

1990

THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA
SENATE

PRIVACY AMENDMENT BILL 1989

SUPPLEMENTARY EXPLANATORY
MEMORANDUM

Amendments and New Clauses to be moved
on behalf of the Government

(Circulated by authority of the Attorney-General, the
Hon Michael Duffy, MP.)



INTRODUCTORY NOTE

This supplementary explanatory memorandum explains the amendments Proposed to the Privacy Amendment Bill 1989 (referred to in this memorandum as 'the Bill') as introduced into the Senate on 16 June 1989.

GENERAL OUTLINE

The amendments will amend the Bill to :

- enable regulation of non-corporate credit providers to occur by operation of the Principal Act , as amended, rather than by determination by the Privacy Commissioner;
- clarify and expressly widen the classes of businesses that will have access to a credit reporting agency;
- enable credit providers to have access to the credit history of guarantors when considering applications for loans;
- allow the transfer of credit information files between credit reporting agencies;
- enable a credit reporting agency to be notified after a debt becomes 60 days overdue. Previously notification would occur after 90 days;
- provide that the requirement placed on credit providers to notify consumers of the disclosure of their information to a credit reporting agency only applies to information collected after the commencement of the Act;
- provide for the disclosure of personal credit information where an individual is evading or attempting to evade his/her credit obligations;
- enable a credit provider to notify a credit reporting agency and to have placed on a credit file a notice that the credit provider believes that the individual concerned has committed credit fraud;
- enable a credit provider to use personal information for the collection of an overdue debt and to disclose personal information to a debt collection agency for the purpose of collecting a debt owed to the credit provider;
- permit the use of consumer credit reports for the assessment of commercial credit applications in certain circumstances;
- permit mortgage insurers and trade insurers to have access to a credit reporting agency.

FINANCIAL IMPACT

The amendments and additional clauses would not significantly increase, and may reduce, the cost of administering the Bill.

Amendment (1) Clause 2 - Commencement

This amendment varies the commencement date, in the absence of a day being fixed by Proclamation, to 9 months after Royal Assent instead of the usual 6 months. This is to provide a more realistic time frame for the Privacy Commissioner to develop the Code of Conduct required under clause 12.

Amendment (2) Clause 5 - Proposed new definition of "commercial credit"

The distinction between consumer credit and commercial credit is central to the scheme proposed by the Bill. "Credit" as already defined in the Bill refers to consumer credit. The insertion of a new definition to cover non-consumer credit is necessary in view of the commercial/consumer distinction. The proposed new definition of "commercial credit" is in terms of "other than" (consumer) credit.

Amendment (3) Clause 5 - Proposed amendment to the definition of "credit card"

This is a consequential change necessary because of the expansion of the definition of "loan" and the now specialised definition of "credit" to mean consumer credit. The proposed amendment will enable "credit card" to include a reference to a wide variety of arrangements under which deferment of payment of a debt is permitted.

Amendment (4) Clause 5 - Proposed amendment to the definition of "credit card"

This is a further consequential change for the same reasons as indicated in respect of Amendment (3).

Amendment (5) Clause 5 - Proposed amendment to the definition of "credit information file"

This amendment is necessary to ensure privacy protection in respect of credit information files created or kept by one credit reporting agency and provided to another credit reporting agency.

Amendment (6) Clause 5 - Proposed amendment of the definition of "credit provider".

The proposed definition of "credit provider" in section 6 of the Principal Act is to be amended so that the definition in proposed section 11B clearly includes a mortgage insurer and a trade insurer.

Amendment (7) Clause 5 - Proposed amendment of the definition of "credit reporting business"

The definition of credit reporting business is amended so as to ensure that a credit reporting business which as part of its operations maintains publicly available information concerning individuals but which does not provide a consumer

credit reporting service will be excluded from the provisions of the Bill. Only those credit reporting businesses which provide a credit reporting service in relation to consumers will be a credit reporting agency for the purposes of the Bill.

Amendment (8) Clause 5 - Proposed new definitions of "loan", "mortgage credit", "mortgage insurer", "serious credit infringement" and "trade insurer".

