Privacy Commissioner
Te Mana Matapono Matatapu

Amendment No 5 to the Credit Reporting Privacy Code 2004

Background Paper for Submitters on Changes to Notified Amendment

5 October 2011

Proposed Amendment No 5 to the Credit Reporting Privacy Code 2004 was publicly notified by the Privacy Commissioner on 17 May 2011, with an invitation to make submissions. Having considered the submissions, and after a series of public hearings, the Commissioner issued the amendment on 30 September 2011 with some changes. This paper explains the principal changes.

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In this paper:

- **the notified amendment** means the version dated 17 May 2011 which was publicly notified on the same date; and
- **the amendment** means the final version issued on 30 September 2011.

Amendment No 5 to the Credit Reporting Privacy Code 2004

Background Paper on Changes to Notified Amendment

1. Introduction

1.1 The amendment

Amendment No 5 was issued by the Commissioner on 30 September 2011. The amendment, which comes into effect on 1 April 2012, makes significant changes to credit reporting in New Zealand. Most notably, the amendment allows for the ongoing collection and reporting of repayment history information by credit reporters. The amendment makes other changes to various parts of the code.

More information on the effect of this amendment can be found in the Information Paper on the amendment, also dated 30 September 2011, available at www.privacy.org.nz. This paper focuses only upon the principal changes made as a result of the submission process.

1.2. The submissions process

On 17 May 2011, the Commissioner publicly notified the proposed amendment and invited submissions to be made by 24 June 2011.

Approximately 70 written submissions were received from credit reporters, banks, finance companies, telecommunications companies, government, consumer groups, insurers, individuals and a number of other groups.

A series of public hearings were held in Auckland and Wellington during July 2011 for the 24 submitters who wished to be heard by the Commissioner. In addition, a meeting was convened by the Office of the Privacy Commissioner in August 2011 to enquire into the situation in the retail energy sector. Follow-up discussions were held with several stakeholders, including major credit reporters and the Retail Credit Association of New Zealand.

2. Outline of selected points raised by submitters

The major focus of submissions was on the proposal to permit the reporting of repayment history information.

Submissions from the credit industry and others, including the Reserve Bank, the Commission for Financial Literacy and Retirement Planning and the NZ Federation of Family Budgeting Services were generally supportive of the proposed amendments. By contrast, many of the comments from individuals expressed concern about the move to more comprehensive reporting. The Commissioner considered all submissions carefully and they are available at www.privacy.org.nz.

2.1. Credit default information

Some submitters made comments about specific parts of the new definitions relating to credit defaults. Some submitters opposed the introduction of a $100 threshold, noting the effect upon recovering small debts. Others supported the threshold or urged that it be raised.

Having considered the submissions, the Commissioner remained satisfied that the changes were warranted. The key objective of the credit reporting system is to support the assessment of creditworthiness, not small debt collection. However, the reporting of repayment history will create new incentives to meet due payments, including small payments.

A number of specific changes, outlined below, have been made to the definitions that ensure consistency and improve the usability of the provisions. Some changes flow from points made in submissions. The Commissioner has also chosen to include a temporary transitional schedule, addressed in detail below, which will permit the continued reporting of existing small defaults that exceed $50 for 6 months following the commencement of the amendment.

2.2. Repayment history information

As noted above, opinion on this amendment was split. Many submitters emphasised the desirability of a move to more comprehensive reporting. Others were generally opposed, or raised specific points of concern. The Commissioner considers that the concerns have been adequately addressed in the amendment. The Commissioner has decided to proceed with the proposal to permit the reporting of repayment history information.

Some submitters made more specific comments about aspects of this amendment:

1. the requirement for authorisation could be practically difficult;
2. credit reporters should be permitted to backload the previous two years of repayment history information;
3. credit reports should show where a payment was missed for some good reason, recognising, for example, situations of hardship;
4. more than 24 months repayment history information should be permitted to be reported;
5. credit reporters should be permitted to collect new subscriber information prior to 1 April 2012 for testing purposes.

