certain that the telephone account was not his. On

contacting Alliance to determine whether the debt was incurred by him, Mr G found that the address and the drivers' license number attached to the account were not his.

During a long process of "badgering" by Alliance, he was requested to produce a range of documents to help prove he didn't own the account. These included:

- A letter from a Justice of the Peace;
- Medical records;
- A copy of his drivers' license; and
- Two additional forms of proof of address.

Ms G was contacted by Alliance with reference to a 2002 Telstra debt. The address listed against the account was an address where Ms G had never lived. Ms G advised Alliance that the account was not hers and provided her license details and other documentation confirming her identity to Alliance. Nonetheless, a default listing was subsequently made on her credit report.

Mr S was pursued by Alliance regarding a mobile phone contract with Telstra. Mr S never had a mobile phone contract with Telstra and as such was wrongly targeted by Alliance. Mr S has a default listing regarding this debt and this can have adverse effects on him while he is waiting for the dispute to be resolved. To make matters worse pressure was put on him to pay money to the debt collector if he wanted to get his default listing removed, a listing that should never have been there in the first place.

Alliance Factoring contacted Ms K about a Telstra debt in early 2005. Ms K never had an account with Telstra. Alliance Factoring's details about the debtor were very similar to Ms K's, but were incorrect in regards to her date of birth and address. Ms K was sent a dispute pack which she returned complete with a statutory declaration and a copy of her driver's licence around September 2005. Ms K still receives phone calls every 2-3 days and Alliance Factoring has placed a default listing on her credit report.

Mr L was contacted by Alliance Factoring on the 27 September 2005 in its continuing pursuit of a statute barred debt. CCLC wrote to Alliance Factoring requesting that they immediately remove the default listing from our client's credit report and provide documents and information in relation to the alleged debt. That letter was dated 26 August 2005 and a follow up letter was sent on 19 September 2005. A response was not received and on 27 September 2005 Alliance Factoring contacted Mr L again to pursue the debt. CCLC did not receive any acknowledgement of our dispute.

Ms G was contacted by Alliance in October of 2002 requesting payment for an assigned Telstra debt. Ms G disputed the debt, on the ground that she had never lived at the address to which the account was attached. Ms G sent documentation to Alliance in 2002 verifying her identity and address, however after two and a half years the only response

she had was that the matter would be redirected to Telstra. Further, a default listing was made on her credit file in December of 2003. In October 2005, Ms G contacted Alliance and was told that the file would be finalised within 6 weeks, however Ms G has not heard from Alliance.

Mr A was contacted by Alliance requesting payment for an assigned Telstra debt. Mr A telephoned Alliance in February 2006 and found that the address, date of birth and drivers' license number were not his and that the debt was for a mobile account which he had never opened. Mr A then disputed that the debt was owed by him and was told that if he refused 'to pay, [he would] be continually contacted by telephone until payment has been resolved'. In addition, on asserting that he would seek legal advice, Mr A was told that he could not seek such advice.

Mr H was contacted in September of 2005 by Alliance to request payment of an assigned Telstra debt. Mr H telephoned Alliance to dispute the debt. Alliance continued to chase Mr H for the next six months for payment, despite the fact that the debt had been disputed and they were unable to produce the contract from which the debt was said to arise or any information beyond name and address linking the debt to Mr H.

Ms T contacted Alliance after noticing a default listing on her credit report relating to a Telstra debt assigned to Alliance. Alliance claimed to have sent numerous requests for payments to an address at which Ms T had never lived. Ms T disputed the debt, however she was told by Alliance staff that the best thing to do was to pay the debt. She was told that she had a good chance of having the default listing removed if she paid an apparently arbitrary sum, which she did, though she continued to dispute that the debt was owed by her. Ms T never received any written documentation from Alliance.

Mr G contacted Alliance after noticing a default on his credit report. Mr G disputed the debt in question as the address and drivers' license number attached to the account were not his. Mr G had suffered from bi-polar disorder at the time during which the debt accrued. Over a period of three months, Mr G was required to send his psychiatric carer's session notes to Alliance three times, notwithstanding that he had already provided other documentation establishing that he did not reside at the address or hold the drivers' license linked to the account. During the same period Mr G telephoned Alliance 16 times and was told that no progress had been made. The complaint was resolved 6 months after the initial dispute, after Mr G had pursued it through the Telstra Complaints Service, the Telecommunications Industry Ombudsman and his local Member of Parliament. We can see no reason for Alliance to request the documents that were requested, other than to exert pressure on the consumer to pay the sum sought.

5 Industry Interviews

5.1 Participation

As discussed above, CCLC arranged to interview industry participants as part of this project in order to gain an understanding of the actual processes of credit reporting and how information on credit reports is used. We interviewed representatives from four credit providers, all of which are members of the Australasian Retailer's Credit Association. These "credit providers" included at least one major bank, a regional bank and a telecommunications company. The term "credit provider" is used to include the telecommunications company for the purposes of confidentiality only. This is not intended to endorse the inclusion of telecommunications companies in the definition of "credit provider" under the *Privacy Act*. A copy of the interview questions is included in Appendix F.

We conducted two telephone interviews with mortgage brokers contacted through the Mortgage & Finance Association of Australia. Each interview lasted approximately 20 minutes. We also met with representatives from the two credit reporting agencies Baycorp Advantage and Dun & Bradstreet.

Due to commercial sensitivity we do not include the transcripts of the interviews in this report. Where reference is made to the general practice of industry participants and/or individual comments, we have not named individual credit providers or brokers, and the names of interviewees, and other identifying or confidential information are not used.

5.2 Summary of results

5.2.1 How does credit reporting assist in their lending decisions?

5.2.1.1 Do credit providers use the current credit reporting system, how often, and for what purposes?

All credit providers interviewed used the credit reporting system to some degree. Usage varied from those credit providers who always accessed the system for every loan application, and reported every default, to those who used the system less frequently. Those credit providers who access the system less frequently were very large institutions that cited their own extensive data as sufficient to manage risk on most loans/accounts. For those credit providers, a significant percentage of applications were simply approved or declined on the basis of a score derived from application information and the credit provider's internal data. Credit information held by a credit reporting agency is only

consulted in those cases where an applicant is considered "borderline" on the basis of other data.

Most credit providers interviewed used Baycorp when they did access credit report information, with Dun & Bradstreet being an additional source of information for some credit providers in relation to some applicants, particularly younger applicants with little credit history in relation to loans. While credit providers were generally in favour of some competition in the credit reporting market, particularly to increase standards of accuracy and improve the amount of information available, they were obviously not in favour any development that might tend to increase rather than decrease the cost per transaction. An example of this would be if they were compelled to go to more than one credit reporting agency on every application to get complete information.

Credit providers interviewed indicated that they did not consult credit file information in offering credit limit increases. Most credit providers used behavioural scoring alone in offering credit limit increases, based either on the account in question, or, increasingly, on all accounts held with the same credit provider. The use of original application information in this decision-making process was also being integrated, although for older accounts this information was often no longer available. None of the credit providers interviewed were taking the additional step of making any acceptance of the offer conditional upon the recipient providing application information (except for ACT residents as required by law) or giving consent to the credit provider accessing their credit file.

5.2.1.2 How do they access the credit reporting system (telephone, fax, computer network interface)?

All credit providers interviewed accessed credit report information via direct computer interface. Some credit providers mentioned interacting with the credit reporting agency and the data in more traditional ways in circumstances where the system could not make a match and further consideration was needed to determine whether the correct person's information was being used. As a result credit providers rarely see a physical credit report as would be obtained by a consumer upon accessing their report.

5.2.1.3 How do listings impact on their credit assessment processes (including but not limited to) credit scoring?

All credit providers interviewed used a combination of automated scoring processes which used credit report information among other sources of information to calculate a score, and policy directives which added an additional layer to the process and could potentially override an applicant's score. The most common example of a policy override was that applicants for unsecured credit who had a default listing on their credit report would be rejected regardless of their score. In such cases a default listing comes into play twice, firstly as a negative characteristic that tends to lower the score and, secondly, as a

policy based rejection. In this particular scenario the score becomes superfluous as a result of the policy override.

Other credit providers used the data on loan/account application forms and the credit provider's internal data (derived from repayment behaviour on other accounts for example) to develop a score before making a decision whether or not to consult an external credit reporting agency. These credit providers who only sought an individual's credit file in borderline cases could not therefore be said to have a "default equals decline" policy as some applicants are approved without the lender being aware of a default. However, once a default is identified it usually leads to the application being declined.

Smaller lenders were more likely to have some human involvement in the decision-making process, although all credit providers interviewed used an automated score as an extremely influential factor in all credit decisions. One credit provider used automated scoring and policy overrides coupled with guided discretion by individual staff members. For example, an applicant who has a default listing on their credit report but has an otherwise acceptable score may then be considered by a staff member on a "refer, recommend decline" basis for further consideration.

Credit providers interviewed did not generally distinguish between types of negative information. That is, default listings, serious credit infringements and court judgments were all considered negative and all had a similar impact on the outcome of a credit application. At least one credit provider indicated that they would look particularly unkindly on defaults with sub-prime lenders, although this would clearly only come into play where some discretion was being exercised in relation to whether an applicant's default would be disregarded.

In reference to consumer/customer dissatisfaction with some aspects of the assessment process, one credit provider said: "Credit scoring is about numbers. Irrespective of what customers say, the reason that it [a particular factor such as number of inquiry listings] has come into the score card is because it is very relevant. Over time it's a good predictor of risk."

Some credit providers did take into account the amount and/or type of default, although the fact that some would not take any notice of defaults below $100 has now been superceded by the decision by Baycorp to restrict default listing to amounts over $100. Others did not distinguish between amount or type of default at all. Those who did distinguish between default types usually indicated that they would only take the amount of a default into consideration if it was a "one-off" and was paid. Multiple defaults and/or unpaid defaults would invariably lead to a declined application.

Credit providers largely indicated that customer notations on the credit report played little or no role in their decision-making processes. One credit provider said that they have to take customer notations into account when they appear, but that they rarely see any.

5.2.1.4 Do they take into account direct customer explanations?

Whether customers were given the opportunity to "explain away" default listings and other derogatory information also varied from credit provider to credit provider and from portfolio to portfolio. The larger institutions generally had no room in their processes for customer explanations, although these could become relevant in the dispute resolution process if the customer made a complaint. Secured lending was treated differently to unsecured lending, with some lenders allowing some defaults on secured lending (usually paid defaults where some plausible explanation had been offered), but most taking a very strict "default equals decline" approach to unsecured lending such as credit cards.

Smaller lenders were more likely to listen to or even seek customer explanations if an applicant otherwise had a high credit score.

One credit provider indicated in a follow-up interview that internal analysis of the progress of loans where there had been an appeal against an initial rejection (often by sales staff), compared to those loans that had been approved in the first instance, revealed a significantly higher success rate among the latter category. This comment was not made in the context of discussing credit reporting in particular, but rather in relation to the entire application process, the point being that discretionary deviation from the decision systems was largely undesirable from a risk management perspective.

5.2.1.5 Do they think the current credit reporting system provides useful and reliable information? Why or why not?

Credit providers were fairly sceptical about the accuracy and completeness of the data available, but most would consult the data that is available (at least in some circumstances) rather than not. This scepticism was less about there being mistakes in the data that is available and more about there being data that is simply missing. This was attributed to inconsistent use by credit providers, rather than any other cause. At least one credit provider also noted that listings did not seem to be consistently updated as paid. There was also some concern about the consistency of data definitions and listing practices, even by credit providers who did contribute to the system on a regular basis. For example, credit providers listed at very different points in the default cycle, from 90 days to several years from the default event. Also, it was never clear whether a $200 default represented a small unmet commitment or the first missed payment on an as yet unpaid $15,000 credit card account.

While some of the credit providers interviewed were not consistent users of the credit reporting system at present, all were convinced of the benefits of reciprocity in ensuring the completeness of credit reporting data. All credit providers interviewed are represented on the ARCA group with a view to improving data standards and consistency through more prescriptive contracts between the credit reporting agencies and subscribers.

Another issue raised was the number of reports per individual debtor. While different credit providers approached the issue of fuzzy-matching differently according to their systems capability, there was a perception that the credit reporting agencies could do more work simply auditing files to merge those which relate to the same person. This issue was also raised by a broker, but from a different perspective. His concern was about files that were incorrectly cross-referenced, leading to repeated unfair credit rejections for an innocent party. The issue of people with similar identifiers such as twins who share a surname and date of birth, or family members who share the same first name, surname and address who become inadvertently linked or wrongly targeted was also alluded to by credit providers.

5.2.2 How do lenders make listings?

5.2.2.1 In what circumstances do creditors make entries on a customer or potential customer's credit report?

There was an enormous variation between the credit providers consulted in relation to listing practices. Whereas inquiries appear automatically provided the credit provider has accessed the credit file in the application process, there is far more discretion, and hence variation, in relation to default listings. Some credit providers listed fairly strictly at 90 days, others at 180, and still others would not list whilst ever they were of the opinion that there was some hope of maintaining the relationship with the customer and getting the account back on track.

Most credit providers said they did not list where a hardship arrangement was in place, although at least one credit provider used the option under the current system to indicate there was a scheme of arrangement in place. At least one credit provider said that debts that were identified as "hardship cases" would be referred to a special section where interest was frozen and listing was not an option whilst ever the customer complied with any repayment arrangement. Defaults which are listed prior to an arrangement being put in placed usually remain despite an arrangement being entered into later.

At least one credit provider interviewed indicated that all debts were outsourced at the point of listing largely because the credit provider did not have the systems in-house to update the credit file once paid.

One credit provider indicated that a serious credit infringement (referred to as a "skip") would be listed if the debtor failed to make contact or respond to contact for 90 days. If the debtor later made contact the report would be updated to "skip located" but the adverse listing would not be otherwise altered or downgraded.

One credit provider indicated that in circumstances where they re-process an application for any reason they will contact the credit reporting agency to request that only one inquiry appear on the report as both are about the initiation of the same account.

5.2.2.2 Do lenders always obtain consent from customers/potential customers for obtaining a copy of their credit report? Do they give notice?

All credit providers interviewed indicated that privacy consents permitting the credit provider to obtain credit file information from a credit reporting agency were always required at the point of application. These consents took various forms, from written statement which required signature to scripts read out over the phone and internet check boxes which must be completed for an application to continue.

5.2.2.3 Do lenders make adverse listings without having first obtained a privacy consent or giving a privacy notice to this effect at the time the loan was entered into?

All credit providers interviewed indicated that privacy consents also covered the possibility of negative information being reported to a credit reporting agency, although it was not necessarily spelt out in those terms.

5.2.2.4 What are the policies and procedures for accessing or amending a credit report (including any notices to the customer before or after any addition/change to their credit report)?

Usually default notices and letters of demand were issued by traditional credit providers prior to listing, with the former being required under other legislation, specifically the *Consumer Credit Code*. One credit provider noted that customers were sometimes confused because they paid the amount on the default notice and were nonetheless listed because of further arrears which occurred on the account in the period of the default. The customers would not be sent an additional default notice, or any additional notice that they may be listed.

5.2.2.5 Are these processes subject to any form of audit or quality control?

Credit providers generally indicated that their credit reporting obligations and functions were subject to internal audit in the same manner as all compliance obligations. Very little detail was provided, except insofar as banks regarded their compliance systems and obligations to be very onerous. The telecommunications company interviewed also indicated that they were subject to compliance audits in relation to their privacy and Australian Communication Industry Forum (ACIF) Codes obligations.

5.2.3 How do they handle complaints?

5.2.3.1 What are the procedures for dealing with credit reporting complaints?

In the case of banks, complaints are dealt with through the usual internal dispute resolution procedures, and then referred to the Banking and Financial Services Ombudsman if unresolved. Standards for dispute resolution for banks are dictated by both ASIC Policy Statement 139 and the Code of Banking Practice. The telecommunications company dealt with complaints using internal dispute resolution and liaison with the Telecommunications Industry Ombudsman.

5.2.3.2 How often do such complaints arise?

Most credit providers interviewed did not believe there were significant numbers of complaints in this area, especially about their interaction with credit reporting data. Complaints about credit rejections were more common but these did not necessarily translate into a dispute with the credit provider. Where a credit report was instrumental in a decision, the applicant would usually be referred to the credit reporting agency and the issue would be taken up with them or the credit provider who listed any adverse information.

The telecommunications company did indicate that the numbers of complaints received were fairly substantial but expressed some satisfaction with the processes for dealing with complaints. The same company indicated concern at the recent substantial increase in the number of telecommunications default listings, and indicated that this was at odds with their internal experience where default listings had actually reduced in the same period.

5.2.3.3 How efficient is the system as it currently operates in resolving such disputes?

Most of the credit provider staff involved in the interviews were involved in risk assessment or collections. They usually did not have an informed opinion about the efficiency of the current system in resolving disputes.

One credit provider was, however, prepared to say that the system was not currently very efficient at resolving complaints. Baycorp had reportedly improved in complaints handling in recent times, but there had been a history of "buck-passing" by all parties, credit providers included. One of the initiatives of the ARCA group is to have one point of contact not only within institutions, but also for managing disputes that involve multiple parties so that the complainant is not tied up in interminable separate processes.

5.2.3.4 What aspects of the system do lenders find helpful or obstructive in resolving credit reporting disputes?

Credit providers were keen that consumers should have a greater understanding of the impact of their repayment behaviour on their credit report. They were concerned, however, that this should stop short of giving such detailed information that applicants for credit could "work the system".

They also indicated that the fact that the applicant must be told about situations where a credit report had an impact on a decision to reject, even where there were many other negative factors, created misconceptions about the weight of credit reporting information in the overall process. Some consumers, they said, get very agitated about an entry on their credit report when in fact they would never have been successful in their application regardless. This in turn creates misguided dissatisfaction with the credit reporting system.

5.2.4 Suggestions for improvement

5.2.4.1 What changes to the system would lenders suggest to improve dispute resolution?

The credit providers interviewed were in agreement that inaccurate listings are unhelpful to both consumers and credit providers alike. Credit providers wish to market their products as widely as possible to "good risks" and do not like to lose business or engender animosity in "good customers" as a result of a wrongful listing. For this reason they were also in favour of improved dispute resolution in this area. One of the credit providers had already instituted a "one point of contact" system for all credit reporting complaints to ensure that they can be monitored and that disaffected consumers do not get given "the run around." The other credit providers interviewed were also working towards this as a commitment to their involvement in the ARCA process.

5.2.4.2 What changes to the system would lenders suggest to improve the overall quality of lending decisions?

All credit providers interviewed were interested in improving the quality and consistency of credit data. With this in mind they were all working through the ARCA group to tighten up the system via improved subscriber obligations.

There was some difference of opinion in relation to whether there should be more data able to be collected. Some were not in favour of extending the system at all, but simply making better use of the system under the current law by means of reciprocity obligations and improved data governance rules. Others were in favour of a move to the reporting of complete repayment history on a monthly basis. This, it was argued, would take the "interpretation" out of the current system by requiring only factual information to be reported. Currently there is a wide variety of definitions of "default" for example, and no other data against which to measure the weight that any particular default should be given in a customer's overall repayment history. Still another credit provider said that they were only interested in:

"…the *minimum information* that will allow us to make a good credit risk assessment. We would like more accurate information about current obligations, what facilities they have, how much, who has more access. So we can be more responsible in our lending assessments." (emphasis added).

Part 3

Analysis and Recommendations

This Part analyses the current credit reporting system with reference to existing research, commentary and media commentary, together with our own research in interviewing/surveying credit providers, caseworkers, mortgage brokers and privacy representatives.

The numbering of Recommendations in this section follows the order allocated in the complete list of Recommendations at the conclusion of this Part of the report. Numbers therefore appear out of sequence in the text.

6 Regulation of credit reporting

The regulatory regime for credit reporting is complex. Credit reporting is currently being regulated by Pt IIIA of the *Privacy Act*, the Credit Reporting Code of Conduct, as well as the National Privacy Principles. Determinations can also be made by the Privacy Commissioner. This makes it unnecessarily complex and confusing, and from the business perspective, costly to maintain compliance. It also presents challenges for those wishing to make privacy complaints. A summary of the regulatory framework is enclosed as Appendix A.

The privacy principles should clearly apply to the collection of personal information for credit reporting purposes, and there needs to be an appropriately defined exception to the *Privacy Act* to facilitate credit reporting. The drafting of the current Part IIIA is complex, rigid and often difficult to comprehend and apply. It also arguably undermines the thrust of the privacy principles. Credit providers, consumers and decision-makers alike become mired in the detailed requirements of the *Privacy Act* and can easily lose sight of the principles those sections were meant to uphold. The following comment taken from a caseworker survey was echoed by credit providers in the interviews:

> *The drafting of the Privacy Act as far as it concerns credit reporting is turgid and possibly in fact contradictory. At any rate, I find it very difficult to understand.*

There are three reasons why credit reporting seems not to fit solely within the framework of privacy.

Firstly, information collected by credit reporting agencies is specifically collected for the purpose of sale to credit providers for use in the credit assessment process, with potentially devastating financial consequences for the subject of the information. This distinguishes credit reporting information from other types of personal information collection, where the potential for detrimental use is usually *incidental* to the stated reason for collecting the information.

Further, whereas the issue for determination in many privacy complaints is *whether* particular personal information has been inappropriately disclosed, credit reporting complaints often turn on the *accuracy* of the of the information disclosed. This has the effect of forcing the OPC into a de facto decision-maker in factual disputes about contractual obligations.

Finally, credit assessment itself is a complex science involving economics, statistical analysis, market forces, commercial decisioning, fair trade issues, as well as the types of data being collected and the way that the data is used. This is clearly something outside of the scope of the *Privacy Act*. It is reasonable to question whether the *Privacy Act* is the best fit as the primary or sole regulatory mechanism. This issue is explored further under some of the specific headings below.

Recommendation 1 Part IIIA of the *Privacy Act* should be redrafted using the National Privacy Principles as a guide to the structure. Without diminishing the relevant rights and responsibilities of all parties, the obligations should be contained in a hierarchy under each privacy principle so that it is clear what each section or group of sections purport to achieve, and that the individual sections do not diminish the overarching obligation to observe the principle.

Recommendation 2 There should be additional consideration of the regulatory framework for credit reporting, including options for dispute resolution, monitoring and enforcement in view of the following:

- disputes about the accuracy of default listing information concern issues beyond the scope of the *Privacy Act*
- disputes about "fair use" of credit reporting information within the context of risk assessment require additional expertise

7 Consumer ownership/control over data and understanding of the system

In the context of privacy, data subject participation and control are important principles. Individuals should be able "to participate in, and have a measure of influence over, the processing of data on them by other individuals or organisations".[29] Flowing on from this are rules requiring data collectors or controllers to collect data directly from data subjects in certain circumstances; rules prohibiting the processing of personal data without the consent of the data subjects; and rules requiring data controllers to orient data subjects directly about certain information on their data processing operations.[30] In this section we discuss the concepts of consumer ownership of credit reporting data and consumer understanding of the credit reporting system, and in the next section we discuss issues related to notification/consent at various stages.

7.1 Consumer ownership of credit reporting data

Credit reporting agencies do not collect data directly from consumers, but from credit providers and/or debt collectors. Baycorp in its submission to the Senate Legal and Constitutional Committee Inquiry into the *Privacy Act* conceded that:

> For the most part, Baycorp Advantage's relationships with consumers are indirect. This makes the operation of privacy protection for individuals a more complex matter, as the proximity and intensity of relationship between Baycorp Advantage and consumers is lower than for many organisations that collect data in their own right. This remote, low intensity relationship makes the exercise of rights by individual consumers a challenge.[31]

As credit history information is collected by credit providers and held by credit reporting agencies, consumers are removed from any sense of ownership of the information held about them. Consumers do not have control over the type of information that is being held, they are reliant on the credit reporting agencies for access to the information, they do not control who else can have access to their information, and they do not have the authority to change and correct the information, yet the information can be used to their detriment.

Improved consumer knowledge of both the credit reporting process generally, and of each individual's own credit report information, is an area where Baycorp and consumer groups share some common ground. Baycorp recognise that the integrity of their data is crucial to its commercial value and also that consumers are the most exacting reviewers

[29] Lee Bygrave, 'Core principles of data protection' (2001)*Privacy Law and Policy Reporter* 9.
[30] Ibid.
[31] Baycorp Advantage, submission to Senate Legal and Constitutional Committee, Parliament of Australia, Canberra, Inquiry into the Privacy Act, 5.

of the accuracy of information concerning themselves. Baycorp are also keen to improve the reputation of their agency for accuracy and increase consumer confidence as part of an overhaul intended to boost their credibility and undermine resistance to their push for a move to a positive credit reporting environment.

In discussions with Baycorp, we explored ways of empowering consumers to take a greater interest in the content of their credit report and its use, but this is no easy task. In the US for example, consumers get a free credit report every 12 months so there is more of a sense of control, and people feel more responsible for their credit data. We canvassed the idea of similarly sending credit reports to all consumers every 12 months. The response was that the cost would be too high. More compelling concerns were also raised about privacy and the danger of sending credit information to a last known address. Currently consumers are required to provide identifying details before a copy of their credit report is supplied. This is a valid concern, especially in the light of a case where a customer's credit report was fraudulently obtained and used for the purpose of perpetrating identity fraud.[32]

Caseworkers also raised the issue of the lack of prominence of the option to obtain a free copy of a person's own credit report on the Baycorp website, alleging that this effectively channels consumers to the paid option in circumstances where there is no particular urgency and the consumer should be able to exercise their right to view their report for free. While Baycorp is cognisant of this issue, company representatives report considerable practical hurdles encountered in attempting to address the problem. Baycorp received 236,000 requests for consumer reports in the 2005/06 financial year. Twenty-five percent of these required further follow-up with the consumer to verify identification information, and 23,000 resulted in investigations of reported inaccuracies ranging from minor spelling errors to more serious complaints about derogatory information. Baycorp has serious concerns that giving any increased prominence to the free option will inundate their systems, causing them to fail to meet turnaround times for both the provision of reports and the investigation of complaints. Despite this, company representatives express commitment to resolving this issue and the credit reporting agency will be running a trial of a more prominent free credit report option on their website during the upcoming Australasian Consumer Fraud Taskforce's four-week campaign 'SCAMS TARGET YOU! Protect Yourself' to measure the impact on their internal systems. This keystone issue in relation to consumer ownership and protection must be addressed as a matter of urgency.

7.2 Consumer misunderstanding of the credit reporting system

[32] See 'Your good name at risk?' *Choice* (Sydney), February 2006, 8.

There are low levels of awareness of credit reporting, what it is, and how it works. There are many misconceptions about credit ratings, and how to "improve" your credit rating by getting more credit. Most consumers do not understand how the Australian credit reporting system works and assumes it is similar to the US model where the emphasis is on 'credit rating'. Caseworkers said:

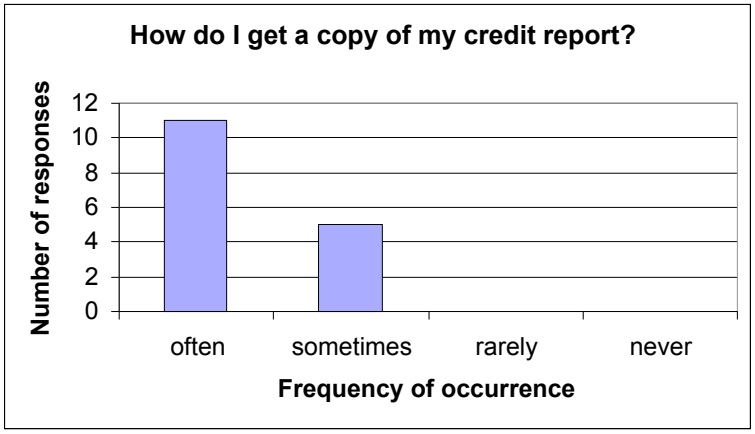
> *Clients do not seem to understand what a good credit rating is – they think the more things you pay out the better the rating. They think in "positive" credit reporting terms. They also do not understand that paying a debt does not remove the listing – only "updates" it.*
>
> *Many clients do not recognise a debt because it is listed in the name of a debt collector, not the original credit provider.*

Some consumers are under the impression that they can build a "credit rating" by borrowing from high-cost, fringe providers in order to gain access to the mainstream, often with precisely the opposite effect when they struggle to meet their expensive commitment.

While some consumers are not aware that the information exists let alone the fact it is being traded, others contact the Credit and Debt Hotline, for example, to ask where they can find out "who they owe money to", as if there is a central register where all their financial transactions have been carefully recorded and tallied. One caseworker said in the questionnaire:

> *I receive a lot of calls relating to problems with credit ratings. There appears to be a lot of confusion with little education for consumers regarding this.*

It also appears that many people do not know how to obtain a copy of the credit report. In our caseworker survey, many caseworkers reported being asked about how to get a person's credit report on a regular basis:



Some consumers do not appear to know the fact that there may be a credit report in their name at all. Many more people apply for credit or mobile phones not knowing that a record of their application will remain on their credit report for 5 years. In most instances a credit report is only mentioned in a negative context – when consumers are being refused credit, or in advertisements for non-conforming or predatory lenders offering credit to those who have "bad credit ratings". The consumer attitude is then often defensive. In one instance the consumer alleged that it is defamation and that the credit report is ruining their reputation, and in another that they argued that they had never authorised an agency to maintain a file about them, regardless of any consent they may have given for a credit provider to give such information to a debt collection agency.

As Baycorp stated, one of the challenges of in the current regime is that "there is comparatively little incentive for individuals to take an active interest in the management of their data. Until there is a problem, consumers typically do not look."[33] The Senate Legal and Constitutional Committee Inquiry into the *Privacy Act* noted concerns of consumer representatives that "the fact that a credit report contains adverse information is generally only brought to consumers' attention when they are denied credit. This … denies consumers the opportunity to check information held on them and to correct it."[34] While noting that Baycorp offers a notification service for a fee where a consumer is notified when their credit report is altered, the Committee also noted that "it is also generally acknowledged that individuals are not utilising these services or taking an active interest in the management of their credit records."[35] It is also questionable whether this should be another potential income stream for the credit reporting agencies, as opposed to a responsibility imposed in return for the right to trade in the data.

Some of the misinformation about credit reporting also arises from the information given to consumers when they are refused a loan. While there is no general obligation on credit providers to give reasons for a loan refusal, there is a mandatory obligation (contained in the *Privacy Act*) to inform the applicant if their credit report formed part of the reason for refusal. While some credit providers will give other reasons also, such as that a person has inadequate security or insufficient income to service a loan, this is not universal. A low credit score from an internal scoring system used by credit providers is not usually given as a reason. The result of this is that consumers will sometimes be informed that their credit report was instrumental in their failure to obtain a loan and not given any other reasons, even where other reasons exist. This distorts the role of the credit report in the lending process and the consumer perception of the importance of the contents of the report. It also raises issues about the level of publicly available information about credit scoring more generally.

[33] Senate Legal and Constitutional Committee, Parliament of Australia, Canberra, Inquiry into the Privacy Act, 19 May 2005, Mr Andrew Want, Baycorp Advantage Ltd, 2.
[34] Senate Legal and Constitutional Committee, above n 14, 103.
[35] Ibid.

Credit providers interviewed as part of this project were in favour of greater consumer knowledge in relation to credit reporting, subject to the proviso that some types of detailed information could expose credit providers to the risk of consumers "working the system".[36]

[36] It was noted in a credit provider interview that some brokers already provided a service of this nature to consumers, such as coaching consumers to include liabilities on their loan application which are referenced on their credit report already and exclude those that are not.

8 Consent/ notice

8.1 Consent/notification at application stage

The principles of control and ownership are also closely related to the issue of consumer consent to their information being collected, used and disclosed.

Typically consumers will be asked to sign a *Privacy Act* authority notifying them that their information may be given to a credit reporting agency, and that the credit provider is authorised to obtain information from the credit reporting agency and other credit providers. However, consumer groups have argued that this is ineffective. It is unlikely that consumers will read the privacy consents and even if they do, in many instances the consent wording is complex and confusing, and does not reflect the true nature of the consent and its often significant consequences. For example, a standard privacy consent runs for two A4 pages and the font size is no bigger than eight. Further, privacy "consents" are buried in pages of other documentation presented at a time when the loan applicant is focussed on the loan transaction itself, rather than any incidental material.

Consumer groups have also criticised the industry practice of bundling consent to disclose personal information to a credit reporting agency with other consents in credit applications. The notice to the consumer that their information may be disclosed to the credit reporting agency is contained in the same document as other *Privacy Act* notices. They argue that the imbalance of power between credit providers and consumers means that consumers are not in any position to give real consent. This point is also acknowledged by Baycorp:

> *In the case of a bundled consent, where an organisation typically seeks a blanket sign off to use personal information for multiple purposes, the reality is in many cases: no sign-off, no product/service. In other words, there is a complete absence of choice, let alone informed consent, on the part of the individual.*[37]

Industry, on the other hand, argues on business efficacy grounds that a prohibition on the use of bundled consent would be "an unwarranted and intrusive restriction on business".[38]

Given these opposing views, it is unfortunate that the *Privacy Act* does not allow for more protection. Section 18E(8)(c) simply requires that a credit provider must not give to a credit reporting agency personal information relating to an individual if … (c) the credit provider did not, at the time of, or before, acquiring the information, inform the individual that the information might be disclosed to a credit reporting agency.

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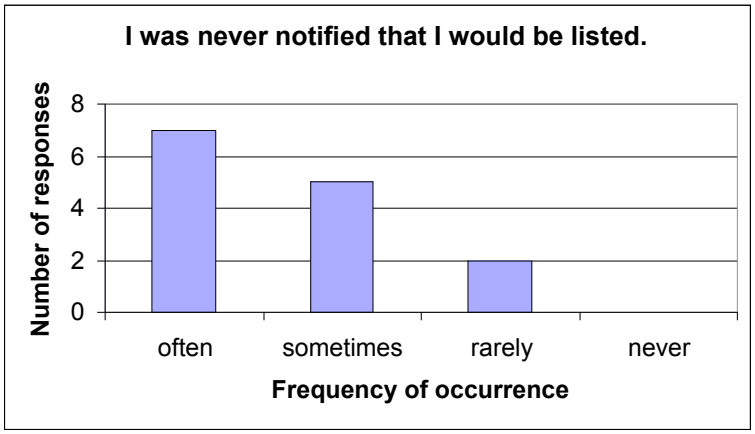
[37] Baycorp Advantage, submission to Senate Legal and Constitutional Committee, Parliament of Australia, Canberra, Inquiry into the Privacy Act, 15.
[38] Senate Legal and Constitutional Committee, above n 14, 102.

The way in which the subsection is drafted leaves little room for consumer protection. While it requires that a consumer must be informed, the key requirement is not consent, but simply notification. It would suffice for the credit provider who is collecting the information that they tell the consumer the information will be passed on to a credit reporting agency. The consumer is not required to give their consent. In addition, the wording of the subsection is *not* that the credit provider cannot collect information if no notification is given, but merely that the collected information cannot be passed on. Further, even if the requirement for collection and use of the information is notification and not informed consent, many caseworkers reported that they were often contacted by people who complained that they were never notified that they would be listed:



Whether or not these consumers were actually notified, the notice is clearly not effective.

In addition, there are also concerns in relation to the interpretation of the notice provisions and the timing of the notice. In the context of a discussion about default listings, the OPC, in correspondence with consumer representatives, has expressed a view that the phrase "acquiring the information" in s 18E(8)(c) refers to acquiring information of the fact of the person's default, rather than acquiring their personal information, such that the notice provisions come into play immediately prior to the listing, and not at the time of application.

A representative complaint under s 36(2A) of the *Privacy Act* has been made to the OPC about the interpretation of this provision by CCLC and the Consumer Credit Legal Service (Vic) Inc. The complaint relates to Alliance Factoring listing 600,000 defaults for former Telstra debts. There was never any evidence produced that Telstra notified the affected consumers when they applied for a telephone service that they may be listed. The complaint argues that the correct interpretation of s18E(8)(c) requires credit providers to notify individuals that their information might be disclosed to a credit reporting agency *at the time of the application for credit* on three bases. Firstly, the natural meaning of the phrase "acquiring information" must refer to the acquisition of the

relevant identifying personal information that is being collected, and not the acquisition of information relating to consumer defaults on a payment.

Secondly, the complaint argues that the parliamentary intent of the provision is to ensure that credit providers inform consumers about the potential use for the personal information *before* the consumer discloses that information. In the Second Reading speech during the passage of the *Privacy Amendment Bill (1990),* the then Attorney-General the Hon. Michael Duffy stated:

> An important aspect of the Government's proposed regulation is that there will be strict requirements for consent before consumer credit information can be sought or passed on. Such information can be passed on at present without the consent or knowledge of the consumer. The new controls will mean that consumers will be able to have authority over information about themselves. Credit providers will be able to continue to maintain their own information on their clients.[39]

It appears that parliament contemplated a high level of individual control over personal information. It is also clear that the amendment was introduced to overcome the difficulty of consumers not *knowing* that their information can be passed on. Section 18E(8)(c) was intended to ensure that the consumer knows how that information could be used, and gives them the choice of disclosure or non-disclosure of personal information through their decision to proceed, or not, with the credit transaction.

Thirdly, the consumer advocacy services argued that it is consistent with other provisions of the *Privacy Act* and *the Credit Reporting Code of Conduct* that the relevant time for notification is at the time of application, given that clearout listings are made in circumstances where the consumer cannot be contacted and therefore by definition cannot be notified that they would be listed.

The question must also be asked whether a regime reliant on consent alone, even informed consent, is in the public interest. In a society very much dependent on credit, most consumers feel there is no real choice, and therefore take little heed of the consents and notifications they are regularly asked to sign. Clearly consumer privacy protection must have considerably wider scope than consent or notice provisions to be effective.

The former Privacy Commissioner Malcolm Crompton queried in a recent speech whether or not "the current privacy protection laws are too 'front end loaded' by being too dependent on notice, collection limitation and purpose limitation", or whether there should be a more focus on "'back end' frameworks based around a security, data quality and general information governance framework".[40] He quotes from US academic Professor Fred H Cate who remarked,

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[39] Commonwealth, *Parliamentary Debates,* House of Representatives, 4 December 1990, 4343, (The Hon Michael Duffy, Attorney-General).