The definition of "loan" is expanded to include all contracts, arrangements or understandings under which a person is permitted to defer payment of a debt. Transactions such as hire purchase, credit contracts, leases and rental agreements for goods and services will be regarded as provision of credit for the purposes of the Bill. This will enable a realistic range of credit providers to have access to a credit reporting agency for the assessment of application for credit.

New definitions of 'mortgage credit' and 'mortgage insurer' are included as the Bill makes provision for mortgage insurers to have access to a credit reporting agency for the purpose of assessing risk for mortgage insurance.

A new definition of "serious credit infringement" is proposed to cover cases where a person fraudulently obtains or attempts to obtain credit; fraudulently evades obligations; or intends no longer to comply with his or her obligations in respect of the loan.

A new definition of "trade insurer" is proposed as the Bill will make provision for trade insurers to be treated as credit providers and have access to the records of a credit reporting agency.

Amendment (9) Clause 5 - Proposed clarification of significance of information concerning commercial transactions

A new subsection 6(5A) in the Principal Act is proposed. The purpose of this relates to the proposal to maintain a distinction between consumer credit and commercial credit. Proposed new subsection 6(5A) will ensure that, for the purpose of the definition of "credit reporting business", information about an individual's commercial transactions will not be taken to be information relating to the individual's consumer credit eligibility, history or capacity to repay.

Amendment (10) Clause 8 - Proposed new subparagraph 11B(1)(b)(iii): "substantial part" of credit providers' business

The definition of credit provider is widened so that certain corporations who provide credit as a substantial part of their business will be credit providers for the purposes of the Bill. Previously, these corporations would not have been credit providers for the purposes of the Bill unless the provision of credit was their sole or principal business'. Basically, only credit providers and the individual about whom the credit file is concerned will be allowed to have access to a credit reporting agency.

The definition of credit provider has been widened to include commercial credit providers. This will allow the disclosure of a consumer credit report by a credit reporting agency to a commercial credit provider in certain circumstances and to allow the use of a commercial credit report by a credit provider for the assessment of a consumer credit transaction. See Amendments (9), (17) and (19).

Amendment (11) Clause 8 - Proposed new subparagraph 11B(1)(b)(v)(A): credit providers

This amendment is a consequential amendment to amendment (10).

Amendment (12) Clause 8 - Proposed amendment to definition of "credit provider" to include non-corporate credit providers

As presently drafted, the Bill allows for the regulation of non-corporate credit providers only if such credit providers would, apart from their non-corporate status, otherwise fall within the definition of credit provider and they are determined to be credit providers by the Privacy Commissioner under proposed section 18K. This proposed amendment to the Bill will enable non-corporate credit providers to be regulated by operation of the amended Principal Act. It is a tidying amendment and merely obviates the need for all non-corporate credit providers to be considered by the Privacy Commissioner.

Amendment (13) Clause 12 - Proposed widening of scope of considerations in Code of Conduct

Clause 12 as presently drafted provides for the Privacy Commissioner to issue a Code of Conduct which will be a guide in the day to day practice of the regulation of the credit reporting industry. This proposed amendment will ensure the Privacy Commissioner is empowered in the amended Principal Act to include the regulation of non-corporate credit providers as part of the Code of Conduct. It is therefore consequential upon amendment (12).

Amendment (14) Clause 13 - Proposed inclusion of reference to commercial credit in permitted contents of credit information files

This proposed amendment to proposed subparagraph 18E(1)(b)(i) reflects the possibility that an applicant for (consumer) credit may consent to the provision of details of his or her commercial credit history by the credit reporting agency to the credit provider. The proposed amendment merely ensures that the credit reporting agency's credit information file can contain commercial credit information. It is therefore consequential upon other provisions of the Bill.

Amendment (15) Clause 13 - Proposed inclusion of reference to commercial credit in permitted contents of credit information files

This amendment is necessary for the same reasons as indicated in respect of amendment (14).

Amendment (16) Clause 13 - Proposed amendment to permitted contents of credit information files to allow records of mortgage insurers and trade insurers

Proposed new subparagraphs 18E(1)(b)(ia) and 18E(1)(b)(ib) are consequential on the amendments to allow access to credit reporting agency files by mortgage insurers and trade insurers.

