

1991

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

LAW AND JUSTICE LEGISLATION AMENDMENT BILL 1991

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be Moved on Behalf of
the Government

(Circulated by the authority of the Attorney-General,
the Honourable Michael Duffy, M.P.)

AMENDMENTS TO BE MOVED ON BEHALF OF THE GOVERNMENT TO THE LAW
AND JUSTICE LEGISLATION AMENDMENT BILL 1991

GENERAL OUTLINE

The amendments to be moved by the Government to this Bill make a series of minor technical amendments to the Privacy Amendment Act 1990 to accommodate credit industry concerns that certain legitimate industry practices would constitute technical breaches of the legislation in the absence of the amendments.

FINANCIAL IMPACT STATEMENT

Depending upon how the amendments operate in practice, there is the possibility that minor additional funds may be sought by the Human Rights and Equal Opportunity Commission.

NOTES ON AMENDMENTS TO BE MOVED ON BEHALF OF THE GOVERNMENT TO
THE LAW AND JUSTICE LEGISLATION AMENDMENT BILL 1991

AMENDMENT (1)

This amendment to clause 2 of the Bill will insert a new subclause 2(1A) which will provide that new Part 2A will commence immediately after the commencement of the Privacy Amendment Act 1990. That Act will commence on 24 September 1991.

AMENDMENT (2)

2. This amendment will insert 2 new Parts into the Bill - Part 2A, Amendments of the Privacy Act 1988 and Part 2B, Amendments of the Privacy Amendment Act 1990.

PART 2A - AMENDMENTS OF THE PRIVACY ACT 1988

Meaning of "Principal Act"

3. Proposed new section 9A identifies the Principal Act in Part 2A as the Privacy Act 1988. As subclause 1(1A) provides that Part 2A commences immediately after the commencement of the Privacy Amendment Act 1990, all references to the Principal Act in Part 2A are therefore to be taken as meaning the Privacy Act 1988 as amended by the Privacy Amendment Act 1990.

Definition of credit reporting business

4. Proposed new section 9B amends the definition of "credit reporting business" in section 6 of the Principal Act by clarifying that the purpose of providing information about individuals' credit eligibility, history or capacity must be the dominant purpose of the business, as distinct from merely a purpose of the business. This is to clarify that the Principal Act is not intended to cause credit providers carrying on their normal business to become, inadvertently, credit reporting businesses by technical operation of the definition of credit reporting business.

Agents of credit providers

5. Proposed new section 9C amends section 11B of the Principal Act by providing that an agent of a credit provider can be taken to be another credit provider, provided that the agent is performing a task that is a necessary step either in processing an application for a loan or in the management of a loan. This amendment is necessary to prevent credit providers

and their agents, acting properly and lawfully in accordance with accepted commercial practice, from committing technical breaches of the Principal Act (for example, paragraph 18N(1)(b)) by so acting. This is done by inserting a new subsection 11B(5) which further provides that when the agent so acts, it will be subject to the same obligations under the Principal Act as any other credit provider.

6. New subsection 11B(6) ensures that the agent of the credit provider can disclose credit information (including a credit report) to the credit provider (the principal in the principal-agent relationship). This will ensure that customers of credit providers who use agents for convenience can continue to make use of this facility.

7. New subsection 11B(7) is designed to prevent debt collectors from gaining access to credit information by means other than through credit providers who have engaged them for that purpose as specifically provided elsewhere by paragraph 18N(1)(c) of the Principal Act.

Individuals may authorise persons to have access on their behalf

8. Proposed new section 9D inserts a new subsection, 18H(3), in the Principal Act which will permit an individual to exercise his or her right of access under subsections 18H(1) and 18H(2) to a credit information file or a credit report through a person authorised by the individual in writing. This access by an authorised person is expressly limited to situations where the individual has applied for a loan or has sought advice in relation to a loan. This right cannot be exercised on the individual's behalf by a credit provider, mortgage insurer or a trade insurer because these categories of persons are the subject of specific provisions elsewhere in the legislation.

Telephone applications for commercial credit

9. Proposed new paragraphs 9E(a) and 9E(b) amend section 18K of the Principal Act to ensure that the accepted credit industry practice of considering applications for commercial credit made by use of the telephone can continue. The Principal Act provides at paragraph 18K(1)(b) that an individual's consent to a credit provider's seeking access to a credit report for the purpose of assessing an application for commercial credit has to be written consent. New subsection 18K(1A) qualifies this by providing that written consent is not required where the commercial credit application is made orally. The relaxation of the written consent requirement is qualified so that it applies only while the application has not yet been made in writing.