[40] Malcolm Crompton, 'The Networked Society: Identity, Surveillance and Privacy' (Speech delivered on 24 August 2005).

> … the energy of data processors, legislators, and enforcement authorities has been squandered on notices and often meaningless consent opportunities, rather than on enhancing privacy. Compliance with data protection laws is increasingly focused on providing required notices in proper form and at the right time, rather than on ensuring that personal information is protected.[41]

Added to this very pertinent observation is that personal information is protected *and put to "fair use"*. As identified in the caseworker surveys, it is not always the accuracy of the information that is in question, but its relevance to the decision to grant credit and the proportionality of the consequence. This is explored more fully in the following sections.

Crompton suggests that the solution may consist of a strong framework of audit, continuous disclosure and clear civil and criminal penalties. He suggests the introduction of laws that could "redress any imbalances by internalising risks of failure and misuse to the organisation through such combinations as requiring greater transparency, regular published audit in a complete information governance framework, allocation of a greater proportion of risks of failure to the organisation including through private class action,"[42] or in other words, forcing credit reporting agencies and credit providers to take greater responsibility for compliance. In contrast the current system could be characterised as an honesty system, dependent for compliance on ill-engaged and ill-informed consumers with almost no business risk attaching to the exposure of errors even when they are identified.

8.2 Notification at other stages

It has also been suggested that education campaigns about credit reports could alleviate some of these concerns. Broad public campaigns, however, are less likely to have an impact on those consumers most in need of the knowledge than measures that are targeted to relevant triggering events. In the case of credit reporting, there are three occasions of natural interaction, although all may occur with limited knowledge on the part of the consumer:

- When the default occurs;
- When a default listing is made; and
- When a loan application is refused.

All of these events are opportunities to involve consumers more intimately with their data, thereby increasing opportunities for consumers to correct inaccuracies, thereby improving data quality and consumer rights simultaneously.

[41] Ibid 9.
[42] Ibid 10.

8.2.1.1 At the time the consumer defaults

Under the *Consumer Credit Code,* credit providers are required to give a notice when a debtor is in default, describing the default, what must be done to rectify the default, and giving the debtor 30 days in which to do so.[43] The principle behind this provision is that the debtor is given every opportunity to rectify the default before the credit provider takes enforcement action. It is usually in the interests of both the consumer and the credit provider to get the contract back on foot if at all possible.

Under the *Privacy Act,* default listings can only be made if:

- The debtor has been notified that information about that individual may be disclosed to a credit reporting agency;
- The debtor is at least 60 days overdue in making a payment; and
- The credit provider has taken steps to recover the whole or any part of the amount outstanding.

The limitations of this approach were highlighted in the Telstra/Alliance Factoring case when a flood of complaints led to public statements by both the Telecommunications Industry Ombudsman and the OPC. Alliance Factoring, who were collecting a large tranche of Telstra debt all of which was well over 60 days overdue, argued that their practice of giving alleged debtors 14 days to pay the debt prior to default listing was not unlawful. While confirming that there was no legal requirement to give alleged debtors any particular notice period, the then Privacy Commissioner, Malcolm Crompton, indicated that this was not "good privacy practice". He indicated that Alliance had responded to his concerns by agreeing to give a longer period of 28 days for debtors to respond to demands. Where a consumer disputed the debt, they were to be given a further 14 days from the receipt of relevant documentation to assist them in confirming whether they owed the debt, or part of it. Similar notice periods should be enshrined in law.

The key consumer concern in relation to credit reporting is to avoid the inclusion of negative information on their report. An effective means of maximising the debtor's chances of avoiding a default listing, while at the same time maximising the credit provider's chances of being paid debts they are legitimately owed, would be to require a notice to be given under the *Privacy Act* prior to the listing of a default. Credit providers would be required, prior to making a listing on a person's credit report, to notify that person of the nature of the default, of what they can do to rectify the default, and to inform the person that a default listing will be made on his/her credit report if s/he fails to rectify the report within 30 days of the date of the notice. The notice should also contain the steps that need to be taken to dispute the debt or default. Section 18E(1)(vi) of the *Privacy Act* (or equivalent in any redrafted Act) should also be amended to require that:

1. The individual is overdue in making a payment;

[43] *Consumer Credit Code* s80.

2. The credit provider has taken steps to recover the amount outstanding;
3. The credit provider has issued a notice warning the individual that they are in default and that the credit provider will list that default with a credit reporting agency unless, within 30 days from the date of the notice, the individual rectifies the default;
4. 60 days have elapsed since the date of the issue of the notice in the preceding section, the debt remains unpaid and undisputed.

Failure to issue such a notice would result in automatic removal of the default listing until that notice had been issued and payment of a civil penalty. Further, if the consumer rectifies the default, or raises a dispute in the manner indicated in the notice within that period, the listing would be similarly prohibited until the matter has been investigated.

Where a credit provider is required to give a default notice under other legislation, such as the Consumer Credit Code, it could be specifically provided that both notices can be given in the same document, although it should be possible to issue a notice under the *Privacy Act* without issuing a default notice under the Consumer Credit Code or any other relevant legislation, and alternatively, to issue a default notice without issuing a notice under the Privacy Act.

8.2.1.2 When a default listing is made

There is currently no requirement at law to notify the person affected after a listing has actually been made. Threats to list are made routinely in debt collection letters, whether they are issued by creditors, debt collectors or assignees. Often an alleged debtor will respond to such a letter with a phone call or letter arranging to pay the debt, make a repayment arrangement, or dispute the debt. Despite this, the credit provider may later list a default anyway, relying on the original notification, either because the repayment offer is not acceptable, the dispute remains unresolved, they do not recognise a dispute has been raised, or simply in error. The consumer meanwhile may believe that the matter has been dealt with, only to be unpleasantly surprised at a future date when they are refused credit.

Credit providers should be required to notify the subject of a listing that a default listing (or any other negative notation) has been made within five working days of making the listing itself. Such notification should be required to inform the debtor of the contact details of the agency with which the default has been listed and invite them to obtain a copy of their report. This would give consumers an opportunity to dispute the listing at a point when memories are fresh and any relevant paperwork has not been lost or destroyed. While this would not assist in cases where the credit provider can no longer locate the debtor, it would nonetheless improve consumer interaction and engagement at a crucial point in the credit reporting process, while allaying the credit reporting agencies' concerns about privacy as the onus would still be on the consumer to satisfy the usual identity checks in obtaining the report.

8.2.1.3 When a loan application is refused

As noted above, credit providers are required to inform consumers if a credit report has been instrumental in their decision to refuse a loan application. Privacy experts interviewed suggested that this requirement could be amended to require the credit provider to supply the consumer with a copy of any credit report on which they have relied. This would remove time and aggravation from the rejection process by taking away the step where the consumer has to independently seek a copy of their report, particularly if they find something contained in the report they wish to dispute and time is of the essence in the loan transaction (such as applying for housing finance). Again there would be no privacy concerns because the individual generally needs to supply sufficient identifying details to apply for the loan. This would require a change to the computer systems of credit provider so that a report could be printed or scanned and enclosed or attached with a rejection notice, even in cases where the credit provider's interaction with the credit reporting agency (and perhaps the customer) has been purely electronic. A similar requirement to this was recently proposed in Ontario and supported in a report on the consumer experience of credit reporting by the Public Interest Advocacy Centre.[44]

Recommendation 3 The credit reporting agencies and government, in consultation with consumer agencies, should ensure the public is better informed about credit reporting law and practice, the need to regularly check your individual credit report, how to dispute inaccuracies, and the possible ramifications of derogatory credit information

Recommendation 4 The credit reporting agencies should be obliged to provide a free copy of an individual's credit report to that individual and to publicise prominent information about how to get a free copy of your credit report.

Recommendation 5 The law should be clarified to ensure that consumers are required to consent to the credit provider accessing their credit information from a credit reporting agency and to reporting information to a credit reporting agency, including derogatory information, at the time of applying for credit, even if such consent may be a condition of securing credit. Such consents, however, should be clearly delineated into "consents which are necessary for you to get this loan" and consents that are optional ("you may elect not to sign/consent to any of the following").

Recommendation 6 There should be prominent notice given at the time of collecting consent informing the individual of the importance of keeping their contact details up-to-date for the purposes of receiving notices about possible adverse listings, or actual adverse listings, on his/her credit report.

Recommendation 7 There should be a requirement to issue a notice to the customer giving the customer 30 days to rectify the default, or to raise a dispute, as a prerequisite

[44] See Appendix B.

to a default listing being made. A default listing should only be able to be made 60 days from the issue of the notice, as opposed to 60 days from the date of the default.

Recommendation 8 There should also be an obligation on credit providers to notify alleged debtors that they *have* listed adverse information on the alleged debtor's credit file, in addition to the notice required prior to making a default listing. This notice should contain information about where to obtain a copy of the relevant credit report, and the process for raising a dispute.

Recommendation 9 When a credit provider rejects an application for credit, in whole or in part in reliance on information contained in the applicant's credit file, the credit provider should be required to supply the applicant with a copy of the applicant's credit report, and the contact details for the agency who maintains the credit file**.**

9 Risk Assessment

Credit reports are used by credit providers in assessing applications for credit. Credit providers look at the risks involved in providing credit to a particular consumer, namely, whether or not the applicant has the capacity and willingness to repay the debt. However, given that credit providers cannot look into the future, they base their decision on a range of factors, including the applicant's current income, assets and liabilities, past behaviour and other characteristics that have been found to be of statistical significance. The latter may include a range of factors such as length of time in employment, and length of time at the same address, and past default history. These statistical factors vary from credit provider to credit provider and across different credit products offered by the same lender. The use of information about current financial position and past behaviour also varies depending on the product and the lender. Some of the information used in the credit assessment process will be derived from the applicant's credit information file held with a credit reporting agency.

9.1 Risk assessment generally

Consumers generally want to be able to access credit at their convenience and according to their needs. It is not in the interests of consumers individually, nor the economy generally, for people to be able to borrow more money that they cannot comfortably repay. On the other hand, lenders want to maximise the size of the credit market and particularly, their share of that potential market. In short, where possible, they want to lend. At the same time, lenders do not want bad debts and therefore seek to minimise lending to consumers who are not likely to repay. To this extent, at the theoretical level at least, the interests of consumers and lenders coincide. Problems occur, however, because credit providers seek to minimise bad debts for minimal cost in order to maximise their returns leading to a reliance on systems, automation and statistical analysis. Credit providers invest considerable resources in these systems and report favourable results at the portfolio level[45], nevertheless their use can be at odds with the interests of particular individual credit applicants.

In addition, there are potential failures in reliance on such systems. The first and most obvious systems failure is where inaccurate information is included in a credit report and consequently taken into account in the credit assessment process erroneously. Consumer groups, credit providers and credit reporting agencies are in agreement on this issue and it is canvassed in other sections such as data quality and complaints handling. The second potential systems failure is where the raw information contained in a credit report is correct but there is a dispute as to its relevance and weight in the credit assessment process. This issue is further complicated by the fact that the finer detail of credit assessment processes are not made public for reasons of commercial confidentiality: credit providers see their credit assessment procedures as part of their competitive edge,

[45] Recent versions of these systems are yet to be tested in an economic downturn.

and they do not want consumers to be in a position to tailor their applications to the assessment criteria.

In addition to checking credit reports, the risk assessment process may also involve a credit scoring process. Credit scoring is a sophisticated statistical mechanism for assessing the risk associated with a proposed credit transaction. Credit scoring has been used in Australia for around 25 to 30 years, though the concept has existed for much longer. Previously, lenders made their lending decisions based on a person's characteristics with little empirical analysis. Since applications were processed by humans, the decision-making process was often subject to the discretion of individual loan officers within specified lending guidelines. In the 1990s, score cards were developed to allow for more sophisticated analysis to predict risk based on a large number of different variables in the data available to lenders. Credit scoring not only removes the discretionary element from the assessment process, it also allows for complete or partial automation, which greatly increases the speed with which decisions can be made on a large volume of applications.

Score cards draw information from a variety of sources such as information on the application form, the borrower's credit report, the borrower's prior performance on the account sought to be extended (if applicable), or on other accounts held with the same institution (also known as behavioural scoring). In many cases, only a subset of these sources of information is used. For example, some credit providers offer credit limit increases on credit cards in the absence of an application form or credit report, relying solely on behavioural scoring either on the account sought to be extended, or, more recently for some institutions, across all accounts held with the same credit provider. Similarly, a lender may have no data on which to base a behavioural score for new customers, and relies on a score derived from the application form and often the applicant's credit report. Some lenders report calculating a credit score on the basis of available data, and only consulting the applicant's credit report in borderline cases, particularly in relation to secured lending.

Score cards are empirically-derived: they may be derived from the lender's own portfolios, or they may be a combination of generic score cards purchased from others, particularly for those smaller or newer lenders or those entering into new product lines for which they have no historical data. Some are a combination of both. Larger institutions revise their scoring systems regularly and adjust them in light of the performance of the relevant portfolio, so that even generic score cards become customised over time. For major lenders, these score cards are embedded in automated decision systems. The system simply allocates a score, the lender must decide at the internal policy level where to draw the line in terms of acceptable risk. This will not necessarily be a static decision, but one which varies according to economic conditions and the lender's market strategy.

Generally the major lenders we interviewed used varying combinations of scoring systems and procedural rules. An example of a rule may be that a default listing will

automatically mean a rejection of the application irrespective of what the score card says; in effect the rules may override the score cards. In such cases the credit report is effectively used twice, once in calculating the score (a default will tend to push the applicant's score down) and again in the application of the rule. One institution interviewed indicated that all applicants with defaults on their credit report are referred to a staff member for review, the usual prompt being "refer, recommend decline". The overall credit score may be taken into account in the decision whether to explore the reason for the default further. In many cases however, the larger lenders automatically reject applications where a default has been identified on the applicant's credit report, rendering the score redundant, particularly for unsecured credit.

One of the credit providers stated that they did not inquire with the credit reporting agency for every application as they are able to make more use of their own customer data. Instead, they calculate a score on the applicant based on their own data and the application form, and depending on that assessment, would make further inquiries with the credit reporting agencies. As a result, a significant number of applications are accepted or rejected without the applicant's credit report ever being consulted.

Baycorp Advantage also offers a scoring service, along with its other business information services. Few of the credit providers interviewed reported using this information, suggesting it was more useful for smaller lenders with less in-house data and less systems development capacity. At least one lender interviewed, however, reported feeding the Baycorp score in as one factor to be taken into account in their own over-arching scoring process.

Credit assessment is largely a commercial risk decision which has, to a large extent, escaped any form of legislative interference or judicial scrutiny. The unjust provisions of the Uniform Consumer Credit Code ("the UCCC") contain a reference to lending to a borrower where the credit provider "knew, or could have ascertained by reasonable inquiry of the debtor at the time", that the debtor could not pay in accordance with its terms without substantial hardship. The NSW Supreme Court has also made a number of decisions which determine that lending in certain circumstances is unconscionable or sufficiently unjust to justify re-opening the contract under the *Contracts Review Act* 1980 NSW. None of these laws or decisions touch on whether someone who has been unable to borrow money should, in fact, have been granted a loan. In effect, the courts and legislature are loathe to force any entity to lend and the only limit on the matters which are able to be taken into account in credit assessment are the limits contained in applicable anti-discrimination legislation. It is arguable that credit has become such an essential service/commodity that this situation should be revisited in the case of institutional lenders.

An analogous example is the insurance industry, which is given wide discretion to calculate risk and offer insurance cover accordingly, including exemptions from laws which prohibit discrimination on the basis of illness or disability. This unfettered discretion was recently curbed by the Federal Court in the decision of *Bassanelli v QBE Travel Insurance* [2004] FCA 396 (7 April 2004) where it was decided that the insurer

had acted unreasonably in making its decision to decline insurance cover to a consumer because of a pre-existing condition.

Alternatively, the principles of relevance and proportionality in relation to the collection and use of personal information also dictate the use of information contained in credit reports, which should be potentially subject to some form of judicial review. This is currently not the case.

9.2 Inquiries

Inquiries are listed on a credit report whenever a consumer makes an application for credit *and* the credit provider seeks access to the person's credit report to assist in their lending decision. If the credit provider does not access the person's credit report in the credit assessment process, that application will not appear on the person's credit report.

Based on the responses received to the caseworker questionnaire, the listing of inquiries appears to be a controversial topic. Overwhelmingly, the caseworker questionnaires revealed that inquiry listings present many problems for consumers:

- *Inquiries can be detrimental when you're canvassing options for a loan but the inquiry listing works against client*
- *"Inquiries" shown without proper indication of withdrawal of request for credit creates environment of suspicion as to why not proceeded with.*
- *I believe the listing of inquiries alone should not be included in credit report. Detrimental effect and unclear circumstances – application may have been withdrawn or credit refused but outcome not clear to future creditors – seems irrelevant to question of credit 'rating'.*
- *Prohibits or punishes consumers for shopping around.*
- *The listing of inquiries seems pointless. Effective immediately it should not be recorded pending investigation into a more reasonable and accurate system.*
- *Inquiries should not be listed as can impact on capacity to get credit.*
- *Inquiries should not be listed as negative. Prudent financial literacy should mean a no. of inquiries to seek best deal. In a 'market economy' the listing of inquiries as a negative is a restraint of trade on the customer. Listing should only be about 'actual' liabilities.*
- *Listing of inquiries for credit does affect client's chances of obtaining credit if they went shopping around for better deal – I think this list should not be available to potential lenders when they do a credit check.*
- *This one is ridiculous – eg. young couple shopping around for most suitable mortgage – many inquiries – were denied credit from major lenders due to number of inquiries.*
- *No listing of inquiries – seems unfair. Distorted perception. How is this relevant to question of whether a person will pay back what they give to prospective lender/creditor.*

A case study from CCLC's earlier consumer survey illustrates the problems inherent in this:

CCLC consumer phone-in survey February 2004

The caller applied for a Myers card account to buy a fridge. She used to have 2 Myers cards with a cumulative $10,000.00 limit and never defaulted. She was rejected because of her credit report. She was embarrassed and humiliated by the rejection which occurred in the store. Upon checking her credit report she found no defaults but numerous changes of address spanning 28 years. She also had many inquiries. Two were as a result of the same transaction where she signed as co-borrower for her daughter's car loan. Most of the others were for telecommunications companies as she regularly switched phone providers seeking the best deal.

This issue has also been picked up in the press. For example concern has been expressed that multiple inquiry listings can give the appearance to creditors that the person is constantly using up credit cards because cancellations of previous credit accounts are not documented, leading to credit rejections for these consumers.[46]

Credit providers interviewed insisted that inquiry listings are risk-indicative based on statistical analysis, i.e. that when analysed at the portfolio level, consumers with more than a specified frequency of inquiries on their credit report were statistically more likely to default in the future than those who had less than the specified frequency. For example, credit providers noted that a series of applications for personal loans within a short time often precede bankruptcy. Again, while this may have statistical validity, reliance on this will inevitably disadvantage consumers who have multiple inquiries for completely different reasons. For example, there is absolutely no evidence to suggest a nexus exists between bankruptcy and mobile phone applications.

While a history of frequent inquiries in the months prior to the loan application does not necessarily mean that the application will be rejected, it is used by credit providers as an indicator or measure of risk in combination with other factors. Excessive inquiries may have strong negative weighting, but a strong previous relationship with the bank may outweigh it. Unlike default listings, inquiry listings will rarely be enough in themselves to result in the denial of credit, but may be sufficient to tip the balance where there are other negative indicators.

Most of the credit providers we interviewed indicated that inquiry listings are only relevant in terms of the number of applications made within a given period of time, say one month, or in the six months prior to the application. In other words they are not delineated by type, but rather, by frequency or regularity, with reference to current market trends. The reason given for this was that analysis over time had proven that

[46] N P McKinnon, 'Being canny with credit can have its pitfalls', *The Sun-Herald* (Sydney), 31 July 2005.

whereas the amount and type of inquiries could be relevant to risk, the factors were not *as relevant* as frequency and certainly not sufficiently relevant to usually warrant inclusion in the score card.

However, approaches to this vary across credit providers, and also across different products within the same institution. The Baycorp scoring system, for example, does give different weights to different types of inquiries, and the Baycorp score was used in conjunction with their own system by at least one major credit provider interviewed. Also, some credit providers match the information in relation to inquiries on the credit report with the consumer's application information about other liabilities. Where there are inquiries which do not appear as commitments on the credit applications, the credit provider assumes that there are either accounts which have not been disclosed, or prior rejections for credit, both of which have negative connotations for credit assessment purposes.

At least one credit provider indicated that they took care not to generate additional inquiry listings when a loan application is re-processed due to error or some other reason by contacting the credit reporting agency concerned and asking them to merge the two inquiry listings which essentially relate to the same account. It is not clear whether all credit providers make this effort and the experience of some consumers suggests otherwise.

Credit providers agreed that the expected frequency of inquiries on a consumer's credit report was considerably higher now than in the past. The free availability of credit, fierce competition between card providers and telecommunications companies for customers, and the increased use of mortgage brokers all lead to a greater frequency of product switching (for example credit card balance transfers, mortgage refinancing and internet plans) and, consequently, more inquiries on consumer credit reports in the normal course of business. At least one credit provider indicated that they had fairly recently increased the tolerance level in their system for the number of inquiries in any given period as a result of statistical feedback showing that a larger number of inquiries was now required to be *risk-relevant*.

Herein lies one of the drawbacks in the statistical approach. There is necessarily a lag between the development of phenomena in the market and the incorporation of the phenomena in the statistical model. While pre-scoring assessment criteria were prone to the same flaw, the more frequent intervention of human decision-making had the potential to prevent unjust results. Lenders prefer automated scoring systems precisely because they lack the inconsistency of decisions left to guided discretion, not only because of the lower cost, but because of the impact on portfolio performance – they assert the results are superior. The chances of any particular consumer being denied credit unfairly, however, are considerably higher. The case of inquiries is a perfect example of information that may or not be risk-indicative and the current system provides little if any opportunity for customer explanation. Further, a rejection of credit on this basis only

exacerbates the problem, resulting in a further inquiry on the customer's credit report to further their probability of being approved by another lender.

Some caseworkers conceded the possible relevance of inquiries on a report in some circumstances:

> *Yes – numerous listings for the same credit sought. Could suggest client shopping around due to decline in credit applications by other lenders.*

> *In my view there are two issues here, one may be unfair denial of credit, but it may also be used to show that the lender made insufficient inquiries as to the capacity to pay of an individual. The situation is somewhat different if the credit inquiries were made over a short period of time for similar amounts to the situation where numerous credit inquiries are made for differing amounts over an extended period of time that may reflect a borrower who is overcommitted. In those cases if the lender provides credit it can be used to show that lender was on notice that the borrower may be overcommitted.*

CCLC solicitors have seen at least one example of a consumer credit report where a spate of inquiries were lodged in a short period of time to lenders who offer short term credit to cover mortgage arrears. This would appear to be a clear indicator of financial stress, but this would only be apparent upon conducting an analysis of the type of lender. As many lenders appear to rely solely on the frequency of inquiries rather than type, this particularly useful information would not be readily apparent.

It is very difficult, however, to envisage the relevance to credit assessment of inquiries for telecommunications and other non-credit services. Lenders support the continued inclusion of this information on the basis that it has proven statistically relevant. Without disputing this claim, it is difficult to see how the inclusion of this information, with a possible negative impact on consumer credit scores, can be considered fair or proportional.

Inquiry listings have also been criticised because they do not indicate whether or not the consumer proceeded or withdrew from the application, or if it was actually approved. One broker who was interviewed suggested requiring those listing inquiries to also report the outcome of the inquiry as proceed/withdraw/rejected. This would give a more accurate idea of the actual meaning or result of the inquiry. This was also suggested by a number of caseworkers:

> *The problem here is the manner in which credit providers interpret the credit info file, not anything explicit on the file itself. Maybe it's worth including information as to whether the application associated with the inquiry was successful.*

At law credit providers have the option to indicate whether they are a current credit provider. In the experience of CCLC caseworkers and the credit providers interviewed

this option is rarely used. As a result, effecting this recommended change would involve either mandating the use of this provision, or extending the types of data allowed or required to be collected/reported.

Lenders draw inferences from inquiries precisely because they lack information about the customer's actual commitments. There is a considerable push from parts of the credit industry to have data about current commitments included in the type of data that is able to be collected and shared via the credit reporting agency. If such a change were to proceed, it is arguable that there would no longer be a need for inquiry information to remain on reports at all, except perhaps as an audit trail, available only to the consumer who is the subject of the report and authorised auditors conducting accountability reviews. A caseworker said:

> *I believe it would be good for client[s] to see this [inquiry listings] but not for the creditors.*

Recommendation 10 Inquiry listings should only be given to a potential credit provider where the inquiry relates to a loan (whether that loan is secured, unsecured, for a specific amount or revolving credit) and the application for which the report is sought is also for a loan. Inquiries relating to other services (such as telecommunications) should only appear as an audit trail to the person the report concerns and any authorised auditing body.

Recommendation 11 In the event the data categories permissible under the *Privacy Act* are expanded to include information about the relevant person's actual credit commitments, inquiries should not appear to any subscriber, only to the person the report concerns and any authorised auditing body.

9.3 Default listings

Section 18(1)(E) of the *Privacy Act* allows for the listing of incidences when an individual has been at least 60 days overdue in making a payment (including a payment that is wholly or partly a payment of interest) where the credit provider has taken steps to recover the debt.

In our interviews of credit providers, it was clear that a default listing on a person's credit report is looked upon unfavourably, and in most instances, would trigger an automatic rejection (by most credit providers interviewed) or, at best, a "refer, recommend, decline" response, indicating that the application would need to be reviewed by a designated staff member with a strong presumption of rejection. However, some credit providers do recognise that not all types of default listings are equally relevant to risk; and some credit

providers distinguish between different types of listing depending on the type of credit applied for. A default is more likely to produce an automatic decline for unsecured credit.

Responses from the caseworker questionnaire, the results of surveys conducted by CCLC/Choice in relation to debt collection and credit reporting, and our own casework experience suggest that while simple incorrect listings by traditional credit providers do sometimes occur, the most common default listing complaints can be categorised as follows:

- Disputed telecommunications listings
- Paid or settled debts
- Mistaken identity
- Identity theft and other fraud
- Billing problems
- Delay between default and listing (particularly debt collectors)
- Other "unfair default listings"

9.3.1 Disputed telecommunications listings

The surveys conducted in relation to debt collection by CCLC and CHOICE in 2004 revealed a high number of complaints about debt collection in relation to telecommunications debts, particularly in relation to amounts under $500.[47] While specific correlations between telecommunications debts and default listings were not drawn, the overall findings in relation to credit report listings are likely to also be significant for telecommunications debts because of the predominance of the latter in the survey overall. This is also consistent with some of the examples quoted in the report and CCLC's casework experience.

Telecommunications listings appear to be disputed more frequently than listings that have originated from loans. Of the 47% of respondents to the CCLC/CHOICE online survey who disputed that they owed the debt for which they were being pursued, 40% were being pursued for telecommunications debts. In contrast, of the 47% of debtors who either acknowledged they owed the debt (37%) or at least part of it (10%), only 24% were being pursued for telecommunications debts, and 40% were being pursued for credit cards and personal loans.

The responses to the caseworker questionnaires collected as part of this project also included particular dissatisfaction with telecommunications listings. When asked about the type of credit provider involved in credit reporting complaints, all fourteen respondents indicated that they received complaints about credit report listings by

[47] 34% of all the respondents to the online survey were being pursued for a telecommunications debt and these represented 50% of the debts less than $500. The next most common category of debt type was credit cards and personal loans, which made up 25% of all responses and 37% of those over $500.) See reproduction in Appendix D of the relevant parts of the Consumer Credit Legal Centre (NSW) Inc. *Report in relation to Debt Collection* April 2004, above n 1.

telecommunications companies often (43%) or sometimes (57%). This was more frequent than all other credit provider types including banks (often 14%, sometimes 57%) and utilities (often 14%, sometimes 36%). When asked if they were aware of situations where a credit report listing may be technically correct and lawful and yet could have consequences that are unfair in all the circumstances, one caseworker responded:

> *Yes. Listings made for less than $100 debts, owed to telcos. Telcos seems to credit list first, ask later.*

Privacy experts interviewed noted the high number of disputes in relation to telecommunications debts and what appears to be a failure of dispute resolution at the level of the consumer/service provider interface. They indicated that this created a strong argument for vastly improved and speedy dispute resolution in relation to the listing itself to avoid unjust outcomes.

Telecommunications services involve access to recent and constantly developing technology sold via complex and often poorly understood contractual arrangements. As a result, the area is rife with disputes over charges, usage and other contractual terms. These issues are further complicated by internet dumping, hacking and theft, a lack of protection for vulnerable consumers such as credit limits, and the bundling of services and bills.[48] The increased transience of the population and frequent movement between services and service providers, also lead to a potential for errors on the part of both consumers and services providers in the issuing of bills and the payment of the same.

Respondent to CCLC Credit Reporting Survey 2004

The caller had a mobile phone dispute with a telecommunications company. He thought that half of the phone calls were not made by him. The company wouldn't listen. He paid what he used (approximately $300) and refused to pay the rest (approximately $290). His son told him to pay it to save any future trouble. He then paid the rest accordingly (at the time the bill was 2 weeks in arrears). When he later checked his credit report there was a default listing from the telecommunications company. He told the credit reporting agency he had paid, they said to get back to the phone company about it. When contacted, the company agreed to update and correct the information. Six months to one year later he applied for a loan and was rejected. He found out the listing had not been removed. He called the company again. It took 2 years for the company to finally resolve the problem.

[48] For a good summary of the issues, see Communications Law Centre, *Overview of Communications Law Centre Telecommunications Research and Policy* (2001). Available online: http://naclc.org.au/docs/Communications%20LC.pdf as at 12 June 2006; Australian Communications Authority, *Preventing Unexpectedly High Bills: Credit Management in Telecommunications* (2004). Available online: http://www.dcita.gov.au/__data/assets/pdf_file/23585/ACA_Oct_04_**Report**_Preventing_Unexpected_High_Bills-**report**.pdf as at 12 June 2006.

Respondent to CCLC Credit Reporting Survey 2004

The caller signed a mobile phone contract under the impression that it included unlimited SMS. He later found out that there was actually a limitation and disputed this with the phone company. The company told him to check the contract, which he did and found that there were four rather pertinent words missing from the right hand column. He refused to pay the rest of the money as he believed the contract was not complete and he had been misled. When he applied for a car loan the broker told him about a default listing. He did not complain as he didn't know where to complain.

In the media, it was reported that almost 600,000 Australians were rated as possible credit risks in the last financial year for not paying mobile phone or internet bills as low as $20.[49] Twenty percent of these defaulters were under 25 years of age and more than half were under 35. This is an enormous shift in the amount and content of the data held by credit reporting agencies, with telecommunications listings now far outweighing listings for failure to meet commitments under traditional loans. In 2005, 62% of all credit default listings were from telecommunications companies, more than banks and utilities put together.[50]

In the TIO's 2003 Annual Report, the Ombudsman's overview referred to a number of apparently systemic issues that had arisen as a result of the sale of a significant amount of telecommunications debt, particularly by Telstra. Apart from the problems presented by the age of the debts, the Ombudsman referred to "complaints that the factor [assignee of the debt] had acted too quickly in credit or default listing affected customers, even though these customers were disputing the debt." He went on to say "Such an approach is quite unreasonable and is a clear breach of a fundamental policy of the TIO scheme."[51]

In December 2005, possibly in response to the significant increase in the telecommunications listings and dissatisfaction with the same, Baycorp Advantage increased the threshold amount for a default listing for a telecommunications debt to $100 from $20.[52] This brought the threshold limit for telecommunications debts such as phone and internet bills in line with all other forms of debt, but begs the question whether the explosion in telecommunications is symptomatic of deeper problems in the telecommunications industry and whether the consequences of these listings are fair and proportionate in the circumstances.

In January 2006 the ACIF Code in relation to Credit Management was amended to

[49] 'Phone debt a credit risk', *The Sunday Times*, 8 January 2006.
[50] 'Telecommunications debt listings increase by 63%', *Vantage,* 15 May 2006, Baycorp Advantage Ltd, 23 May 2006.
[51] TIO Annual Report 2003, Ombudsman's Overview, p10.
[52] 'Baycorp increases debt for history check', *Sydney Morning Herald*, 14 December 2005.

explicitly prohibit the listing of telecommunications debts in circumstances where there are unresolved service or billing issues involving disputed account balance amounts. The same instrument requires the telecommunications company to ensure that credit management processes prescribed by the Code are followed prior to listing a debt with a credit reporting agency, and that where a customer has been listed in error the telecommunications supplier should notify the credit reporting agency within one business day. It is too soon to determine whether this change has had any impact on the number of disputed debts which are default listed but consumer groups remain sceptical on account of the low sign-up rate among industry players and a poor history of compliance with, and enforcement of, these self-regulatory instruments.

Such a large increase in defaulters poses potential problems for credit providers, who generally reject defaulters and yet do not want to unnecessarily limit their potential customer base. The credit providers interviewed for the purpose of this project did not generally distinguish between types of default (as opposed to amount) for unsecured credit, although some had considered giving less weight to telecommunications debts. One credit provider said that their research suggested that telecommunications debts were predictive of later defaults, but not as predictive as defaults in relation to traditional loans. Some credit providers were of the opinion that telecommunications default listings are predictive, and can add value to the assessment process because they capture the market of the youth, who may have no other credit history apart from their mobile phone. Some indicated that telecommunications listings were *only* useful when servicing particular sections of the community, such as the youth market. It was not clear, however, whether this was a principle built into their decision-making logic, or simply an observation.

In contrast to this, Dun & Bradstreet recently released a press release in relation to research suggesting that telecommunications debt are not only predictive, *but more so* than defaults in relation to traditional loans. Dun & Bradstreet was commissioned by Decision Intellect to investigate whether credit applicants with *only* telecommunication debts and/or debts of a low amount (under $500) were at a higher or lower risk of defaulting than credit applicants with other types of defaults, namely loan defaults.[53]

D&B pooled data from 281,838 records sourced from both Dun & Bradstreet and Baycorp Advantage. Their research revealed that applicants with only telecommunications adverse listings are *slightly* higher risk than applicants with any other type of bureau defaults (there were 3.8 good applicants for every one bad applicant for the former category whereas there were 4.1 good applicants for every one bad applicant for the latter).

It is difficult to assess the value and credibility of this research because the research itself was never published. Further, the vested interests of D&B as specialists in

[53] 'A Default is a Default! – Telecommunications and low value defaults are just as predictive or risk as high value and lender defaults' Report from Dun & Bradstreet, 2006.

telecommunications default information must be taken into consideration. CCLC was given a five-page research report on request, but this contained a fairly limited account of the methodology. Further, the risk assessments were analysed over a fairly short term, 12 to 24 months, whereas default listings are retained for five years. It was difficult to analyse whether any other correlations that were not reported that could have impacted on the conclusions.

D&B express concern that some lenders ignore this data that is highly predictive data, and propose that instead lenders should consider lowering their current scorecard cut-off and take on the best group of applicants.

For some major credit providers to downgrade the impact of telecommunications defaults, they would clearly need to change the current policy of automatically rejecting applicants with any default listing regardless of score. Should any credit provider make this change, however, it is difficult to imagine that the same default information would not be retained for the purpose of deriving the applicant's credit score, resulting in the outcome recommended by D&B in practice.

Clearly it would also be simpler to address the problem at other points in the credit reporting/credit assessment matrix. Increased consumer access to credit reports coupled with improved dispute resolution for example could address those debts that are reasonably disputed. This should be done regardless of and in addition to any other measure. A more thorough solution would involve the rejection of telecommunications companies from access to the credit reporting system completely (see **Access to the System – Definition of Credit Provider** and **Dispute Resolution** below) or tiered access, such as allowing telecommunications companies to view only other telecommunications information, and likewise for traditional credit providers. Other options include further increasing the lower threshold for default listings (although this would need to be indexed to keep pace with inflation) or allowing the removal of telecommunications defaults after a lesser period, such as two years, to decrease the degree of disproportionate impact a telecommunications default may have on a persons ability to access credit into the future.

9.3.2 Paid or Settled Debts

In the CCLC/CHOICE Debt Collection Survey in February 2004, the most common reason given for disputing a debt was that they had already paid the debt (31% of participants). While these debts were not necessarily listed with a credit listing agency, 22% of respondents to the survey with disputed debts had been default listed and 56% of respondents had never checked to find out.

Ten of the fifteen caseworkers (75%) who responded to the caseworker questionnaire indicated that their clients queried in relation to debts that were already made but listings were still made 'often' (2) and 'sometimes' (8). The remaining five saw this problem on

rare occasions, but no one indicated that it never arose. Another question in the caseworker survey, however, about how often clients claimed that they had never been 60 days overdue with the relevant payment produced much lower results. This may indicate that some consumers who complain about this issue have paid the debt after the 60 days but prior to the listing. This is a more difficult issue. Most consumers are not aware that they can still be listed if they pay a debt after the 60 days has expired. It is arguable that if a consumer is told to pay a debt within a certain time period or face a number of consequences including possible default listing, then they should not be listed if they pay within that time period. Indeed a debt collector who represents that a listing can be avoided by payment within a given period and then lists a default regardless is likely to be at risk of being found guilty of misleading and deceptive conduct.

9.3.3 Mistaken Identity

Of the consumers who disputed a debt they were being pursued for in the 2004 CCLC/Choice debt collection survey, mistaken identity was cited by 17% of the respondents as the reason for the dispute, this being the second most frequent response after "The debt has already been paid". At least one respondent to the debt collection survey reported being repeatedly mistaken for someone else, indicating a possible connection with information being supplied by a credit reporting agency.[54] The issue also came up in the responses to the concurrent credit reporting survey published in this report:

> *Respondent to CCLC Credit Reporting Survey 2004*
>
> The caller had a default listing but it seemed that Baycorp had confused him with his son, as there was a wrong birth date. He was rejected for credit and he complained to the creditor, Baycorp and the OPC. Luckily his credit report was corrected and he received an apology.