2.2.1. Authorisation

Individual authorisation has always been fundamental to the operation of the code and a fair and transparent credit reporting system. Amendment No 5 will significantly change the depth and breadth of personal information provided to credit reporters. Current practice will change substantially. In this context, the Commissioner does not accept that a departure from the central concept of authorisation is warranted. Credit providers will have to obtain authorisation from their customers for the ongoing reporting of repayment history information.

However, the Commissioner does recognise that some practical issues exist where a credit provider wishes to begin uploading repayment history information about a current customer. The natural point at which authorisation for credit reporting is obtained is at the point of signing a new credit contract. Current customers will already have signed this contract and may already have authorised some information sharing with credit reporters.

The Commissioner has decided to provide more explicit rules to govern the transition. Where credit providers propose to upload information in reliance on previously obtained authorisations, they will need to provide customers with a clear notice outlining the changes in practice. This is addressed in the temporary transitional schedule set out below.

2.2.2. Backloading

Backloading would run counter to the fundamental principle of informed individual authorisation. Repayment history information can only be disclosed to credit reporters with the authorisation of the individual. It is crucial that individuals are made aware of the new practice of reporting. The Commissioner has not permitted backloading.

2.2.3. No payment required

The reporting of repayment history information, and associated concepts of reciprocity and consistent data standards, will reduce a credit provider's discretion to report missed repayments. However, credit providers sometimes decide not to require a repayment, perhaps in recognition of individual hardship.

The notified amendment permitted the reporting of whether or not an individual had made a required repayment on their credit account. It did not explicitly address the situation where no payment was required in a given month. To address this, the definition of "repayment history information" has been changed to permit the reporting of whether or not a payment was due at all. This should allow for more accurate and fair reporting of this information.

2.2.4 Reporting period

A submission was made to increase the reporting period for repayment history information to 30 months from the date a payment is due. The proposed period of 24 months allows the credit reporter to report two complete annual cycles of repayment history and is the period proposed in Australia. There is evidence to suggest that older information is less predictive. The Commissioner does not accept a case to increase this period to 30 months as one submitter suggested.

However, it is unlikely that subscribers will upload repayment history information in the month it is due but, rather, the following month. The Commissioner is satisfied that the code

should provide that the 24 month maximum reporting period should run from the month after the payment is due.

2.2.5. Systems testing

The prior testing of systems designed to carry and process sensitive repayment history information is to be encouraged. The amendment requires credit reporters to implement many safeguards relating to the use and disclosure of this information and it is in the public interest to ensure that credit reporters are sure such safeguards have been adequately implemented. While real personal information should not normally be used for testing, there may be circumstances where this could be useful. This is addressed in the temporary transitional schedule set out below.

2.3. Disclosure of credit account information

There was general support for the approach the amendment has taken to the disclosure of credit account information (including repayment history information).

There was some concern that the inclusion of utilities in the more comprehensive credit reporting regime could have a negative impact on certain sectors of society, including adults in shared accommodation. As a result of these concerns, the Commissioner convened a meeting of retail energy providers to explore their relevant credit practices. In this meeting, a number of submitter concerns were discussed and resolved (for example, the availability of pre-pay energy or the use of multiple names on energy accounts).

As membership of the Telecommunications Dispute Resolution Service ("TDRS") is not now contingent on membership of the Telecommunication Carriers' Forum, the definition of a "telecommunications service provider" now requires direct membership of the TDRS.

An insurer submitted that mortgage insurers have a legitimate need to access credit information beyond an initial decision to underwrite a loan. The Commissioner accepted this submission and insurers can now access credit information for decisions on underwriting or continuing credit-related insurance.

2.4. Suppression of credit information for victims of fraud

There was broad support for the proposal to permit individuals to request that their credit information be suppressed if they are at risk of fraud. Some submitters raised specific practical issues. One submitter opposed the proposal because of concerns about its practicality.

