



**Submission by the
Financial Rights Legal Centre**

Productivity Commission

Data Availability and Use Issues Paper, April 2016

July 2016

About the Financial Rights Legal Centre

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumer's understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the Credit & Debt Hotline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. Financial Rights took over 25,000 calls for advice or assistance during the 2015/2016 financial year.

Financial Rights also conducts research and collects data from our extensive contact with consumers and the legal consumer protection framework to lobby for changes to law and industry practice for the benefit of consumers. We also provide extensive web-based resources, other education resources, workshops, presentations and media comment.

This submission is an example of how CLCs utilise the expertise gained from their client work and help give voice to their clients' experiences to contribute to improving laws and legal processes and prevent some problems from arising altogether.

For Financial Rights Legal Centre submissions and publications go to www.financialrights.org.au/submission/ or www.financialrights.org.au/publication/

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Credit & Debt Hotline 1800 007 007
Insurance Law Service 1300 663 464
Aboriginal Advice Service 1800 808 488

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Introduction

Thank you for the opportunity to comment on the Productivity Commission's Data Availability and Use Issues Paper. The Financial Rights Legal Centre (Financial Rights) wishes to confine its comments to matters relating to Australia's consumer credit reporting regime, insurance reporting and privacy protections. In doing so we seek to variously address the following questions posed in the Issues Paper:

- *How can the sharing and linking of private sector data be improved in Australia?*
- *How can individuals' and businesses confidence and trust in the way data is used, be maintained and enhanced?*
- *What types of data and data applications (public sector and private sector) pose the greatest concerns for privacy protection?*
- *What impediments currently restrict consumers' access to and use of public and private sector data about themselves?*
- *Are regulatory solutions of value in giving consumers more access to and control over their own data about them?*

In summary, we wish to make the following points:

Consumer Credit Reporting

1. We have grave concerns about unintended consequences in making credit reporting mandatory.
2. Australia's comprehensive credit reporting (CCR) regime is relatively new, having commenced in March 2014, and the Principles of Reciprocity and Data Exchange (PRDE) even more recent in December 2015.
3. There has as yet been no review on the effectiveness of the CCR regime in meeting the objectives of the Privacy Act 1988 changes on credit reporting.
4. There is no evidence to support any change to the current CCR regime given there has been no independent review of effectiveness.
5. There are no jurisdictions that we are aware of that use mandatory credit reporting.
6. Australia's regulatory system is to be distinguished from the United States regime as we have responsible lending and financial hardship provisions enshrined in legislation.
7. Financial Rights contends that, as a general principle, evidence must be used to underpin the development and implementation of best practice policies. At this point Financial Rights see no evidence to support any change until the current voluntary CCR regime has been in use and an independent review has been commissioned.

Insurance reporting

1. Similar to the regulations in place already for the voluntary consumer credit reporting regime, Financial Rights recommends that the Federal Government, working with the Office of the Australian Information Commissioner and the insurance industry, overhaul the insurance reporting system through regulation.
2. Central to any regulations should be rules to address issues of accuracy, timing, consistency of information, dispute resolution and the application of natural justice. The management of the database should also be put out to tender and principles of competition applied.
3. Consumers should also have the right to access the information held on them for free. Currently this is not the case.

Access to Private Sector Data: Consumer perspective on the comprehensive credit reporting regime

Financial Rights notes that this Productivity Commission Issues Paper is directed at examining options for improving availability and use of both public sector and private sector data. Financial Rights however has concerns regarding any pre-emptive changes to the CCR regime including turning a voluntary regime into a mandatory regime before it has had a chance work and be reviewed to properly analyse the positive and negative consequences for consumers, businesses and government.

The key arguments that we put forward to argue against any pre-emptive changes to the regime are as follows.

1. Mandatory consumer credit is not applied in other jurisdictions

Financial Rights is not aware of any other jurisdictions where consumer credit reporting is mandatory.