Errors in identifying information contained in reports are problematic in that they can contribute to further more serious errors such as mistaken identity and mis-matched reports. "Mismatching" is a mistake that occurs where a credit provider may receive the wrong person's report, or information about another unrelated party is listed on a person's credit report.

A broker wrote:

> *As a broker I often conduct credit searches on clients seeking finance facilities. So many of these searches reveal credit files that are an absolute mess in regards to the accuracy of a client's personal information and in this day and age this*

[54] See Appendix D.

> *simply is not good enough. Errors most common are: misspelt Christian names and surnames, incorrect date of births, badly recorded addresses, multiple files because of incorrect data, cross-matched files with other individuals, defaults not listed as paid; judgements not listed as paid or settled.*

A large number of complaints to consumer assistance agencies in relation to mistaken identity appeared to follow directly upon the sale of a large tranche of Telstra debt in about 2002/2003. This suggests that the debt collection company used poorly matched identifying information, perhaps obtained from the credit reporting agency, to collect debts on a significant scale.

A contributing factor to potential mismatching is that identifying information is usually entered directly by credit providers. If one lender enters details that are slightly different from the information already contained in the report, such as differences in spelling, the credit reporting agencies do not necessarily have systems in place that automatically flag this as a potential mistake that needs to be corrected.[55] Baycorp now has links to other organisations for data matching purposes to ensure accuracy, e.g. land titles office, registries of births, deaths and marriages, and drivers licence registries.[56]

In assessing applications for credit, credit providers also check the identity of the applicant via their credit report. Identifying details such as name, address and date of birth on an application form is matched with the database. Data matching is usually performed by the credit reporting agency, which will then supply the strongest match to the credit provider. If there is a possible match, called a 'fuzzy match' or 'weak match', that information is sometimes provided to the credit provider also. If the credit provider is of the opinion that the reports are of the same person, then they request that the files be merged, or cross-referenced.

Credit providers treat these reports differently depending on what's on the cross-reference or merged file. If it appears as if the person had tried to rearrange some letters in their name deliberately to avoid their credit file being picked up, or the name has been changed to create a new file, then the application is likely to be rejected. However, a credit provider interviewed felt that, from his experience, many of the cross-referenced files do contain adverse listings on them. The interviews with credit providers did not explore whether applicants are told they have been rejected as a result of their credit report in such cases, or whether they would see the cross-reference in the event that they asked for a copy of their file. This information is very relevant to whether a person is able to raise a dispute if any of these steps have been taken unjustifiably.

One caseworker said,

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[55] Credit provider interviewed.
[56] Senate Legal and Constitutional Committee, Parliament of Australia, Canberra, Inquiry into the Privacy Act, 19 May 2005, Mr Andrew Want, Baycorp Advantage Ltd, 4.

> *A client wanted to purchase a vehicle for employment reasons but was rejected for finance from several financial providers. He requested a copy of his credit information file and discovered that many details, including his name were incorrect. Baycorp had merged 2 files of similar sounding names (of foreign descent). The client lost employment opportunities as a result of the dispute. The Privacy Commissioner found that Baycorp had erred but it was a human error and it had put processes in place to ensure this did not happen again. It refused to make any further orders.*

Cross-references occur quite often with twins, or fathers and sons with the same name, for example. In such scenarios, a notation on the credit report would be useful. Credit providers also felt that the matching processes could be improved, as they had encountered circumstances where the credit report received was not the right customer.

Automation has also had an impact on this process:

> *When we're looking at high volume automation, it's inevitable that there will be mistakes in not matching the names because the names were spelt differently. The reverse also occurs, where you have matched when you shouldn't have. For these, we would need to be smarter about the way we use rules and software that do the automation. We also need to improve the way in which we deal with complaints that come out of that.*[57]

Clearly there is room for improved standards in relation to the management of cross referenced files, merged files and multiple files for any given individual for both credit providers and the credit reporting agencies.

9.3.4 Identity Theft and Other Fraud

A less cited and yet not uncommon complaint is in relation to listings related to identity theft and related fraud. Identity theft occurs whereby a consumer's personal details are used to obtain credit of some form, leaving the victims with the debt but in no knowledge that the "theft" has occurred, usually until they are pursued for the debt or rejected for credit. It is estimated the identity fraud costs as much as $2.2 billion each year.[58]

Numerous media reports on this subject suggest that the current response system to reports of fraud is inadequate and biased against the consumer. Reporting identity fraud to creditors can be expected to take more than a year to resolve for a single lender,[59] it

[57] Credit provider interviewed.
[58] P. Weekes, 'Identity theft on the rise', *The Age*, 16 August 2005
[59] 'Your good name at risk?' *Choice* (Sydney), February 2006, 8.

takes more than 6 months to take the matter to the OPC,[60] the default remains on the victim's credit report until the matter is resolved and the burden is placed on the victim to prove they are innocent.[61]

This accurately reflects the experience of clients of consumer assistance agencies. As stated above, the victim of the fraud bears the burden of proving that they are *not* responsible for a debt. The nature of these disputes is that the victim will rarely have paperwork to prove they do not owe a debt and are reliant on producing circumstantial evidence which tends to suggest that they could not be the person who incurred the liability. The process, involving police reports, correspondence, statutory declarations from family and friends, and phone calls with the creditor and often a debt collector also, is distressing, time-consuming and sometimes too overwhelming.

A professional woman who had been the victim of identity fraud in relation to a mobile phone had just discovered a credit report listing in relation to the same fraudulently acquired phone account after months of dealing with the phone company, the police and the TIO. She said she didn't think she had the energy to start the process of disputing the listing also.

CCLC has assisted clients to successfully negotiate a solution to the consequences of identity fraud, including the removal of a related default listing, but the process can take many months even with the assistance of a solicitor. In the meantime the victim suffers the unjust result of being unable to access credit.

Further it is unjust in the extreme that creditors (including assignee debt collectors) can list debts without any need to establish that the debt is owed, while the victims of fraud are required to spend many months proving their innocence. This is a situation where prima facie evidence of a genuine dispute about liability should be sufficient to require the removal of the listing pending resolution of the dispute. Further, the standard of proof required of creditors (including assignee debt collectors) to report a default where debts are disputed should be significantly higher.

Credit providers interviewed agreed that listings that are completely incorrect (as a result of fraud or mistaken identity for example) were undesirable, but they relied largely on consumers to dispute these listings and to get them removed, rather than provide flexibility at the credit assessment stage. While one credit provider did suggest they might give an applicant an opportunity to explain a default listing if their credit score was otherwise high, most credit providers would only look into the facts behind a listing if the applicant made a complaint after being rejected for credit. The applicant would need to

[60] Consumer Credit Legal Centre (NSW) Inc., 'Ruddock neglects massive credit reporting problem in favour of the private sector', (Press Release, 25 August 2004).
[61] 'Your good name at risk?' *Choice* (Sydney), February 2006, 8; N. Galvin, 'Double Jeopardy', *Sydney Morning Herald*, 20 September 2005.

produce fairly convincing evidence that the listing was factually incorrect for the credit provider to reconsider their application.

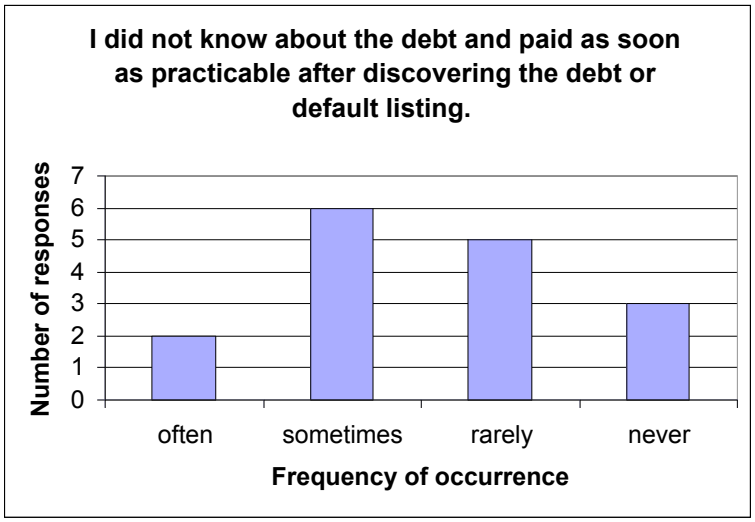
There is strong media sentiment that privacy laws need to be updated to reflect new technologies and for businesses to put in place better mechanisms for handling customer information (which could be as simple as acquiring a shredder for documents no longer required).[62] The security of information held by credit reporting agencies has also been criticized.[63] In response to these media reports, it has been reported that the Federal Government is considering tightening privacy laws, particularly in relation to the sale of personal details by overseas companies.[64]

Some overseas jurisdictions[65] have introduced or contemplated various forms of markers to identify credit reports where there is a higher than usual probability of fraud, either at the instigation of the consumer (for self-protection) or at the instigation of creditor(s). There appears to be some merit to these measures but no specific recommendation is made in this report due to the need to consider these issues in the context of a wider discussion about identity management and the role of credit reporting agency (or agencies) that is beyond the scope of this report.

9.3.5 Billing problems

Billing problems appear to lead to a significant number of credit reporting complaints. Thirteen of the sixteen caseworkers who answered the questionnaire received complaints from consumers who indicated that they had not known about a debt and had paid the debt immediately when they found out about it.

[62] 'Your good name at risk?' *Choice* (Sydney), February 2006, 8;
, 'Businesses warned against storing credit card data', *ABC Online*, 24 October 2005.
[63] K. Dibben, 'My identity crisis', *The Sunday Mail*, 26 June 2005.
[64] M. Shaw, 'Privacy laws may be tightened', *Sydney Morning Herald,* 16 August 2005; K. Dearne, 'Poor privacy aids thieves', *The Australian*, 30 August 2005.
[65] See Appendix B.



Billing problems do not generally occur in relation to loans as the payment method is usually fixed for the term of the loan, subject to customer initiated variations. There are occasionally problems with notices (such as default notices) and statements being sent to wrong addresses after the customer has moved, but these are much rarer than disputes arising from billing in relation to other types of services. Further, borrowers rarely simply overlook an outstanding loan balance, whereas other types of payment can easily be genuinely missed when bills and reminders are not received.[66]

Billing problems fall into two broad categories:

- Where the customer has *not* failed to take reasonable action in the circumstances, such as informing the creditor of a forwarding address, but nonetheless did not receive a bill; and
- Where the customer has failed to take reasonable action in the circumstances such as not notifying the creditor of a change of address, or failing to arrange the closing or transfer of an account.

Such situations can also be complicated if the bill, once received, is also disputed.

The former scenario includes common situations where a failure of the creditor's systems causes a bill to be sent to the wrong address, but also situations where mail has been tampered with beyond the consumer's control. In the former scenario it can often be quite understandable that a consumer does not pay a debt about which they have not been informed. Further, in many such cases it is not possible to take action to collect the debt, which is a prerequisite to making a default listing.

In such instances it should theoretically be possible to have the debt removed, provided

[66] One exception to this is where a consumer moves after believing they have paid out a revolving credit facility, such as a credit card, and further transactions are subsequently charged to the account.

the debtor can establish that they took all reasonable steps in the circumstances so as not to disadvantage the creditor or attempt to evade the debt. In practice, however, this is often not the case because consumers have the burden of providing evidence to prove events that may have taken place sometimes several years previously (e.g. caseworkers survey case study about a gas company).

The latter case above, where the consumer has not taken reasonable steps in the circumstances, such as where the consumer has failed to notify the lender of a forwarding address, presents a larger challenge. This type of scenario figures frequently in complaints to consumer agencies that the system is "unfair". Often the amount is small, and the consumer has some reasonable explanation for their oversight, for example:

- flatmate or other co-occupant took over account and the name on the account was never changed;
- flatmate or other co-occupant indicated they had or would pay the account upon leaving the premises;
- relationship ended and one party claimed to take responsibility for the debt;
- debtor in crisis such as a critical illness, death in the family, fleeing domestic violence or other traumatic experience which interfered with their capacity to carry out usual tasks.

While some creditors will agree to remove such listings, there is no guarantee that this will happen, as there is nothing in the *Privacy Act* or Code of Conduct that offers any option for consumers in such circumstances.

Community lending programs also recognise this as a major issue, with many of their clients unable to access the mainstream credit sector due to default listings on their credit report:

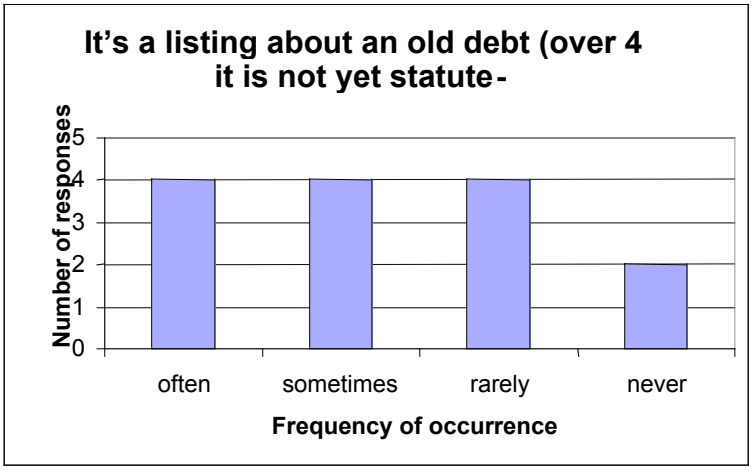
> *"For example, if someone has moved house and forgotten to provide a forwarding address to a utility company, they may end up with an unpaid bill on their credit record. We have found in a number of instances, these items come as a surprise to the customer as the situation occurred without their knowledge and sometimes in the distant past."*
>
> *"If people demonstrate and are willing to develop a payment plan to settle these bills, we recognise that this signals a commitment to repaying. Community Sector Banking has been willing to show flexibility and consider lending to people under these circumstances. For instance, a woman recently applied for a loan for a washing machine. After doing a credit check, we discovered an unpaid electricity bill of $138 from 4 years ago. At this time, she had left her previous residence as her marriage had ended. She had forgotten to provide the utility company with a forwarding address. After discovering the unpaid bill, she was determined to pay it and said, 'I want to clear my name. I am not happy to have a bad name.' She*

paid the bill, we approved a loan for her and she has never missed a payment. This situation is not unique – we meet many low income earners with small unpaid bills on their credit record." [67]

Defaults which arise from honest or understandable oversight and are paid immediately upon discovery (including entering into and honouring a repayment arrangement) are treated the same as any other default under the current system.

9.3.6 Delay between default and listing

The caseworker survey identified that delay between alleged defaults and the listing of debts was a source of problems for consumers. Fourteen of sixteen caseworkers came across instances where debts had been listed more than four years after an alleged default had occurred but prior to the expiration of the limitation period at six years. The listing of statute barred debt also occurs, though with significantly less frequency. Delayed listing of debts was also identified as a problem in the CCLC Report in relation to Debt Collection 2004.



Delayed listings are most likely to be made by a debt collector who is later assigned the debt where the original creditor has not opted to make the listing. This presents numerous difficulties for the alleged debtor, who may then learn of the debt for the first time many years after the events from which it arose, or who may not owe the debt at all and no longer has the documentation to prove this fact. Finally the result of delayed listing is that the consequences of the debt endure for significantly longer than five years from the events which gave rise to them, and indeed beyond the expiration of the limitation period.

CCLC recommended in its 2004 *Report into Debt Collection* that creditors should be

[67] Genevieve Sheehan and Pat Cavanagh, "The BSL and the Community Sector Banking", Conference Paper delivered at Microcredit: More than just small change, June 2006, Melbourne.

required to make default listings within 12 months from the date of the alleged default. This recommendation was consistent with an internal policy of Baycorp that requires listings to be made within 12 months of default and was intended to ensure that listings could not outlast the limitation period for collecting the debt (except in the case of serious credit infringements). It would also greatly increase the probability that disputes will come to the fore in a timely fashion before memories have faded and documents have been lost or discarded as no longer relevant. However, as an internal policy it is inconsistently applied, and the OPC has stated that it cannot be enforced.

From a potential credit provider's perspective, the relevance of a default to assessing risk commences immediately upon the default failing to be rectified within a reasonable period of time. There is little value in defaults listings being made many years after the relevant breach of contract, with the debtor being able to freely access credit in the intervening period. Not only does this increase the likelihood of creditors unknowingly exposing themselves to unacceptable risk in the years following immediately upon default, it could also lead to the unnecessary exclusion of possible good business in the period of the listing at which time the debtor may well have successfully re-established his or her financial position.

The ARCA group has also sought to address this issue. The proposed ARCA rules currently envisage consistent compulsory listing times for different categories of debt, such as telecommunications debts, secured loans and unsecured loans, ranging from 120 days overdue to 180 days depending on the type of debt. There is also capacity for excluding debts that are subject to hardship arrangements, although this is currently ill-defined. For telecommunications debts the time would not start running until disconnection or (if the debtor has switched providers) final notice. At this time in point, these proposals are still the subject of some debate. Further many credit providers do not yet have the systems capability to comply with these timeframes. The principle of listing defaults within a timely fashion is generally supported, but consumer groups would resist any move to contract the period between default and listing more rigidly than necessary to prevent injustice through lengthy delay, or to remove the flexibility credit providers currently have to work with consumers who have fallen behind to assist them to get back on track.

9.3.7 Other unfair listings

Listings which are technically correct and yet perceived unfair in the circumstances figure frequently in complaints received by consumer casework services. Respondents to the caseworker questionnaire identified a number of such issues, some of which have been covered above such as reporting amounts which are subject to a dispute, or when the consumer has a reasonable explanation for the delay or oversight which is not taken into account. Issues raised which are not yet covered elsewhere include defaults which are technically correct, but for small amounts, and listings which are made despite the debtor adhering to a repayment arrangement. The relationship between default listing and hardship arrangements is dealt with separately below.

In the 2004 consumer surveys taken by CCLC at the same time as the CCLC/CHOICE Debt Surveys, 24 of the 59 people who reported their experiences of the credit reporting system thought that the contents of their credit report were accurate but unfair in the circumstances. The reasons given for this perceived unfairness largely reflected the issues discussed above:

- I had not heard about the alleged debt until I found an adverse listing on my credit report
- I was in the process of disputing the debt when it was listed
- I was not notified that I would be default listed
- I was not told about the listing when it occurred
- I did not understand about credit reporting and how it works
- I thought I had a repayment plan in place with the credit provider.
- It took me 3 months to find out how to get a copy of my credit report.
- I closed a phone account but was not told about the outstanding amount.
- I paid my share of an $80 phone bill and went overseas. The other half was not paid and a default was placed against me. I never had a chance to explain.
- I could not buy an appliance because of too many inquiry listings. I did not have a single default listing.
- The credit provider said the listing would be fixed once we paid but the listing was not removed.

9.3.8 Small Debts

Listings for small amounts received the most attention from caseworker respondents, although by their very nature many of these small debts may also fall into other categories discussed above such as disputed telecommunications debts and debts resulting from billing errors. The arguments in relation to small debts per se, are that:

- They are irrelevant to whether a consumer is likely to default on a larger commitment; and/or
- When they are disputed they are unlikely due to their low value to ever be tested in court; and/or
- Even when validly incurred, the consequences of a default listing can far outweigh the misdemeanour for which the debtor is effectively being held to account.

Some caseworkers commented that:

> *Small debt listing resulting in inability to refinance debts to lower percentage rate lenders leaving clients trapped with high cost, fringe credit providers.*

> *Another example is of course listing for small amounts. The lowest listed amount that I have come across was for an amount of 50c.*

Two of the caseworker respondents felt that debts should not be listed if they are under $200 or $500 to prevent disproportionate consequences. A third caseworker also supported a minimum threshold for default listings but went on to point out that the issue is not really about what is listed, provided it is correct, but with how credit providers use that information in credit assessment decisions.

The issue of default for small amounts was explored with credit providers in the interview process. There was a considerable degree of difference on this point with some agreeing they would disregard listings below a certain amount, particularly if they were for services such as telecommunications rather than for a loan, and others indicating that a default is a default regardless of source or size. Again, unsecured credit was far more likely to fall into the latter category than secured credit, where more flexibility is usually applied.

With respect to small amount listings, some credit providers may overlook a small amount listing where there is a plausible reason for the default. One credit provider said,

> *When you get the full picture, you get a better idea of what the customer will be like. Sometimes a person neglects small debts but are good with big payments.*

In the D&B research, 95,539 records (including 1,389 applicants with a performance flag) were also examined in relation to small debt listings. The report concluded that applicants with all defaults less than $500 were at a *slightly* higher risk than their counterparts with at least one default of more than $500. The odds for both these categories would still be deemed to be at a very high risk.

However, the interviews with credit providers and the D&B research focus on the *predictiveness* of telecommunications defaults and other small debts to the exclusion of all else. From a public policy perspective, however, predictiveness is only one part of the equation. Fairness and proportionality of consequence are also relevant.[68] It is exemplified in D&B's risk modelling that statistical analysis inherently leads to the rejection of several "good" applicants for every eventual defaulter.

Privacy experts interviewed were also of the opinion that while predictiveness is a valuable consideration, proportionality is also important, and credit providers should bear in mind that telecommunications debts and other small debts are often incurred by young people, who may very well change their attitude and mature as they grow up.

9.3.9 Unjustness

[68] Bygrave, above n 29.

Summarising the above sections, problematic default listings can be divided into three categories:

1. Where the listing is clearly in dispute because either liability is itself in dispute (for example, mistaken identity and contractual disputes), or the consumer had no notice of the obligation and no opportunity to pay through no fault of their own (for example, creditor billing errors)
2. Where liability is not in dispute, but the consequences of the listing are disproportionate (for example, listings for very small amounts)
3. Disputes where liability is not strictly in dispute, and yet the listing and/or its consequences are unjust in all the circumstances (regardless of the size of type of listing).

The first two categories can be dealt with by rules and procedures of general application, such as reversing the onus of proof, improved dispute resolution, and higher minimum thresholds for default listings. The third category, however, requires a discretionary component that is not available under the current law.

While it is desirable that there is a high degree of certainty and consistency in the system, there is a range of circumstances in which the current law produces unjust results, and yet it is impossible to recommend a general solution. To attempt to predict all the circumstances in which unjustness might result would be ambitious in the least; to adequately describe, categorise and recommend definitive solutions or remedies in advance, would be impossible. A discretionary power is much more appropriate.

Clearly a default listing on a credit report is rarely a welcome development for the individual concerned,[69] and many would be disputed as "unfair". Conversely, credit providers would argue that the credit reporting system is about predicting risk, and in their experience the overwhelming majority of defaults are predictive of risk regardless of the individual's "excuse". The aim of introducing a category of listings which are "unjust in all the circumstances" would therefore be to introduce a degree of flexibility into the system to avoid results which are unnecessarily punitive and which undermine consumer confidence, without reversing the underlying assumption that a default is a negative indicator and should be available to other credit providers to manage risk.

There are precedents at law for a discretionary remedy in cases of "unjustness": s 70 of the *Consumer Credit Code,* and *ss* 7 and 9 of the *Contracts Review Act 1980 (NSW).* These provisions provide a range of factors that guide the use of the discretion and give the decision-maker a range of options for determining an appropriate remedy. The decision-maker is required to take into account "the public interest and all the circumstances of the case". Unlike unconscionability, unjustness does not require any conscious wrong-doing or even negligent exploitation on the part of any party to a transaction, although the actions of all parties involved may be relevant factors to take

[69] Occasionally consumers express indifference or even relief ("I *really* don't want any more credit") at the prospect of a default listing.

into account in determining both whether to make a finding of unjustness and the appropriate remedy.

In the case of credit reporting relevant factors to be taken into consideration might be:

- The actions of the individual making the complaint at or around the time of the default;
- The circumstances surrounding the default;
- The actions of the credit provider making the listing;
- The actions of the individual making the complaint since the listing (including any subsequent payment(s) made);
- The impact (or likely impact) of the listing on the individual making the complaint;
- The likely impact on potential credit providers, including but not limited to whether the default (or defaults) are the result of an isolated issue or event rather than a pattern of behaviour

Remedies should include the possibility of removing the listing completely, or reducing the period for which the listing will remain on the credit report. There should be no penalty to the credit provider making the listing *solely* on the basis of a finding of unjustness in all the circumstances. While listings removed on the basis of unjustness should not appear to any potential credit provider, they could be retained as an audit trail to be taken into account in any similar complaint in the future.

Recommendation 12 Default listings should be made within 12 months of a default. (For this purpose the default itself should be the defining event to avoid any artificial extension of this timeframe by a failure to issue a notice. As covered above, however, the notice of an intention to list a default unless it is rectified should be the defining event for determining whether the amount has been outstanding for more than 60 days).

Recommendation 14 The minimum threshold for listings should be $500, and this amount should be indexed to CPI or reviewed annually to ensure it remains constant in terms of real value.

Recommendation 15 Default listings for non-credit services such as telecommunications should be removed after two years (or removed from the system completely, see **Access to the System – Definition of Credit Provider**)

Recommendation 16 The onus of proof should be on the credit provider making a listing on a person's credit report to prove the accuracy of that information. If a person notifies a credit reporting agency that information held about that person is disputed, the credit reporting agency should correct the report if possible, or mark the listing as disputed and give the credit provider who has listed the information 30 days to provide proof that the debt is owed. If the credit provider fails to provide satisfactory proof within 30 days, the listing should be removed.

Recommendation 17 Where a credit provider has produced prima facie evidence that a listing is correct, and the consumer continues to dispute this, the credit reporting agency should either:

- Determine the dispute within 30 days on the evidence provided and remove the listing or not accordingly (for example where a person has provided evidence that they did not enter the contract in question, or provides proof of previous settlement or payment in full); or
- Refer the dispute to a dispute resolution scheme with appropriate jurisdiction (for example where a person raises a defence under the Consumer Credit Code which the credit reporting agency does not have the expertise or jurisdiction to determine the dispute).

Recommendation 18 Where a credit reporting agency has decided a dispute against a consumer, the consumer should be given information about how to dispute this decision, the contact details and the time limit in which they must initiate their complaint.

Recommendation 22 The *Privacy Act* should be amended to enable a Court, the OPC, or any appropriate dispute resolution scheme, to be able to take action in relation to a default listing, or other derogatory listing, which is accurate and yet unjust in all the circumstances. Where a listing is found to be unjust in all the circumstances, the decision-maker should have the power to take appropriate action including, but not limited to, removing the listing, or reducing the period of time the listing should remain on the relevant credit report.

Recommendation 23 The law should be clarified to ensure that individuals who are refused credit on the basis that their file has been cross-referenced to another file, or any other reason that is based on information held by a credit reporting agency that is not apparent from the copy of the file the individual would be given upon request, are entitled to be given adequate information to enable them to correct any inaccuracies or false assumptions attributable to the data held by the credit reporting agency.

Recommendation 39 Credit reporting agencies should be required to publish policies and procedures in relation to data-matching, file merging and cross referencing to improve transparency.

Recommendation 40 There should be data quality standards imposed on credit reporting agencies that are mandatory and subject to regular independent audit that address the merging and cross-referencing of files.

9.3.10 Hardship Arrangements

Managing financial hardship among consumer debtors is a balancing act that must take into account the following (sometimes competing) objectives:

- Maximising the debtor's ability to ride out temporary financial setbacks and eventually meet their credit commitments;
- Preventing debtors in financial difficulty from becoming further indebted;
- Maximising the debtors capacity to exercise options which genuinely improve their capacity to meet their contractual commitments such as refinancing on better terms; and
- Ensuring credit providers are able to recover their debts, or at the very least take reasonable action to minimise their losses.

Some caseworkers were concerned about what some coined the "overzealous listing behaviour" of some lenders. They stated that sometimes a listing would be made strictly even if the debtor is in the process of negotiating a repayment arrangement with the credit provider, or in some cases, where a repayment arrangement is already in place and being adhered to. This was also reported in the CCLC/CHOICE research in 2004.

Caseworkers argue compellingly that a valid hardship arrangement entered into under s66 of the Consumer Credit Code is a variation of the contract and does not equate to a default. Problems clearly arise, however, when a default occurs prior to the establishment of the variation, and in contracts that are not subject to the Consumer Credit Code (such as telecommunications contracts). The former issue is of particular concern because debtors often report to consumer assistance agencies that they are told "ring back when you are in default" when they try to make variations to their repayment obligations.

In the case of telecommunications debts there is no legal obligation to either assess ability to pay or otherwise provide appropriate products, or to provide flexibility for customers facing financial hardship. While some of these issues are dealt with in the ACIF Codes, and there have been improved processes introduced by the larger industry players, the Codes are complicated and inaccessible, and there is no effective mechanism to ensure industry-wide compliance. Further, the ACIF Code Status Report as at March 2007 reveals approximately 13 signatories to the ACIF Credit Management Code, while there are 1706 industry members of the TIO. If telecommunications debts are to be retained as part of the credit reporting system, there should be clear and enforceable legal obligations placed on telecommunications companies in relation to credit assessment, hardship and notices to be provided prior to disconnection, credit listing and any other enforcement action.

The Code of Banking Practice also places obligations on bank credit providers that go beyond those enshrined in the Consumer Credit Code. There are also moves to introduce similar obligations into the Mortgage and Finance Association of Australia Code of Practice, which would extend those provisions to many other credit providers not currently covered by the Code of Banking Practice. Unfortunately neither telecommunications companies, nor the myriad of credit providers who do not subscribe to either of the aforementioned Codes will be affected by these obligations.

The credit providers interviewed generally indicated that they do not make a default listing while the consumer is working with the credit provider to get their account back on track. The latest version of ARCA proposals also defines default to exclude those situations where a repayment arrangement is in place and being largely complied with. The reported consumer experience, however, suggests that this is not always the case in current practice, a fact that is not surprising given the large number and diverse nature of credit reporting agency subscribers.

The current facility to have a scheme of arrangement indicated on a person's credit report is not widely used, although at least one credit provider interviewed does report schemes of arrangement. Part of the reason for this is that under the current system a default must be listed prior to the listing of a scheme of arrangement. In recognition of this, the ARCA has proposed that the law should perhaps be amended to enable a customer to be 'flagged' as having entered a reduced repayment arrangement, without the need for a default to be listed first. Any such amendment would also require scoring systems to be adjusted to take account of the new listing type. The concept mooted is that this type of listing would not endure for a specified period, but instead be removed upon the successful completion of the repayment arrangement, that being when the person has either repaid the debt in full or paid all arrears and resumed normal repayments.

While there are cogent reasons for flagging a consumer in hardship to prevent further indebtedness, there are also valid concerns if this process prevents the consumer from exercising options that would alleviate their financial difficulty (such as refinancing at a lower rate) or has the effect of driving a consumer into the expensive sub-prime sector. A recent analysis of calls to CCLC in relation to credit card debt for example produced numerous examples of consumers who were trapped in high rate contracts and could not refinance out as a result of a default listing. Further, any proposals need to recognise the fundamental concept that consumers should be given the opportunity to rectify defaults before any adverse consequences ensue.

A related issue is that of multiple defaults. While multiple listings of the same default in clearly undesirable, and the *Privacy Act* should clarify that these should be updated rather than listed again, a related scenario is where a correctly-listed default is rectified, and a subsequent default occurs. While there are arguments for and against entering a new default in these circumstances, the over-riding principle should be that a person who has managed to rectify a default and then fallen behind again should be no worse off (as a result of multiple listings for the same account) than a person whose report contains a single unpaid default. One possibility would be to enter the details of the new default in place of the old default if the information relates to the same account.

Recommendation24 Telecommunications companies should be subject to similar regulatory obligations as consumer credit providers in relation to assessing ability to pay and/or providing appropriate products, dealing with financial hardship and notice prior to any form of enforcement action.

Recommendation 25 All subscribers to the credit reporting system should be required to subscribe to a Code of Practice which addresses hardship policies and procedures in broad terms, is subject to monitoring and compliance mechanisms, and is taken into account in the decisions of an approved EDR Scheme.

Recommendation 26 Any amendment to the law to allow repayment arrangements to be listed in the absence of a default should take into account:

- Debtors' rights under s66 and s68 of the Consumer Credit Code to vary their contract in response to a change of circumstances;
- The need to balance the prevention of over-indebtedness with the desirability of preserving consumer options to reduce their financial difficulties by refinancing on more favourable terms.
- Any obligations under a relevant Code of Practice.

Recommendation 7 There should be a requirement to issue a notice to the customer giving the customer 30 days to rectify the default, or raise a dispute, as a prerequisite to a default listing being made. A default listing should only be able to be made 60 days from the issue of the notice, as opposed to 60 days from the date of the default.

Recommendation 27 Schemes of arrangement, or any equivalent type of listing, should be removed from a customer's credit report when the contract is paid out, or the customer repays any arrears and resumes normal repayments, whichever occurs earlier. In the event that the scheme of arrangement occurred subsequent to a legally listed default, the default should be marked as paid.

Recommendation 28 The law should clarify that changes to amounts owing in relation to a default should be included by way of an update to the original default (that is altering rather than adding information). The same should apply where a new default occurs on the same account for which a paid default is still marked on the credit file.

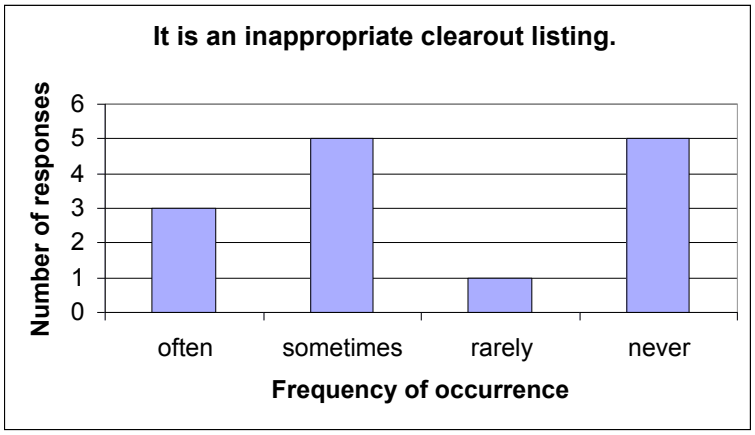
9.3.11 Default listing by specific lenders

In the context of secured lending, credit providers said that they were more likely to be more flexible in assessing the size and circumstances of a default listing, including looking at the type of credit provider that made the listing. Whereas telecommunications debts may be more likely to be overlooked in the secured lending scenario, at least one credit provider interviewed suggested it would be more hesitant about lending money to a person who has defaulted on a perceived marginal or high risk sub-prime mortgage.

A considerable number of caseworkers also reported in the surveys that they had received complaints about default listings by sub-prime lenders.[70] As sub-prime lenders offer credit at higher rates than prime lenders, it is considerably more likely that borrowers in that segment of the market will default. This creates a distinct possibility that having once entered the sub-prime market, many consumers may become trapped in a cycle of expensive debt from which it is almost impossible to break free, a theory that is all the more perturbing because some consumers have entered the sub-prime market as a result of a disputed credit report listing in the first instance.

9.4 Serious Credit Infringement ('clearout' listings)

Serious credit infringements attracted some attention in the caseworker survey responses:



When asked if they were aware of situations where a credit report listing may be technically correct and lawful, and yet could have consequences that were unfair in all the circumstances, one caseworker said,

> *Yes. An excellent example is the clearout listing. According to the Credit Reporting Code of Conduct to list a clearout you only have to write a default letter to the last address and not get a response and a clearout can be listed. This can be so unfair. The consumer may have moved address, had a family death or crisis, be overseas and still be a clearout.*

Interestingly, no credit provider interviewed treated serious credit infringements any differently to other defaults, primarily because a default already resulted in a rejection for credit in the overwhelming majority of cases. The sting of a serious credit listing is therefore in the tail, being the extra two years for which they remain on the credit report beyond the five years of a standard default. Consumers who approach CCLC have taken

[70] This was a surprise to the authors of the report as CCLC caseworkers have not come across default listings by sub-prime lenders at all.

umbrage at the label, which clearly implies a type of fraud, in addition to being concerned at the practical impact of a seven-year default listing.

While in some circumstances, moving address and failing to make contact with a credit provider will clearly indicate an intention not to pay a debt, this will not always be the case. Further, where a consumers has been listed as a serious credit infringement for no other reason than that the credit provider has lost contact, and the consumer later makes contact with the credit provider and settles their debt, there should be capacity to reduce the serious credit infringement listing to a standard default, as this behaviour is clearly inconsistent with an intention to avoid payment of the liability. The *Privacy Act* and Code of Conduct are currently interpreted such that if the credit provider is found to have been reasonable in listing the debtor as a serious credit infringement at the time the listing was made, then the listing remains. While the reasonableness of the credit provider in making the listing should be relevant to determining whether any penalty should flow from the listing if incorrect, amendment of the listing should be possible if further information or developments indicate that a serious credit infringement is not appropriate in all the circumstances.

The seriousness of impairing an individual's access to credit for seven years should not be underestimated. Credit providers should not be permitted to make serious credit infringement listings lightly. There should be series of steps which a credit provider must take before a serious credit infringement can be listed.

In CCLC's experience, serious credit infringements are used exclusively for "skips" (consumers who have moved with an alleged debt owing), and not for other forms of fraud. While it is clearly important that creditors should be permitted to alert other potential creditors about convicted fraudsters, this is an extremely serious and potentially defamatory allegation, the listing of which should be subject to the rigorous standards of proof of the criminal law.

Recommendation 29 The law should be amended to require a series of steps to be taken before a serious credit infringement can be made:

- The credit provider must issue a notice under the *Privacy Act* indicating that a default has occurred and a listing may be made unless the default is rectified to the customer's last known address;
- A default listing should be made (60 days from the notice) and a notice issued informing the customer that this has occurred;
- The credit provider should make at least two genuine attempts to contact the debtor by phone (including searching the white pages directory to confirm whether there is any other number listed for the debtor)
- The default listing must remain for 90 days to give the debtor an opportunity to contact the creditor and make arrangement to pay the debt.