Commercial information in credit reports

10. Proposed new paragraph 9E(c) makes a technical amendment to subsection 18K(6) of the Principal Act to correct an oversight. Subsection 18K(6) prohibits inclusion, in a credit report, of commercial credit information. As a credit report

is drawn from a credit information file and a credit information file may contain some commercial credit information (for example, paragraph 18E(1)(b)(i)(A): the amount of commercial credit sought; paragraph 18E(1)(b)(iii): a trade insurer having sought a report; and paragraph 18E(1)(b)(vii): a dishonoured cheque), the prohibition on commercial information in subsection 18K(6) is subject to an exception in respect of the permitted contents provision in section 18E.

Credit providers: internal management

11. Proposed new paragraph 9F(a) amends the provisions concerning permitted use of information in section 18L of the Principal Act to allow credit reports or information to be used for internal management purposes by the credit provider. This is subject to the express qualification in new paragraph 18L(1)(ba) that the internal management purposes must be directly related to the provision of loans or management of credit such as occurs in the practice of credit scoring.

Telephone applications for credit

12. Proposed new paragraphs 9F(b) and 9F(c) amend section 18L of the Principal Act to ensure that the accepted credit industry practice of considering telephone applications for credit can continue. The Principal Act requires an individual's consent to use by a credit provider of commercial credit information in assessing a credit application be written consent. New subsection 18L(4A) qualifies this by providing that the written consent is not required where the credit application is made orally.

Provisions in cases of joint applications for credit

13. Proposed new paragraph 9G repeals the existing section 18M of the Principal Act and substitutes a new section 18M. Existing section 18M requires a credit provider that has refused an individual's credit application wholly or partly on information derived from a credit report to inform the individual in writing of the fact of the refusal, that the refusal was based wholly or partly on information derived from a credit report from a credit reporting agency and the name and address of the credit reporting agency. New section 18M retains these existing requirements but also makes additional provision in cases of joint applications for credit by more than one person. New subsection 18M(2) expressly allows the credit provider to advise one of the joint applicants that the refusal was based wholly or partly on an adverse credit report in relation to another of the joint applicants.

New provisions relating to credit providers

14. Proposed new paragraph 9H makes a series of amendments to section 18N of the Principal Act which generally regulates disclosure of personal information by credit providers.

Consent to disclosure by credit providers

15. Proposed new paragraphs 9H(a) and 9H(d) make amendments which will ensure that, where an individual consents orally to a credit provider's disclosing personal information to another credit provider, that disclosure can occur. New paragraph 18N(1A)(a) will enable the standard credit industry practice of accepting and processing telephone applications for credit and commercial credit to continue. As with the other amendments relating to telephone applications (proposed new paragraphs 9E(a), 9E(b), 9F(b) and 9F(c)), the permitting of oral consent will apply only until a written application for credit or commercial credit has been made.

Guarantors

16. Proposed new paragraph 9H(b) will insert a new paragraph 18N(1)(ba) in the Principal Act to permit a credit provider to disclose personal information to a guarantor of a loan such information as is necessary to enable the credit provider to enforce the guarantee.

Mortgage insurers

17. Proposed new paragraph 9H(b) will also insert a new paragraph 18N(1)(bb) in the Principal Act to permit a credit provider to disclose to a mortgage insurer such personal information as is necessary to enable the mortgage insurer to assess whether to provide insurance or to assess the risk of an individual defaulting on mortgage credit or for any purpose arising under a mortgage insurance contract.

Dispute settling

18. Proposed new paragraph 9H(b) will also insert a new paragraph 18N(1)(bc) in the Principal Act to enable recognised dispute settling bodies, such as the banking industry ombudsman, to be given personal information for the purpose of settling disputes between the credit provider and the individual concerned.

State and Territory assistance schemes

19. Proposed new paragraph 9H(b) will also insert a new paragraph 18N(1)(bd) in the Principal Act to enable disclosure of personal information to be made by credit providers to State or Territory authorities where those authorities give assistance in the provision of mortgage credit. This will be limited to the purpose of enabling the State or Territory to determine the extent of assistance it will give in the provision of mortgage credit. This amendment is necessary to permit the continuing assistance by State or Territory authorities in the provision of low cost-mortgages.