2. Mandatory CCR is not recommended by the ALRC

The Australian Law Reform Commission (ALRC) in its 2007 *Review of Australian Privacy Law*¹ advised against compulsory reporting obligations in its recommendation for a more comprehensive credit reporting system. The ALRC reported these conclusions in its *For Your Information Report*² stating that such mandatory requirements were inappropriate and that the matter was best left to the responsibility of credit providers themselves and industry associations to decide how to proceed with information sharing within the framework provided by the legislation. These conclusions were made in light of the principle of reciprocity that was generally prevalent and supported by credit providers. The ALRC consequently

¹ Australian Law Reform Commission, *Review of Australian Privacy Law*, DP 72 (2007), Proposal 51-2.

² Australian Law Reform Commission, *For Your Information Report*, Australian Privacy Law and Practice, Vol 3, Report 108, May 2008, para. 55.193.

proposed that the code developed by industry should provide for access according to principles of reciprocity.

3. *An independent review of CCR has yet to be conducted*

There has been no independent review of CCR and by any standard it is too early to conduct such a review. The CCR regime commenced 1 March 2014. Many credit providers are still making system changes. Many credit providers also waited for the Principles of Reciprocity and Data Exchange (PRDE) Code. We contend that it is normal to have a transition period and 2 years is reasonable – from the time the required regulation was in place – in this case ending with the PRDE.

4. *CCR implementation indicates growing effectiveness of the voluntary regime*

Financial Rights believes that the iterative development and implementation of the voluntary CCR regime demonstrates that the regime is growing in effectiveness.

In March 2014, legislation for CCR came into effect. Implementation of the regime, however, has taken considerable time.

In November 2014, the Financial System Inquiry, chaired by David Murray, in its Final Report indicated that the CCR would not be operational until March 2015 at the earliest.³ The Australasian Retail Credit Association (ARCA) reported that industry was then in the process of developing a data-sharing agreement based on reciprocity between credit providers to implement the CCR.⁴ The agreement was not expected to be finalised until March 2015 at the earliest, and industry moreover anticipated that significant portions of credit data will not be exchanged until late 2016 or early 2017.⁵

In February 2015, ARCA sought authorisation from the ACCC in relation to establishing the PRDE. The PRDE is described as “a standardised system for exchanging credit liability information between credit reporting bodies and credit providers”⁶ consisting of a voluntary set of rules to govern the exchange of comprehensive credit and credit reporting information by lenders.⁷ ARCA sought authorisation in relation to provisions of the PRDE that fall into the categories of Reciprocity Obligations, Consistency Obligations and Enforceability Provisions. In December 2015, the ACCC granted authorisation to ARCA for the above-mentioned provisions for five years until 25 December 2020.⁸ The PRDE has therefore only been

³ Australian Government, *Financial System Inquiry, Final Report*, November 2014, p 190.

⁴ The Australian Retail Credit Association (ARCA), Second round submission to the Financial System Inquiry, 2014, p 3-4

⁵ Australian Government, *Financial System Inquiry, Final Report*, November 2014, p 190-191.

⁶ ACCC, Australian Retail Credit Association Limited, Authorisation - - A91482, <http://registers.accc.gov.au/content/index.phtml/itemId/1184971/fromItemId/278039>, accessed 18 July 2016.

⁷ Elsa Markula, The Principles of Reciprocity and Data Exchange (PDRE) and what it means for AICM members, *Credit Management in Australia*, July 2015 http://aicm.com.au/files/3714/5525/3504/The_principles_of_reciprocity_and_Data_exchange.pdf

⁸ ACCC, Australian Retail Credit Association Limited, Authorisation - - A91482, <http://registers.accc.gov.au/content/index.phtml/itemId/1184971/fromItemId/278039>, accessed 18 July 2016.