Recommendation30 Where a debtor subsequently makes contact with the credit provider and pays their debt, or makes some other arrangement which is acceptable to the

credit provider, the serious credit infringement should be downgraded to a standard default listing.

Recommendation 31 There should be a separate process for other types of fraudulent conduct, requiring a conviction in a criminal court before a listing can be made, and the reference to fraud should be deleted from the current serious credit infringement section.

9.5 Bankruptcies, Part IX Debt Agreements and Court Judgments

Other matters are recorded on credit reports, including court judgments, bankruptcies and Part IX Debt Agreements. All credit providers interviewed stated that they would reject applications from undischarged bankrupts, and those with a court judgment; however, the value of Part IX debt agreements listings is more uncertain.

Part IX debt agreements are binding agreements whereby the majority of a debtor's creditors representing 75% of the value of the debt can vote to accept a debtor's formal proposal to pay a percentage of their outstanding debts in full and final settlement. It is often referred to as a low cost *alternative* to bankruptcy. Nonetheless, proposing a debt agreement is technically an act of bankruptcy. Many consumers are not aware that the mere proposal of a Part IX debt agreement will result in a record to that effect, meaning that rejected debt agreement proposals may still be listed (theoretically at least[71]) without the debtor ever missing a payment.

While s 18E(1)(ix) of *Privacy Act* allows for "bankruptcy orders made against the individual" to be listed on credit reports, no mention is made about Part IX debt agreements. Indeed, CCLC has been advised that the OPC allows the listing of Part IX debt agreements not because they are allowed under the *Privacy Act,* but because such agreements are part of the public record and as such the *Privacy Act* does not regulate it.

This juxtaposition of public information with other credit report specific information can be quite misleading and detrimental. Another example of publicly available information is the listing of court summons information, without any indication of the outcome of the case.

Consumer representatives also expressed concern about the listing of court judgments. Court judgments are not necessarily an indicator of a person's credit worthiness, but rather, disputes that have been determined by the courts. The fact that court judgements are to be listed on a litigant's credit report may act as a deterrent for people turning to the court system to settle valid contractual and other disputes, effectively denying citizens

[71] In reality many consumers are advised by commercially operated "debt help" firms to stop making payments when a part IX debt agreement is put forward, often to their detriment.

natural justice. Further, in cases where a consumer is appropriately insured, his or her insurance company may opt to initiate or defend proceedings in the consumers' name under their right of subrogation. It would be manifestly unjust for the consumers' ability to obtain credit to be jeopardised in these circumstances. It would be far more logical to limit listings to judgment debts that originated from credit contracts. At the very least other judgments should not be included unless they have remained unpaid for a period of three months.

Recommendation 32 Court judgments should only be included if they relate to a credit contract by a credit provider as defined by the *Privacy Act* or any other relevant instrument.

Recommendation 33 There should be limits contained in the *Privacy Act* on the publicly available information that can be supplied by credit reporting agencies.

Recommendation 34 Debt Agreements, if listing is permitted, should be removed when the debtor has satisfied their obligations under the agreement.

9.6 Customer Notations

The *Privacy Act* currently allows individuals to add comments to explain the content of their credit file or to present an alternative view to that of the credit provider who has made the listing.[72] While such notations are duly allowed for by the credit reporting agencies, it would appear from the interviews with credit providers that they serve little if any purpose. The automated systems for the larger lenders have no capacity to analyse and process customer notations. It would appear that this right created by the *Privacy Act* is illusory in practice.

Some credit providers suggested other uses which the notation section could serve, including:

- Noting the existence of valid powers of attorney;
- Notices in relation to financial management orders or equivalent under the guardianship laws of each state;
- Noting similarities in name with other family members, for example, father and son with the same name, or twins, who may have similar names and the same address and date of birth;
- Self-exclusion from credit by gamblers or others who recognize that they are in financial trouble.

[72] *Privacy Act* s 18J.

While these suggestions have merit, considerable consultation with affected consumers and other stakeholders would need to be undertaken which are beyond the scope of this report. Further, such uses are quite different to the right intended to be created by Parliament in allowing for customer notations and would amount to a new and unenvisaged use of the credit reporting system.

9.7 No report/newly-created report

Most, if not all, of the credit providers interviewed believed that a person who has no credit report, or only a newly-created credit report, should be treated with caution. A person who has been an adult for some time and yet has no credit file to their name is not as good a credit risk as one who has a credit file with some personal information and inquiry listings. Credit providers believe that the absence of a report tends to suggest that there may be some fraud involved, for example, identity fraud. Credit providers were in agreement that having no file at all would also impact negatively on a credit score.

Credit reports may also appear to be suspicious if it is 'empty', i.e. where an old default listing may have been removed after the expiry of 5 years. One credit provider suggested that it would be useful if the credit reports could include the date of its creation, so that such cleared credit reports would not be treated as a newly-created report and hence be viewed with suspicion.

10 Access to the system - Definition of credit provider

"Credit providers" are defined in s 11B of the *Privacy Act* as banks, or corporations a substantial part of which business is the provision of loans; or which carry on retail businesses that issue credit cards in connection with the sale of goods or the supply of services. Corporations or agencies carrying on a business involving the provision of loans can also be determined by the Privacy Commissioner as a credit provider for the purposes of the *Privacy Act*.

In August 2006, the Privacy Commissioner renewed two Determinations in relation to credit providers after a public review. Determination No. 2006-1 (Assignees) permits assignees of debt to undertake credit reporting in respect of the loans. Determination No. 2006-2 (Classes of credit provider) states that a corporation is regarded as a credit provider for the purposes of the *Privacy Act* where it provides a loan in respect of the provision of goods or services on terms which allow the deferral of payment, in full or in part, for at least 7 days.

Most caseworkers are concerned about the nature of organisations that are permitted to list defaults on credit information files. They argue that the Determinations effectively allow vets, video stores and telecommunications companies to make credit listings contrary to the original intention of the legislation and with no appropriate consideration given to whether the level of risk taken on by these service providers justifies this erosion of presumption of privacy. Indeed the OPC's conclusion that there is no evidence from complaints handling bodies that there are systemic issues with the operation of the above Determinations[73] begs the question whether there is any justification for their inclusion in the first instance.

Three organisations that represent the interests of consumers made submissions to the review by the OPC, and all three organisations recommended that the Determinations not be renewed. In its submission, Legal Aid Queensland stated that approximately 20% of credit reporting complaints they received related to telecommunications accounts but none of them had any legal action taken against their client (therefore providers are using listing as an alternative to legal action and/or to threaten customers into paying). It was argued by CCLC that businesses operating outside the finance sector should not be allowed to access the credit reporting system because of the low monetary figures associated with the provision of goods and services, as opposed to the provision of credit, that payment defaults in relation to telephone, utility, medical or video hire are more likely than consumer credit defaults to arise out of legitimate disputes rather than an

[73] Report on the Review of the Credit Provider Determinations (Assignees and Classes of Credit Providers), August 2006, available at http://www.privacy.gov.au/publications/index.html/

inability or refusal to pay. More specifically, the Determination would allow telecommunications companies to make listings but they have no obligation to put into place any of the consumer protection mechanisms required by the Consumer Credit Code.

Allowing access to non-traditional credit providers to the credit reporting system has led to vested interests keen to preserve the status quo. The credit reporting agencies have an expanded customer base which in turn boosts potential income. While credit providers may encourage research and debate on the relevance to risk of various types of information, they are united in the view that relevance to their risk assessment is a primary or sole determinant of whether particular information should form part of a consumers' credit report. This appears to turn the issue entirely on its head. For example, the current debate about the risk relevance of telecommunications data would never have taken place if the OPC had not constructed the definition of credit provider so liberally. Consequently, the debate is now not about whether telecommunications companies face sufficient credit risk to warrant their access to very personal information, and, if there is such a risk, whether there are other more appropriate ways of managing or limiting that risk. Instead the debate is solely focused on whether traditional credit providers can make use of the information provided by telecommunications companies, as if that alone can justify their inclusion.

There should be a clear restatement of the purpose of the credit reporting system with the right to privacy and the protection of consumer information as the starting point, departure from which should only occur where there is sufficient justification in the public interest for doing so. While risk assessment and the relevance of particular types of information to risk assessment is a valid concern in that process, it is not determinative.

In the US and some other countries with more comprehensive credit reporting systems, real estate agents and employers are entitled to access credit reports/scores. This does not appear to have been the case in Australia to date. While specific tenancy databases are in use and have attracted considerable adverse comment culminating in recent reforms, CCLC is not aware of any particular instance where a default on a credit account or telephone account has jeopardised access to private rental housing, but this should also be prohibited. Similarly, allowing employer access to credit information has not been a permissible use of credit information in Australia and this should remain the case. To allow otherwise would be to potentially restrict a person's ability to lead a productive life and would clearly inhibit their ability to recover from any form of financial difficulty. Not only should the exclusion of these groups from the system be incontrovertible, but there should be a specific prohibition on credit reports being required to be supplied by individuals (who can access their own reports) in any context. In other words access to this information should be clearly limited to those who have been given access by the legislature, and this limitation should not be subject to possible circumvention by forcing the individual to access and produce their own report.

Recommendation35 Credit Provider Determination 2006 No. 2 (Classes of Credit Providers) should be overturned/not renewed. Credit Provider is clearly defined in the Privacy Act. There should be capacity in the regulations to specifically exclude further categories of credit provider, but not to extend the definition.

Recommendation36 There should be an offence created under the *Privacy Act* of requiring an individual to provide a copy of his/her credit report in the course of any business or enterprise.

11 Debt Collection

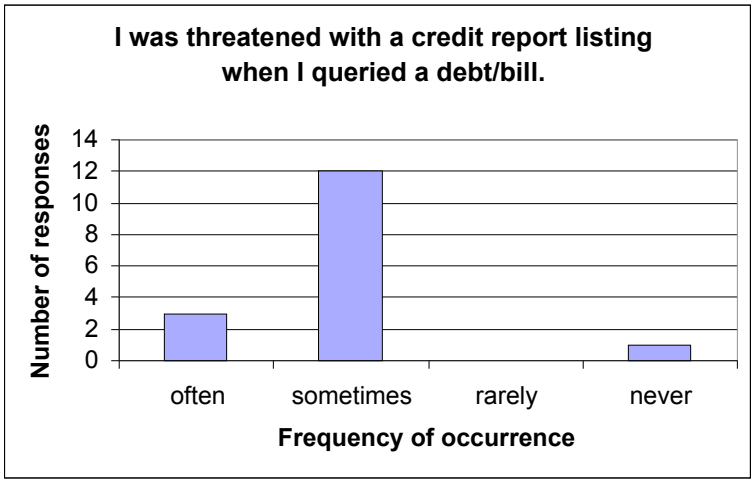
There are two key concerns in relation to credit reporting and debt collection. The first is about the extent to which credit report listings are used to influence, or in some cases, manipulate people into paying debts. The second is the impact on the consistency and accuracy of the credit reporting agency data as a result of it being used extensively for debt collection, but not necessarily for risk management.

11.1 Credit listing as leverage

While misrepresentations about credit reports are an offence under the relevant federal or state fair trading legislation, there are degrees of influence that may be exerted to convince an alleged debtor to make payments in order to avoid a 'black mark' against their name. This is significant when viewed in light of the fact that consumers know very little about how credit reports work, and the experience of some consumers who have disputed a listing would suggest that knowing more about it would not necessarily lend any comfort.

The 2004 CCLC Debt Collection Report identified the use of both the threat of default listing on a credit reporting, and in some cases actual listing, as leverage in the debt collection process. Similar results can be seen in the caseworker questionnaire conducted for this report.

Most caseworkers had come across consumers who had been threatened with credit report listings when they queried an account.



Consumers who had paid bills they believed they did not owe to prevent a listing, or in order to have a listing removed were also encountered, though less frequently.

There is some evidence to suggest that default listing has replaced other forms of debt collection for an array of small debts that would not be commercially viable to pursue via the traditional court system. Legal Aid Queensland's submission to the Privacy Commissioner's review of Credit Provider Determinations concerning assignees and classes of credit providers asserted that of the numerous default listings made by telecommunications companies, few attempts are even made to enforce the alleged contractual obligations from which these defaults allegedly ensue. As an example, they cite that 20% of the complaints about credit reporting made to the Legal Aid Queensland involve alleged telecommunications debts and yet none of the clients have been subject to legal action. This means that many of these consumers are never given the opportunity to accept or deny these debts and, where appropriate, defend them. This issue is of particular concern in the light of the attitude to the of the OPC in relation to determining substantial issues in dispute as exemplified in this casestudy:

> *The PC refused to consider whether there was a legitimate sale of the vehicle and whether the amount alleged as owing advising us that the matter of liability would better be assessed through the legal system. However the lender had never taken action beyond sending a letter advising of intention to list against the consumer. This effectively meant that the consumer was in the position of having to take legal action to prove that the debt was not due to remove the listing.*

The OPC is undoubtedly correct to decline to determine issues about which they have no jurisdiction or expertise. However the outcome for the consumer is that they are never given an opportunity to determine these issues, and may be forced to initiate legal action to determine relevant issues in the circumstances even though the onus should be on the creditor to commence proceedings. Further, as a result of a delay of sometimes several years between a default and a listing, and often further delay before the consumer discovers the listing, a consumer may be denied the opportunity to plead a valid defence because of the expiry of relevant time limits (an unjust contract application under the UCCC, for example, must be made within 2 years of the termination of the contract).

11.2 Data Distortion

As credit providers differ in their approach to debt collection, this has led to inconsistent, ad hoc, and delayed listings. Some defaults are never listed and others are listed many years after the information is relevant, allowing consumers to access credit at a time when they may be financially stressed and denying credit many years after the events have ceased to have any relevance. Further, as noted elsewhere in this report, listing without sufficient evidence of liability (including identity errors), or despite the existence of a genuine dispute, leads to inaccurate and unreliable data, and consequent poor outcomes for consumers and credit providers alike. This needs to be addressed urgently.

Recommendation 14 The minimum threshold for listings should be $500, and this amount should be indexed to CPI or reviewed annually to ensure it remains constant in terms of real value.

Recommendation 16 The onus of proof should be on the credit provider making a listing on a person's credit report to prove the accuracy of that information. If a person notifies a credit reporting agency that information held about that person is disputed, the credit reporting agency should correct the report if possible, or mark the listing as disputed and give credit provider who has listed the information 30 days to provide proof that the debt is owed. If the credit provider fails to provide satisfactory proof within 30 days, the listing should be removed.

Recommendation 12 Default listings should be made within 12 months of a default. (For this purpose the default itself should be the defining event to avoid any artificial extension of this timeframe by a failure to issue a notice. As covered above, however, the notice of an intention to list a default unless it is rectified should be the defining event for determining whether the amount has been outstanding for more than 60 days).

Recommendation 13 Where a debt collector assignee purchases a debt they cannot list a default on the credit report unless:

- Less than 12 months have passed since the default *and* the former credit provider has not listed the default *and* a notice required under the *Privacy Act* has been sent *and* the requisite time period expired; or
- The original credit provider has already listed the default *and* the debt collector updates the default to include the debt collector as creditor *and* sends a notice to the debtor to this effect. In this case the original credit provider should also be noted on the file and the date for removal of the listing should be calculated from the date of the original listing.

Recommendation 21 Relevant EDR schemes should have the jurisdiction to determine disputes about liability that would otherwise be out of time for the purposes of settling a dispute about a credit report listing.

12 Data quality and consistency

There are significant concerns over the accuracy of information contained in credit reports. In 2004, 65,000 customer default listings for OneTel had to be dropped after it was discovered the liquidator did not update listings once debts were paid.[74] In 2003, CHOICE magazine reported that there was an error in over 34% of credit reports out of a sample of 50.[75] Although 84% related to personal details such as a wrong licence number, wrong address, wrong date of birth or wrong employment details, this raises significant potential for mismatching of individuals to debts owing.[76]

Inaccuracies disadvantage consumers because they create the potential to be unfairly denied credit and pursued for debts that do not belong to them. It also disadvantages credit providers because they are less able to rely on credit report information as an accurate gauge of a person's creditworthiness and leads to inefficiencies in the credit system.

Inaccuracies are also one of two key concerns that have arisen in Baycorp's recent meetings with consumer groups to ascertain problems with the credit reporting system. Baycorp is currently working towards improving the poor quality of the information that is input into the system, and suggests that consumers should take an active role in managing their personal information by checking the accuracy of information held by others.[77]

Inaccuracies not only occur due to credit reporting agency practices, but they also flow on from inadequate record-keeping and data management systems of credit providers (including assignee debt collectors) who make the listings. In 2006, CCLC and the Consumer Credit Legal Service (VIC) Inc submitted a representative complaint to the OPC about a telecommunications company and its assignee debt collector's failure to ensure that their listings are accurate.

Credit providers also complained about the information that is missing from the credit reporting agency databases (as opposed to wrongly listed) and the different definitions applied by data contributors. One lender said that for example, a default listing of $100 on a credit report does not tell them whether it's $100 from a $15 000 credit card, or simply $100; another example is the differences in approach to when a listing or inquiry

[74] Office of the Privacy Commissioner. '65,000 One.Tel debtor default listings dropped from credit records because of inaccuracy', (Press release, 23 October 2004).
[75] 'Reporting on the credit reports', *CHOICE Magazine: Consuming Interest*, No 99 Autumn 2004.
[76] Ibid.
[77] Senate Legal and Constitutional Committee, Parliament of Australia, Canberra, Inquiry into the Privacy Act, 19 May 2005, Mr Andrew Want, Baycorp Advantage Ltd, 3.

is made. Most credit providers agreed that all members should participate at the same level, and that there should be consistent listing practices and definitions applied.

There are moves by key players in the industry to address this problem through self-regulation. The principles of this process would be that access to credit information would be entirely dependent on contribution of data and vice versa. This would be largely regulated via the contractual relationship between the credit reporting agencies and subscribers and overseen by a body on which key players would be represented. While this may lead to considerable improvement in consistency, there are other recommendations in this report that are required to address accuracy, including reversing the onus of proof for default listing and requiring credit providers to be able to provide evidence of liability for an alleged default within a specified timeframe.

Consumer groups are also sceptical about any self-regulatory scheme that is not underpinned by a clear legislative mandate and subject to effective compliance monitoring and enforcement. Further, credit reporting agencies trade for profit, can have considerable power in the marketplace and have considerable power over the people in whose information they trade. They should not be able to be mere post boxes for the transfer of information but should carry specific responsibilities related to their custodianship of that information, including responsibilities to people about whom they hold information but with whom they have no contractual arrangement. The law should define those responsibilities and give the credit reporting agencies a clear role in data quality control, dispute resolution, systemic issue identification and public reporting of activities, statistics and trends.

Recommendation 37 Failure to remove a listing, in circumstances where the credit provider who supplied the information has not complied with the timeframe for substantiation, should constitute a breach on the part of the credit reporting agency and the relevant credit provider.

Recommendation 17 Where a credit provider has produced prima facie evidence that a listing is correct, and the consumer continues to dispute this, the credit reporting agency should either:

- Determine the dispute within 30 days on the evidence provided and remove the listing or not accordingly (for example where a person has provided evidence that they did not enter the contract in question, or provides proof of previous settlement or payment in full); or
- Refer the dispute to a dispute resolution scheme with appropriate jurisdiction (for example where a person raises a defence under the Consumer Credit Code which the credit reporting agency does not have the expertise or jurisdiction to determine the dispute).

Recommendation 18 Where a credit reporting agency has decided a dispute against a consumer, the consumer should be given information about how to dispute this decision, the contact details and the time limit in which they must initiate their complaint.

Recommendation 38 Credit reporting agencies should have clear and onerous obligations to monitor compliance with statutory obligations, codes and standards, including the obligation to develop systems to identify and investigate possible systemic non-compliance, and to report on those systems and outcomes. Penalties for non-performance of these obligations should be sufficiently stringent as to outweigh any competing commercial interest in maintaining subscriber numbers or maintaining a relationship with any particular subscriber.

Recommendation 41 Credit reporting agencies should be required to bear the cost of regular, independent audits of their operations to ensure compliance with the law and data quality standards and to report the outcomes of such audits.

13 Automation

The credit reporting system has largely moved towards an automated model in recent years. One of the lenders interviewed stated that it is increasingly becoming more cost prohibitive to assess each individual application that they receive. Most of the credit providers interviewed used automated systems for their credit assessment. When asked how often an application would be looked at by a human, the usual response was that it would only happen if a complaint by the rejected application is raised.

A privacy expert interview recalled that the consequences of a default listing were much less serious than they are now. He recalled that consumers were still able to obtain credit even if there were default listings on their credit report,

> *Having a small default was not the end of the world, credit providers still looked at the circumstances of the case. It seems that automation is making a huge difference.*

He pointed out that Article 15 of the European Parliament and the Council of the European Union Directive of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data explicitly grants the right to persons not to be subject to certain forms of fully automated decision-making. It states:

> Member States shall grant the right to every person not to be subject to a decision which produces legal effects concerning him or significantly affects him and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him, such as his performance at work, creditworthiness, reliability, conduct, etc.

Some European countries have since enacted similar legislation.

14 Risk-based pricing

One potential use of shared credit data is to enable credit providers to set the price of a contract according to the risk posed by the particular applicant. The ability to price individual contracts according to risk, and as a result offer lower risk borrowers cheaper credit, is one of the mooted advantages of a more comprehensive reporting system. As risk-based pricing is already occurring in the market to some extent under the existing credit reporting rules, however, it is appropriate to discuss the issue in more general terms.

The argument generally posited in favour of risk-based pricing in the context of a more comprehensive credit reporting system is that the lack of information available about any given customer's current credit commitments and repayment history forces credit providers to set prices at a level which reflects the average risk of the portfolio. This, it is argued, has two undesirable effects:

- The price for some borrowers is higher than necessary because they are effectively subsidising higher risk borrowers; and
- Adverse selection results because the credit is too expensive for very low risk borrowers, and relatively cheap for higher risk borrowers, leading to a relatively higher take-up among the higher risk group.

The corollary of this argument is of course that more targeted risk-based pricing would lead to more low risk borrowers taking up credit, and higher risk borrowers being either priced out of the market or, at least, profitable at the portfolio level as a result of the higher price paid.

An example of risk-based pricing already occurring in the context of the current credit reporting system is sub-prime lending in the home mortgage market. Increasingly consumers seeking help from consumer assistance agencies are struggling to pay high rates of interest on sub-prime loans. It is not uncommon for these consumers to have refinanced from the cheaper prime lending sector as a result of defaulting on their original mortgage or other loans which are then rolled into their mortgage debt.

Some store credit, such as that sold via interest-free promotions on furniture, whitegoods for example, is also priced for risk in effect because those who can pay off the goods within the interest-free period do so, and those who cannot pay considerably higher rates than are paid on other forms of revolving credit. A recent analysis of CCLC information and advice records for example revealed that more callers with credit or store cards owed money to GE, the largest provider of interest-free credit by market share, than any other creditor.[78] Further, GE was the creditor with whom the most callers had more than one

[78] CCLC Credit and Debt Hotline data. However, not all callers had necessarily taken advantage of interest-free promotions.

account. Many of these callers were Centrelink recipients, or other very low income earners with relatively low debts, who complained that the relatively high interest rates were seriously inhibiting their ability to repay their debt.

While these types of credit may expand the credit opportunities available to disadvantaged consumers, it is the experience of many consumer assistance agencies that these loans are often not sustainable. Arrears on sub-prime mortgages, for example, are considerably higher than arrears on other mortgages. Repossessions are also on the rise in NSW, the ACT and Victoria. An analysis of repossessions of real property in the ACT identified a disproportionate number of possession proceedings involved non-bank lenders,[79] some of whom lend on a priced-for-risk basis. At best, risk-based pricing means that the most disadvantaged consumers often pay the highest price for credit. At worst, where consumers are unable to repay, it is not an expansion of the options available to disadvantaged consumers but an expensive, traumatic and ultimately fruitless exercise.

For these reasons, consumer advocates are wary of any move to greater price discrimination on the basis of risk, and do not accept this particular argument in favour of an expanded credit reporting system. Improved access to credit is desirable only insofar as it is affordable, and as a result, sustainable.

In the US, shared credit data also enables credit providers to trigger price changes on existing contracts. The *universal default clause* enables a credit provider to use the fact of a default on a credit account with another creditor to initiate a higher rate of interest under their completely separate contract with the consumer.[80] This type of term is profoundly unfair, as it not only enables one party to a contract to penalise another in circumstances where there has been no default, but also greatly increases the chances that a person in financial difficulty will quickly spiral into a crisis from which they cannot recover financially. This is a poor result for the debtor, their creditors and potentially the wider economy if activated on a broad enough scale. There is no suggestion that any interest-group is seeking to introduce this practice in Australia. It should nonetheless be made explicit that the use of shared credit data to trigger price changes under existing credit contracts is unequivocally prohibited.

Recommendation 56 The use of credit file information to trigger price variations on existing contracts should be expressly prohibited.

Recommendation 57 The greater ability to price risk, and hence lower the price of some credit contracts, should not be accepted as being necessarily in the public interest.

[79] Kilpatrick, A. *They want to take our house: An investigation into house repossessions in the ACT Supreme Court,* Consumer Law Centre of the ACT, 2006

[80] Centre for Responsible Lending, *The Plastic Safety Net: The Reality Behind Debt in America,* Demos and CRL, October 2005

15 Responsible lending

There are many signs of serious over-indebtedness in Australia in recent years. The household debt-to-income ratio is at 150% and is now the third highest ratio in the world. Household debt reached a record of almost $750 billion in 2005,[81] an increase of $80 billion from the 2004 figure (which was itself an increase of $100 million from 2003[82]). In November 2006, credit card debt was at a record high of $38 billion,[83] while the amount of debt accruing interest was at a record high of $27 billion. In the three months to December 2006, the number of personal bankruptcies increased by about 20% to over 6000.[84] The total number of bankruptcies in NSW have increased by 43% from the period of 2003-2004 to 2005-2006, and has remained the highest amongst all states.

One of the other signs of over-indebtedness is the dramatic increase in home repossessions statistics in recent years. In NSW, there was an almost 50% increase to matters on the Supreme Court Court List for repossessions between 2002 and 2004, and a further 50% increase between 2004 and 2005. This is a very disturbing trend representing a significant increase in the number of people facing the loss of their home. Similarly, while CCLC received only 4 calls in relation home loan possession proceedings in the Supreme Court in our first month of operation in September 2004, and by the second quarter of 2005 these peaked at 15 per month. We have also taken additional calls on this issue on our legal advice line.

"Responsible lending" is a label that has been used by consumer advocates in relation to the need for proper credit assessment processes to protect consumers from crippling over-indebtedness. More recently the phrase has been appropriated by advocates of an expanded shared data set for the credit reporting system. Used in this context by industry spokespeople the term emphasises the capacity for expanded data to potentially assist with responsible lending decisions. It also serves to distract from the other possible uses of expanded data, such as greater lending volumes for a similar default rate and/or greater use of differential pricing on the basis of risk.

The use of the term "responsible lending" in this context is viewed sceptically by many consumer advocates. In fact one caseworker responded to the question in the survey about recommending changes to the credit reporting system to improve lending practices as follows:

> *Lending practices aren't part of the credit reporting system really: I don't quite understand the question. Is this a dog-whistle reference to positive credit*

[81] 'Swimming in debt, but we're not drowning', *Sydney Morning Herald,* 26 March 2005.
[82] 'Economy in doldrums but no end to debt binge', *Sydney Morning Herald,* 3 June 2004.
[83] Reserve Bank of Australia, *Credit and Charge Card Statistics,* November 2006.
[84] Insolvency and Trustee Service Australia, *Quarterly Statistics*, October 2006 to December 2006.

reporting? At any rate, I don't think any changes to the credit reporting system will reduce overcommitment in any large degree.

Other caseworkers focussed on the impact of poor credit assessment practices in contributing to consumer defaults (when the consumer cannot repay the loan), rather than on the potential use of default listings or other aspects of the credit reporting system to improve lending practices:

Essential! If people are given loans when they don't have capacity to repay (eg. Low DOCS or non-conforming lenders) they have increased chance of ending up with listing.

Sub-prime lenders attempt to distance themselves from "knowledge" of the inability of debtors to repay prior to lending.

I think this issue is beyond credit reporting! It would be great if telcos had to comply with lending standards under UCCC, would halve telco listings in my area.

In particular, low documentation loans are particularly under attack for not requiring the necessary documentation to ensure that a person will not default on the loan, which would have a substantial impact on their credit risk for years to come.[85]

Other caseworker respondents outlined the reforms needed in relation to credit assessment practices in preference to relying on the credit reporting system, or indeed as a pre-condition to any expansion on the credit reporting system.

Rely on accurate assessment of applicant's situation not credit report.
There should be:

- *Greater inquiry into ability to pay*
- *More transparency and dialogue regarding consequences of default (including possibility of listing) prior to lending*
- *Verification of personal details/amounts before/during/after incurring debt – consultation with debtor / more personal service*
- *Procedural requirements of lenders with penalties for breach available through industry ADR schemes*

Industry argues that positive credit reporting will improve lending practices. LAQ has not seen any evidence supporting such a contention and in fact there are current tools available to lenders under the credit reporting regime that are not adequately used to pose additional questions to potential borrowers.

[85] 'Consumers ignorant about credit risks', *Sydney Morning Herald*, 27 May 2005.

> *Responsible lending is a key measure to ensure that consumers do not borrow more than they can afford to pay. Before even considering reform to credit reporting there must be clear laws in place providing for:*
>
> - *remedies for consumers who are victims of irresponsible lending*
> - *laws stating that lenders have a duty to lend responsibly*
> - *penalties for failing to lend responsibly*
>
> *Only after the above measures have occurred can consideration be given to whether the credit reporting system should be amended to assist this.*

Apart from the latter grudging reference to the possible potential of an expanded credit reporting system, a small number of caseworkers acknowledged the potential role of the credit reporting system in facilitating appropriate lending decisions:

> *Some lenders ignore credit listing or don't check at all and they provide credit to people who are already overcommitted (credit cards). Also fringe lenders specialise in lending to people who have bad credit history e.g. City Finance, loans by phone etc.*

> *I believe banks do need to understand amount of credit already extended to clients. I accept that they don't need to know who the other creditors are. Would take a lot of updating.*

The usefulness of inquiries in certain circumstances was also conceded by some caseworkers as noted in the section in relation to inquiry listings above.

As noted elsewhere in this report, credit providers interviewed as part of this project had very different procedures in relation to routinely checking credit reports in relation to loan applications. Several very large credit providers did not routinely check credit reports unless the application was in some aspect borderline, largely because they had a high degree of confidence in their own extensive internal data and did not believe the additional expense of checking a credit report in relation to every application was justified. These same credit providers, however, are now working co-operatively within the ARCA to make access to the data reliant on contribution of data, in the interests of creating a more comprehensive and consistent system. In practice, this means routine checking of credit reports on all applications in order to ensure that all credit inquiries are logged.

While there is clearly some potential for the credit reporting system to be used more effectively to protect consumers from over-indebtedness, there is no reason why this will happen unless responsible lending is specifically mandated. There are numerous potential sources of information for lenders to use in the credit assessment process:

- Application information including current income and liability information supplied by borrowers (and other data relevant to credit scoring processes).

- Data already held by the credit provider including the size of current liabilities on existing accounts and behavioural data drawn from the operation of those accounts (sometimes referred to as "relationship data").
- Verification sources such as employers, tax records, business financial statements, accountants.
- Data from other credit providers, usually accessed via the credit reporting system.

It is currently at the discretion of the credit provider as to how much of the above information is used in any give lending decision. Accessing and analysing data from each of the above sources comes at a cost and the decision whether or not to do so is largely a commercial decision taken by balancing forecast profits against potential risk. The potential impact on the circumstances of any particular borrower are lost in portfolio-wide statistics. For example, credit limit increase offers have been made in recent years on the basis of behavioural scoring alone, without any reference to credit reports, original application information, updated personal financial information, or relationship data. This has led to repeated examples of Centrelink recipients being offered credit limits which are far beyond their capacity to pay being identified by consumer assistance agencies. Some credit providers have recently moved to address this situation by accessing relationship data or original application data but others have not. Few, if any, have opted to access the full range of data available to them.

The current regulatory regime also allows the credit reporting agency to include in a credit report information regarding whether a particular credit provider is a current credit provider for that person. None of the credit providers interviewed indicated that they provided this information to a credit reporting agency and CCLC solicitors report that they have not come across this information on a client's credit report in the course of their casework. No reason was given for the choice not to supply this information, except that perhaps it would be too cumbersome to update. It is also likely that credit providers simply do not want to share this information as they see inadequate commercial advantage in what they might receive in return for surrendering this information about their own customers. It would seem that including this data would possibly be useful in preventing over-indebtedness and yet few credit providers, if any, have opted to provide this information.

The only regulatory or self-regulatory mechanisms impact on the credit assessment process are:

- The Code of Banking Practice (in the case of banks)
- Common law concepts of maladministration, duty of care and unconscionability
- The *Contracts Review Act* (NSW) (in NSW only)
- Unconscionable conduct provisions in the *ASIC Act* or state fair trading legislation
- The *Uniform Consumer Credit Code* ("UCCC")
- The *Fair Trading Act* (ACT)

The UCCC is the only nationally applicable legislation that particularises this requirement in any way, although even this requirement is expressed as one factor to be taken into account among a list of others in determining whether a contract is unjust. Section 70(2)(l) says that one of the factors that may be taken into account in determining whether a contract is unjust is whether "the credit provider knew, or could have ascertained by reasonable enquiry of the debtor at the time, that the debtor could not pay in accordance" with the terms of the contract. The ACT legislation requires that the credit provider take a written statement of the borrowers income, assets and liabilities prior to providing credit or extending the amount of credit available under a contract. However, none of the legislative or self-regulatory provisions require that the lender check a potential borrower's credit report, let alone specify how that information should be used if an enquiry is made.

The proposed contractual obligations under discussion by the ARCA group would make access to data dependent on the provision of data, but would not dictate in any way how that information is used in the credit assessment process. In practice this will probably mean that there are more defaults listed and that more people are denied credit by mainstream bank lenders. There is no guarantee, however, that these will be people who are over-indebted as opposed to people who have been involved in a dispute, or who have missed a bill due to oversight or personal crisis, particularly if the issues raised elsewhere in this report remain unaddressed. Further, this development is likely to lead to an expansion of expensive sub-prime lending, where defaults are often used to price risk rather than to exclude applicants.

In short there is no evidence that greater use of the current credit reporting system alone will reduce over-indebtedness in the absence of a specific legislative requirement upon all credit providers to lend responsibly having regard to all reasonably accessible data regarding the borrowers' financial situation. Further, there are serious ramifications to be considered in mandating use of the credit reporting system:

- This type of requirement effectively writes a meal ticket for existing credit reporting agencies by forcibly increasing demand for their information and services;
- There is a danger in a competitive market that some players, particularly fringe players who have no vested interest in the integrity of the system but find themselves with a legal obligation to access credit reporting agency data, will look for other cheaper service providers to enter the market and compromise any improvements in data quality, consistency and other process standards such as dispute resolution.

Recommendation 58 Stand-alone responsible lending provisions should be introduced into the Consumer Credit Code, requiring credit providers to take reasonable steps to ensure that an applicant can meet his/her obligations under the contract without substantial hardship.

Recommendation 45 Credit reporting agencies should be required to report aggregate numbers of defaults and other derogatory information held by type of credit/service to increase transparency and allow government and stakeholders to better monitor trends.

16 Current system or more data?

As stated in our introduction, providing a meaningful answer to the question of what data is necessary or suitable for the credit reporting system in the Australian context necessitates economic analysis and modelling which is clearly beyond the scope of this project. While this project does not purport to examine the question of whether or not the credit reporting system should be extended to include additional data ("comprehensive" or "full-file" reporting), the question of what data is required for credit providers to make credit assessments was raised regularly in our interviews. In this section we will examine what these views were in the context of developing some basic consumer protection principles, and appropriate systemic checks and balances, that should apply regardless of the amount and type of data collected.

16.1 Differing views

Caseworkers were generally sceptical about the value of positive credit reporting. One caseworker stated:

> *Industry argues that positive credit reporting will improve lending practices. [We have] … not seen any evidence supporting such a contention and in fact there are current tools available to lenders under the credit reporting regime that are not adequately used to pose additional questions to potential borrowers.*

Baycorp has been advocating for more comprehensive credit reporting, a potential benefit of which would be to allow consumers to manage their credit history.[86] Some proponents argue that greater reporting can provide greater transparency and accountability for creditors, and that overseas experience has shown positive economic results. On the other hand, consumer groups argue that either there should be no additional information or that the inadequacies of the current negative information credit reporting system should first be fixed.[87] Industry proponents assert that positive data could actually be a remedy for some consumers currently disaffected by credit reporting, by displaying all the credit obligations a person has fulfilled as counterpoints to instances where default does occur.[88] Further, in instances where a person continually shops around for better

[86] Senate Legal and Constitutional Committee, Parliament of Australia, Canberra, Inquiry into the Privacy Act, 19 May 2005, Mr Andrew Want, Baycorp Advantage Ltd, 3.
[87] See Consumers' Federation of Australia, *Policy position on credit reporting*; Consumers' Federation of Australia and Australian Consumers' Association, 'Consumer groups attack credit reporting campaign', (Media Release, 16 February 2005).
[88] C. LaFrenz, 'Late Bills could ruin future credit', *Channel Seven website – News section*, 16 December 2005

credit deals, positive information may show that they can pay each card off responsibly and prevent unfair refusals to credit applications.

While one credit provider interviewed did not see the value of positive credit reporting at all, most of the credit providers interviewed argued that the current system was inadequate for credit assessment purposes. However, there was no universal agreement on this point or on what additional data would be required to address the issue.

Some credit providers reasoned that under the current credit reporting system, it is very difficult to get a complete picture of the person. Further, the current system is very skewed against consumers, who may have a great credit payment history with most of their accounts, but may have defaulted on one because of some legitimate reason.