Credit cards and EFTPOS transactions

20. Proposed new paragraph 9H(b) will also insert a new paragraph 18N(1)(be) in the Principal Act to enable disclosure of personal information to be made by a credit provider to a person or body carrying on a business of supplying goods or services for the purpose of enabling that person or body to decide whether to accept payment by means of credit card or electronic transfer of funds (EFTPOS). This amendment is to remove doubt as to the legality of the provision by credit providers, such as credit card issuers, of information necessary to enable the credit card system and EFTPOS payment system to continue.

Payout figures on charged or encumbered property of credit applicants

21. Proposed new paragraph 9H(b) will also insert a new paragraph 18N(1)(bf) in the Principal Act which will enable credit providers to disclose personal information to persons or bodies considering taking on assignment of, or discharge of, a debt owed to the credit provider by the individual concerned. This will enable, for example, a motor car dealer to be advised of the amount of money owing on an encumbered vehicle by an individual to the credit provider for the purpose of calculating and advising the individual of a "bottom line" price in respect of a purchase the individual wishes to make from the motor car dealer by trading in that encumbered vehicle.

Mortgage securitisation (secondary mortgage market practice)

22. Proposed new paragraph 9H(b) will also insert a new paragraph 18N(1)(bg) in the Principal Act which will enable the standard industry practice of mortgage securitisation to continue. This will be subject to the provision that disclosures of personal information necessary in the securitisation or secondary mortgage process will be subject to the specific agreement by the individual concerned.

Individuals' and/or authorised representatives' access to credit providers' information

23. Proposed new paragraph 9H(c) inserts a new paragraph 18N(1)(ga) in the Principal Act to allow disclosure of personal information by a credit provider to the individual or a person authorised in writing by the individual to seek access in connection with a loan application or advice in relation to a loan. This will enable individuals to authorise credit providers to disclose information about them to persons they choose to authorise, including solicitors, accountants and finance brokers.

Consent to credit providers' disclosure

24. Proposed new paragraph 9H(d) also inserts new paragraph 18N(1A)(b) in the Principal Act, which reflects credit industry practice in relation to the giving of consent by an individual to a credit provider disclosing personal information about that individual to another credit provider.

Where the individual's consent to disclosure as between credit providers is required, it may be given to either the disclosing credit provider or the recipient credit provider. This amendment will permit an individual, when applying to a credit provider for credit, to give consent to disclosure of information to the credit provider presently being approached (and who will be the recipient of the disclosure) as distinct from giving consent to the previous credit provider(s) who will be the discloser(s) of the information.

Right of individuals to access to information about themselves

25. Proposed new paragraph 9H(d) will also insert a new subsection 18N(1C) in the Principal Act to ensure that credit providers can disclose personal information about an individual to the individual who is the subject of that information.

Consequential amendments: mortgage insurers

26. Proposed new section 9J makes consequential amendments to the Principal Act to ensure that mortgage insurers may use information for the wider purposes allowed in proposed new paragraph 18N(1)(bb).

27. Proposed new section 9K makes consequential amendments to section 18Q of the Principal Act to ensure that a person or body that has obtained information in the course of the mortgage securitisation system provided for by proposed new paragraph 18N(1)(bg) use the information for any purpose other than that of enabling the performance of a necessary task in the mortgage securitisation arrangement unless that other purpose is required or authorised by or under law.

Transitional provisions

28. Proposed new section 9L amends subsection 18V(2) of the Principal Act so that the requirement to advise an individual that information might be disclosed to a credit reporting agency (paragraph 18E(8)(c)) does not apply where that information is acquired by the credit provider before 25 February 1992. Similarly, subsection 18V(3) is amended so that the relevant date for the commencement of maximum permissible periods under subsection 18F(2) will be 25 February 1992.

PART 2B - AMENDMENTS OF THE PRIVACY AMENDMENT ACT 1990

Commencement

29. Proposed new section 9M adds a new section 25 to the Privacy Amendment Act 1990 which provides that an act or practice engaged in before 25 February 1992 is not taken to constitute a breach of the Code of Conduct or a breach of a provision of Part IIIA unless that act or practice constitutes a breach of sections 18H (access by individuals to credit information files and credit reports) or 18J (alteration of credit information files and credit reports). When read in conjunction with subsection 2(2) of the Privacy Amendment Act 1990, this means that from 24 September 1991 to 24 February 1992 (both dates inclusive) only sections 18H and 18J will have effect, and on and from 25 February 1992 the entire Privacy Amendment Act 1990 will operate.