operational for less than a year. ARCA projected that contribution of full comprehensive data by signatories would be achieved by 2017.⁹ ARCA further anticipated that there would be sufficient factors present driving critical mass participation in the PRDE, thereby rendering unnecessary any government intervention to implement a mandatory system of CCR.¹⁰ ARCA advised that mandatory credit reporting “would likely be more costly and less responsive” than the industry framework of the PRDE.¹¹ The PRDE review is scheduled to be reviewed three years after its commencement.¹²

In March 2016, Veda reported that CCR progression was gaining momentum and that its implementation in Australia is doing well “compared to other markets that have gone through this transition and in light of the scale of change lenders need to undertake.” Participating lenders were reported to have provided CCR data on 24 per cent of retail Australian credit accounts.¹³

The Financial System Inquiry in its Final Report of December 2014 recommended that the Government should only consider legislating mandatory participation if, over time, participation in the voluntary comprehensive credit reporting scheme was inadequate. The Inquiry suggested that the Government, in 2017, should review industry’s participation in CCR to determine whether a regulatory incentive or legislation for mandatory reporting is required.

Financial Rights contends that 2017 is too soon given that the PRDE has only recently been implemented.

5. CCR interaction with existing regulation

There has also been a lot of industry confusion as to how to implement the changes in the context of other regulatory obligations on credit providers. Australia has strong, best practice laws dealing with financial hardship and responsible lending. These are critical consumer protection laws that prevent harm to consumers on an everyday basis. It is crucial that any change to CCR does not interfere with those laws.

A particular concern expressed by Financial Rights over many years is that CCR may be a reason for consumers to be scared to approach their credit provider and exercise their rights to a financial hardship arrangement. This would be a poor outcome for consumers if this occurred, leaving them exposed to debt collection and repossession. Great care needs to be taken by credit providers to ensure that consumers have access to financial hardship arrangements and the credit provider’s systems can make appropriate changes to CCR (for example, repayment history information) to ensure it is accurate and reflects the arrangement.

⁹ ACRA, Principles of Reciprocity and Data Exchange (PRDE), ARCA submission in response to market inquiries, Public version, 29 May 2015, p 17.

¹⁰ Ibid.

¹¹ Ibid, p 18.

¹² Ibid, p 67.

¹³ Veda, “Veda celebrates two years of Comprehensive Credit Reporting with a positive outlook”, 15 March 2016, <https://www.veda.com.au/insights/veda-celebrates-two-years-comprehensive-credit-reporting-positive-outlook>, accessed 18 July 2016.

If this was not reflected accurately this could lead to a rise in disputes in External Dispute Resolution and harm for consumers.

Another concern is the impact of any changes to CCR on responsible lending laws. Australia has best practice legislation ensuring consumers are given loans that are “not unsuitable.” ASIC Regulatory Guide 209 makes it clear that credit reporting is a tool and it is not a replacement for enquiries about a consumer’s financial situation and purpose, or the verification of a consumer’s financial position. It is simply not possible under our current laws to automate loans based on a credit report and nor should it be as this would undermine responsible lending.

6. There is currently no evidence to demonstrate the benefits of credit reporting for consumers

Those advocating for mandatory credit reporting have asserted there would be a number of benefits including better access to finance (at a better or more competitive price) and better lending decisions. There is no independent evidence – taking into account the current regulatory environment in Australia – to support these claims.

In contrast, there is evidence that CCR does lead to risk based pricing with consumers having to pay more for credit. There is also evidence that there is harm for low income and disadvantaged consumers from CCR in the UK.¹⁴

7. There are a number of identified problems with the current CCR regime

Financial Rights has already identified problems with the use of CCR, even in its currently limited form. These include:

1. Credit providers are inaccurately recording repayment history information (RHI) after a consumer has requested financial hardship. That is, some credit providers are reporting customer payments under hardship variations as delinquent in their RHI, when in fact, if a consumer is making payments on time in accordance with the new variation their RHI should be recorded as paid on time, regardless of what the original credit contract states.
2. Credit providers are indicating they may not comply with a Financial Ombudsman Service decision that clearly set out a view on how RHI is to be recorded.
3. A debt collector accessing credit reports in the thousands without authority. On this a complaint has been lodged with the Office of the Australian Information Commissioner and is in a queue.
4. The Office of the Australian Information Commissioner is severely under-resourced
5. Representative complaints have been lodged against Veda by Financial Rights Legal Centre, Consumer Action Law Centre, Australian Privacy Foundation and Financial Counselling Australia. Complaints have included:

¹⁴ *Does increased credit data sharing really benefit low income consumers?*, Centre for Responsible Credit, Damon Gibbons February 2013.