One credit provider was of the view that credit reports should include current (active, and also open) accounts, limits, repayments and the balance, perhaps via monthly snapshots. This "factual" information, rather than interpretative information, would actually assist consumers, they argue, because it paints a factual and true picture of their overall circumstances. It would also eradicate inconsistencies in the current data that arise from definitional issues such as what constitutes a default, or a serious credit infringement, or a genuine hardship arrangement and inconsistencies in listing practices. This is a model used in a number of overseas jurisdictions including the US and the UK and is the model preferred by Baycorp. Baycorp does not dispute, however that they have a vested commercial interest in this particular outcome:

> *Baycorp Advantage's analysis and international experience indicates that the Group will be a net beneficiary of comprehensive reporting …it is reasonable to assume that data volumes would increase in excess of 10 times through the credit reporting agency.*[89]

Two of the credit providers interviewed as well as credit reporting agency Dun & Bradstreet, however, suggested that ideally there should be the minimal amount of information on a credit report sufficient for them to do their credit assessment appropriately. This would include only information such as current credit commitments, what facilities the borrower has, their available limits, and whether or not an account was closed with good status.

The benefits espoused of moving to a more comprehensive system are:

- A larger credit market;
- Greater penetration of lending into lower socio-economic groups with less loan losses than may have otherwise been the case;

[89] Baycorp Advantage 2005 Annual Financial Results: Preliminary Report, p13. Available online: www.baycorp.com.au/sharedholder_investor_information/pdf/preliminary_report_incl_4E_AFR_2005.pdf

- A reduction in the number of credit applications that are rejected for 'good borrowers';
- Improved credit fraud detection;
- Lower interest rates (at least for some);
- Less defaults;
- Lower housing deposits;
- Better informed lending decisions leading to less over-indebtedness.

What seems to be left deliberately hazy is the fact that some of the alleged benefits are a case of 'either/or'. For example, you can have more lending at a steady default rate, and more defaults in absolute terms, *or* you can have the same amount of lending with a reduced default rate and less defaults.

The above point was well made by Carolyn Bond of the then Consumer Legal Service (Vic) Inc. in a presentation to the 2006 Bankruptcy Congress.[90] Bond argued that there were a number of courses of action lenders *could* take if they were given access to additional credit reporting data and no guarantees that lenders *would* take any of them. In short Bond argued that,

- while credit providers could refuse to extend credit to borrowers who are already over-extended, they could equally target those same borrowers with expensive priced-for-risk products;
- while credit providers could use the additional information available to reduce defaults, they could equally use the information to increase lending volumes while maintaining default rates resulting in a larger total number of defaulters;
- while credit providers could use the additional information to improve the quality of their lending decisions, they could equally use the information to further abridge the application process (by relying on the credit report rather than application data , for example) to compete more effectively on the basis of approval time and price.

Bond also stressed that the US experience of comprehensive reporting reveals no apparent reduction in the amount of "fringe" or "predatory lending", that while greater price differentiation is a likely result, there are winners and losers in that process. Finally, there is nothing in the current law to suggest that the failure to use additional credit reporting data to lend responsibly would necessarily result in any significant legal penalty.

16.2 Tackling over-indebtedness

[90] C. Bond, Should we have positive credit reporting? What lenders could do vs what they would do." Unpublished notes from presentation to the 2006 Bankruptcy Congress, Qld, Australia, 2006

Tackling over-indebtedness, is certainly one of the main slogans with which comprehensive credit reporting is promoted:

> **"This is an important issue to stem the increasing number of (credit) defaults," Ms Christian [Christine Christian, Chief Executive, Dunn and Bradstreet] said… "Clearly for some people personal credit growth is not affordable…While some argue it is up to lenders to revise lending practices they can only work within the system they're given."[91]**
>
> **Under the existing negative system, lenders can argue that the problem of consumers finding they are unable to afford their level of credit arises because the lender did not have enough information to determine whether a credit request was sustainable.**
>
> **However, with more information available under a positive system, lenders will be able to make decisions about whether credit applications can be justified and in turn be held to account more successfully for their credit decisions.[92]**

Similarly, Baycorp stated in their Annual Financial Results: Preliminary Report in 2005 that:

> **Consumers (who in the main do not have the financial planning and analytical capabilities to form accurate view on these issues) have the right to expect that lenders are in a position to, and will, exercise judgements as to servicing risk. Negative credit reporting does not allow lenders to form a complete view of the ability of a consumer to afford the credit that the consumer is seeking.[93]**

As stated in the previous section in relation to responsible lending, consumer groups are less confident that providing additional data via the credit reporting system would automatically result in more responsible lending decisions. While credit scoring is simply a tool to inform credit assessment decisions, not to make them, a credit reporting system determines only what information is available, it does not determine how that information is used in the lending process. Current experience by casework services in relation to lending practices[94] suggests that the improvement in responsible lending predicted by the credit reporting agencies will not occur as a consequence of an extended credit reporting system but would have to be specifically imposed by the legislature.

Having said this consumer groups are cognisant of the fact that a more comprehensive system has been adopted with consumer support, or indeed even advocated for by consumer groups, in some overseas jurisdictions, South Africa and the UK being recent examples.

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[91] *Lenders need more information: DB*, Seven News website, 10/03/05. Available online: http:/seven.com.au/news/business/168533

[92] Dun & Bradstreet, *Shifting to a fair positive system*. Available onlineL: http://www.dnb.com.au/general/press_releases/industry_news_3.asp

[93] Baycorp Advantage, *2005 Annual Financial Results: Preliminary Report*, p15.

[94] CCLC casework experience.

Contrary to this, however, comparative research by the European Credit Research Institute suggests that there is no established correlation between positive registries and lower levels of indebtedness, and that the additional data stored and exchanged on positive registries raises legitimate questions about cost, privacy, and the risk of the data being used to facilitate predatory lending practices.[95]

It was apparent in conducting the interviews with credit providers for this project that there is a preference for behavioural data and credit reporting agency data over other types of information because it is readily available in an electronic form capable of statistical analysis and therefore extremely quick and cheap to process, and because it does not require verification as it is from a source independent of the applicant. Further, considerable resources are invested in analysing information available in this format simply because it is readily available in this form, rather than because it is the most relevant or useful information. Indeed it could be argued that the significance of inquiry information on credit reports has arisen precisely because credit providers do not have access to independent information about the borrowers' actual commitments. Nonetheless, it should be emphasised that there was not a shared position among industry participants about whether additional data sharing was warranted or desirable.

16.3 What information then?

This leads to a key issue in relation to the debate about whether the type of data that can be contained in a credit report should be changed. None of the proponents of change argue that the information currently collected should be dispensed with. All agree that additional information is required, the difference being in whether there is a small amount of additional information or a radical shift to a very comprehensive amount of personal payment data. CCLC proposes that if consideration is given to changing the parameters of data collection permitted for the purpose of data sharing for credit assessment purposes, then rather than automatically adding to the current data, it should be a case of "back to the drawing board" to ensure that only the "most relevant" information is collected.

While the jurisdictions who have adopted full-file reporting have clearly not taken this approach, there is ample support for this proposition in the core principles of privacy regulation. Referred to as the second core principle of data protection laws by Lee Bygrave, Research Fellow with the Norwegian Research Centre for Computers and the Law, the principle is variously described as "minimality", "necessity", "non-excessiveness" or "proportionality", and is summarised as follows:

> *the amount of data collection should be limited to what is necessary to achieve the purpose(s) for which the data are gathered or processed.*

[95] Riestra, A.S.J, *Credit bureaus in Today's Credit Markets*, ECRI Research Report No 4 September 2002, pp22-23.

In the context of credit reporting, this means, for example, that information regarding outstanding loans and available limits could replace information about inquiries, or that the capacity to record judgment debts could be replaced with default judgments in relation to loan commitments only. Similarly, a rigorous process applying the principle of minimalism could conclude that only traditional credit providers offering loans or revolving credit facilities should be entitled to contribute data for the purpose of sharing. In short, if the data parameters are subject to change, there should be:

- a decision made regarding the appropriate purpose(s) of credit reporting from a public policy perspective, for example, to enable lenders or providers of certain services (including defining these categories) to manage risk and to reduce over-indebtedness among consumers
- a thorough review to determine which data is most relevant to achieving the identified purpose(s).

Risk management experts within large lending bodies such as banks continually analyse the data available to them to determine the factors most relevant to assessing risk in order to refine their credit scoring processes. Such analysis is however necessarily confined to the data currently available to them and is focussed on risk management from the lender's perspective, rather than reducing over-indebtedness *per se*.

This report makes no conclusions in relation to the benefits of extending or altering the data able to be collected and made available by credit reporting agencies. However, in the event that such a change is considered, the following principles should apply:

- The purpose of the credit reporting system should be clearly defined;
- The type of data able to be collected and the level of access to that data should be limited to only what is the *most relevant or necessary* to achieving that purpose;
- There should be adequate rights for consumers in relation to accessing their report, understanding their report and how it is used;
- There should be robust and rigorous dispute resolution schemes in place;
- There should be adequate safeguards to ensure the security and integrity of the data;
- There should be a specific legislative requirement on lenders to lend responsibly having regard to all readily available information; and
- There should be safeguards to ensure that the system is not used to exacerbate or entrench financial hardship, such as prohibitions on access by employers or real estate agents, for marketing or for triggering price differentials on existing accounts.

Further, there would be a greater argument for making data contribution compulsory if information directly pertinent to assessing whether a person has a current capacity to pay were held by the credit reporting agencies. Taking for example the possible reporting of the amount or credit limit of any current loan; this information would only be useful if credit providers could be confident that *all* of the borrower's commitments were

included. This raises the same issues covered in the previous section in relation to responsible lending and compulsory reporting in a private competitive market. While there would be a stronger argument for compulsory reporting in an environment where information about current commitments was available, there would be an equally strong argument that this information should be held by a single, non-profit entity, charged with the responsibility of maintaining the data for the public benefit alone, not commercial opportunity.

Recommendation 46 Any change to increase, or substantially alter, the permitted categories of data held by credit reporting agencies should be preceded by independent local research with a view to estimating the effect of any proposed change on:

- Over-indebtedness
- Access to affordable credit, including for those who are socially or economically disadvantaged.

Recommendation 47 Any extension of the data categories permitted in credit files/reports should be undertaken only if the following preconditions/standards are met:

- The purpose of the credit reporting system should be clearly defined;
- The type of data able to be collected and the level of access to that data should be limited to only what is the most relevant or necessary to achieving that purpose;
- There should be adequate rights for consumers in relation to accessing their report, understanding their report and how it is used;
- There should be robust and rigorous dispute resolution schemes in place;
- There should be adequate safeguards to ensure the security and integrity of the data;
- There should be a specific legislative requirement on lenders to lend responsibly having regard to all readily available information; and
- There should be safeguards to ensure that the system is not used to exacerbate or entrench financial hardship, such as prohibitions on access by employers or real estate agents, for marketing or for triggering price differentials on existing accounts.

17 Multiple credit reporting agencies

Although most markets in the world operate in a multi-bureaux environment, there are only two credit reporting agencies operating in Australia. The main credit reporting agency is Baycorp Advantage, formerly known as Credit Advantage, and also Credit Reference Association of Australia. The Baycorp Advantage Group has three main business units: Solutions Group, Business Information Services & Solutions (BISS) and Collection Services. BISS operates consumer credit reporting and identification verification markets in Australia and New Zealand, and offer services including credit reporting agency services, decisioning solutions, risk scoring solutions, fraud prevention services and identification verification services. In 2006, Baycorp reported that the overall revenues for BISS grew by 5% since 2005.[96]

In Australia, Baycorp Advantage holds credit files of over 14 million people.[97] It is also estimated that 1.5 million of them contain defaults. However, only approximately 200,000 consumers seek access to their credit file each year.[98] In 2005, the number of credit default listings increased by 63%.[99]

The second credit reporting agency is Dun & Bradstreet (D&B). D&B operates in over 190 countries. It offers a range of credit services, including debt collection and recovery, receivable management outsourcing, credit scoring decision tools, credit reporting, and business marketing information services. It launched its consumer credit reporting agency in 2004.

D&B Australasia has been operating since 1887. It employs 500 people and operates across six regional offices in Australia and New Zealand.[100] 77.5% of D&B Australasia is owned by AMP Capital Investors, 20% stake by a local management team, and 2.5% by D&B itself. There are future plans for an initial public offering of DNB Australasia.

In the context of consumer credit reporting, D&B is mostly involved with the listing of the more non-traditional credit information, such as telco debts, credit relating to pay television accounts, and debts by young people. The competition has resulted in improvements in such areas as data quality and driven initiatives such as the Australasian Retailers Credit Council. While some credit providers make default listings at both

[96] Baycorp Advantage Ltd, *Annual Report,* 2006, 17.
[97] Ibid 17.
[98] Senate Legal and Constitutional Committee, Parliament of Australia, Canberra, Inquiry into the Privacy Act, 19 May 2005, Mr Andrew Want, Baycorp Advantage Ltd, 5.
[99] The Sunday Times, 'Phone debt a credit risk', 8 January 2006.
[100] Dun & Bradstreet, 'D&B Today', Dun & Bradstreet, <http://www.dnb.com.au/general/dnb_today.asp> at 12 October 2006.

agencies, some only list at one of them. The overlap is approximately 3 million records.[101]

A number of credit providers interviewed thought that competition was desirable. One major credit provider is in the process of reviewing their strategy to see how they can use both agencies. It said,

> *The market is keen to have competition, but it's not so much about competing between the two, but about accuracy of data, reducing error rates, and ultimately lowering cost per transaction.*

One credit provider suggested that there could be specialisation in the way that credit reporting agencies handle information, such that credit providers would only have to send data to one agency. It was also suggested that credit providers would only go to both agencies in relation to an application if the level of risk is deemed to be too high, and there is a need to get a fuller picture of the applicant's circumstances.

Privacy experts questioned whether or not the industry was suitable for a competitive marketplace. However, it was also expressed that an organisation holding the monopoly in a particular market is more likely to receive softer treatment from regulators.

Consumers representatives are far more hesitant about the benefits of competition. If consumers are not conversant with how one credit report works at the moment, it is doubly difficult for them to have to track two or three. The extra burden on consumers to have to obtain their credit report from more than one source, or to ensure that the two or three credit reports in their name are accurate is undesirable. Further, as all parties appear to agree that consumer access is key to ensuring data integrity, such access should not require detective skills and a higher than average capacity for perseverance.

Consumer groups are also more sceptical about relying on competition to improve accuracy and responsiveness to consumer complaints. A system of effective independent dispute resolution, a robust regulator with appropriate powers, increased penalties and greater judicial oversight would be far preferable.

As a purely pragmatic matter, consumer advocates suggest that where a consumer alleges a default listing on both reports is incorrect, there should at least be an automatic referral system between the credit reporting agencies to facilitate investigation of complaints and take appropriate corrective action.

Recommendation 43 In the event that multiple credit reporting agencies are permitted to operate, there should be a system whereby consumers can access their credit reports from

[101] Interview with Credit Reporting Agency.

a single contact point and for the automatic referral of disputes between the credit reporting agencies and between credit providers.

18 Private Sector Credit Reporting Agencies

The essential conflicts of interest inherent in private sector, profit-driven entities controlling sensitive credit data are cause for concern. The ongoing tension between consumer organisations and the credit reporting agencies about the definition of credit provider and consequent access to the system is a typical example. As the largest consumer credit reporting agency in Australia, Baycorp, for example, is an influential player in any political process or regulatory review, yet the company's vested interests in retaining the widest possible subscriber base inevitably informs their view. While giving due credit to the credit reporting agencies and other industry players for undertaking proactive initiatives to improve data quality, this is only likely to occur on issues where there is a perception that the interests of consumers, creditors and credit reporting agencies coincide. Where conflicts of interest occur, business innovation will invariably drive the system at the expense of the public interest.

Until very recently Baycorp also had both a debt collection arm, which collected debts for other companies on an agency basis, and a debt buyout company that purchased and pursued debts in its own right. Dunn and Bradstreet currently have a significant debt collection operation. The fact that these two functions, data custodian and debt collector can reside in the same company raises serious concerns in the eyes of consumers affected by their operations. The fact that the data can only be legally accessed by debt collectors in narrowly defined circumstances is of small comfort to the public, despite the most sophisticated of Chinese walls, when the same company also maintains complete control over the relevant data as a result of a separate function. This arrangement can only undermine public confidence in the security and integrity of the system.

Debates about the role of the credit reporting agencies in identity management, and the sale of other publicly available information, also highlight the endless business possibilities that arise as a direct or indirect result of data custodianship. The pool of data is a "honey pot" of potential opportunity, and the law will always remain one step or more behind the game if private interests are permitted to control it.

Confining the role of credit information reporting to a non-profit, state owned or licensed monopoly would:

- Improve public confidence in privacy protection;
- Ensure easy consumer access to reports and information (no multiple credit reporting agencies)
- Improve transparency;
- Expedite reform processes by removing the vested interests of credit reporting agencies from any debate (balancing the needs of credit providers with the needs of consumers only); and

- Remove conflict of interest between the commercial imperative and the public interest.

Recommendation 42 The credit reporting agency should be a non-profit, licensed or state owned, monopoly.

Recommendation 38 Credit reporting agencies should have clear and onerous obligations to monitor compliance with statutory obligations, codes and standards, including the obligation to develop systems to identify and investigate possible systemic non-compliance, and to report on those systems and outcomes. Penalties for non-performance of these obligations should be sufficiently stringent as to outweigh any competing commercial interest in maintaining subscriber numbers or maintaining a relationship with any particular subscriber.

Recommendation 44 Companies that operate a credit reporting agency, or any related companies, should not be permitted to have a debt collection function, or any other function that potentially undermines or conflicts with their obligations as data custodians.

19 Complaint-handling and dispute resolution

19.1 Industry based dispute resolution

Consumer representatives have been very vocal about the difficulties that consumers face when making a complaint about credit reports. A caseworker wrote:

> *I think they are successful in having minor details changed, particularly in relation to inaccurate personal details because of course this assists lenders but where errors occur in the accuracy of the default, challenging default listings, objecting to unauthorised inquiries, the inappropriate use of clearouts and what an examination of the meaning of "die and owing" the system favours lenders particularly when consumers are challenging the listing at the time they are seeking to obtain credit to purchase real property, other goods and services. Based on casework over the past 8 years.*

Firstly, the lack of knowledge or awareness about credit reports is a huge impediment. As discussed above, many consumers do not understand how credit reports work and so may not be aware of a right to complaint even if one arises.

Secondly, where there is a problem with a listing on a credit report, the consumer may attempt to resolve the matter with the credit provider and/or the debt collector who made the listing; they may be asked to contact the credit reporting agency, who may then refer the consumer back to the entity that made the listing. Some organisations are also not set up to deal with complaints about credit reporting, and consumers with a complaint are referred to different areas of the entity but arrive at no results. This causes a lot of confusion and consumers have often reported that they would give up due to complaint fatigue. A caseworker said:

> *My clients generally don't have the skills and/or persistence to stay in a frustrating complex process. Clients lose interest in pursuing the issue or I lose contact with them.*

CCLC Hotline Call 2007

A caller contacted the hotline with a complaint about a credit report listing made in 2003 by a company that is now defunct. The caller raised the dispute with the credit reporting agency but they have refused to do anything, stating that the credit reporting agency cannot remove the listing unless the member replies. The caller has been running around trying to find this non-existent company to try to get them to respond. He finally found an old number for the original company and found the owner, who told him that the listing would be removed. However this was still not

done. The situation is further complicated by the existence of another company operating in Queensland with the same name. The caller was extremely upset and just wanted to get the listing removed.

At least one credit provider interviewed has implemented a system whereby there is a single point of contact within their organisation for complaints about credit reports, so that they carry the responsibility for the complaint from beginning to end. This approach is being actively encouraged by the ARCA group and is likely to be reflected as a requirement in whatever contractual documents or Code of Conduct the group eventually settles on.

Thirdly, the role of external dispute resolution schemes is important. When asked what works for consumers, some caseworkers suggested the following:

> *Where the entity is a member of an ADR scheme, taking the complaint about the debt to the ADR scheme to resolve and obtaining a positive result through the ADR process and as part of the settlement having the entity contact the credit reporting agency and obtaining a removal of the listing.*

It was also reported that better and faster results were obtained from credit providers/service providers that have competent and effective internal dispute resolution (IDR) and external dispute resolution (EDR) schemes in place. The ASIC requirements for financial service license holders, for example, require that every service provider is not only a member of an approved EDR scheme, but that IDR processes are established that also meet requisite standards. Further, the interaction between IDR and EDR over time, and pricing structures for complaint handling which provide incentives for effective early dispute resolution, usually conspire to ensure that systems improve and meritorious complaints are resolved without delay.

Unfortunately the consumer advocate experience with external dispute resolution schemes was not uniformly positive:

> *In contrast disputes with telcos go like this – Telco has little or no IDR, cannot even comprehend a meritorious argument due to poor training and always say no at IDR level. Unfortunately the experience at the TIO is not much better. The TIO tends to back up poor arguments from the telco. Eventually after much argument the telco gives in and removes the listing still denying merit to our claims (when there is merit).*

This was also the experience of a consumer who recently contacted CHOICE:

> *A Phone company [name deleted] had put a default on my credit report, when I was overseas for three years and had switched away from them. After doing everything the TIO suggested, including obtaining a copy of the original number porting form, the TIO was unable to anything. The phone company said they didn't care, and the TIO said that was the end….*

> *Strangely, I forward the same documentation to the actual credit reporting agency, and within three weeks they fixed it up. The phone company mysteriously now says that they put the default in error. So I have had a few years of bad credit, on [sic] the phone company gets to walk away without even apologising. Clearly the TIO is a waste of money, because it couldn't fix in two years and two cases something Baycorp can do in three weeks.*

This is a positive reflection on improved dispute resolution at Baycorp but raises concerns about the responsiveness of the telecommunications company and the TIO.

Baycorp recently became a member of the Banking and Financial Services Ombudsman (BFSO) in December 2005. This is a positive move on the part of Baycorp to ensure effective dispute resolution processes are available for consumers of banking and other finance services where the service provider is a member of the BFSO. Baycorp reports that 2 to 3 matters per month are referred to or from the BFSO. Baycorp's membership of the BFSO makes it more likely that all parties to the dispute are also parties to the dispute resolution process, facilitating appropriate exchanges of information and effective implementation of the resolution of any dispute. This does not, however, assist consumers who are in dispute with service providers who are not members of the BFSO.

The Ministerial Council for Consumer Affairs recently agreed in principle that all credit providers offering consumer credit as defined by the *Consumer Credit Code* should be required to become members of an approved external dispute resolution scheme and are investigating the most appropriate means of achieving this outcome.[102] The matter has been referred to the Uniform Consumer Credit Code Management Committee to explore possible regulatory tools for achieving this end. If this development proceeds, dispute resolution in relation to credit reporting could be effectively addressed by confining access to the system to those credit providers that are required by law to comply with recognised standards for IDR and to belong to an approved EDR scheme. Creating a nexus between these issues would greatly improve dispute resolution outcomes for consumers without the need for a parallel mechanism for regulation and compliance (of IDR/EDR processes), at the same time as addressing consumer concerns in relation to overly broad access to the system. Alternatively, requiring subscribers to the credit reporting system to be members of an ASIC approved EDR scheme (or equivalent benchmark) should be required as an absolute minimum. Further the OPC would need to play a far more pro-active role in compliance with IDR/EDR standards, and EDR schemes could be required to submit complaint data to the OPC and report on systemic issues.

[102] Private correspondence between MCCA and CCLC.

Recommendation 19 Only credit providers that are required by law to be a member of an ASIC-approved external dispute resolution scheme (or equivalent benchmark) should be permitted to contribute to, or access credit information from, credit reporting agencies.

Recommendation 20 The terms of reference of relevant EDR schemes, and any other relevant instrument, should be reviewed to ensure that the schemes have the power to amend credit report listings and award compensation in appropriate circumstances.

20 Regulatory oversight – the Office of the Privacy Commissioner

20.1 Complaints Handling

As the regulator of credit reporting, the Office of the Privacy Commissioner has been criticised by caseworkers as being ineffective. Caseworkers cite significant delays, lack of transparency and lack of procedural fairness, as some of the reasons for this. Privacy experts noted that the decisions made by the OPC are inconsistent and have at times questionable reasoning. They are also critical of the fact that few formal determinations are made and that there appears to be a failure to generalise issues for systemic examination.

The backlog of complaints has been one of the main focuses of consumer criticism. As at May 2006, the average waiting time for a complaint to be heard was 9 months, after a period of being in a "queue" for about 18 months.[103] The Office has a procedure whereby they can move complaints up the queue, but there is very little evidence that this occurs, and even if it does, there is no clear policy in relation to the criteria for the move.

Since the introduction of private sector provisions in 2004, the number of complaints received by OPC has increased dramatically. The huge volume of complaints means that there are significant periods of delay in the complaints-handling process. The average time taken for the OPC to finalise complaints involving preliminary investigations was 6 months, and those involving formal investigations was 18 months in 2005-06[104], but caseworker experience indicates it can be longer:

> *CCLC Hotline Case Study March 2007*
>
> A caller contacted the hotline frustrated about a complaint in relation to a "clearout listing" (serious credit infringement) on his credit report. He lodged a complaint with the OPC a long time ago, and had been waiting for a determination for 29 months. He said that they hadn't even given a preliminary view on the matter. When pressed, the staff at the OPC told him that they did not even have a procedure in place for making a determination.

> *CCLC Casework Example*
>
> In about April 2006 CCLC and Consumer Credit Legal Service (Vic) lodged two representative complaints with the Office of the Privacy Commissioner. So far,

[103] Informal report to consumer consultative meeting at the OPC
[104] Office of the Privacy Commissioner, *Annual Report,* 2005-2006, 32.

> almost 12 months later, we have received nothing but an acknowledgement of the receipt of the complaints.

These timeframes are cause for concern as credit reporting complaints often occur in circumstances in which time is of the essence. Further, some consumers may opt not to pursue a complaint because the time for the lapse of the listing may pre-date the likely time for the OPC to deal with their complaint, particularly if they have become aware of the listing some time after it was made.

The OPC has recently implemented complaints handling criteria to enhance the efficiency of their complaints handling, including the allocation of caseworkers to cases pending investigation.

The statistics provided in the OPC's annual reports are categorised differently each year and alternate between the use of number figures and percentages. This makes comparison across different years extremely difficult.

The OPC operates the Privacy Hotline, a telephone service that provides information and receives enquiries about privacy law. In the year to July 2006 there were 19,150 Hotline enquiries, 1,279 of which were categorised under the heading of "credit reporting".[105] This places credit reporting issues as the second most common topic of enquiry on the Hotline, after enquiries under the private sector provisions. The true number of credit reporting enquiries may actually exceed this number since credit reporting is also dealt with under the private sector provisions.[106]

Overall, credit reporting matters arose in 13.7% of all complaints made to the OPC in 2005/06.[107] Once a complaint is made, there are three procedural stages where the OPC may close the file on that complaint. Cases may be closed without any investigation, closed following preliminary enquiries, or closed following an investigation.

Almost 60% of all complaints were not investigated by the OPC in 2005-06.[108] Eighty credit related cases were closed without formal investigation or preliminary enquiries.[109] This comprises almost 12% of all complaints that terminated at this stage. The predominant reason for closing credit files was that there was no interference with privacy. This was the finding in almost 34% of credit cases in 2005/06,[110] up from 26% in 2004/05.[111] In another 29% of credit cases, the reason for closure was that the disputed credit listing was not raised first with the other party, and in 21% of cases it was because

[105] Ibid 26.
[106] Office of the Privacy Commissioner, *Annual Report,* 2003-2004, 54.
[107] Office of the Privacy Commissioner, *Annual Report,* 2005-2006, 30.
[108] Ibid 32.
[109] Ibid 37.
[110] Ibid 37.
[111] Ibid 43.

the other party had not been given enough time to deal with the dispute.[112] The other party was found to have dealt with the matter sufficiently in over 6% of cases.[113] Just over 1% of cases were closed because the complainant had known of the complaint for more than a year.[114] The average time for finalising complaints that are terminated without investigation was 1 month.[115]

Twenty-nine percent of all OPC complaints terminated after a preliminary investigation during the same period.[116] 51 credit cases were closed at this stage, comprising 14% of all cases closed at this stage.[117] These complaints took an average of 6 months for the OPC to resolve.[118] In almost 16% of cases termination occurred because either the disputed credit listing was not raised first with the other party or because the other party had not been given enough time to deal with the dispute,[119] however in the vast majority of credit cases, the OPC found either that the other party had adequately dealt with the matter (in 45% of cases) or that there was no interference with privacy (in 27% of cases)[120] Of the 23 cases found to have been adequately dealt with, 16 complainants had their record corrected, three complainant received an apology, one case resulted in changed company procedures, one person was provided access to the record, one person received compensation of between $501 and $2000 and there were also five "other" results.[121]

In the same period, the OPC closed 11% of all complaints after conducting an investigation.[122] Thirty-six credit complaints were closed at that stage, comprising over 24% of total complaints closed at this stage.[123] As for credit complaints terminated after a preliminary inquiry, in most cases the OPC found either that the other party had adequately dealt with the matter (in 58% of cases) or that there was no interference with privacy (in 28% of cases).[124] Of the 36 cases found to have been adequately dealt with, there were 19 instances where the result achieved was a corrected record, one instance where an apology was received, three instances of a company changing procedures, and one instance where access was provided to the record.[125] There were also eight instances of compensation within the 36 cases, with 2 complainants receiving compensation of up to $500, one complainant between $501 and $2000, three complainants between $2001

[112] Ibid 37.
[113] Ibid 37.
[114] Ibid 37.
[115] Ibid 32.
[116] Ibid 32.
[117] Ibid 35.
[118] Ibid 32.
[119] Ibid 35.
[120] Ibid 35.
[121] Ibid 36.
[122] Ibid 31.
[123] Ibid 33.
[124] Ibid 33.
[125] Ibid 34.

and $20,000, and two confidential compensation settlements.[126] Investigated complaints took an average of 18 months to finalise, six months longer than the OPC's target time frame of 12 months.[127]

After preliminary inquiries or investigation by the OPC, 25 cases were resolved by the other party,[128] down from 46 cases in 2004/05.[129] In 64% of cases, the issue involved a disputed default.[130] Issues involving accuracy concerns and failure to provide a notice before default each accounted for 12% of cases resolved by the other party.[131]

A significant number of complaints to the OPC, included in the statistics above, are disposed of under s41 of the *Privacy Act*. This includes among other possibilities that "the act or practice is not an interference with the privacy of an individual"[132] and that the complaint has been adequately dealt with by the respondent.[133] These two categories for example account for 67% of those closed after preliminary investigation, and 86% of those closed after investigation.

Caseworkers[134] and privacy experts[135] alike expressed dissatisfaction with the preponderance of complaints being resolved under this section because the practice effectively deprives the complainant of any real decision in relation to the substance of their complaint. This problem is exacerbated by a dearth of Determinations under section 52 of the *Privacy Act* or even reported case outcomes, and the absence of useful appeal rights.[136] The OPC is in practice *"a law unto itself*", operating with limited transparency and very little judicial oversight.

It must also be noted in this context that a significant number of the credit reporting complaints reported by caseworkers related to whether or not the person affected by the listing was liable for the amount included in the default listing. Whereas some complaints are strictly about whether the provisions of the *Privacy Act* have been followed (such as whether requisite notices have been given), others turn on contractual issues, or rights under other related legislation such as the *Consumer Credit Code*. The latter are matters

[126] Ibid 34.
[127] Ibid 32.
[128] Ibid 39.
[129] Ibid 47.
[130] Ibid 39.
[131] Ibid 39.
[132] *Privacy Act* 1988 (Cth), s41(1)(a).
[133] *Privacy Act* 1988 (Cth), s 41(2).
[134] "*The current dispute resolution is totally inadequate. It takes years! It is not procedurally fair. The OPC can decline to investigate so they never have to make a decision. Decisions aren't published. No detailed guidelines."* Caseworker questionnaire.
[135] Interview with Privacy Experts. A more detailed exposition of can also be found in the Submission by Professor Graham Greenleaf to the Review of the private sector provisions of the Privacy Act 1988 (Cth), Graham Greenleaf, Professor of Law, University of New South Wales, General Editor, *Privacy Law + Policy Reporter*, 20 December 2004.
[136] Greenleaf, above n 135.

that do not fall within the expertise of the OPC. Further, it would seem that there are better uses of the OPC's limited resources than the time-consuming task of determining whether any particular person owed any particular business a specified amount of money at a relevant point in time. It would be significantly more efficient if these disputes could be resolved at another level by an appropriate dispute resolution body, reserving the OPC's resources for more systemic and proactive intervention.

Recommendation 48 The OPC should be required to issue a Determination at the insistence of the complainant if the matter has not been resolved to the satisfaction of the complainant. All such Determinations should be published (without identifying the complainant if necessary).

Recommendation 49 There should be a meaningful right of appeal to an accessible court or Tribunal from Determinations made by the OPC.

Recommendation 50 There should be more meaningful and consistent reporting of OPC handling of complaints. Where possible outcomes should be reported in addition to complaints, at least in aggregated terms.

Recommendation 51 The OPC should take a more pro-active role in systemic issues, both in relation to substantive breaches of privacy law and complaints handling, and report on those issues in its Annual Report.

Recommendation 52 The OPC should undertake regular internal audits in relation to:
- Complaint time-frames
- Procedural fairness
- Drop-out rates (complainants who do not proceed with a complaint after an initial contact and why).

20.2 Remedies

The outcomes from complaints are often very unsatisfactory. Even where a listing is found to be "lawful" and correct, the consumer is likely to feel wronged and hard-done-by because of what they see as disproportionate consequences of a listing. A caseworker wrote:

> *Many consumers initially dispute the correctness of a default listing, however it often turns out that the listing is lawful. In this respect, clients generally feel they are unsuccessful in resolving their credit reporting issues as they have very few options to improve their credit information file and thus ability to obtain credit in the short term.*

Listings which are found to be unlawful, however, can also leave the affected consumer unsatisfied when after many months of frustration, time wasted chasing evidence, and

inability to access credit, their credit file is adjusted without any recognition of the inconvenience they have suffered and no apparent consequence for the credit provider.

Case studies from the OPC website and annual reports provide some indication of what remedies and forms of compensation are awarded in practice.

The most common types of remedial action required by the OPC or otherwise taken by the respondent are as follows:

- Apologies for mistakes made and inconveniences caused;[137]
- Removal of incorrect listings;[138]
- Efforts towards conciliation of disputes;[139]
- Staff training to ensure that the proper procedures in regards to the collection and disclosure of personal information are followed in the future;[140]
- Monetary compensation.[141]

The remedies vary greatly depending on the circumstances of each case. An apology was sufficient in a case where unauthorised disclosure was made due to out-of-date information on a computer database.[142] Taking steps to ensure proper collection of information procedures in the future was deemed sufficient in another case.[143] In one case involving a wrongful listing, an apology and removal of the listing sufficed.[144]

Undertakings to provide further staff training, a formal apology and $5,000 in compensation for humiliation and embarrassment was the result in the case of a wrongful listing of a serious credit infringement.[145] In another case involving a serious credit infringement made in circumstances where no reasonable credit provider would have believed a serious credit infringement had occurred, removal of the listing was sufficient.[146]

Grants of monetary compensation have occurred in two cases involving unauthorised access by third-parties. An apology and $7,500 in compensation was the result where an employee of a company (and the girlfriend of the complainant's ex partner) accessed the complainant's credit file.[147] In a similar case where records were accessed by the

[137] *Q v Credit Provider B* [2005] PrivCmrA 16
[138] *B v Credit Provider* [2005] PrivCmrA 2; *Q v Credit Provider B* [2005] PrivCmrA 16.
[139] *S v Credit Provider* [2005] PrivCmrA 18.
[140] *D v Banking Institution* [2006] PrivCmrA 4.
[141] Case studies in the OPC 2001/2002 Annual Report at 5.3.5 Credit Reporting Complaints; *H v Credit Provider* [2004] PrivCmrA18; *I v Major Wholesaler* [2003] PrivCmrA 7.
[142] *U v Major Banking Institution* [2004] PrivCmrA 9.
[143] *D v Banking Institution* [2006] PrivCmrA 4.
[144] *Q v Credit Provider B* [2005] PrivCmrA 16.
[145] Office of the Privacy Commissioner, *Annual Report,* 2001- 2002, 5.3.5.
[146] *K v Credit Provider* [2005] PrivCmrA 8.
[147] *I v Major Wholesaler* [2003] PrivCmrA 7.

complainant's ex-wife and handed over to her lawyer, a written apology and $1,000 in compensation was the outcome.[148]

However, compensation is very rarely awarded. In our caseworker questionnaire, while three of the fifteen recalled compensation or settlement offer being made by the credit providers to resolve a complaint about an erroneous listing, not one of the fifteen respondent caseworkers was aware of any compensation being awarded by the OPC as a result of a complaint. One caseworker commented that:

> *Anybody who has an inaccurate credit report should be entitled to compensation even if it is nominal. I have had a number of clients with inaccurate credit reports and not one has received compensation.*

Under the current system there is little incentive for credit providers (including assignee debt collectors) to ensure that the information provided to a credit reporting agency is correct. While the *Privacy Act* clearly provides for penalties for the supply of inaccurate or out-of-date information. we are unaware of any prosecutions for breaches. Further, as it seems the vast majority of complaints result in nothing more than the removal of the default and perhaps an apology, there is no compelling business argument for investing in accuracy, particularly for smaller service providers and debt collectors with little reputational risk. In fact the Telstra/Alliance Factoring case referred to elsewhere in this report appears to support the business efficacy of listing large numbers of consumers with minimal evidence of liability like a drag net fishing exercise, with little regard for those who are inadvertently and mistakenly caught in the net.