Amendment (17) Clause 13 - Proposed new section 18E(1)(b)(ii)(A) - Permitted Contents of credit information files

This amendment will enable a credit provider to notify the credit reporting agency that an individual is overdue in making a payment as soon as the individual is 60 days overdue and steps have been taken to recover the debt.

Previously, 90 days had to elapse before notification could occur. This amendment is to meet the credit industry's concern that an individual intent on obtaining credit fraudulently could use the 90 day period to the detriment of credit providers. It should be noted that a credit provider can place a notification on the individual's credit file held by the credit reporting agency that the individual has committed a serious credit infringement at any time.

Amendment (18) Clause 13 - Proposed new subparagraph 18E(1)(b)(ii)(B) - Permitted contents of credit information files

This amendment is a companion measure to amendment (17). It will enable a credit provider to notify the credit reporting agency of an overdue debt so long as the credit provider has taken steps to recover any part of the debt. Previously, the credit provider would have been required to take steps to recover the total amount of the debt.

Amendment (19) Clause 13 - Proposed new subparagraph 18E(1)(b)(v) - Permitted contents of credit information files

This amendment strengthens the Bill in relation to protecting credit providers from fraudulent individuals. It will allow an individual's credit file to contain an opinion by a credit provider that the individual has committed credit fraud. The credit provider is required to have reasonable grounds for the opinion, see Amendment (22).

Amendment (20) Clause 13 - Proposed new paragraph 18E(1)(d) - Permitted contents of credit information files

This amendment will permit credit reporting agencies to record on credit information files notices where persons are no longer in default in relation to credit (that is, the notice required of credit providers by subsection 18F(4)).

Amendment (21) Clause 13 - Limitation on the kind of information permitted when opening a credit information file

This amendment will limit the kind of information which may be used by a credit reporting agency when opening a credit information file about an individual. It limits the kind of information to that referred to in paragraph 18E(1)(b), which sets out the permitted contents of such files. The effect of the amendment will be to ensure that publicly available information cannot be used to create a credit information file. This is consistent with the Bill's approach of not seeking to regulate publicly available information.

Amendment (22) Clause 13 - Proposed new paragraph 18E(9)(a)(a) - Permitted contents of credit information files

This amendment will require that a credit provider who supplies information concerning individuals to a credit reporting agency must have reasonable grounds for believing the information is correct.

Amendment (23) Clause 13 - Deletion of information from credit information files

Proposed new subsection 18F(2) sets maximum permissible periods for the keeping of various categories of personal information on credit information files. It is proposed to amend proposed subsection 18F(1) so that a credit reporting agency will have a period of grace of one month after the expiration of the relevant maximum permissible period in which to delete the dated information.

Amendment (24) Clause 13 - Maximum permissible period in relation to mortgage insurers and trade insurers

This amendment is consequential upon Amendment (16).

Amendment (25) Clause 13 - Maximum permissible period in respect of overdue payments information

This is a minor amendment which enables the five year maximum permissible period in respect of overdue payments information to commence on the day on which the credit reporting agency was informed of the overdue payment instead of the day on which it actually became overdue.

Amendment (26) Clause 13 - Maximum permissible period in respect of serious credit infringement notice

This proposed amendment will enable a credit reporting agency to keep information about the opinion of a credit provider that an individual has committed a serious credit infringement (proposed new subparagraph 18E(1)(b)(v)) for a period of seven years commencing on the day of its inclusion in the credit information file.

Amendment (27) Clause 13 - Proposed omission of proposed subsection 18F(5)

This is a minor amendment to omit the originally proposed requirement that where credit reporting agencies are required to delete information from credit information files they were also to delete the information from any other records under their possession or control. This provision is not required because the Bill regulates only the information held on credit information files and not beyond.

Amendment (28) Clause 13 - Personal information to be not misleading

This is a minor amendment to provide that credit reporting agencies take reasonable steps to ensure that personal information held on credit information files is not only accurate, up-to-date and complete but also not misleading.

Amendment (29) Clause 13 - Provision of information to be for the purpose of assessing an application for credit

Proposed paragraph 18K(1)(a) is to be amended to require the provision of information in a credit report to be for the limited purpose of assessing an application for credit by an individual. As presently drafted, paragraph 18K(1)(a) would enable wider use of the information "in connection with" an application for credit.

