



Fleur Grey
Senior Specialist
Credit, Retail Banking and Payments
Financial Services
Australian Securities and Investments Commission
responsible.lending@asic.gov.au

20 May 2019

CONSULTATION PAPER 309 Update to RG 209: Credit licensing: Responsible lending conduct

Submission Overview

Our first submission is that any consideration of the documents that should be prepared and preserved should also take into account the obligations to provide copies of those documents to the consumer under the *Privacy Act 1988*.

Documents should exist to enable the credit provider to show it has complied with its obligations. Computerised processes may not be sufficient evidence.

Care should also be taken when looking at the documents and information a credit provider may wish to avail themselves of when determining whether or not to make a loan, to consider the limitations contained within the *Privacy Act 1988*.

A consumer credit file can only be accessed by a credit provider for a consumer credit application and conversely a commercial credit file and only be accessed for a commercial credit application.

Introduction

MyCRA lawyers is a law firm operated by Legal Practice Holdings Pty Ltd. It specialises in credit reporting law and is the only specialist credit repair law firm in Australia.

Legal Practice Holdings Pty Ltd operates as an incorporated legal practice. It incorporated the operations of a previous, nonlawyer credit repair business so that it can call upon over nine years of experience in this area.

MyCRA Lawyers assists clients throughout Australia with removing adverse information from consumer and commercial credit files.

As far as we are aware, we are the only law firm to work exclusively in credit reporting and repair. As a result, we are possibly uniquely placed to be able to identify issues that might not otherwise be discernible and also to observe possibly unintended consequences flowing from current laws and practices.

Submission One: Properly documenting processes

The consultation paper envisages credit providers making a number of enquiries in order to ensure that they are acting prudently in their lending.

In the event that a challenge is made to the process undertaken by the credit provider, consideration should be given to the evidence that the credit provider may be required to provide.

For instance, is it sufficient for a credit provider to have automated systems that require a borrower to click on a box for, say proof of consent, during an online application process?

If the credit provider is asked for documents pursuant to the *Privacy Act 1988*, do they have sufficient evidence to sustain a court challenge to their compliance with their obligations?

We have experience of credit providers saying that their online process will not allow an application to proceed unless certain boxes are ticked along the way, therefore all boxes must have been checked and therefore all requirements have been met.

The credit providers, however, do not provide proof of their internal online systems having functioned properly in that particular instance.

Can the credit providers satisfy the court that they have adequately identified the borrower?

What if the court finds that it is not unusual for people filling out an online form to tick boxes without properly considering their importance? What if the court finds that there is an insufficient warning to the client at each stage of the online process?

What if the court finds that a particular borrower had a particular disadvantage when it came to completing online forms, perhaps a lack of reading skills, or perhaps duress?

In our submission, it would be appropriate for lenders to take these matters into account and also for these matters to be incorporated into guidance being provided by the ASIC as far as compliance with their lending obligations is concerned.

In our submission, the proliferation of online applications means that particular care should be put to the expectations of lenders when developing and relying upon online systems.

We also question the appropriateness of relying on “template” documents when proving compliance with obligations. There is an argument that if a credit provider wishes to assert that a document was sent to a borrower and a copy of the actual documents sent should be kept.

Given modern storage capacities in computerised systems there is little excuse for not being able to keep a copy of the actual documents sent rather than relying on saying that a document complying with a particular template would have been sent on a particular date.

Keeping a copy of the actual document is, arguably, the best evidence that could be provided by the credit provider in the event of conflict with the borrower as to whether the document was ever sent.

Recording Enquiries on Credit Files

We have a further concern about the disconnect between encouraging borrowers to “explore the market” so as to identify the best possible deal for the clients and the recording of enquiries on credit files.

Presently many lenders (possibly guided by mortgage insurers) attribute an arbitrary figure for the maximum number of enquiries that they consider appropriate within certain periods of time. Presently, for instance, we believe that 4 enquiries in the last 6 months or 6 enquiries in the last 12 months is currently the maximum permitted.

If there are too many enquiries within that period there will be an automatic decline of the loan application.

There is currently woefully insufficient warning to clients about the risk of their “investigating the market” and the possibility that their enquiries will stop them being able to borrow, regardless of other credit eligibility information.

In our experience finance brokers may not be aware of the line between looking at possibilities and an “enquiry” for the purposes of recording on a credit file. The word “enquiry” in this context has a specific meaning and consequence which may not be readily apparent to someone scrolling distractedly on the Internet at night.

In the circumstances, we, therefore, have experience of clients who are arguing that they did not intend to make an enquiry with a creditor but were simply looking into possible lenders. We would anticipate this area to remain controversial unless clarity is provided in the automated lending systems and online systems employed by lenders.

In the absence of an **unequivocal warning that proceeding beyond this point will constitute an enquiry for the purposes of credit reporting and may harm future finance applications**, in our view the current system is inadequate to protect clients from themselves in circumstances where they are actively encouraged to look around for the best possible deal.