From the consumer perspective, loss can be hard to demonstrate or quantify because it is often made up of intangible factors such as embarrassment, frustration, and time spent dealing with the complaint. Although some complainants are able to demonstrate a tangible financial loss because of a refusal of credit with serious consequences, others wisely avoid applying for credit pending resolution of the issue (so as to avoid further inquiries on their report) but may have lost opportunities as a result. The imposition of a civil penalty payable to the consumer in all cases where a complaint is made out, in addition to actual compensation for loss where the loss exceeds the amount of the civil penalty, would serve the dual purpose of ensuring consumers are compensated to some degree and that credit providers are given an incentive to list only with reasonable care.

Recommendation 53 There should be a greater range of options available under the *Privacy Act* as both remedy and penalty including but not limited to civil penalties (for individual complainants and systemic breaches), injunctions and adverse publicity orders to ensure that there are sufficient incentives for compliance, and adequate responses to non-compliance.

[148] Office of the Privacy Commissioner, *Annual Report,* 1998-1999.

Recommendation 54 Complainants should have the option of having their dispute dealt with by an EDR scheme *and* by lodging an application with the OPC for a civil penalty, provided the OPC is also notified of the dispute being dealt with by the EDR scheme.

20.3 OPC Auditing Powers

Under s28A of the *Privacy Act*, the OPC is empowered to conduct audits of credit reports held by both credit reporting agencies and credit providers to ensure compliance with privacy laws.

The OPC's auditing powers form the second foundation to the Commissioner's regulatory functions, in conjunction with the OPC's handling of individual complaints. Audits allow the OPC to increase awareness and compliance with the *Privacy Act* and Credit Reporting Code of Conduct in the credit and debt industries. Audits also allow the OPC to monitor the Determinations it makes in relation to credit reporting matters, which have primarily expanded companies' access to sensitive credit worthiness information.

After the *Privacy Act* was amended in 1990 to regulate credit worthiness information, the number of credit audits that were commenced initially escalated dramatically from zero in 1990-1991 to a peak of 32 in 1993-1994.[149] However the overall trend since has been on a gradual decline to an approximate average of five credit audits each financial year between 1997-2003.

The total number of OPC audits is also declining, though for each financial year between 1992-2003, the proportion of credit audits have remained fairly steady, typically accounting for around a third of all audits.[150] There was a marked jump in the proportion of credit audits shortly following the introduction of the National Privacy Principles in December 2001. The majority of audits in 2002-2003 were credit related, but in figure terms only equated to four credit audits out of a total of seven for that financial year.

However no credit audits were conducted in 2003-04 or 2004-05.[151] The total number of OPC audits has also declined with only seven audits for those two years combined.[152] In 2005-06, the OPC only commenced audits for which specific funding had been provided.[153]

[149] Office of the Privacy Commissioner, *Annual Report,* 2004-2005, 51.
[150] Ibid 51.
[151] Ibid 51.
[152] Ibid 51.
[153] Ibid 43.

In the 1999-2000 Annual Report, the OPC conducted 12 audits of credit providers and listed a number of issues of concern, including:[154]

- systemic concerns about breaches of the *Privacy Act;*
- lack of training about obligations arising under the *Privacy Act* and the Code of Conduct;
- inadequate notification to applicants of possible disclosure of personal information;
- lack of reasonable safeguards to protect credit reports from unauthorised use, loss, modification, disclosure or other misuse;
- failure to inform applicants for credit of the reasons why their application was declined in writing;
- credit providers being unaware of their obligations to notify credit reporting agencies when a person disputes a listing

Audits are crucial to the OPC identifying and correcting systemic issues present in a credit provider or credit reporting agencies' processes. Systemic flaws allow breaches of privacy laws to occur on a wide-ranging basis, and cannot be adequately dealt with through a system of individual complaints, particularly given the large proportion of individual complaints are terminated on the basis that the other party has adequately dealt with the matter.

Further, many aspects of the credit reporting system are essentially invisible because the interactions between the credit reporting agencies and their subscribers consist of private commercial arrangements and processes to which consumers or their representatives are not privy. There is considerable potential for the law to be breached without giving rise to any complaint because those affected (the end consumer of credit products) may have no awareness that a particular practice is happening. There is no effective way of monitoring compliance with these provisions apart from a system of regular, robust and independent audits.

Recommendation 55 There should be adequate priority and resources given to the audit functions of the OPC.

Recommendation 41 Credit reporting agencies should be required to bear the cost of regular, independent audits of their operations to ensure compliance with the law and data quality standards and to report the outcomes of such audits.

[154] Ibid 42.

21 Recommendations

21.1 General

Recommendation 1 Part IIIA of the *Privacy Act* should be redrafted using the National Privacy Principles as a guide to the structure. Without diminishing the relevant rights and responsibilities of all parties, the obligations should be contained in a hierarchy under each privacy principle so that it is clear what each section or group of sections purport to achieve, and that the individual sections do not diminish the overarching obligation to observe the principle.

Recommendation 2 There should be additional consideration of the regulatory framework for credit reporting, including options for dispute resolution, monitoring and enforcement in view of the following:

- disputes about the accuracy of default listing information concern issues beyond the scope of the *Privacy Act*
- disputes about "fair use" of credit reporting information within the context of risk assessment require additional expertise

21.2 Consumer information, consent and access to credit reports

Recommendation 3 The credit reporting agencies and government, in consultation with consumer agencies, should ensure the public is better informed about credit reporting law and practice, the need to regularly check your individual credit report, how to dispute inaccuracies, and the possible ramifications of derogatory credit information.

Recommendation 4 The credit reporting agencies should be obliged to provide a free copy of an individual's credit report to that individual and to publicise prominent information about how to get a free copy of your credit report.

Recommendation 5 The law should be clarified to ensure that consumers are required to consent to the credit provider accessing their credit information from a credit reporting agency and to reporting information to a credit reporting agency, including derogatory information, at the time of applying for credit, even if such consent may be a condition of securing credit. Such consents, however, should be clearly delineated into "consents which are necessary for you to get this loan" and consents that are optional ("you may elect not to sign/consent to any of the following").

Recommendation 6 There should be prominent notice given at the time of collecting consent informing the individual of the importance of keeping their contact details up-to-

date for the purposes of receiving notices about possible adverse listings, or actual adverse listings, on his/her credit report.

21.3 Notice requirements

Recommendation 7 There should be a requirement to issue a notice to the customer giving the customer 30 days to rectify the default, or to raise a dispute, as a prerequisite to a default listing being made. A default listing should only be able to be made 60 days from the issue of the notice, as opposed to 60 days from the date of the default.

Recommendation 8 There should also be an obligation on credit providers to notify alleged debtors that they *have* listed adverse information on the alleged debtor's credit file, in addition to the notice required prior to making a default listing. This notice should contain information about where to obtain a copy of the relevant credit report, and the process for raising a dispute.

Recommendation 9 When a credit provider rejects an application for credit, in whole or in part in reliance on information contained in the applicant's credit file, the credit provider should be required to supply the applicant with a copy of the applicant's credit report, and the contact details for the agency who maintains the credit file**.**

21.4 Inquiry listings

Recommendation 10 Inquiry listings should only be given to a potential credit provider where the inquiry relates to a loan (whether that loan is secured, unsecured, for a specific amount or revolving credit) and the application for which the report is sought is also for a loan. Inquiries relating to other services (such as telecommunications) should only appear as an audit trail to the person the report concerns and any authorised auditing body.

Recommendation 11 In the event the data categories permissible under the *Privacy Act* are expanded to include information about the relevant person's actual credit commitments, inquiries should not appear to any subscriber, only to the person the report concerns and any authorised auditing body.

21.5 Default listings – time limits and thresholds

Recommendation 12 Default listings should be made within 12 months of a default. (For this purpose the default itself should be the defining event to avoid any artificial extension of this timeframe by a failure to issue a notice. As covered above, however, the

notice of an intention to list a default unless it is rectified should be the defining event for determining whether the amount has been outstanding for more than 60 days).

Recommendation 13 Where a debt collector assignee purchases a debt they cannot list a default on the credit report unless:

- Less than 12 months have passed since the default *and* the former credit provider has not listed the default *and* a notice required under the *Privacy Act* has been sent *and* the requisite time period expired; or
- The original credit provider has already listed the default *and* the debt collector updates the default to include the debt collector as creditor *and* sends a notice to the debtor to this effect. In this case the original credit provider should also be noted on the file and the date for removal of the listing should be calculated from the date of the original listing.

Recommendation 14 The minimum threshold for listings should be $500, and this amount should be indexed to CPI or reviewed annually to ensure it remains constant in terms of real value.

Recommendation 15 Default listings for non-credit services such as telecommunications should be removed after two years (or removed from the system completely, see **Access to the System – Definition of Credit Provider**)

21.6 Dispute Resolution

Recommendation 16 The onus of proof should be on the credit provider making a listing on a person's credit report to prove the accuracy of that information. If a person notifies a credit reporting agency that information held about that person is disputed, the credit reporting agency should correct the report if possible, or mark the listing as disputed and give the credit provider who has listed the information 30 days to provide proof that the debt is owed. If the credit provider fails to provide satisfactory proof within 30 days, the listing should be removed.

Recommendation 17 Where a credit provider has produced prima facie evidence that a listing is correct, and the consumer continues to dispute this, the credit reporting agency should either:

- Determine the dispute within 30 days on the evidence provided and remove the listing or not accordingly (for example where a person has provided evidence that they did not enter the contract in question, or provides proof of previous settlement or payment in full); or
- Refer the dispute to a dispute resolution scheme with appropriate jurisdiction (for example where a person raises a defence under the Consumer Credit Code which the credit reporting agency does not have the expertise or jurisdiction to determine the dispute).

Recommendation 18 Where a credit reporting agency has decided a dispute against a consumer, the consumer should be given information about how to dispute this decision, the contact details and the time limit in which they must initiate their complaint.

Recommendation 19 Only credit providers that are required by law to be a member of an ASIC-approved external dispute resolution scheme (or equivalent benchmark) should be permitted to contribute to, or access credit information from, credit reporting agencies.

Recommendation 20 The terms of reference of relevant EDR schemes, and any other relevant instrument, should be reviewed to ensure that the schemes have the power to amend credit report listings and award compensation in appropriate circumstances.

Recommendation 21 Relevant EDR schemes should have the jurisdiction to determine disputes about liability that would otherwise be out of time for the purposes of settling a dispute about a credit report listing.

Recommendation 22 The *Privacy Act* should be amended to enable a Court, the OPC, or any appropriate dispute resolution scheme, to be able to take action in relation to a default listing, or other derogatory listing, which is accurate and yet unjust in all the circumstances. Where a listing is found to be unjust in all the circumstances, the decision-maker should have the power to take appropriate action including, but not limited to, removing the listing, or reducing the period of time the listing should remain on the relevant credit report.

Recommendation 23 The law should be clarified to ensure that individuals who are refused credit on the basis that their file has been cross-referenced to another file, or any other reason that is based on information held by a credit reporting agency that is not apparent from the copy of the file the individual would be given upon request, are entitled to be given adequate information to enable them to correct any inaccuracies or false assumptions attributable to the data held by the credit reporting agency.

21.7 Financial Hardship

Recommendation 24 Telecommunications companies should be subject to similar regulatory obligations as consumer credit providers in relation to assessing ability to pay and/or providing appropriate products, dealing with financial hardship and notice prior to any form of enforcement action.

Recommendation 25 All subscribers to the credit reporting system should be required to subscribe to a Code of Practice which addresses hardship policies and procedures in broad terms, is subject to monitoring and compliance mechanisms, and is taken into account in the decisions of an approved EDR Scheme.

Recommendation 26 Any amendment to the law to allow repayment arrangements to be listed in the absence of a default should take into account:

- Debtors' rights under s66 and s68 of the Consumer Credit Code to vary their contract in response to a change of circumstances;
- The need to balance the prevention of over-indebtedness with the desirability of preserving consumer options to reduce their financial difficulties by refinancing on more favourable terms.
- Any obligations under a relevant Code of Practice.

Recommendation 27 Schemes of arrangement, or any equivalent type of listing, should be removed from a customer's credit report when the contract is paid out, or the customer repays any arrears and resumes normal repayments, whichever occurs earlier. In the event that the scheme of arrangement occurred subsequent to a legally listed default, the default should be marked as paid.

Recommendation 28 The law should clarify that changes to amounts owing in relation to a default should be included by way of an update to the original default (that is altering rather than adding information). The same should apply where a new default occurs on the same account for which a paid default is still marked on the credit file.

21.8 Serious credit infringements

Recommendation 29 The law should be amended to require a series of steps to be taken before a serious credit infringement can be made:

- The credit provider must issue a notice under the *Privacy Act* indicating that a default has occurred and a listing may be made unless the default is rectified to the customer's last known address;
- A default listing should be made (60 days from the notice) and a notice issued informing the customer that this has occurred;
- The credit provider should make at least two genuine attempts to contact the debtor by phone (including searching the white pages directory to confirm whether there is any other number listed for the debtor)
- The default listing must remain for 90 days to give the debtor an opportunity to contact the creditor and make arrangement to pay the debt.

Recommendation 30 Where a debtor subsequently makes contact with the credit provider and pays their debt, or makes some other arrangement which is acceptable to the credit provider, the serious credit infringement should be downgraded to a standard default listing.

Recommendation 31 There should be a separate process for other types of fraudulent conduct, requiring a conviction in a criminal court before a listing can be made, and the reference to fraud should be deleted from the current serious credit infringement section.

21.9 Judgments and other publicly available information

Recommendation 32 Court judgments should only be included if they relate to a credit contract by a credit provider as defined by the *Privacy Act* or any other relevant instrument.

Recommendation 33 There should be limits contained in the *Privacy Act* on the publicly available information that can be supplied by credit reporting agencies.

Recommendation 34 Debt Agreements, if listing is permitted, should be removed when the debtor has satisfied their obligations under the agreement.

21.10 Access to the credit reporting system – defining "credit provider"

Recommendation 35 Credit Provider Determination 2006 No. 2 (Classes of Credit Providers) should be overturned/not renewed. Credit Provider is clearly defined in the Privacy Act. There should be capacity in the regulations to specifically exclude further categories of credit provider, but not to extend the definition.

Recommendation 36 There should be an offence created under the *Privacy Act* of requiring an individual to provide a copy of his/her credit report in the course of any business or enterprise.

21.11 Data quality and credit reporting agency obligations

Recommendation 37 Failure to remove a listing, in circumstances where the credit provider who supplied the information has not complied with the timeframe for substantiation, should constitute a breach on the part of the credit reporting agency and the relevant credit provider.

Recommendation 38 Credit reporting agencies should have clear and onerous obligations to monitor compliance with statutory obligations, codes and standards, including the obligation to develop systems to identify and investigate possible systemic non-compliance, and to report on those systems and outcomes. Penalties for non-performance of these obligations should be sufficiently stringent as to outweigh any

competing commercial interest in maintaining subscriber numbers or maintaining a relationship with any particular subscriber.

Recommendation 39 Credit reporting agencies should be required to publish policies and procedures in relation to data-matching, file merging and cross referencing to improve transparency.

Recommendation 40 There should be data quality standards imposed on credit reporting agencies that are mandatory and subject to regular independent audit that address the merging and cross-referencing of files.

Recommendation 41 Credit reporting agencies should be required to bear the cost of regular, independent audits of their operations to ensure compliance with the law and data quality standards and to report the outcomes of such audits.

Recommendation 42 The credit reporting agency should be a non-profit, licensed or state owned, monopoly.

Recommendation 43 In the event that multiple credit reporting agencies are permitted to operate, there should be a system whereby consumers can access their credit reports from a single contact point and for the automatic referral of disputes between the agencies and between credit providers.

Recommendation 44 Companies that operate a credit reporting agency, or any related companies, should not be permitted to have a debt collection function, or any other function that potentially undermines or conflicts with their obligations as data custodians.

Recommendation 45 Credit reporting agencies should be required to report aggregate numbers of defaults and other derogatory information held by type of credit/service to increase transparency and allow government and stakeholders to better monitor trends.

21.12 Comprehensive Reporting

Recommendation 46 Any change to increase, or substantially alter, the permitted categories of data held by credit reporting agencies should be preceded by independent local research with a view to estimating the effect of any proposed change on:

- Over-indebtedness
- Access to affordable credit, including for those who are socially or economically disadvantaged.

Recommendation 47 Any extension of the data categories permitted in credit files/reports should be undertaken only if the following preconditions/standards are met:

- The purpose of the credit reporting system should be clearly defined;

- The type of data able to be collected and the level of access to that data should be limited to only what is the most relevant or necessary to achieving that purpose;
- There should be adequate rights for consumers in relation to accessing their report, understanding their report and how it is used;
- There should be robust and rigorous dispute resolution schemes in place;
- There should be adequate safeguards to ensure the security and integrity of the data;
- There should be a specific legislative requirement on lenders to lend responsibly having regard to all readily available information; and
- There should be safeguards to ensure that the system is not used to exacerbate or entrench financial hardship, such as prohibitions on access by employers or real estate agents, for marketing or for triggering price differentials on existing accounts.

21.13 The Role of the Office of the Privacy Commissioner ("OPC")

Recommendation 48 The OPC should be required to issue a Determination at the insistence of the complainant if the matter has not been resolved to the satisfaction of the complainant. All such Determinations should be published (without identifying the complainant if necessary).

Recommendation 49 There should be a meaningful right of appeal to an accessible court or Tribunal from Determinations made by the OPC

Recommendation 50 There should be more meaningful and consistent reporting of OPC handling of complaints. Where possible outcomes should be reported in addition to complaints, at least in aggregated terms.

Recommendation 51 The OPC should take a more pro-active role in systemic issues, both in relation to substantive breaches of privacy law and complaints handling, and report on those issues in its Annual Report.

Recommendation 52 The OPC should undertake regular internal audits in relation to:

- Complaint time-frames
- Procedural fairness
- Drop-out rates (complainants who do not proceed with a complaint after an initial contact and why).

Recommendation 53 There should be a greater range of options available under the *Privacy Act* as both remedy and penalty including but not limited to civil penalties (for individual complainants and systemic breaches), injunctions and adverse publicity orders to ensure that there are sufficient incentives for compliance, and adequate responses to non-compliance.

Recommendation 54 Complainants should have the option of having their dispute dealt with by an EDR scheme *and* by lodging an application with the OPC for a civil penalty, provided the OPC is also notified of the dispute being dealt with by the EDR scheme.

Recommendation 55 There should be adequate priority and resources given to the audit functions of the OPC.

21.14 Other

Recommendation 56 The use of credit file information to trigger price variations on existing contracts should be expressly prohibited.

Recommendation 57 The greater ability to price risk, and hence lower the price of some credit contracts, should not be accepted as being necessarily in the public interest.

Recommendation 58 Stand-alone responsible lending provisions should be introduced into the Consumer Credit Code, requiring credit providers to take reasonable steps to ensure that an applicant can meet his/her obligations under the contract without substantial hardship.

Part 4

Appendices

22 Appendix A - Regulatory Framework in Australia

22.1 Regulatory Framework

In Australia, credit reporting is regulated under Part IIIA of the federal *Privacy Act (Cth)* 1988, the Credit Reporting Code of Conduct and the national privacy principles. The Office of the Privacy Commissioner ('OPC') is responsible for the administration, regulation and enforcement of the *Privacy Act*. The provisions set out the parameters within which the collection, use and disclosure of credit information and credit reports may transpire.

22.1.1 *Privacy Act (Cth)* 1988

22.1.1.1 Types of information that may be contained in credit reports

Section 18E(1) of the *Privacy Act* specifies an exhaustive list of the personal information that can be recorded on credit reports. These include:

- only as much personal information as is reasonably necessary to identify the individual who is the subject of the file. Explicitly prohibited personal information include information about political, social or religious beliefs, criminal records, lifestyle, character and reputation;[155]
- applications for credit from credit providers and the amount of credit that was applied for;
- records of credit providers, mortgage insurers, or trade insurers who have sought a credit report in connection with the provision of specific services;
- records of current credit providers;
- records of incidences when an individual has been at least 60 days overdue in making a payment (including a payment that is wholly or partly a payment of interest), where the credit provider has taken steps to recover the debt;
- records of instances where cheques over the value of $100 have been dishonoured twice;
- court judgments made against the individual;
- bankruptcy orders made against the individual;
- opinions of any creditor that the individual has committed a serious credit infringement; and
- records of overdue payments incurred as a guarantor.

[155] *Privacy Act 1988* (Cth) s18E(2).

Credit providers are required to inform the individual either before or at the time of acquiring the information that the information might be disclosed to a credit reporting agency.[156] Furthermore, credit providers cannot give personal information to a credit provider if they have no reasonable grounds to believe that the information they are providing is correct.[157]

The information that is collected may only remain on a person's credit report for a set period. This maximum period is generally five years for credit application listings, overdue payments, dishonoured cheques, and adverse court judgments;[158] and seven years for bankruptcy orders and serious credit infringements.[159] Credit reporting agencies are then given an extra month to perform the administrative function of deleting that data from their system.[160]

Credit providers have a duty to inform credit reporting agencies as soon as practicable whenever an individual ceases to be overdue by making a payment or whenever an individual contends that they are not overdue.[161] The credit reporting agency must then make a file note to that effect.[162] If the credit provider ceases to be the current credit provider, they must also inform the credit reporting agency as soon as practicable.[163] Information relating to records of a current credit provider can only be kept for a maximum period of 14 days after the credit provider informs the credit reporting agency they are no longer the current credit provider of the debt.[164]

Both the credit reporting agency and any credit provider in possession or control of credit information must take reasonable steps to ensure the info is accurate, up-to-date, complete and not misleading.[165] This includes the responsibility to make corrections, deletions, additions in accordance with the individual's request and to take reasonable steps to include in the person's credit information or report any statement they individual wishes to make.[166] There must be reasonable security safeguards against loss, unauthorised access, use, modification or disclosure and other misuse.[167]

[156] *Privacy Act 1988* (Cth) s18E(8).
[157] *Privacy Act 1988* (Cth) s18E(8).
[158] *Privacy Act 1988* (Cth) s18F(2).
[159] *Privacy Act 1988* (Cth) s18F(2).
[160] *Privacy Act 1988* (Cth) s18F(1).
[161] *Privacy Act 1988* (Cth) s18F(3).
[162] *Privacy Act 1988* (Cth) s18F(4).
[163] *Privacy Act 1988* (Cth) s18F(5).
[164] *Privacy Act 1988* (Cth) s18F(2)(b).
[165] *Privacy Act 1988* (Cth) s18G.
[166] *Privacy Act 1988* (Cth) s18J.
[167] *Privacy Act 1988* (Cth) s18G.

Credit providers and reporting agencies must take reasonable steps to ensure the individual or anyone authorised by that person can access their credit information or report.[168]

22.1.1.2 Disclosure of information contained in credit reports by credit reporting agencies

The circumstances in which credit reporting agencies may disclose information is restricted to finite categories:[169]

- disclosure to a credit provider for the purpose of assessing an application for credit (for commercial credit, the individual must also specifically agree to the disclosure);
- disclosure in specific circumstances in cases where a guarantor, mortgage, insurer or securitisation arrangement is being sought (specific agreement to the material to be disclosed may also be required);
- disclosure of debts at least 60 days overdue for which the creditor provider has taken steps to recover the debt, but only 30 days after being informed of the overdue debt;
- disclosure to credit collectors for the purpose of collecting overdue payments (there are extra requirements in the case of commercial credit);
- disclosure to other credit reporting agencies;
- disclosure of publicly available information; or
- disclosure required or authorised by law.

The credit reporting agency must make a file note each time personal information is disclosed.[170] Disclosure outside of prescribed categories is a criminal offence, punishable by a maximum fine of $150,000.[171]

22.1.1.3 Use of personal information obtained from credit reports by credit providers

The manner in which credit providers may use any information obtained from credit reports is also stringently mandated.[172] Permitted uses include:

- assessing applications for credit made by the individual to the credit provider;

[168] *Privacy Act 1988* (Cth) s18H.
[169] *Privacy Act 1988* (Cth) s18K.
[170] *Privacy Act 1988* (Cth) s18K(5).
[171] *Privacy Act 1988* (Cth) s18K(4).
[172] *Privacy Act 1988* (Cth) s18L.

- specific uses for securitisation arrangements, guarantors;
- collection of payments and commercial credit due to the credit provider from the individual;
- internal management processes directly related to the making and management of loans;
- use as required or authorised by law; or
- uses connected with the individual's serious credit infringement where the credit provider has reasonable grounds to believe an infringement has occurred.

Breach of these provisions is an offence, again attracting a maximum penalty of $150,000.[173]

If an application for credit is refused at least partly based on information derived from a credit report, the credit provider must give all applicants written notice stating that the refusal of application was based on the person's credit report, providing the name and address of the relevant credit reporting agency, and advising the individual of their right to access their credit file.[174] This also applies to guarantors.[175]

22.1.1.4 Protections against further disclosure of personal information obtained from credit reports by credit providers

Credit providers may only disclose personal information obtained from credit reports for specific purposes including:[176]

- disclosure to credit reporting agencies for inclusion in a credit information file
- for the use of businesses to determine whether to accept payment by credit or electronic transfer of funds (however the information that can be disclosed is limited to identification information and whether the individual's line of credit or funds deposited with that particular credit provider is sufficient to meet the relevant payment);
- where the individual has specifically agreed to the disclosure for a particular purpose;
- disclosure to the individual or a person authorised by the individual in writing to access the information;
- disclosure to a person also authorised to operate the account of information which is disclosed in the ordinary everyday operation of that account and also basic transaction information;

[173] *Privacy Act 1988* (Cth) s18K(4).
[174] *Privacy Act 1988* (Cth) s18M(2).
[175] *Privacy Act 1988* (Cth) s18M(3).
[176] *Privacy Act 1988* (Cth) s18N.

- disclosure to other credit providers or law enforcement authorities where the credit provider believes on reasonable grounds that the individual has committed a serious credit infringement;
- disclosure to guarantors and mortgage insurers in certain circumstances;
- disclosure to a recognised institution that serves to settle disputes between credit providers and customers;
- disclosure to State or Territory bodies in relation to them providing assistance to the individual in relation to obtaining mortgage credit;
- disclosure to guarantors, debt collectors, persons or companies considering taking an assignment of that person's debt or discharging a debt owed to that credit provider. The information that can be disclosed is again limited to what is required for these purposes;
- disclosure to corporations related to the credit provider (where that credit provider is a corporation);
- disclosure to the person who manages the credit provider's loans for that purpose;
- disclosure to another credit provider that has also a mortgage credit over the same property where the individual is at least 60 days overdue in making a payment, in order to assess what action to take;
- use as required or authorised by law; or
- disclosure where the credit provider is seeking mortgage insurance, or another corporation is considering assigning the debt, accepting that debt as security for loan to the credit provider, or is considering purchasing a interest in the credit provider for those purposes.

Disclosure outside the permitted circumstances is also an offence attracting a maximum fine of $150,000.[177] Corporations must use the information obtained by credit providers only for the specified purposes. Failure to do so may attract a maximum penalty of $30,000 upon conviction.[178]

Any credit reporting agency or credit provider that knowingly discloses a credit report containing false or misleading information is guilty of an offence with a maximum fine of $75,000.[179]

Anyone who obtains access to credit reports held by credit reporting agencies or credit providers without authorisation under the legislation (including under false pretences) is liable to a maximum fine of $30,000.[180]

22.1.1.5 Powers of the Privacy Commissioner

[177] *Privacy Act 1988* (Cth) s18N(2).
[178] *Privacy Act 1988* (Cth) s18Q(9).
[179] *Privacy Act 1988* (Cth) s18R.
[180] *Privacy Act 1988* (Cth) ss 18S, 18T.

The Privacy Commissioner is imbued with various substantive powers to administer and enforce the credit reporting provisions of the *Privacy Act*. The Commissioner is empowered with additional powers under s28A specifically in relation to credit reporting. These include the ability to:

- develop a Credit Reporting Code of Conduct (further discussed below);
- investigate possible infringements of the credit reporting provisions and attempt to conciliate disputes if appropriate;
- make Determinations;
- publish guidelines for credit reporting agencies and credit providers;
- conduct audits of credit reports held by credit reporting agencies or credit providers to ensure compliance with the *Privacy Act;*
- monitor the security and accuracy of personal information in credit files held by credit reporting agencies or credit providers; and
- examine records held by credit reporting agencies and credit providers to ensure that there is no misuse or unlawful disclosure of information held in credit files.

22.1.2 Credit Reporting Code of Conduct

The Credit Reporting Code of Conduct is a legally binding document created to supplement Pt IIIA of the *Privacy Act* by imposing additional legally binding conditions on credit providers and credit reporting agencies. It also implements dispute resolution procedures. Explanatory notes accompany the Code and provide an instructional guide to its application but are not themselves binding.

The Code was issued by the Privacy Commissioner in 1991 pursuant to powers under s18A(1) of the *Privacy Act* and became operational in February 1992.

The Code is divided into two main parts. The responsibilities of credit reporting agencies are set out under Part I and those of credit providers under Part II.

22.1.2.1 Obligations imposed on credit reporting agencies

Credit reporting agencies have numerous responsibilities to ensure that the information they hold falls within the permitted categories. They must provide anyone disclosing personal information to them with detailed instructions on the types of personal information that is permitted to be given to credit reporting agencies.[181] They must also not accept any information that does not appear to be permitted, ensure its removal from their credit files and notify the credit provider that inclusion of the information could constitute a breach of the *Privacy Act*.[182]

[181] Credit Reporting Code of Conduct, 1.2, 1.3.
[182] Credit Reporting Code of Conduct, 1.2, 1.3.

If an agency becomes aware that information about overdue payments or serious credit infringements may be inaccurate, and reasonably believes that other credit files may contain similar inaccuracies, it must immediately notify the credit provider concerned and request them to check the accuracy of other files that could be affected. The Privacy Commissioner must also be advised if this situation arises.[183]

Whenever an agency discloses personal information, it must be carefully noted in the file.[184] Credit reporting agencies should also make recipients of personal information aware of the limitations in the *Privacy Act* surrounding use and disclosure.[185]

The right of the individual to access their information is carefully safeguarded. Credit reporting agencies must ensure free availability of information regarding access to credit reports and have adequate systems in place to respond to requests for access.[186] They must grant access within 10 days[187] of a request.[188] It is preferred, but not necessary, that the credit reporting agency require such evidence as is reasonable to satisfy itself of the individual's identity before disclosing the credit files.[189]

Agencies must maintain annual records about listings of serious credit infringements where there has been no previous listing of an overdue payment.[190]

22.1.2.2 Obligations imposed on credit providers

The obligations imposed on credit providers under the Code ensure the accuracy of credit reports and that only authorized disclosure is made.

Accuracy and fairness underpin the credit provider's role in providing personal information to reporting agencies. Credit providers must inform credit reporting agencies immediately if a credit provider either becomes aware of any inaccuracies which might have adversely affected decisions regarding credit, or realizes that information of a type that is not permitted has been provided.[191] The provision of information concerning overdue payments where recovery is barred by the statute of limitations is expressly forbidden.[192] Where one party is released from the obligation to repay for joint serious credit infringement that has already been reported, the credit reporting agencies should be

[183] Credit Reporting Code of Conduct, 1.4.
[184] Credit Reporting Code of Conduct, 1.17.
[185] Credit Reporting Code of Conduct, 1.15.
[186] Credit Reporting Code of Conduct, 1.6.
[187] Credit Reporting Code of Conduct, 1.11.
[188] Credit Reporting Code of Conduct, 1.7.
[189] Credit Reporting Code of Conduct, 1.10.
[190] Credit Reporting Code of Conduct, 1.18.
[191] Credit Reporting Code of Conduct, 2.5.
[192] Credit Reporting Code of Conduct, 2.8.

informed that the listing should be removed.[193] If the provider is informed that they have provided non-permitted information, they must alter its reporting procedures to ensure compliance with the Act.[194]

The Code also imposes procedural obligations on credit providers before and upon holding credit information. Before obtaining a credit report from another credit provider, the recipient credit provider must be satisfied that the individual has given specific written consent.[195] Conversely, the credit provider disclosing that information should also make sure consent has been obtained.[196] The recipient must also record the details of the disclosure,[197] and should keep such records whenever any disclosure is made.[198] Where the credit provider mistakenly obtains the credit report of a person about whom they had not enquired from a credit reporting agency, they are to destroy the file and notify all persons given the information and the credit reporting agency that provided the report of the error.[199]

When a credit provider ceases to be the current credit provider, they must inform the credit reporting agency within 45 days.[200] This defines the outer limit of the "as soon as practicable" time requirement for this to occur under the *Privacy Act*. Disclosure to agents of the individual requires evidence of the specific written consent of the individual, and is limited to the scope of the written agreement.[201]

There is strong emphasis on an individual's right to access their credit information. Access to credit reports must be made available within 30 days of a written request, or if the credit provider is no longer in possession, the details of the reporting agency from which the report was obtained must be furnished.[202] If the credit provider receives a request for an amendment or the inclusion of a statement in the credit file, the credit provider should refer the request to the credit reporting agency (along with its opinion about the amendment) within 10 days, inform the individual of this referral and note this action on the credit files in their possession.[203]

22.2 Dispute resolution

[193] Credit Reporting Code of Conduct, 2.11.
[194] Credit Reporting Code of Conduct, 2.4.
[195] Credit Reporting Code of Conduct, 2.12.
[196] Credit Reporting Code of Conduct, 2.13.
[197] Credit Reporting Code of Conduct, 2.14.
[198] Credit Reporting Code of Conduct, 2.19.
[199] Credit Reporting Code of Conduct, 2.2.
[200] Credit Reporting Code of Conduct, 2.3.
[201] Credit Reporting Code of Conduct, 2.17, 2.18.
[202] Credit Reporting Code of Conduct, 2.21, 2.22.
[203] Credit Reporting Code of Conduct, 2.23.

The Privacy Commissioner must generally investigate all complaints,[204] so long as the complainant has first addressed the dispute with the respondent, or if the Commissioner has decided that this would be inappropriate.[205] Other exceptions to investigation or further investigation of a complaint include where:[206]

- the act or practice does not interfere with a person's privacy;
- the complaint was made more than 12 months after the person become aware of the act or practice;
- the complaint is or has been dealt with under other legislation;
- other legislation provides a more appropriate remedy;
- the respondent is or has dealt adequately with the matter; or
- the respondent has not been given an opportunity to deal with the complaint.

Individuals may make credit reporting complaints to the Privacy Commissioner,[207] with the only exception being complaints against organisations bound by approved privacy codes that specify a procedure for dispute resolution.[208] Representative complaints may also be made and can be initiated by any individual whose privacy has been interfered with on behalf of all the complainants.[209] However the Privacy Commissioner may decide to discontinue a representative complaint on application by the respondent if she feels it is in the interests of justice to do so.[210]

The Commissioner is also empowered to conduct investigations into privacy infringements on her own motion.[211]

All complaints must be in writing,[212] however the Privacy Commissioner's staff are required to provide appropriate assistance to people wishing to make a complaint, including help in formulating that complaint.[213] The complaint must specify the respondent to the complaint[214] and describe the act or practice engaged in by that organisation that is the subject of the complaint.[215]

All investigations must be conducted in private.[216] Before beginning an investigation the Commissioner must inform the respondent of the pending investigation.[217] In the course

[204] *Privacy Act 1988* (Cth) s40(1).
[205] *Privacy Act 1988* (Cth) s40(1A).
[206] *Privacy Act 1988* (Cth) s41(1), (2).
[207] *Privacy Act 1988* (Cth) s36(1).
[208] *Privacy Act 1988* (Cth) s36(1A).
[209] *Privacy Act 1988* (Cth) s36(2).
[210] *Privacy Act 1988* (Cth) s38A.
[211] *Privacy Act 1988* (Cth) s40(2).
[212] *Privacy Act 1988* (Cth) s36(3).
[213] *Privacy Act 1988* (Cth) s36(4).
[214] *Privacy Act 1988* (Cth) s36(5).
[215] *Privacy Act 1988* (Cth) s36(1).
[216] *Privacy Act 1988* (Cth) s40(2).
[217] *Privacy Act 1988* (Cth) s43(1).

of its investigation the Commissioner may obtain information from any persons and make any inquiries as she thinks fit.[218]

Upon completion of the investigation, the Commissioner will make a determination either dismissing the complaint or declaring that the respondent has interfered with a person's privacy and is not to repeat that conduct.[219] The determination will state any findings of fact upon which the determination is based.[220] The Commissioner cannot make a determination unless it has afforded the person or organisation that will be adversely affected by that determination the opportunity to make submissions relevant to the matter.[221]

The Commissioner may also declare that the respondent should engage in a course of conduct to redress any loss or damage bourn by the complainant or specify a sum which the complainant should be entitled to as compensation.[222] The declaration can also include orders to correct information held in records and credit reports and to attach to a record or credit report a statement from the complainant about the correction that was sought[223].

Determinations are not binding.[224] However non-compliance with a determination allows either the complainant or the Commissioner to bring an action in the Federal Court or the Federal Magistrates Court to make the determination enforceable.[225]

22.3 Remedies and Compensation

The Commissioner may declare that the complainant should be reimbursed for expenses reasonably incurred in connection with the making and the investigation of the complaint, even where a complaint is not substantiated upon investigation.[226] Compensation will usually take the form of a debt due from the respondent to the complainant.