The Commissioner remains convinced that these amendments should proceed. However, the provisions have been clarified to emphasise that the process responds to the risk of new account fraud – that is, the obtaining of new credit in someone else's name. A number of improvements to the suppression provisions have been made that should ensure that the scheme is effective in achieving this goal and are clearer and more precise. For example:

1. Credit reporters can update credit information about credit accounts that were already listed at the time of the request, provided that these accounts are not affected by fraud.
2. Credit reporters can disclose suppressed information to certain subscribers in limited circumstances but generally not for the purpose of granting credit.

3. Credit reporters must notify credit providers that have credit accounts listed about a request for suppression.

Some other changes have been made to better protect individuals, including:

1. There is now a 12 month minimum period for an extension of suppression.
2. A password or PIN is to be issued for use in later interactions, to protect against further fraud.
3. Credit reporters must make certain information available to ensure that individuals are well aware of what to expect from the scheme.

Changes have been made to address requests that have been made in bad faith, including empowering credit reporters to:

- refuse an extension request where it appears that the request is vexatious or not made in good faith; and
- terminate a suppression where it becomes apparent that the individual misrepresented a material fact.

2.5 Managers of personal property

Civil society, and especially groups representing affected communities, was not supportive of the proposal to make explicit reference to property managers under the Protection of Personal and Property Rights (PPPR) Act. The problem that the amendment sought to address would appear to be fairly rare and may not justify the special arrangements proposed. Accordingly, the Commissioner considers that this proposal should not proceed at this time.

2.6. Other important changes

There was general support for the approach of the amendment to:

- clarifying the definition of “credit”;
- “serious credit infringement information” and “credit non-compliance action information”;
- pre-screening;
- quotation enquiries; and
- changes relating to external accountability.

Some minor drafting improvements have been made to some of these amendments.

3. Outline of changes made to notified amendment

3.1. Deleted clauses

The following clauses contained in the notified amendment have been removed, with the remainder of the amendment being renumbered accordingly:

1. *Old clause 7* (definition of credit information - manager of personal property information) – The Commissioner has chosen not to proceed with this proposal.
2. *Old clause 12* (collection of manager of personal property information) – The Commissioner has chosen not to proceed with this proposal.
3. *Old clause 14* (use of information suppressed pursuant to clause 9) – The use of suppressed credit information is now regulated by a new Schedule 7 (see below).
4. *Old clause 20* (charges) – Charging in relation to suppression is now regulated by a new Schedule 7 (see below).
5. *Old clause 21* (victims of fraud may request the suppression of credit information) – The suppression provisions have been moved to a new Schedule 7.
6. *Old clause 24(2)* (subscriber agreement) – The Commissioner has chosen not to proceed with this proposal.

3.2. Clause 2 (commencement)

A small change has been made to reflect the addition of a new transition schedule, parts of which will come into force on the earlier date of 1 December 2011.

3.3. Clause 5 (definition of credit information – credit default information)

The $100 threshold has now been repeated in the definition of a guarantor default to ensure consistency with treatment of other small defaults.

References to “written notice” have been replaced by a requirement to “notify” to avoid the impression that the code requires a particular method of notification. Subparagraphs (a) and (b) of the definition of guarantor credit default, which relate to the requirement to notify the guarantor, have been brought together for simplicity.

3.4. Clause 6 (definition of credit information – repayment history information)

The notified definition of repayment history information may have prevented the reporting of cases where, for whatever reason, a payment was not due and payable. A new subparagraph (a) has been inserted into the definition of repayment history information, permitting the credit reporter to report whether or not a periodic payment is due in a particular month.

3.5. Clause 7 (old clause 8) (definitions relating to disclosure of credit account information)

The definition of “telecommunications service provider” has been amended to reflect that telecommunications companies must be members of the Telecommunications Dispute Resolution Service. A small change has also been made to ensure consistency with the Telecommunications Act 2001.