There should be clear indications to the client as to the possible consequences. The notion of finance applications being refused if there are too many enquiries should be clearly stated. An indication as to the number of enquiries that may be too many should be clearly stated.

We do not believe the current requirements are being adequately followed.

Section 21C of the *Privacy Act 1988* sets out the current requirements on the credit provider when they collect the personal information from the individual that they are likely to disclose to a Credit Reporting Body (for instance in relation to enquiries). Arguably it is insufficient to make clear to a client the possible consequences in relation to finance enquiries that may be recorded on the credit file.

Submission 2: Caution to be taken on the use of credit reporting information

Whilst the encouragement of creditors to review as much information as possible to form an opinion about the creditworthiness of the borrower is an understandable and generally desirable aim, it should not be forgotten that there are limits to the information available to be accessed and used by creditors. A specific example is information disclosed by Credit Reporting Bodies.

Credit Reporting Bodies are commercial entities who collect information about borrowers and will provide information upon payment of their requisite fee. The Credit Reporting Body may not know the reason for which the creditor is seeking the information but the availability of the information does not make it legal for the lender to obtain or use the information from the Credit Reporting Body if that disclosure is not permitted by the *Privacy Act 1988*.

The effect stated simply

A lender can only look to an individual's consumer credit file in relation to a consumer credit enquiry and to an individual's commercial credit file in relation to a commercial credit enquiry. They cannot look to both.

Under the *Privacy Act 1988* there is a distinction between "consumer credit information" and "commercial credit information".

Consumer loans have a lot more protection for the borrower than a commercial loan.

Under the *Privacy Act 1988* you have to look to the reason why information was initially given to the Credit Reporting Body– was it for consumer credit or for commercial credit?

The Credit Reporting Bodies should keep that information separate as either consumer credit information or commercial credit information.

A lender must be careful not to look at the wrong sort of information when considering a request from a borrower. It is not enough that the information held by the Credit Reporting Body might be relevant or of interest to the lender. The information must have been provided to the Credit Reporting Body for the same purpose as the current request.

There are consequences for breaching this rule in, inter alia, sections 24 and 25 of the *Privacy Act 1988*.

Difference between "consumer" and "commercial"

Section 6 of the *Privacy Act 1988* defines "*consumer credit*" as essentially for an individual:

that is intended to be used wholly or primarily:

- (i) *for personal, family or household purposes; or*
- (ii) *to acquire, maintain, renovate or improve residential property for investment purposes; or*

•

(iii) to refinance consumer credit that has been provided wholly or primarily to acquire, maintain, renovate or improve residential property for investment purposes.

Whereas "commercial credit" means credit (other than consumer credit) that is applied for by, or provided to, a person.

Permitted Uses

There will be information that may be available to a credit provider that is either commercial credit information or consumer credit information and they cannot simply use it as they see fit.

To see what is permitted you need to cross-reference section 20F (1) with section 21H of the *Privacy Act 1988*.

Section 20F (1) sets out the reasons why information might be collected by the Credit Reporting Body.

Section 20F (1) indicates that there is a difference between:

1. information requested for consumer credit related purpose; and
2. information requested for a commercial credit related purpose (and for which the individual expressly consents for the information to be used for that commercial credit related purpose).

Section 21H of the *Privacy Act 1988* sets out the permitted uses by a credit provider of that information provided by an individual.

If information is provided for consumer credit related purposes it can only be used for:

- A. *"securitisation related purpose" of a credit provider in relation to an individual is the purpose of:*
- (a) assessing the risk in purchasing, by means of a securitisation arrangement, credit that has been provided to, or applied for by:*
 - (i) the individual; or*
 - (ii) a person for whom the individual is, or is proposing to be, a guarantor; or*
 - (b) assessing the risk in undertaking credit enhancement in relation to credit:*
 - (i) that is, or is proposed to be, purchased or funded by means of a securitisation arrangement; and*
 - (ii) that has been provided to, or applied for by, the individual or a person for whom the individual is, or is proposing to be, a guarantor.*

OR

- B. *the internal management purposes of the provider that are directly related to the provision or management of consumer credit by the provider.*

Most importantly consumer credit information that has been acquired by the Credit Reporting Body for consumer credit reasons can only be disclosed by the Credit Reporting Body for consumer credit purposes.

Information that has been acquired by the Credit Reporting Body for commercial credit related purposes in relation to the individual can only be disclosed by the Credit Reporting Body for that particular commercial credit related purpose.

We feel it important to remind credit providers that they should ensure that they do not seek information they are not entitled to.

Sincerely

A handwritten signature in black ink, appearing to read 'Patrick Earl', with a stylized flourish at the end.

Patrick Earl
Senior Solicitor
p.earl@adslaw.com.au