Where a complaint is investigated and found to be substantiated, the Commissioner may also determine that the respondent should perform any reasonable act or course of conduct to redress any loss or damage suffered[227] and, or in the alternative, that the

[218] *Privacy Act 1988* (Cth) s43(3).
[219] *Privacy Act 1988* (Cth) s52.
[220] *Privacy Act 1988* (Cth) s52(2).
[221] *Privacy Act 1988* (Cth) s40(5).
[222] *Privacy Act 1988* (Cth) s52(1).
[223] *Privacy Act 1988* (Cth) s52(3B).
[224] *Privacy Act 1988* (Cth) s52(1B).
[225] *Privacy Act 1988* (Cth) ss55A, 62; Office of the Privacy Commissioner, *Privacy Matters* above n 11, 3.
[226] *Privacy Act 1988* (Cth) s52(3).
[227] *Privacy Act 1988* (Cth) s52(1)(b)(ii).

complainant is entitled to a specific amount in compensation for loss suffered.[228] This may include compensation for hurt feelings and humiliation.[229] However, this determination is not binding or conclusive.[230]

22.4 Commissioner's determinations

Determinations of the Privacy Commissioner are authorised by a number of provisions in Pt IIIA of the *Privacy Act*. They are disallowable instruments[231] which are published in the gazette.[232]

The determinations of widest applicability determine which companies are in fact credit providers and thus fall within the scope of the *Privacy Act* and the Code of Conduct. Two determinations currently in force are the Credit Reporting Determination 2006 No 1 and 2. The former deems corporations that acquire the rights of a credit provider in relation to repayment of a loan to be regarded as the credit provider for the purposes of Pt IIIA. The latter deems as credit providers, corporations that allow deferral of payments for transaction for at least 7 days and leasing companies that require deposits less than the value of the hired goods for at least 7 days. This effectively allows any service provider including doctors, vets and video stores to place listings on credit reports. Both these determinations form part of a series of renewals of previous determinations, with Determination No 1 being first introduced in 1995, and No 2 in 1991. Both determinations were last renewed without alteration on 31 August 2006 for a further 5 years.

The Privacy Commissioner may also determine the substance of several specific provisions of the *Privacy Act*. There has only been one determination of this type, in relation to the kinds of information reasonably necessary to ascertain an individual's identity for the purposes of s18E(3) of the *Privacy Act*. This was determined in the Credit Reporting Determination 1991 No 2 to include only the person's full name and all known aliases, sex, date of birth, a maximum of three addresses, either the current or last known employee, and their driver's licence number.

A substantial proportion of determinations have also related to whether specific entities fall into the category of credit providers for the purposes of the Act.[233]

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[228] *Privacy Act 1988* (Cth) s52(1)(b)(iii).
[229] *Privacy Act 1988* (Cth) s52(1A).
[230] *Privacy Act 1988* (Cth) s52(1B).
[231] *Privacy Act 1988* (Cth) s18E(6).
[232] *Privacy Act 1988* (Cth) s18E(5).
[233] Tasmanian Collection Service, 1992, No. 2; Aboriginal and Torres Strait Islander Commission, 1999, No.1; Aboriginal and Torres Strait Islander Services, 2003, No 3; Australian Government of Employment and Workplace Relations, 2004, No 1.

22.5 Future Directions

The office of the Privacy Commissioner has undertaken to review complaint handling procedures in the 2005/2006 reporting year, acknowledging the dissatisfaction with delay and complaint handling.

The Privacy Commissioner will be further implementing recommendations following the recent review entitled "Getting in on the Act: The Review of the Private Sector Provisions of the *Privacy Act* 1988". The focus will be improving its complaints handling procedures, particularly in reducing the complaints backlog, and making greater use of determinations to settle complaints earlier in the complaints process[234] and implementing or improving its complaints handling manual. The OPC also intends to initiate more own motion investigations.

The OPC will be receiving an extra $8.1 million in funding over next four years under the 2006/07 Federal Budget.[235] As a result, the OPC intends to improve complaints handling processes and is increasing its staff levels to facilitate this process[236]. This includes the creation of a "Senior Manager" role in compliance and complaints handling, and an increase of seven or eight positions in the OPC's complaints handling and compliance departments to bring the total to 26 or 27. A specialised team for the handling of systemic complaints will also be convened.

There are also plans to improve the interface of the OPC website to make it more user-friendly.

[234] Office of the Privacy Commissioner, *Privacy Matters* above n 11, 2.
[235] Ibid 6.
[236] Ibid.

23 Appendix B - International Credit Reporting Systems

23.1 The United States

23.1.1 Introduction

In the US, there are three major credit reporting bureaux in the US, Experian, Trans Union and Equifax. The credit reporting system is regulated by the federal *Fair Credit Reporting Act*.[237] The Act was amended in 2003 by the *Fair and Accurate Credit Transactions Act*[238] "to prevent identity theft, improve resolution of consumer disputes, improve the accuracy of consumer records, make improvements in the use of, and consumer access to, credit information, and for other purposes."

The Act sets out the following provisions:

- permissible purposes of consumer reports
- requirements for listing
- disclosure
- procedure in case of disputed accuracy
- public record information for employment purposes
- civil liability for wilful and negligent non-compliance
- limitations
- unauthorised disclosure
- administrative enforcement
- disposal of records

23.1.2 What information can be listed

The US has a full-file credit reporting system which means that they collect, in addition to the types of information that is allowed in Australia, the following:

- methods of bill payment
- court actions against the consumer
- arrest information

Most information remains on the credit report for 7 years, while bankruptcies remain on the report for 10 years.

[237] *Fair Credit Reporting Act,* 15 U.S.C. § 1681
[238] *Fair and Accurate Credit Transactions Act* Pub.L. 108-159 (2003).

23.1.3 Obligations of credit reporting agencies

Credit reporting agencies have the obligation to correct or delete inaccurate, incomplete or unverifiable information within 30 days.

23.1.4 Use and access

Section 604 of the Act provides that the credit reporting agency may furnish (disclose) a credit report only in an enumerated list of circumstances. These include in response to a court order, written instructions of the consumer, for the purpose of the information being used in connection with a credit transaction involving the consumer, employment purposes, insurance, determination of the consumer's eligibility for a licence granted by a governmental instrumentality, in connection with a valuation or an assessment of credit or prepayments risks associated with an existing credit obligation, otherwise a legitimate business need for the information in connection with a business transaction initiated by the consumer; or to review an account to determine whether the consumer continues to meet the terms of the account, and to test capacity to make child support payments or determining the appropriate level of such payments.

In relation to disclosure for employment purposes, the Act provides that it must not occur unless a clear and conspicuous disclosure has been made in writing and the consumer has authorised it in writing.

23.1.5 Consumer rights

Consumers are entitled to obtain a free credit report every twelve months from each of the three credit reporting agencies, and have the right to request a credit score. Consumers are also entitled to a free copy report if:

- a person has taken adverse action against the consumer because of information in the report;
- the consumer has been a victim of identity theft and placed a fraud alert in their file;
- the file contains inaccurate information as a result of fraud;
- the consumer is on public assistance;
- the consumer is unemployed but expects to apply for employment within 60 days.

23.1.6 Administration/ Dispute resolution

The Division of Financial Practices of the Bureau of Consumer Protection at the Federal Trade Commission oversees the administration of the Act. It is responsible for developing policy and enforcing laws related to financial and lending practices affecting consumers. Consumers may make complaints to the FTC however it does not resolve individual consumer problems.

In 2004, a research report compiled by the National Association of State Public Interest Research Groups in the US found that 25% of the credit reports surveyed across 30 different states contained serious errors that could result in the denial of credit, such as false delinquencies or accounts that did not belong to the consumer; 54% contained personal demographic information that was misspelled, long-outdated, belonged to a stranger, or was otherwise incorrect; 22% listed the same mortgage or loan twice; almost 8% were missing major credit, loan, mortgage or other consumer accounts that demonstrate the creditworthiness of the consumer; and 30% contained credit accounts that had been closed b the consumer but remained listed as open. In total, it found that 79% of the credit reports surveyed contained either serious errors or other mistakes of some kind.[239]

23.2 Canada

23.2.1 Introduction

The Canadian regulatory system is unique for its lack of uniformity in its legislative provisions throughout its provinces, and the availability of a common law remedy in negligence that can be pursued against credit reporting agencies.

In Canada, there is no uniform legislation regulating credit reporting. Each jurisdiction is regulated by its own mix of federal privacy legislation, provincial legislation and also by the common law of negligence.[240]

Federal privacy legislation consists of the *Personal Information Protection and Electronic Documents Act* 2000*,* which specifies a list of privacy principles controlling the collection, use and disclosure of personal information and is applicable in the majority of Canadian jurisdictions.[241] It does not apply in three provinces with substantially similar provincial legislation in force.[242]

In most jurisdictions, provincial privacy legislation and provincial legislation relating specifically to credit reporting are also in force but the substance of these provisions vary. They primarily consist of limits on the use, collection and disclosure requirements of personal information and procedure requirements to ensure the accuracy of credit reports.[243]

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[239] *Mistakes do happen: A look at errors in consumer credit reports*, June 2004, National Association of State PIRGs.
[240] S. Lott, *Credit Reporting: how are consumers faring?* Public Interest Advocacy Centre (Canada), 17.
[241] Ibid 17.
[242] Ibid 14.
[243] Ibid 19.

In addition, under common law, credit reporting agencies could hold a duty of care to the people whose credit reports it holds, thus rendering them liable to actions for negligence.[244] This would enable an award of damages not permitted by the legislative provisions.[245]

Credit providers have a common law obligation to report personal information that is accurate, complete and not misleading to credit reporting agencies.[246]

23.2.2 What information can be listed

Credit reports contain both positive and negative information such as:

- Personal identifying information
- Credit history of paying bills and creditors
- Public record information – such as information about secured loans, bankruptcies, court judgments
- Information about any involvement with collection agencies pursuing unpaid debts
- Consumer statement
- Inquiries

Each of the three credit reporting agencies in Canada – TransUnion, Equifax Canada and Northern Credit Bureaus – may also have limitations on what information they hold.[247]

23.2.3 Use and access

Credit reports are required to be provided to consumers free of charge only where provincial legislation exists.[248]

All provincial legislation gives employers access to credit reports without limiting this access to employment purposes. Insurance underwriting is usually also a permitted use in provincial legislation.[249]

23.2.4 Administration/ Dispute resolution

[244] *Haskett v Equifax Canada* [2003] 63 OR (3d) 577 (CA), cited in S. Lott, above n 240, 20.
[245] Ibid 20.
[246] *Millar v General Motors of Canada* [2002] O.J. No. 2769.
[247] S. Lott, above n 240, 13.
[248] Ibid 14.
[249] Ibid.

The federal legislation created the Office of the Privacy Commissioner to oversee the Act by receiving individual complaints. However enforcement powers are few, and damages are not available,[250] but include the ability to make orders or levy fines.

In individual provinces, administration of provincial legislation takes a wide variety of forms. There may also be a registrar, government department or individual director empowered to investigate consumer complaints and grant licenses to credit reporting agencies.[251] Credit counselling services may also be provided.[252]

23.2.5 In practice – statistics

In 2005 the Public Interest Advocacy Centre in Ontario Canada produced a report that examined the consumer experience of credit reporting. In the report "Credit Reporting: How are consumers faring?" PIAC conducted a national survey of consumers as well as in-depth interviews with a range of key stakeholders. The key findings of the report are:

- only 17% of Canadian adults had checked their credit rating in the last three years;
- 18% found inaccuracies on their credit report, predominately either generally inaccurate or items that should have been removed;
- 80% had taken steps to correct the inaccuracy;
- 10% believed they were denied access to financial services as a result of the inaccuracy; this is more than 750,000 people;
- it took on average half a day of work time to correct the problem. Relatively high levels of stress and wasted time reported as a result of the inaccuracies

While 63% of respondents indicated that the credit reporting system was understandable and a good way to determine access to financial services, the report concluded that consumers are not sufficiently aware of credit reporting and there is a lack of public attention to and transparency around credit reporting by credit reporting agencies, credit grantors and government.

The report made a number of recommendations, including uniform regulation across all jurisdictions, and that inquiries should only be recorded if they result from actual applications for credit.

It supported a private member's bill in Ontario which would require credit providers to provide a copy of the credit report to the consumer with the name and address of the reporting agency and to notify the consumer of their right to correct incomplete or inaccurate information where they take adverse action based on information on the credit reporting. The bill would also require a credit reporting agency, upon request, to

[250] Ibid 17.
[251] Ibid 18.
[252] Ibid 18.

disclose the current credit score, range of possible scores, all key factors adversely affecting the score, date the score was created, and a summary of how the score was calculated.

The report also recommended that credit reporting agencies should be required by law to do upon request at no cost, or upon notification by a creditor of a possible information leak to place fraud alerts of credit files. Credit providers should be required to check for and observe fraud alerts. Consumers should be able to place a "security freeze" on credit reports to prevent the report being shared with potential creditors, that can be lifted on use with a special code or for certain creditors. Credit bureaus should notify of attempts to access credit reports after a fraud alert is issued. There should be a right to a credit report clean-up of fraudulently obtained credit.

In relation to regulation, the report recommended that there needed to be better tracking and reporting processes related to consumer contacts and complaints, and that there should be a strict regulation of credit repair businesses, and of even 'greater benefit' would be that credit repair agencies are 'severely curtailed by regulation in all provinces, with a view to effectively eliminating the industry'.[253] It questioned whether any real service was being provided by these companies, since 2 of the 3 credit reporting agencies do not allow them to be members, and they charge exorbitant up-front fees.

23.3 United Kingdom

23.3.1 Introduction

In the UK, credit reporting is regulated under *Data Protection Act* 1998 (UK). This Act gives effect to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, concerning the protection of personal data.

This Act replaces the credit reporting provisions in the *Consumer Credit Act* 1974, however transitional provisions mean that the prior provisions and the corresponding *Consumer Credit (Credit Bureau) Regulations* 2000 (S.I. No. 290) may still apply until late 2007.[254]

[253] Ibid 46.
[254] *Data Protection Act 1998* (UK) - Legal Guidance, UK Information Commissioner's Office, http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/data_protection_act_legal_guidance.pdf

The three main consumer credit reporting agencies are Equifax, Experian and Callcredit.[255]

23.3.2 What information can be listed

Credit reports can contain:

- personal identifying information, including aliases and linked addresses
- public record information
- history of payments to lenders
- accounts held by the individual, whether or not closed or in default
- bankruptcy information, including voluntary arrangements, court judgments, and administration orders or decrees
- arrangements to pay
- notices of correction – a statement made by the individual about their credit file

The length of time that information, including defaults, accounts, bankruptcy information, individual voluntary arrangements, court judgments, and administration orders or decrees may be kept on the credit report is six years.[256]

Credit reports can also contain inquiries where an application for credit has been made, and quotation searches where the individual is only requesting a quote for a product, without having made an application for credit.[257] This form of information is kept for between 1-2 years, depending on the credit reporting agency.[258]

Credit reports may also list the names of a person's financial 'associations' with whom the person holds joint accounts or has made joint applications for credit. This information may be removed by a written statement to the credit reporting agency that there is no longer any financial connection between the two people.[259]

The UK's fraud prevention service may also place CIFAS markers on a person's credit file as a warning to lenders to ensure the identity of a person applying for credit under that name.[260] CIFAS is a not-for-profit fraud prevention service which places warnings on a credit report where they identify a fraud. While a CIFAS warning does not necessarily mean that the person is involved in the fraud, and it does not encourage credit

[255] Information Commissioner's Office (UK), *Credit Explained,* (2005). Available online: http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/credit_explained_leaflet_2005.pdf, 1.
[256] Ibid 10.
[257] Ibid 11.
[258] Ibid 11.
[259] Ibid 12.
[260] Ibid 13.

providers to reject the application, it does warn them to take extra precautions to ensure the application is genuine.[261]

Repossession information may also be contained on a person's credit file, however only members of the Council of Mortgage Lenders may access this information.[262]

There is also a Gone Away Information Network, which allows participating lenders to provide credit reporting agencies with information about customers who have defaulted and moved without giving the lender new contact details. This information can be held for six years but only participants can access this information.[263]

23.3.3 Obligations of credit reporting agencies

Credit reporting agencies must provide a copy of an individual's credit report within seven days of receiving a written request and payment of the required fee.[264]

The credit reporting agency must provide a response within 28 days of any written complaint and inform the individual if an incorrect entry has been removed, amended or if no action was taken.[265] If an amendment is made, a copy of the changes must be sent to the individual and any lender that performed a search in the past six months.[266]

23.3.4 Use and access

Consumers have a right to access their credit reports by providing a written request and paying a fee not exceeding £2.[267]

Consumers have the right to be informed if their personal information will be used, held or in any other way dealt with by a credit reporting agency.[268] The credit reporting agency must also provide a description of the personal information held, the purposes for which it will be held, used or otherwise dealt with, and the potential recipients of the information.[269] The individual must be informed as much as is known to the credit reporting agency about the source of the personal information and what information constitutes the personal data.[270]

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[261] See CIFAS http://www.cifas.org.uk/default.asp
[262] Information Commissioner's Office (UK), above n 255, 13.
[263] Ibid 14.
[264] Ibid 6.
[265] Ibid 22.
[266] Ibid 22.
[267] Ibid 6.
[268] *Data Protection Act 1998* (UK), s 7(1)(a).
[269] *Data Protection Act 1998* (UK), s 7(1)(b).
[270] *Data Protection Act 1998* (UK), s 7(1)(c).

If an individual is refused credit by a credit provider that uses credit scoring, that person should be informed of the logic for any significant decision likely to have been solely based on the use of the credit file.[271]

23.3.5 Administration/ Dispute resolution

The Information Commissioner (called the Data Protection Commissioner prior to the enactment of the *Freedom of Information Act* (2000) enforces the *Data Protection Act* 1998 (UK) and receives complaints about credit reporting.[272]

The Commissioner cannot award compensation for breaches of the Act, however the Act does allow for individuals to take credit reporting agencies to court to claim compensation for damages caused by a breach of the Act.[273] It is a defense to this claim if the credit reporting agency can prove that it took reasonable care in all the circumstances to comply with the Act.[274]

An individual may also apply to the court for an order rectify, block, erase or destroy any inaccurate personal data.[275]

23.4 South Africa

23.4.1 Introduction

South African credit reporting is regulated by the *National Credit Act* 2005 which came into force on 1 June 2006. This legislation operates uniformly across all South African jurisdictions and is based upon a registration regime. All major credit providers and for-profit credit bureaus must be registered, upon which they become bound by the Act.[276]

The legislation also establishes the National Credit Regulator and the National Consumer Tribunal to regulate its provisions.

It will be supplemented by *National Credit Act Regulations*, which were released in draft form for general public comment on 20 February 2006.

23.4.2 What information can be listed

[271] *Data Protection Act 1998* (UK), s 7(1)(d).
[272] Information Commissioner's Office (UK), above n 255, 24.
[273] *Data Protection Act 1998* (UK), s 13.
[274] *Data Protection Act 1998* (UK), s 13.
[275] *Data Protection Act 1998* (UK), s 14.
[276] *National Credit Act2005* (South Africa), ss 70. 43.

Under the *National Credit Act*, the information permitted to be included on credit reports include[277]:

- Credit history, including applications for credit, credit agreements entered into, pattern of payment/default, debt rearrangements, incidents of enforcement actions, circumstances of termination & related matters
- Financial history – past and current income, assets and debts & other matters within the scope of that person's financial means, prospects and obligations
- Education, employment, career, professional or business history including circumstances of any termination of these
- Identity – name, date of birth, identity number, marital status, family relationships, any contact details, & related matters

Under the draft regulations to the National Credit Act, credit reports may also include:[278]

- Payment histories and status of continuous services
- Any information relevant to the purposes of credit fraud detection and prevention
- Payments made after a debt has been sold
- Information not related to consumer credit so long as the person has consented to its inclusion

Under the draft regulations, credit reports cannot include:[279]

- Political affiliation
- Medical status / history
- Religion or thought / opinion / belief
- Sexual orientation [aside from marital status and list of family members]
- Membership of trade union [aside from mention in employment history]

Under the draft regulations it is proposed that details and results of disputes lodged by consumers can be retained for 18 months, inquiries for 3 years, payment profiles for 5 years, adverse information for 1 year, debt re-arrangements (which are akin to hardship variations in Australia) for 3 years or until a clearance certificate is issued, and civil court judgments for 5 years.

23.4.3 Obligations of credit reporting agencies

Credit reporting agencies must accept consumer credit information from any credit provider once they've paid filing fees. They must also accept consumer credit information provided by the consumer to correct or challenge information held by the

[277] *National Credit Act2005* (South Africa), ss 40. 43.
[278] Draft Regulation to the National Credit Act, Reg16.5
[279] Draft Regulation to the National Credit Act, Reg16(3)

bureau, free of charge. Under the draft regulations, they may also accept information from debt collectors who have bought debt, providers of continuous services, insurance providers, educational institutions, entities investigating fraud, organs of the state, and judicial officers.[280]

Credit reporting agencies must also take reasonable steps to verify the accuracy of consumer credit information.[281]

Credit reports must be issued upon payment of a fee if it is required for a prescribed purpose.[282] Prescribed purposes proposed under the draft regulations include:[283]

- Affordability assessment with the person's consent
- Credit assessment with the person's consent
- Official investigation into fraud, corruption, theft
- Fraud detection and prevention services
- Employment considerations given specific consent of the person
- Assessment of debtor's book for debtor's sale / insurance purposes
- Setting limit of service provisions
- Assessing insurance applications
- Verifying qualifications and employment
- Obtaining consumer information to access unclaimed funds (including pension and insurance)
- Credit provider tracing the person in respect of a credit agreement, if person agreed at the inception of the agreement
- Development of a credit scoring system

23.4.4 Use and access

Credit providers must advise a person before reporting prescribed adverse information to a credit bureau, and provide a copy of that info on request.[284]

People have the right to inspect any credit bureau or national credit register, file or information concerning that person without charge once each 12 months, when ordered by a court or tribunal, and once within a reasonable period after successfully challenging any information to verify it has been corrected.

23.4.5 Consumer rights

[280] Draft Regulation to the National Credit Act, Reg16
[281] *National Credit Act 2005* (South Africa), s 70.
[282] *National Credit Act 2005* (South Africa), s 70.
[283] Draft Regulation to the National Credit Act Reg16.4
[284] *National Credit Act 2005* (South Africa), s 72.

Consumers have a right to challenge the accuracy of information and require investigation from the credit reporting agency or the National Credit Regulator, without charge. The credit reporting agency or the National Credit Regulator must then take reasonable steps within a prescribed time to seek evidence in support of the challenge and either provide credible evidence to the person or remove all record of that information from its files.[285]

Consumers also have the right to compensation for the cost of correcting inaccurate information from anyone who reported incorrect information or from the National Credit Registrar.[286]

Consumers have the right to receive a document in an official language the consumer reads or understands – having regard to what is reasonable – considering usage, practicality, expense, regional circumstances and balances of the needs and preferences of the population.[287]

Credit providers cannot penalise consumers for exercising their rights.[288]

23.4.6 Distinguishing features

The National Credit Act does not apply to mortgage agreements or to agreements exceeding a threshold value to be determined by the Minister.[289]

Credit reporting agencies cannot be registered unless it satisfies the National Credit Regulator that it has the appropriate qualifications, competence, knowledge and experience; human, financial and operational resources; procedures to handle questions and complaints in a timely efficient and courteous manner.[290]

Credit reporting agencies also cannot be registered if a credit provider or debt collection agency has a controlling interest in that agency.[291]

The Minister can require the National Credit Regulator to establish and maintain a single national register of outstanding credit agreements.[292]

23.4.7 Administration/ Dispute resolution

[285] *National Credit Act 2005* (South Africa), s 72.
[286] *National Credit Act 2005* (South Africa), s 72.
[287] *National Credit Act 2005* (South Africa), s 63.
[288] *National Credit Act 2005* (South Africa), s 66.
[289] *National Credit Act 2005* (South Africa), ss4, 9(4), 7(1)(b).
[290] *National Credit Act 2005* (South Africa), s 43.
[291] *National Credit Act 2005* (South Africa), s 43.
[292] *National Credit Act 2005* (South Africa), s 69.

The National Consumer Tribunal was established to impose remedies for breach of the *National Credit Act* 2005.[293] It may make orders resolving disputes over information held by credit reporting agencies,[294] however there is a three year time-limit for complaints.[295]

Complaints can also be addressed to Financial Services Ombudsmen Schemes, consumer courts, and through alternative dispute resolution agents.[296]

23.5 New Zealand

23.5.1 Introduction

The New Zealand credit reporting system is regulated by the *New Zealand Privacy Act* 1993 and the *Credit Reporting Privacy Code* 2004. The *Privacy Act* does not contain specific provisions in relation to credit reporting but rather has twelve Privacy Principles of universal application. However these principles generally do not create any legal rights enforceable in a court of law[297] and can be modified by any Codes of Conduct issued by the NZ Privacy Commissioner.[298]

The Credit Reporting Privacy Code 2004 was issued on 6 December 2004 to deal with the specific area of credit reporting, but only wholly came into effect on 1 April 2006. The Code is delegated legislation and is enforceable in the same manner as the Act.

The Code only applies to credit reporting agencies.[299] Although credit providers and debt collectors are explicitly excluded from the scope of the Code,[300] credit providers have the same obligations indirectly because credit reporting agencies cannot legally disclose credit information to a credit provider without a subscriber agreement in place.[301] This subscriber agreement requires credit providers to:[302]

- ensure the information they provide to credit reporting agencies are accurate, up to date, complete, relevant and not misleading;
- take reasonable steps to update information previously given to credit reporting agencies;

[293] *National Credit Act 2005* (South Africa), s 27.
[294] *National Credit Act 2005* (South Africa), s 137.
[295] *National Credit Act 2005* (South Africa), s 166.
[296] *National Credit Act 2005* (South Africa), s 134.
[297] *Privacy Act* 1993 (NZ) s11(2).
[298] *Privacy Act* 1993 (NZ) s46.
[299] *Credit Reporting Privacy Code* 2004, Clause 5,
[300] *Credit Reporting Privacy Code* 2004, Commentary to Clause 3.
[301] Credit *Reporting Privacy Code* 2004, Rule 11.
[302] *Credit Reporting Privacy Code* 2004, Subscriber Agreement, Schedule 3.

- notify people of the purposes of collection and for which disclosure will be made;
- cooperate with compliance checks initiated by the credit reporting bureau;
- promptly cooperate with the credit reporting agencies' investigatory and complaint resolution processes, and may be required to supply evidence of defaults; and
- adopt processes and train staff to prevent improper access to credit information held by the credit provider.

23.5.2 What information can be listed

Permitted identification information is limited to the person's full name, aliases and previous names, sex, date of birth and address. Supplementary information may also include current occupation, any previous occupation, current employer and any previous employer,[303] but these details can only be disclosed to confirm identity information supplied by a subscriber.[304]

Permitted credit information includes information reported by credit providers in relation to applications for credit and credit default information where a subscriber has taken steps to recover the debt. Information relating to serious credit infringements, summary instalment orders or judgments for money, status of any bankruptcy that may exist, credit scores, correction statement or notice of disputed debt attached to credit information and administrative information relating to credit reporting activities are all deemed to be credit information.[305] Serious credit infringements can only be listed where there is actual or attempted fraud or where a reasonable person would consider the individual's actions to indicate an intention that the individual was not going to comply with their credit obligations.[306] Credit information can also include information relating to identification documents being lost, stolen or otherwise compromised.[307]

The period credit information may be retained for is five years for information regarding compromised identification documents, credit applications, credit defaults, serious credit infringements, judgements and previous enquiries. The period is seven years for bankruptcy information.[308]

23.5.3 Obligations of credit reporting agencies

The privacy principles as modified by the Code limit the collection of personal information only as necessary for lawful purposes from the person concerned by lawful and fair means. The credit reporting agency should take reasonable steps to give all

[303] *Credit Reporting Privacy Code* 2004, Clause 5.
[304] *Credit Reporting Privacy Code* 2004, Rule 11.
[305] *Credit Reporting Privacy Code* 2004, Clause 5.
[306] *Credit Reporting Privacy Code* 2004, Clause 5.
[307] *Credit Reporting Privacy Code* 2004, Clause 5.
[308] *Credit Reporting Privacy Code* 2004, Clause 9.

relevant information about the collection to the person. All reasonable security safeguards should be taken by the credit reporting agency and the person has the right to access and correct that information. Agencies must also only use the information after taking reasonable steps to ensure the information is accurate, up to date, complete, relevant and not misleading.

The credit reporter must also establish and maintain controls that as far as reasonably practicable prevent inaccurate information from being used or disclosed.[309] There must be monitoring of information quality and regular checks on compliance, identification and investigation of possible breaches and prompt and effective action in respect of any identified breaches and systematic review of such controls and procedures. Credit reporters must also take reasonably practicable measures to avoid any mismatching of information when comparing personal information.

23.5.4 Use and access

Credit reporters can only disclose information if it believes on reasonable grounds that disclosure is:[310]

- to a debt collector for the purposes of enforcing the individual's debt;
- authorized by the individual and for a prescribed purpose such as for a credit provider or a prospective landlord, employer or insurer to make a decision relating to that person in relation to credit, lease, employment or insurance respectively; or
- is necessary for law enforcement purposes, for insurance investigations, to protect public revenue, or court or tribunal proceedings; or where the individual will remain anonymous.

23.5.5 Consumer rights

Generally consumers cannot be charged for credit information, unless the request is urgent.[311]

23.5.6 Administration/ Dispute resolution

The credit reporting agencies initially handles all complaints for breach of the Code, and must designate a person to facilitate the fair, simple, speedy and efficient resolution of complaints.[312] Complaints must be acknowledged within five days and within a further

[309] *Credit Reporting Privacy Code* 2004, Clause 9.
[310] *Credit Reporting Privacy Code* 2004, Clause 11.
[311] *Credit Reporting Privacy Code* 2004, Clause 7.
[312] *Credit Reporting Privacy Code* 2004, Clause 8.

ten days a decision must be made or else the individual must be kept informed about how investigations are progressing.[313]

Between the time a request for the correction of personal information is received and until a decision is made in regards to that request, the credit reporting agency must either suppress the disputed information or clearly identify the information is disputed and currently being checked.[314]

When a complaint is made, the credit reporting agencies should also provide the individual with a copy of the Summary of Rights.[315] Once a decision is made, the credit provider must also notify the individual of his or her right to attach a statement to their credit information.[316] The credit provider must also keep the individual informed as to what response is being taken, provide him with a copy of any corrected material and advise of the complaints procedure if the request is refused.[317]

Complaints can also be made to the Privacy Commissioner. The Commissioner can also conduct audits of personal information maintained by credit reporting agencies to ascertain whether the information privacy principles are being adhered to.[318]

[313] *Credit Reporting Privacy Code* 2004, Clause 8.
[314] *Credit Reporting Privacy Code* 2004, Clause 7.
[315] *Credit Reporting Privacy Code* 2004, Clause 7, Schedule 4.
[316] *Credit Reporting Privacy Code* 2004, Clause 7.
[317] *Credit Reporting Privacy Code* 2004, Clause 7.
[318] *Privacy Act* 1993 (NZ), s13(1)(b)

24 Appendix C – Summary of Consumer Research

In Australia, there has only been some small-scale research conducted into the effect of the credit reporting system from the consumer perspective. While research and debate on credit report would benefit from a qualitative study of the experience of consumers, it proved beyond the scope of this project to conduct any large-scale survey of consumers. In this chapter we summarise the existing consumer research into credit reporting.

24.1 CHOICE survey

In 2003, CHOICE magazine asked 58 subscribers to apply for a copy of their credit report. Of the 50 who had a credit report in their name, 34% contained one or more mistakes, and 84% were mistakes of personal details, such as a wrongly spelt name or street name, or wrong date of birth, employment details, or addresses they had not lived at. CHOICE found that not enough care was taken with the highly sensitive information.

24.2 CCLC Debt Collection Report 2004

In April 2004, CCLC released its research report into debt collection. CCLC co-operated with Choice to execute an online survey in relation to debt collection, the results of which formed part of the report. A section of the report examines the problems in relation to credit reporting in the context of debt collection. Credit reporting and the application of the *Privacy Act* are discussed in Chapter 9 of the report, but discussion of general concerns in the context of other problems also occurs elsewhere in the report. An extract of the report relevant to credit reporting as well as Chapter 9 of the report are attached as **Appendix D.**

24.3 CCLC Credit Reporting Survey 2004

In preparing the Report into Debt Collection, CCLC also conducted a phone-in survey in relation to credit reporting. These results have not been previously published. The survey was promoted to consumers jointly with CHOICE.

In total, fifty-nine people contacted CCLC to respond to the survey. Of those 59 callers, 29 alleged that their credit reports contained inaccuracies, while 24 contended their report was accurate but unfair in the circumstances.

24.3.1 Inaccurate Reports

For the 29 callers whose credit reports contained inaccuracies, 79%, or 23 of them, were rejected for credit. However, despite this high percentage, only 3 of them went on to make a complaint to the Federal Privacy Commissioner, and of those, there was only 1 instance where the incorrect listing was removed. The other two complaints were still ongoing after 18 months.

Of the 29 inaccurate reports, there were 26 instances of incorrect default listings, 2 instances of incorrect personal information, and 4 instances of incorrect inquiry listings. Most callers (22) discovered the problem when they were rejected for credit, while 3 people applied for their credit report to check it, and 3 were alerted to a possible problem by a creditor or debt collector.

Twenty people became aware of the problem within the last 12 months; 4 discovered the problems between 1 and 2 years ago, 2 callers between 2 and 4 years, and 2 people between 4 and 6 years.

As to how long after the default listing did the caller become aware of it, the answers were more varied (less than three months – 3, between three and twelve months – 11, up to two years – 4, up to three years – 2, up to four years – 1, five years or more – 1, and can't remember – 5). As most people only became aware of the problems when they were rejected for credit, these numbers will not give a complete picture of how widespread the problem of incorrect listings is as some people may simply not know of the incorrect listings.

24.3.1.1 Complaints

Fourteen callers complained to the creditor and seven to the debt collector about the incorrect reports, twelve to Baycorp Advantage, three people complained to the OPC, and 2 sought advice from private solicitors. People also complained to the CTTT, and the BFSO, and where problem involved fraud and/or harassment, the caller also complained to the police.

There were also a number of people who did not make any complaints – 10. Seven out of the 10 people said they did not know where to complain to, 1 person said they were still inquiring, 1 said they didn't have their credit report yet, and 1 said there was no point.

Of those who made complaints, in 13 cases nothing was done. The credit report was corrected in 4 cases, and 1 person received an apology. Those who had their problems resolved, 1 was resolved between 2 to 3 months, one between 6 to 9 months, 1 between 9 to 12 months, 1 said over 2 years. Two cases were still ongoing.

24.3.1.2 Adverse consequences

The majority of callers who had an incorrect listing had been unfairly rejected for credit (23). 14 of them were debts that they did not owe, 4 of them paid the debt even though they did not believe it was owed. 18 callers had spent considerable time and energy dealing with the complaint, and 24 said they could not apply for credit while waiting for the listing to be removed from the credit report.

24.3.2 Unfair Reports

Twenty-four respondents thought that the listings on their credit report were accurate but unfair in the circumstances. Some examples of these situations included:

- I had not heard about the alleged debt until I found an adverse listing on my credit report
- I was in the process of disputing the debt when it was listed
- I was not notified that I would be default listed
- I was not told about the listing when it occurred
- I did not understand about credit reporting and how it works
- Data washing issue/privacy
- I thought I had a repayment plan with the credit provider.
- I own a $800,000 home but cannot borrow money or even get a mobile phone.
- It took me 3 months to find out how to get a copy of my credit report.
- I closed a phone account but was not told about the outstanding amount.
- I paid my share of an $80 phone bill and went overseas. The other half was not paid and a default was placed against me. I never had a chance to explain.
- I have been listed for 15 years by a finance company.
- I could not buy an appliance because of too many inquiry listings. I did not have a single default listing.
- The credit provider said the listing would be fixed once we paid but the listing was not removed.
- I had a listing placed against me for a phone bill that I did not owe. My wallet and drivers license had been stolen three months earlier and was reported to police at the time. Someone else had used my personal details to obtain the phone.

For the 24 callers whose reports were accurate but were unfair in the circumstances, 62.5%, or 15 of them, were rejected for credit. Only 2 of these rejected applicants made a complaint to the OPC, but the complaints had still not been resolved at the time of the survey.

Sixteen callers discovered the problem when they were rejected for credit, while 2 people applied for their credit report to check it, 2 were alerted to a possible problem by a

creditor or debt collector, and 1 person checked their report when preparing for their hardship variation, 1 person was informed by Baycorp and 1 person agreed to the listing as part of a debt settlement.

Eighteen people became aware of the problem within the last 12 months; 2 discovered the problems between 1 and 2 years ago, 2 callers between 2 and 4 years, and 1 person between 4 and 6 years.

As to how long after the default listing did the caller become aware of it, the answers were more varied (less than three months – 5, between three and twelve months – 5, up to two years – 6, up to three years – 0, up to four years – 1, five years or more – 2, and can't remember – 3). As most people (see above) only became aware of the problems when they were rejected for credit, we contend that these numbers will not give a complete picture of how widespread the problem of incorrect listings is as some people may simply not know of the unfair reports.

24.3.2.1 Complaints

Thirteen callers complained to the creditor and five to the debt collector about the problem reports, seven to Baycorp Advantage, three people complained to the OPC, and six sought advice from private solicitors. One person also complained to the Department of Fair Trading.

There were also a number of people who did not make any complaints. Five out of the eight people who did not complain said they did not know where to complain to, 1 person said they were still trying to settle the matter, 1 person had agreed to the listing as part of a settlement, and 1 person had not yet received their credit report.

Of those who made complaints, in 11 cases nothing was done. The credit report was corrected in 2 cases, and one person received an apology. Those who had their problems resolved, 1 was resolved in less than 1 month, 1 between 2 to 3 months, 1 between 3 to 6 months, and 2 for over a year.

24.3.2.2 Adverse consequences

The majority of callers who had an incorrect listing had been unfairly rejected for credit (15). 2 of them were debts that they did not owe, 3 of them paid the debt even though they did not believe it was owed. 7 callers had spent considerable time and energy dealing with the complaint, and 16 said they could not apply for credit while waiting for the listing to be removed from the credit report.

24.3.3 Detailed Case studies

The following illustrate the experience of the respondents to the CCLC 2004 credit reporting survey.

24.3.3.1 Telecommunications Disputes

The person had a default listed by Vodaphone even though there was never any default. The person rang when he found out about the default and told them he had paid. However he was asked to prove it, but he didn't have the records because it was four years ago. When Vodaphone checked their computer records, they discovered within 15 minutes that it had indeed been a mistake. They apologised and said they would remove the listing. Because of the default listing, the person applied unsuccessfully to get credit cards, personal loans, car loans etc. He made 6 or 7 applications that were rejected, and they have now become enquiries on the report. He had to ask his father to borrow money for him.