- a. access to free credit reports are not as easy to access or identify as paid reports via Veda's websites;
- b. there is no option to obtain a free report over the phone but a paid credit report is available over the phone;
- c. identification requirements for a free credit report are more onerous than for paid reports;
- d. Veda charges consumers for accessing their credit reports when they are entitled to free reports;
- e. a free credit report was not provided within the required 10 days;
- f. the cost of paid credit reports is excessive and unreasonable;
- g. Veda does not include 'Vedacore' information in free reports; and
- h. Veda inappropriately uses consumers' personal information for direct marketing purposes.

These current problems are serious and indicate a need to ensure the current system is working before any further changes can be considered.

Recommendation

The Financial Rights Legal Centre strongly recommends that:

1. mandatory credit reporting not be implemented or considered;
2. an independent review is commissioned in 2018 to review the effectiveness of the current regime;
3. the Office of the Information Commissioner be funded appropriately to deal with increased consumer data privacy concerns;
4. that regulators ensure that credit reporting agencies must enable access to a free credit report to all Australians once every twelve months (and in some additional circumstances) and that access to these free credit reports is as easy as getting a paid report;
5. that credit reporting agencies are policed to ensure that they are meeting the requirements regarding the use of consumers' personal information for marketing, the content of free reports, and the timeframes in which reports must be provided to consumers.

Access to Private Sector Data: Consumer perspective on the current Insurance Reporting regime

The insurance industry has a process of sharing information about the claims history of every consumer that has purchased insurance. The database is managed and supported by Veda Advantage on behalf of Insurance Reference Services Ltd – a member organisation owned by Australian insurers. The database contains the following information on consumers in Australia:

- Name, date of birth, driver's license, gender and residential address;
- Applications made for insurance;

- Enquiries made by agents of insurance companies - such as loss assessors, insurance investigators and recovery agents;
- Claims made under insurance policies; and
- Details of fraud investigations.

However a consumer can only obtain a copy of their insurance report or “insurance passport” at www.myinsurancepassport.com.au for \$29.95. There is no free access available to an insurance report for a consumer.

Insurers regularly check insurance reports when a claim has been made. The consumer purchasing insurance is told about the possibility of reporting to an “insurance reference bureau” (or similar) in the Product Disclosure Statement, often close to the end of the PDS. There does however seem to be inconsistency in obtaining consent to provide this information.

The selling point of an insurance passport put forward by Veda is that:

“It’s a good idea to obtain a copy of your insurance passport before shopping for insurance online or obtaining quotes from the your insurance company so that you are aware of the minimum claims information that you must disclose to insurers in order to purchase a valid policy.”¹⁵

A consumer being able to access a central database of claims information that assists in answering disclosure questions holds some potential value but Financial Rights is unaware to what extent consumers have taken up the opportunity. Insurers tracking consumers who make fraudulent or excessive claims to reduce the instance of fraud and calculate premiums also has potential value but there are many opportunities for misreporting and abuse without adequate rules and oversight.

However in our discussions with insurers, the reports are haphazard, inconsistent and largely unreliable so that the current report provides minimal benefit to insurers or consumers.

It is also Financial Rights understanding that insurers may be using the database inconsistently, and are not aware of what the information contained on the report may mean. This could lead to a consumer being disadvantaged in unfair premiums, rejections for non-disclosure and inconsistent treatment. The utility and value for a consumer in having the report at the cost of \$29.95 is therefore undermined if the information it records is not consistent, accurate or up-to-date.