A new amendment has been added (clause 7(2)) which replaces the definition of “prospective insurer” to align it with rules 11(2)(b)(iv) and 11(3)(c)(ii).

3.6. Clause 9 (old clause 10) (definition of serious credit infringement and new definition of credit non-compliance action)

A small change has been made to the definition of "confirmed credit non-compliance action information" that properly refers to clause 3A of Schedule 3.

3.7. Clause 10 (old clause 11) (collection of credit non-compliance action information)

A small drafting change has been made.

3.8. Clause 11 (old clause 13) (pre-screening)

A small drafting change has been made to subclause (1).

3.9. Clause 12 (old clause 15) (credit scores)

The notified new rule 10(4) has been changed to 10(3) to reflect the removal of the above amendment.

New subrule (3) prohibits the use of the fact of a request for suppression in the creation of credit scores. This is to ensure that individuals are not penalised for seeking a suppression.

3.10. Clause 13 (old clause 16) (disclosure of credit information)

A small drafting change has been made to clause 13(1).

A new amendment has been added (clause 13(2)) which amends rule 11(2)(b)(iv) to permit the disclosure of credit information to an insurer for the purpose of making a decision on the continuation of insurance in respect of a credit related transaction.

3.11. Clause 14 (old clause 17) (disclosure of credit account information)

The new rule 11(3)(c)(ii) has also been amended to permit the disclosure of credit account information to an insurer for the purpose of making a decision on the continuation of insurance in respect of a credit related transaction.

3.12. Clause 15 (old clause 18) (disclosure of credit information when it is suppressed)

The new rule 11(3)(d) has been amended to refer to the new Schedule 7, which sets out the new suppression provisions.

3.13. Clause 16 (old clause 19) (disclosure of fact of suppression)

A small grammatical change has been made.

The new rule 11(4A)(b) has been amended to refer to the new Schedule 7.

3.14. Clause 18 (old clause 23) (maximum reporting periods)

The reporting period for repayment history has been increased from 2 years from the date the payment is due and payable to 2 years from the month following that date. The maximum reporting period now starts from the date the payment was "due", rather than "due

and payable". This change reflects the change made to the definition of repayment history information, set out at paragraph 3.4 above.

A guarantor debtor default may now be reported until 5 years from the date the guarantor was notified of the default. This recognises that a guarantor may be notified some time after the debtor originally defaulted.

The entry relating to "manager of personal property information" has been removed as the Commissioner has chosen not to proceed with this proposal.

3.15. Clause 21 (old clause 26) (assurance report)

The word "should" in the opening sentence of clause 1 of Schedule 6 has been replaced with the word "must".

Some small changes have been made to clause 3 of Schedule 6 to align it with the new approaches taken in Schedule 7, which relates to the suppression of credit information.

3.16. Clause 22 (suppression of credit information for victims of fraud)

The notified amendment placed the suppression provisions in a new clause 9. These provisions have now been moved to a new schedule – Schedule 7. This has the advantage of brining together cross cutting issues and permitting the use of subheadings. The major improvements made to the suppression provisions are set out above at paragraph 2.4.

3.17. Clause 23 (transitional arrangements associated with introduction of comprehensive credit reporting)

A new Schedule 8 has been inserted, intended to facilitate the transition to more comprehensive credit reporting. This Schedule is temporary, expiring on 31 March 2013. The Schedule provides for the following:

1. The collection and use of personal information (including the new information permitted to be reported by the amendment) for systems testing. This is permitted from 1 December 2011 (clauses 3.1-3.3).
2. Where a subscriber is relying on an existing authorisation (obtained prior to commencement of the amendment) to list credit account information with a credit reporter, it must also take steps to notify the individual of the changes in practice (clauses 4.1-4.2).
3. Credit reporters may continue to report small defaults (relating to overdue payments on amounts equal to or more than $50) until 1 October 2012 (clauses 5.1-5.6).
4. Credit reporters must provide reasonable assurances of compliance with the Schedule in their annual assurance reports (clause 6.1).