The caller believed that his report contained inaccuracies – he had default listings from Telecom even though he had no dealings with them, and 3 inquiry listings from lenders he had never dealt with. The caller thought it was unfair to have inaccurate information.

The caller had a default listed for an 8 year old $200 Optus debt. He did not know where to complain to but he had been unfairly rejected for credit and he paid the money even though he did not owe it.

A former flatmate stole the caller's identity and fraudulently used her details to get a Telstra account and chalked up a debt of $409.00. She complained to Telstra, the debt collector Alliance Factoring, Baycorp, and the Privacy Commissioner, and also the Police. Nothing happened for 18 months at the time of the call, the OPC even suggested she should just pay the debt.

A divorced caller had a default listed for a $500 Optus debt which belonged to his daughter. He had two credit reports as Optus did not have a driver's licence and residential address. His solicitor told him that even if he obtained a CTTT order that the debt is not owing the listing will not be removed. He was rejected for credit, he complained to the creditor, the debt collector and Baycorp, but nothing was done. He has been unfairly rejected for credit and he paid money he did not owe, and spent a lot of time and energy to deal with the problem.

The caller had a mobile phone dispute with Optus. He thought that half of the phone calls were not made by him. Optus wouldn't listen. He paid what he used (approximately $300) and refused to pay the rest (approximately $290). His son told him to pay it to save any future trouble. He paid the rest accordingly (at the

time the bill was 2 weeks in arrears). When he checked his credit report there was a default listing from Optus. He told the credit agency he had paid, they said to get back to Optus about it. Optus agreed to update and correct the information when he called. 6 months to 1 year later he applied for a loan and was rejected. He found out it hadn't been removed. He called Optus again, who said they would look into it. It took 2 years for Optus to resolve the problem finally.

The caller contacted One.Tel to ask if he could use their Internet service without entering into a contract, as he only wanted to use it for a month. The operator talked to the manager and verbally agreed. They later sent out a copy of the contract that didn't mention anything they talked about on the phone. He didn't sign it and sent it back. He stopped using the Internet service after more than 1 month, but they kept on chasing him for money. They could not produce a copy of a signed contract, as he didn't sign anything. When he applied for a car loan, he was rejected for credit.

The caller signed a mobile phone contract with Vodaphone under the impression that they would be unlimited SMS. He later found out that there was actually a limitation and disputed this with Vodaphone. Vodaphone told him to check the contract, which he did and found that there were 4 words missing on the right hand column. He refused to pay the rest of the money as he believed the contract was not complete. When he applied for a car loan the broker told him about a default listing. He did not complain as he didn't know where to complain.

About 2 years ago he lost his wallet with his driver's licence in it. He reported this to the police straight away. 3 months later he went overseas for 3 weeks. After he came back he went through all the bills and paid everything. Then he realised that he paid for a mobile phone bill, but he didn't even have a mobile phone at the time. He called AAPT and said that it was not his bill and didn't apply for a phone. AAPT refused to listen and said that his payment of the first bill was evidence that he used the phone. The bills continued to come in, but he refused to pay. He reported this to the police who took a long time to get back to me, and decided that it would cost them too much to sort this matter out for him. He then rang the TIO to sort this one. What happened was that the lost driver's licence was used to apply for the phone. The picture on the licence was changed, it looked nothing like the caller. The ombudsman wrote a letter to AAPT, which later reimbursed the payment.

A year later he applied for a mobile phone but he was rejected, but he just took out a $500,000 loan a week earlier. He found out from his credit report that AAPT made a default listing on his report.

The caller left the house and cancelled the phone bill but the next occupant used the same account and made $1500 worth of calls. The caller disputed the bill. He

complained to the creditor but nothing was done. His application was rejected when he applied to Energy Australia for an electricity account.

First NetComm listed a 6 year statute barred debt for a caller. They also made a false inquiry listing.

The caller had an unfair default listing. The caller had two phone accounts one was for a friend and the other his. He terminated his friends' account but was not told about the outstanding amount. He only found out about the debt when he was rejected for credit. He complained to the phone company but nothing was done. The creditor refused to fix the report so he had to wait while he complained.

Ms H disputed a bill with Telstra. Unbeknownst to her, Telstra sold the debt to a debt collector. Fearing difficulty in applying for a home loan, Ms H paid the disputed amount. She assumed that no listing would be made on her credit report. A listing marked as paid was made by the debt collector. Ms H now has difficulties obtaining a loan.

24.3.3.2 Inaccurate

The caller believed that he did not owe the debt, but Baycorp insisted it was accurate, He paid it so that he could get his listing marked as paid so he could get a loan.

24.3.3.3 Non- credit provider

The person did not pay a subcontractor because the work was not done properly. However the debt was listed and she could not buy her house because of the disputed debt. She nearly lost $64,000.00.

Mrs A had a bill due from the hospital. She told the hospital she was going overseas and gave her overseas address. The hospital sent the bill to her last address instead of her current address. After a delay, Mrs A became aware of the bill and paid it in full. Three years later Mrs A applied for a fixed term energy contract. She became aware of a default listing in her credit report made by the hospital for the delayed payment. She complained to the hospital and they agreed to remove the listing.

24.3.3.4 Inquiries

The caller's credit report was not wrong, but he had a lot of trouble obtaining credit because there were too many inquiries. When he migrated to Australia he

did not understand that too many applications for credit would appear on his credit report and affect his ability to obtain credit. This resulted in much hardship, and every time he applied for credit he had to explain his 'life story'.

The caller's credit report was not wrong but it was misleading because there were too many inquiries leading to rejection. The caller had a number of inquiries but some were the result of shopping around (eg 3 for one car purchase as co-borrower for her daughter). Another time she had two entries for the same car loan because the dealer messed up the contract and had to do another one. She had several phone inquiries because she was very canny with money and liked to switch providers regularly to catch the best deals. She said she couldn't believe how many years of addresses were on the credit report – 28 years. She used to have 2 Myers cards with a cumulative $10,000.00 limit and never defaulted, but when she applied for a Myers card to buy a fridge she was rejected because of the credit report.

The caller had an incorrect inquiry listing on her report. There were also two addressed on there that she could not remove. There was an inquiry listing for when she just made an inquiry about a car, she only showed them the drivers' licence but never applied in writing, but it still appeared on her credit report.

24.3.3.5 Identity matching

The caller had two files, one in her maiden name and one in her married name. This appeared to be having the effect of getting her rejected for credit, as the mere fact of having used two names seemed to imply she was a fraudster. She complained to Baycorp, a solicitor and the OPC, who told her it would be a waste of time because there would be a 6-month wait. Nothing was done in the end. She had been unfairly rejected for a mobile phone plan even though she had never had a default, had a government job for 8 years, husband was employed, and had plenty of assets. She had enormous difficulty getting hold of the file in her maiden name, Baycorp wanted to charge her again for the other file. When it was finally supplied neither file had a default.

The caller had a credit report but it seemed that Baycorp had confused him with his son, as there was a wrong birth date. He was rejected for credit and he complained to the creditor, Baycorp and the OPC, luckily his credit report was corrected and he received an apology.

The caller had two credit reports one in her maiden name and the other in her married name. There were a number of inquiry listings, and a number of them

she did not apply for. The caller now only has 1 home loan and 1 credit card and the inquiries are misleading.

A caller said that his report had been illegally data-washed, as there was an address on there that never appeared on any credit application or privacy consent.

24.3.3.6 Correct but unfair

The caller had a default listed, there was no dispute about the default but it was not removed even after he paid the debt in 2000. He was rejected for credit, didn't know who to complain to.

The caller had an ANZ credit card but when he went overseas his friend did not pay his bill. The account was closed and the debt was factored to RMG *and* Alliance. He paid RMG in full, but the listing was not corrected or removed. He was rejected for credit, and his solicitor made complained on his behalf. In the end his credit report was corrected within 3 to 6 months.

24.3.3.7 Credit report and debt collection

While on a repayment plan with AMEX, the caller found out that her default was still listed. She was rejected for credit and she complained to the creditor, but nothing was done. She has been unfairly rejected for credit even though she owns a $800,000 home, she cannot borrow or even get a mobile phone.

The caller had a default listed as the creditor insisted on listing as part of settlement. Caller tried to negotiate that this was unfair, as he had received the funds he could not pay by mistake or bank error. The default is now marked as paid but he is worried about getting credit in the future.

The caller had a hardship situation and a repayment arrangement. She was told that she would not be listed while she paid. Baycorp was very uncomfortable about discussing the listing. They provided the report promptly when paid but were very reticent to give further information. She has complained to the OPC but so far no response.

More than 6 years ago the caller owed $87 to Westpac as loan repayment. He was unemployed at the time and could not meet the payment on the agreed date. He however paid the $87 one week later. He later found out that a default listing was recorded on his credit report when applying for a home loan. His application was rejected as a result. He tried contacting Baycorp several times for the default

listing to be removed, but he was not sure if they have done so. He is still getting loan rejections, and has resorted to making joint applications with his wife.

Mr D obtained a credit card from the well-known department store David Jones. The card was not used for several years. On one occasion Mr D tried to use his card and was told that the card had expired through a lack of use. No money was owed.

Later that year he applied for a loan to build an extension to his house. The loan was rejected as his credit report had a default listing from the David Jones credit card. Knowing this to be untrue, as the card had expired and no money was owing on the card, Mr D called David Jones. He was told that he had to pay the amount owing. Only by doing this could he remove the default listing on his credit report and have his loan approved.

By this time the extension was complete and Mr D was put under considerable stress to make a payment. Desperate for money he paid David Jones the amount owing, even though he adamantly believed that he did not owe David Jones any money and had not defaulted on any payments. The default listing was removed from his credit report and his loan was approved.

Subsequently David Jones contacted Mr D and informed him that they had made a mistake. They refunded the money that he had paid and gave him a fifty dollar gift voucher as consolation.

24.3.3.8 Length of listing

The caller had a default listing of a debt that was statute barred (over 6 years) that she did not owe, and she still had a listing. She was rejected for credit and as a consequence she had to go to a non-conforming lender to get a loan.

25 Appendix D – Extracts from CCLC Debt Collection report 2004

Chapter 3.2

This section discusses Commonwealth regulation of debt collection practices. In relation to the ACCC guideline that states a collector should not exercise unacceptable pressure on a debtor, a debt collector should not "threaten to list a debtor on a blacklist or a bad debts database or otherwise threaten to take action which purports to affect a debtor's credit rating or ability to obtain credit, unless such listing is permitted under the credit reporting provisions of the Privacy Act."

Chapter 3.2.3

This section discusses the operation of the *Privacy Act* 1988 (Cth).

Chapter 5

This section discusses the issue in relation to proof of debt, and it documents a response from a consumer who stated:

> "At the time of being contacted (just before Christmas) the debt collection agency was unable to provide any useful information about the debt being recovered (i.e. who was claiming a debt against me, why and for how much. I would have thought that this information should have been provided in a clearly documented format. No details were given of who was claiming. It was not clear whether or not my name had been given to credit rating agencies or tenant blacklists. No confirmation was sent confirming the issue was closed."

Chapter 9 Credit reporting

Introduction

The credit reporting system is a system whereby credit providers report applications for credit made to them, and payment defaults on credit extended to a borrower by them, to a central body for the use of other credit providers. Creditors use the credit reporting system to assess the credit worthiness of potential borrowers. They also use it to assist them in collecting overdue payments. Debt collection companies who have purchased

debt from a credit provider also use it to assist them in collecting overdue payments. The main credit reporting agency in Australia is operated by Baycorp Advantage Limited, a listed company that also has a significant receivables management business in Australia and New Zealand.[319] There are a number of problems associated with the credit reporting system that affect consumers in a significant way.

What the law says

The credit reporting system as it applies to consumers is regulated by Part 111A of the Privacy Act, which limits the kind of information that can be held by a credit reporting agency, how long it can be held, who can obtain it and the purposes for which it may be used.[320] A debt collecting agency who has purchased a debt (and is deemed to be the credit provider under the Act) may access information for the purpose of collecting overdue payments; a debt collecting agency acting as an agent of the debt collector may not.

What is happening

Overview

The fear of having a default listed on their credit reports, or actually having a default listed, is a significant problem for debtors. CCLC clients and clients of other agencies report difficulties associated with credit reporting. The surveys conducted by the CCLC and CHOICE also reveal problems. The problems include:

- being threatened with having a default listed, or actually having a default listed, as a collection tool, including as a means of locating the debtor
- being listed for a default, or 'a serious credit infringement' without their knowledge
- being listed for very old and/or very small debts and
- inability to remove an inaccurate or unfair listing.

Listing as a collection tool

Threat of listing as leverage

The clients of the CCLC and other agencies fear having a default or other credit infringement listed on their credit report. A default listing seriously affects a person's ability to get credit for the duration of the listing (five years for a default listing or seven years for a listing for 'a serious credit infringement'). Consequently the threat of listing is a real threat. Using listing as a threat, or actually listing, gives the collector considerable

[319] Dun and Bradstreet also maintain a credit reporting agency.
[320] See para XR -- XR.

leverage in its relationship with the debtor. About one half of the respondents to the surveys reported that the debt collector or creditor had threatened to report a default on the respondent's credit report and/or to ruin his or her credit rating.[321] In some cases, the default had been reported even before the respondent was contacted, or in relation to a debt that had already been paid. A respondent to the online survey wrote:

- *"[The debt collector] promised an itemised bill would be sent to us before two weeks was up. [The debt collector] refused to allow a longer period to pay, we wanted the bill before paying, they said "sure wait but we will be blackmarking your credit report for failing to pay". The debt was for an old mobile phone [bill of $79]."*

Listing has also been used as leverage against CCLC clients.

A CCLC client was being pursued for a very old debt, the last payment of which had been made more that six years before. The debt collector admitted the debt was statute barred but stated it would list it as 'a serious credit infringement' on the debtor's credit report and "if she wants it removed she will have to pay the debt".

A caller had gone overseas, redirecting her mail to a PO box. A friend, with whom she was in email contact, was clearing the box. Her credit card statements did not reach the box and she was in arrears when the debt collector contacted her. The debt collector threatened to list unless she paid the full amount by the following Friday.

The fact that a debt has already been listed can also be an effective means of securing payment. A debtor may pay an alleged debt he or she does not believe is owed or is at least unsure about merely to have the default marked as paid. A number of respondents to the telephone survey had paid debts they believed they did not owe or were unsure of for this reason.

- Mr M contacted the liquidator of a telecommunications company about a default listing on his credit report. He explained that the phone was not in his name and that it was not his debt. The liquidator did not care and said that they had proof that it was his debt and told him to pay. He settled the matter by paying part of the debt in a lump sum payment and had the default marked as paid so he would be able to apply for a loan.
- Mr C was default listed on his credit report for a $500 debt to a telecommunications company. Having no statement and very little details, Mr C was uncertain if he owed the debt or not. He paid the debt anyway to try to remove the default listing. He has still not succeeded in getting the listing removed.

[321] 50% of online survey respondents and 54% telephone survey respondents.

Using listing as a location tool

When a debt collector buys a debt that is already listed as in default, the collector's name should be substituted for that of the original credit provider. However, the CCLC has been told that the default may be listed again. This means the five (or seven) year period of listing recommences. If the debt has not already been listed the debt collector may list as the new 'credit provider'. It may list immediately if the statutory requirements have been met[322], or it may list later. Once the collector is listed as the provider it may ask the agency for information about the debtor, including up to date location information. If the collector is unable to find the debtor it may list the debtor for a 'serious credit infringement' so that it will be automatically notified if the debtor applies for credit or his or her personal details are updated. The collector may list a default at first instance and later update the listing to a 'serious credit infringement'. In either case the collector is using the listing mechanism as a means of getting current location information.

A caller to the CCLC's advice line got behind in payments on her credit card on which she owed $13 000. After an unsuccessful attempt to make an arrangement to pay by instalments the bank eventually listed her as in default. Some years later she was contacted by a debt collector and discovered that the debt had blown out to $25 000. The debt collector had listed her in respect of the same debt for which she had been listed some years earlier. Furthermore it listed her as a 'serious credit infringement' despite the fact that she had not moved house in the interim.

A CCLC client checked her credit report to find she had been listed twice in relation to the same debt. She had been listed by the original credit provider (a bank) and, about two years later, by a debt collector who had bought the debt from the bank.

Being listed without being informed

A creditor may list a debtor for a default if the debtor is at least 60 days overdue in making a payment and the creditor has taken steps to recover the whole or part of the amount outstanding. When a debt collector buys a debt it may list a default assuming these preconditions have been met without further contact with the debtor although, as a matter of practice, some debt collectors inform the debtor that it may do so by letter to his or her last known address. This information will not, of course, reach the debtor if he or she has moved from that address. As a result, the debtor may not know that he or she has been listed at the time of listing and may not find out until he or she applies for credit or a loan, which may be some years later.[323] Respondents to the online survey wrote:

- "I was unable to pay my lease payments so I went to the car dealer and asked to trade my car and pay the difference. The dealer calculated the amount to pay out

[322] See para XR

[323] 52% of respondents to the online survey and 44% of respondents to the telephone survey did not know whether or not a default had been listed on their credit report in relation to the debt.

the lease but did not include the current month's payment. I acquired a loan to pay the amount. Four years later when I applied for a loan I was advised that a bad debt was listed for the months instalment and the loan [was] declined. . . . I was not aware that I had this slight until I applied for the loan. Credit agencies should be made to notify and justify these situations."

- "Only at a later time when I was denied credit did I discover that the default was still registered as being owed even though it had been paid."
- "I had referred the debt to the TIO and informed the debt collector and lawyers acting for them of this. I did not hear from them again until I recently obtained a copy of my credit report and found the debt listed as a default."

Inability to remove inaccurate listings

The law requires that information on a person's credit report is accurate.[324] However, if an individual disputes an entry on his or her credit report, it will not be removed as a matter of course, even temporarily while the dispute is being sorted out. All that the credit reporting agency is required to do is to include the individual's statement of the amendment sought and to notify people nominated by the individual of the amendment made, if any, or the statement of the amendment sought. The only recourse for the individual is to make a complaint to the Privacy Commissioner. It will take six OR MORE months for the complaint to be heard and in the meantime the individual is unable to access credit. Of the respondents to the online survey, 22% had a default listing for a debt they denied. Respondents to the telephone survey also reported inaccurate listings.

- Mr X was contacted by a bank for a credit card debt. He denied the debt as his signature had been forged. It took 4 years for the bank to start an investigation into the matter. A default listing was made on his credit report after he had clearly said that his signature had been forged.

CCLC clients have failed to have an inaccurate listing removed.

- A caller was listed as a clearout for a $300 debt, which had blown out to $750, including fees. The creditor settled for $530, which has been paid, but it will not lift the listing.

Listing old debts

[324]However, of the respondents to the online survey:
- 26% reported that the listing was accurate
- 31% reported that it was not accurate but did not know how to dispute it
- 23% disputed the listing but failed to have it removed
- 17% succeeded in having the listing removed and
- 3% added an explanation.

It is not permissible to default list a statute barred debt (that is, a debt to which the Limitation Act 1969 (NSW) applies).[325] In fact, the CCLC has been told that Baycoorp's policy is that listings should be made within 12 months of the actual default. Nevertheless a number of CCLC clients have been listed for very old debts. A number of CCLC clients and clients of other agencies have been listed for alleged debts to a failed telecommunications company. The debts are for small amounts and are often statute barred.

Respondents to the telephone survey also reported being listed for very old debts.

- A debt collector contacted Mr M for debt incurred more than 10 years ago. The debt collector had purchased the debt from a bank. Mr M was threatened with default listing and was asked to pay a lump sum. Mr M consulted legal advice and found out from the solicitor that the debt was statute barred. Further more, the debt had already been written off by the bank.

Listing small debts

CCLC clients have also been listed for very small debts, including:

- a $33 telephone debt
- a $70 telephone debt and
- $112 finance company debt.

A caller to the CCLC's advice line was listed for a $125 telecom debt which, he said, he failed to pay because he had had to move house after a fire. As a result he is unable to get a home loan.

About one half of the debts reported to the online survey were for less than $500. Of the respondents who reported a debt of less than $100, 23% were aware of a default listing for the debt.[326] Of the respondents who reported a debt of $100 to $499, 37% were aware of a default listing.[327] Respondents to the telephone survey also reported being listed for very small amounts.

- Mr V was contacted by a debt collector over a telecommunications debt for under $100. He believed he owed some of the money claimed but not the entire debt. The debt collector agreed to remove the default listing on his credit report if he paid half of the debt in a lump sum payment. He paid the agreed amount but the debt collector did not remove the default listing.

Listing as a 'serious credit infringement'

[325] See para XR.
[326] 23% did not have a default listing and 55% did not know.
[327] 14% did not have a default listing and 49% did not know.

The CCLC has been told that creditors and/or debt collectors routinely list alleged debtors they cannot locate as a 'serious credit infringement'. It is not a 'serious credit infringement' to be unable to be located by a creditor or debt collector. Being unable to be located is not sufficient evidence that a debtor is fraudulently evading his or her obligations in relation to credit, or attempting to do so, or an indication of an intention no longer to comply with the his or her obligations in relation to credit:

- A CCLC client was listed as a 'serious credit infringement' on the day he was appearing in court to have a judgment set aside. The creditor was present in the same court as the debtor on that day.
- A CCLC client, a non English speaking newly arrived immigrant, got an interest free loan to buy a refrigerator and a television from a department store. He subsequently moved interstate. He rang the creditor to tell them that he had moved and to find out how he should make his repayments. He was told he could pay only in cash in the city in which he bought the goods (1 000 km from the city in which he lived). He was listed as a 'serious credit infringement' before he had received the information about how to pay.

In client correspondence with CCLC on this issue, the Office of the Privacy Commissioner has reference to the Credit Reporting Code of Conduct and its Explanatory Memorandum in interpreting this provision of the Privacy Act. This approach focuses entirely on whether it was reasonable for the debt collector or credit provider to list the alleged debtor as a serious credit infringement at the time the listing was made. It does not take into account subsequent evidence that may be presented by the debtor of the steps he or she had taken to contact the credit provider. It also fails to take into account situations where, by no fault of their own, a person has simply not realised an account was outstanding, and upon becoming aware of the debt has taken immediate steps to settle it. In these circumstances, effective disqualification from mainstream credit for seven years can be a drastic consequence and does not appear to be what the relevant sections of the *Privacy Act* intended.

Potential conflict of interest

Baycorp Advantage is the main credit listing organisation in Australia. It also has a large receivables management business. This gives rise to a potential conflict of interest.

Other issues

In the course of our advice and casework, and in talking to the consumers who contacted us during the phone-in survey, CCLC has come across a range of other problems associated with credit reporting, its regulation and practical operation that are beyond the scope of this report. While a number of specific recommendations are made below they do not represent a comprehensive solution to even the problems raised in this report. CCLC is of the view that a more comprehensive inquiry into credit reporting in Australia and its impact on consumers is urgently warranted.

The CCLC's view

Listing agency should inform debtor default has been listed

In the CCLC's view, when a creditor or debt collector lists a default or a 'serious credit infringement' on a debtor's credit report the listing agency should be obliged to notify the debtor in writing at his or her last known address. Threats to list are not always followed by actual listing and, unless he or she is notified that listing has in fact occurred, the alleged debtor is in limbo, not know whether or not the debt has been listed. In addition, notification of listing will enable a person who believes he or she should not have been listed, for example, because the debt had already been paid, to dispute the listing immediately and not three or four years later when rejected for a credit card or a home loan. The notification of listing should include information about what to do if the recipient wants to dispute the listing. The CCLC acknowledges that the debtor's last known address will not always be his or her current address. Nevertheless, this would enable debtors who receive the information to attempt to address any outstanding issues between the creditor and themselves or to negotiate an outcome. It would certainly reduce the incidence of unexpected and often unexplained default listings on people's credit reports.

Recommendation

The listing agency should be obliged to notify an alleged debtor that a default or a 'serious credit infringement' has been listed on his or her credit report, within 14 days of listing. It should provide the debtor with information about how to dispute an inaccurate listing at the same time.

…

Creditor should not list while alleged debtor disputes the debt

Inaccurate or disputed listings can cause serious consequences to the individual whose credit rating is affected by the listing and he or she is powerless to do anything about it. In the CCLC's view, a creditor or debt collector should not be able to list a debt when the alleged debtor has denied liability for the debt until liability is ascertained. If the disputed debt has already been listed as a default or a 'serious credit infringement' the creditor or debt collector should be obliged to remove the listing.

Recommendation

The creditor should not be able to list a debt (and must remove an existing listing) when the alleged debtor has denied liability for the debt until liability is ascertained

…

Old and small debts should not be listed

Although it is not permissible to default list a statute barred debt it is permissible to list a debt a few months, weeks or even days before it becomes statute barred. The effect of this is to extend the adverse consequences of the default nearly five (or seven in the case of a listing for a 'serious credit infringement') years beyond the limitation period. This is inconsistent with the policy prohibiting the listing of statute barred debts and should not be allowed. In the CCLC's view the creditor should not be allowed to list a default later than one year after the issue of the default notice. Similarly, small debts should not be listed. The consequences of listing a debt for $100 or $200 or even $500 far outweighs the misdemeanour. Many small debts are telecommunications debts and appear to be related to problems with billings systems, billing errors and change of address problems. Small, possibly disputed debts are unlikely to be relevant to a risk assessment for future credit.

Recommendations

The creditor should not be allowed to list a default later than one year after the issue of the default notice.

The creditor should not be allowed to list a debt below a minimum amount ($500)

…

Chapter 10 Appendix

This section outlines and analyses all survey results. In particular, Chapter 10.3 outlines the responses that fall under "Threats to list default on credit report". Approximately half of all respondents reported that the debt collector or creditor had threatened to report a default on the respondent's credit report and/or to ruin his or her credit rating. In some cases, the default had been reported even before the respondent was contacted or in relation to a debt that had already been paid. The following three examples are discussed:

> *[The debt collector] promised an itemised bill would be sent to us before two weeks was up. [The debt collector] refused to allow a longer period to pay, we wanted the bill before paying; they said, "Sure wait but we will be blackmarking your credit report for failing to pay". The debt was for an old mobile phone [bill of $79].*
>
> A debt collector contacted Mr M for a debt incurred more than 10 years ago. The debt collector had purchased the debt from a bank. Mr M was threatened with default listing and was asked to pay a lump sum. Mr M

took legal advice and found out from the solicitor that the debt was statute barred. Furthermore, the bank had already written off the debt.

Mr N had a medical procedure costing under $500. He paid the amount requested and made a claim on Medicare for the balance. Sometime later Mr N was informed that the referring doctor could not refer for that service and Medicare would not pay. He then arranged for his surgeon to provide a referral at his next appointment in 3 months time. He was told this was acceptable and had made a successful claim to Medicare.

Mr N then received a letter from a firm of solicitors. The letter said Mr. N had not paid the medical bill and threatened to list a default on his credit report. Mr N contacted the creditor who was horrified and said it was all a mistake and that they would ask the debt collector to write to Mr N apologising and acknowledging the bill had already been paid and to remove any default listing.

Mr N received a letter from the debt collector which simply acknowledged that he had paid the account, making it sound as if he had done so in response to their letter. There was no apology or mention of his credit report. It may have been just a threat but Mr N was not sure.

Chapter 10.8

This section outlines the survey results in relation to whether or not the consumer was aware that they had a default listing. Approximately half of the respondents reported that they did not know whether or not there was a default listing on their credit report related to the alleged debt, and 30% reported that there was a default listing. Three case examples are then discussed:

My account to [telecommunications company] for $121.50 was paid on 31/12/03. I was given a default listing 20/1/04 and the default was listed as paid on 29/1/04. This has caused my personal loan application to be rejected. I was not aware that I had been listed and had trouble finding out who had listed me and why. After many phone calls and time wasted I have been led to believe the error by [telecommunications company] will be removed within 72 hours. They had no legal right to list me for an account that had been paid weeks earlier and the debt collector informed me that [telecommunications company] had received the payment from them before the 12th. There was no apology and I believe in the very least I am entitled to that.

Mr M contacted the liquidator of a telecommunications company about a default listing on his credit report. He explained that the phone was not in

his name and that it was not his debt. The liquidator did not care and said that they had proof that it was his debt and told him to pay. He settled the matter by paying part of the debt in a lump sum payment and had the default marked as paid so he would be able to apply for a loan.

Mr C was default listed on his credit report for a $500 debt to a telecommunications company. Having no statement and very little details, Mr C was uncertain if he owed the debt or not. He paid the debt anyway to try to remove the default listing. He has still not succeeded in getting the listing removed.

26 Appendix E – Caseworker questionnaire

Credit Reporting Research Project

Casework Service Questionnaire

Consumer Credit Legal Centre (NSW) Inc. is conducting a research project into the credit reporting system in Australia. As part of the project, we are surveying casework services to find out about their experience of working with clients who have a credit reporting issue.

The questionnaire is designed to draw out the experience of your organisation as a whole, hence only one worker is required to fill it out, but please feel free to consult with other caseworkers in your organisation. It should take approximately 15-30 minutes to complete. All information collected will be used anonymously, and only for the purpose of the Credit Reporting Research Project. We ask for your organisation details in Questions 1 – 3 only for the purpose of follow-up if required and also for possible comparison between various states.

Note: For all questions, please provide case studies where relevant.

In this questionnaire, the "credit reporting system" is a broad term used to encompass all aspects of the credit reporting system including, but not necessarily limited to:

- practices and polices of the credit reporting agencies
- practices and policies of the lenders and other subscribers to the agencies
- Part IIIA of the *Privacy Act*
- the Credit Reporting Code of Conduct
- the Office of the Federal Privacy Commissioner
- any relevant ADR scheme

Part 1 – About you

1. What is the name of your Service?

   _____

2. Who is the contact person for this questionnaire?

_____

3. What are your contact details?

   Phone: _____

   Fax: _____

   E-mail: _____

Part 2 – Preliminary

4. Does your Service receive calls from clients (or people seeking assistance from your service) who may have inquiries or complaints about credit reports?

   - o Yes
   - o No

5. How often do you receive such inquiries?

   - o More than once a week
   - o About once a week or fortnight
   - o About once per month
   - o About once every few months

6. Which of the following credit reporting issues do your clients experience? Please tick according to the frequency of occurrence as registered by your service.

	Often	**Sometimes**	**Rarely**	**Never**
Getting my credit report				
How do I get a copy of my credit report?				
They won't give me a copy of my credit report.				
My personal details on the credit report are incorrect.				
There is a listing on my credit report but …				
The amount owing in the listing is incorrect.				
The listing was made while I was disputing the debt with the credit provider.				
My dispute with the credit provider about the debt was never formally resolved but they still made the listing.				
The debt was already paid but they still				

made the listing.				
I don't recall dealing with the company who made the listing.				
I was never notified that I would be listed.				
I was never 60 days overdue.				
It is an incorrect inquiry listing.				
There are lots of inquiry listings on my report.				
It's a listing about an old debt (over 4 years) but it is not yet statute-barred.				
It's a listing about a statute-barred debt (over 6 years).				
It is an inappropriate clearout listing.				
Type of credit provider				
Mainstream bank				
Credit Union				
Sub-prime lender				
Telecommunications company				
Utilities				
Other – please specify				
Credit reporting and debt collection				
I was threatened with a credit report listing when I queried a debt/bill.				
I paid a bill I did not owe to prevent a listing on my credit report.				
I did not know about the debt and paid as soon as practicable after discovering the debt or default listing.				
Consequences				
I have been denied credit because there are too many inquiries on my report.				
I paid a bill I did not owe just to clear my credit report.				
Any other issues – please describe				

Part 3 – Resolving disputes: Self-Help

Please provide case studies to illustrate your answer.

7. In your opinion, is the general public successful in resolving their credit reporting issues?
   - o I think they are generally successful.
   - o I think they are generally unsuccessful.
   - o I don't know if they are successful.

8. Why do you think people are successful/not successful in this regard?

_____

_____

_____

_____

_____

_____

9. On what experience/information do you base this opinion?

_____

_____

_____

_____

_____

Part 4 – Resolving disputes: caseworker-assisted

Please provide case studies to illustrate your answer.

10. What strategies do you employ to resolve credit reporting issues for your clients, or to assist them in resolving a credit reporting issue?

_____

_____

_____

_____

11. How successful are you in resolving credit reporting issues?

12. In cases you have been involved in, which features of the current credit reporting system worked/helped and which ones didn't? Which features of the current system were a hindrance?

Part 5: Effect of credit report listings

Please provide case studies to illustrate your answer.

13. What are the consequences of an inaccurate or otherwise unlawful credit report listing for your clients?

_____

_____

_____

14. Are you aware of clients who have obtained compensation as a result of an inaccurate credit report listing? ❑ Yes ❑ No Give details:

_____

_____

_____

_____

_____

_____

15. Are you aware of clients who, in your opinion, should have been entitled to compensation but did not get compensation? ❑ Yes ❑ No Give details:

_____

_____

_____

_____

_____

_____

16. Are you aware of situations where a credit report listing may be technically correct and lawful and yet could have consequences that are unfair in all the circumstances? ❑ Yes ❑ No Give details:

_____

_____

_____

_____

_____

_____

Part 6: Recommendations for change

Please provide case studies to illustrate your answer.

17. Would you recommend changes to the credit reporting system in relation to the following categories? If so, please specify.

Dispute resolution

_____

_____

_____

_____

_____

_____

_____

Accuracy of listings

_____

_____

_____

_____

_____

_____

_____

_____

Listing of inquiries and possible link to unfair denial of credit

_____

_____

Improvement of lending practices

Preventing unfair denial of credit (proportionate consequences)

Improving consumer access and control

Other

18. Do you have any other comments?

Part 7: Case studies

19. Could you provide any other (anonymous) case studies? Please attach case studies.

==========

27 Appendix F – Credit Provider Interview Questions

Credit Reporting Research Project

Interview – Credit Provider

In this interview, the "credit reporting system" is a broad term used to encompass all aspects of the credit reporting system including, but not necessarily limited to:

- practices and polices of the credit reporting agencies
- practices and policies of the lenders and other subscribers to the agencies
- Part IIIA of the *Privacy Act*
- the Credit Reporting Code of Conduct
- the Office of the Federal Privacy Commissioner
- any relevant ADR scheme

Part 1 – Preliminary

1. Does your company use the current credit reporting system to assist with your lending decisions?
2. Is access to credit reports automatic or is there some guidance or criteria? If yes what are the criteria?
3. For what purposes do you use the credit reporting system?
4. How do you access the credit reporting system? By telephone, by fax, or through a computer network interface, or other? If other, please specify.

Part 2 – Use of credit reporting system to assist in lending decisions

Inquiry Listings

5. How do inquiry listings impact on your credit assessment processes (including but not limited to) behavioural scoring?
6. Are inquiry listings delineated by type, or is only the number of inquiry listings relevant?

7. Do you deny credit purely on the basis of the number of listings on the applicant's credit report?

Default Listings

8. How do default listings impact on your credit assessment processes (including but not limited to) behavioural scoring? Does a default listing automatically mean denial of credit?
9. Do you distinguish between types of default listing?
10. If yes, how do you distinguish between them? Do you take into account:
    a. Amount in default
    b. Date of default
    c. Type of company
    d. Customer notations
    e. Other - Please list.

Serious Credit Infringement Listings

11. How do serious infringement listings impact on your credit assessment processes (including but not limited to) behavioural scoring?
12. Do you distinguish between types of serious infringement listings?
13. If yes, how do you distinguish between them? Do you take into account:
    a. Amount in default
    b. Date of default
    c. Type of company
    d. Customer notations
    e. Other - Please list.

Other Listings

14. How do other listings, eg, court judgments, bankruptcy, dishonoured cheques, impact on your credit assessment processes (including but not limited to) behaviour scoring?
15. How do you treat cross-matches with credit reports? Do you make further investigations? If so, please specify what investigations.

Denying an application

16. If you are about to deny an application for credit, how much weight do you give to the applicant's explanation as to why a particular inquiry/default/serious infringement or other listing is on their credit report?
17. When denying an application for credit, what do you inform the applicant?

General

18. Do they think the current credit reporting system provides useful and reliable information? Why or why not? How important is it in your lending decisions?
19. We understand that in addition to direct access to credit reports, Baycorp offers a scoring service based on the information contained in a credit report. Do you make use of this service? If so, how does it interact with your own internal credit assessment processes?
20. Do you derive information from credit reports other than that already covered above? If so, what information and how do you use it?

Part 3 – Making of listings

Making of listings

21. In what circumstances do you access a customer or potential customer's credit report resulting in an inquiry listing?
22. In what circumstances do you make *default* entries on a customer's credit report? Is this discretionary or are there strict policy guidelines?
23. In what circumstances do you make *serious credit infringement* entries on a customer's credit report? Is this discretionary or are there strict policy guidelines?
24. Do you make default listings in circumstances where a customer is in default in relation to their contract but has a repayment arrangement in place?

Notification/ privacy consent

25. Do you always obtain privacy consents from customers/potential customers for accessing their credit report? If yes, at what stage?
26. Do you notify the debtor that a *default* or a *serious credit infringement* listing may be made before making the listing? If yes, at what stage?
27. Do you give notice or obtain privacy consent that adverse listings may be made at the time the loan was entered into?
28. What are the policies and procedures for accessing or amending a credit report (including any notices to the customer before or after any addition/change to their credit report)?
29. Are these processes subject to any form of audit or quality control? If yes, how often?

Part 4 – Complaints

30. What are your company's procedures for dealing with credit reporting complaints? Do you have written policies and procedures?
31. How often do such complaints arise?
32. How efficient is the system as it currently operates in resolving such disputes?
33. What aspects of the system do you find helpful or obstructive in resolving credit reporting disputes?
34. Do you have procedures in place to ensure that default listings are always later marked as paid if appropriate?
35. In what circumstances, if any, do you request the removal of a default listing, or downgrade or remove a serious credit infringement listing, rather than simply marking the debt as paid?

Part 5 – Suggestions for improvement

36. What changes to the system would you suggest to improve dispute resolution?
37. What changes to the system would you suggest to improve the overall quality of lending decisions?