Financial Rights has several additional concerns about the ‘Insurance Passport’. First, very few consumers know that insurance reports exist, their purpose and when their information is recorded.

Secondly, if information on a consumer’s insurance history is collected and shared amongst insurers, access to this report should at the very least be free. Consumers need to be able to access information held by insurers about them to ensure that that information is accurate.

¹⁵ Veda, (n.d.). myinsurancepassport.com.au FAQs, viewed on 20 January 2016, <http://www.myinsurancepassport.com.au/faq/>

Finally, Financial Rights is concerned that there are no specific regulations covering insurance reports stipulating the permitted contents of the report, the type and the meaning of listings and the length of time the information is retained on a report.¹⁶ The information held in an insurance report has the potential to be very prejudicial to a consumer in obtaining insurance or in making a claim. The lack of specific regulation in insurance reporting is in stark contrast with credit reports where there is extensive regulation about what information can be held, how consumers can get access and correction procedures.¹⁷ Fraud is a serious allegation and the reporting of fraud on an insurance report is potentially defamatory and needs to be tightly regulated.

Under s. 4.8 of the General Insurance Code (2014) insurers have committed to giving reasons why they cannot provide insurance and supplying consumers with the information they have relied on, if requested. In Financial Rights' experience these reasons are often vague and rarely have information regarding an insurance report. This means consumers are not even aware of the problem on their insurance report.

Of additional concern is that it appears that Veda Advantage uses the claims history information used in the insurance report in a related product called My Car History at www.carhistory.com.au. This product is aimed at car owners but also prospective purchasers, as it includes a Personal Property Security Register check. It also purports to include "insurance claims reported" which indicates that it has access to the insurance claims information. It does not appear that any consumer has received disclosure of this use and further, that there was no intention of insurers to provide the information for the use of prospective purchasers in negotiating the purchase of a vehicles rather than a fraud detection tool . The concerns are, if the information is inaccurate, the vendor is suffering a loss and there is a complete lack of transparency as to the use of insurance information.

Insurance reports drawn from the database owned by Insurance Reference Services Ltd managed by Veda Advantage are haphazard, inconsistent and largely unreliable providing minimal benefit to both consumers and insurers. Very few consumers know that insurance reports exist. Access to a consumer's own information is not free. There are no specific regulations defining and limiting the permitted contents of the report, the time information stays on the report, and no systems in place to ensure that incorrect, prejudicial and potentially defamatory information can be removed.

Similar to the regulation in place already for consumer credit reporting, Financial Rights recommends that the Federal Government, working with the Office of the Australian Information Commissioner and the insurance industry, overhaul the insurance reporting system through regulation. Central to any regulations should be rules to address issues of accuracy, timing, consistency of information, dispute resolution and the application of natural

¹⁶ According to Veda Advantage insurance enquiries are held for five years and claims for ten years, calculated on the date the information was added to the file and are based on the time limits provided in the Privacy Act 1988.

¹⁷ Part IIIA of the Privacy Act 1988 (Cth) regulates consumer credit reporting in Australia and is supported by the Privacy Regulation 2013 (Cth) and the Privacy (Credit Reporting) Code 2014 (Cth).

justice. The management of the database should also be put out to tender and principles of competition applied. Consumers should also have free access to the information held on them.

Recommendation

The Financial Rights Legal Centre recommends the Federal Government introduce insurance reporting regulations to bolster consumer and privacy protections.

Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please do not hesitate to contact the Financial Rights Legal Centre on (02) 9212 4216.

Kind Regards,



Karen Cox
Coordinator
Financial Rights Legal Centre
Direct: (02) 8204 1340
E-mail: Karen.Cox@financialrights.org.au



Katherine Lane
Principal Solicitor
Financial Rights Legal Centre
Direct: (02) 8204 1350
E-mail: Kat.Lane@financialrights.org.au