Amendment (30) Clause 13 - Proposed new provisions relating to limits on disclosure of personal information by credit reporting agencies

This amendment makes a number of significant changes to the scope of permitted disclosure by credit reporting agencies.

As presently drafted, proposed new section 18K would permit disclosure in circumstances limited only to provision of credit reports for the purpose of assessing an application for credit; where disclosure is authorised by or under law; or where the credit reporting agency believes on reasonable grounds that the individual in question has attempted to obtain credit by fraud.

The new paragraphs (b), (c), (d), (e), (f), (g), (h), (j) and (k), proposed to be inserted into subsection 18K(1), create exceptions to the strict rule of non-disclosure to reflect legitimate needs of the credit industry.

Proposed new paragraph 18K(1)(b) will enable a credit reporting agency to provide information contained in a credit report to a credit provider where that credit provider has received an application for commercial credit provided that the individual who made the commercial credit application has consented in writing to the credit report being given to the credit provider for that purpose.

Proposed new paragraph 18K(1)(c) will enable a credit reporting agency to provide information contained in a credit report to a credit provider where that credit provider requests the credit report for the purpose of assessing whether to accept an individual as a guarantor provided that the individual offering himself or herself as guarantor has consented in writing to the credit report being given to the credit provider for that purpose.

Proposed new paragraph 18K(1)(d) will enable a credit reporting agency to provide information contained in a credit report to a mortgage insurer for purposes related to the assessment of the provision of insurance by the mortgage insurer to a credit provider.

Proposed new paragraph 18K(1)(e) will enable a credit reporting agency to provide information contained in a credit report to a trade insurer for purposes related to the assessment of the provision of insurance by the trade insurer provided that the individual to whom the report relates has consented in writing to the report being given to the trade insurer for that purpose.

Proposed new paragraph 18K(1)(f) will enable a credit reporting agency to provide information about an individual contained in a credit report to a credit provider who requested the report for the purpose of collecting overdue payments in respect of credit which has been provided to the individual by the credit provider.

Proposed new paragraph 18K(1)(g) will enable a credit reporting agency to provide information about an individual to another credit reporting agency.

Proposed new paragraph 18K(1)(h) will enable a credit reporting agency to disclose personal information contained in an individual's credit information file if the only information about individuals is publicly available information.

Proposed new paragraph 18K(1)(j) does not represent a change from the provisions of the original Bill. It replaces original paragraph 18K(1)(b) and provides that credit reporting agencies can disclose personal information where this is "required or authorised by or under law".

Proposed new paragraph 18K(1)(k) introduces a slight change to the original paragraph 18K(1)(c). The proposed change will enable a credit reporting agency to disclose personal information if it is satisfied that either a credit provider or law enforcement authority believes on reasonable grounds that an individual has committed a serious credit infringement and the information is given to that or any other credit provider or law enforcement authority. In the provision contained in the Bill as originally drafted, it would have been enough that the credit reporting agency believed on reasonable grounds that the individual had attempted to obtain credit by fraudulent means.

Amendment (31) Clause 13 - Prohibition on disclosure of information which credit reporting agency is prohibited from including on the file or required to delete

This proposed amendment is a technical one designed to ensure that credit reporting agencies can not disclose information the use of which is not regulated just because it is prohibited from being included on the credit information file by virtue of its nature or because it should have been deleted in accordance with the maximum permissible periods provisions of proposed subsection 18F(2).

Amendment (32) Clause 13 - Proposed amendment to proposed subsection 18K(2)

This amendment is consequential upon proposed Amendment (31) above.

Amendment (33) Clause 13 - Proposed amendment to proposed subsection 18K(4)

This is a further technical provision which reflects the policy of the Bill that a distinction is to be maintained between consumer credit which is regulated under the Bill's provisions and commercial credit which is not to be regulated. The proposed amendment prohibits the disclosure of commercial information under the general (consumer) credit application provision of proposed paragraph 18K(1)(a). Amendment (30) above makes separate provision for disclosing commercial information with the individual's consent (proposed new paragraph 18K(1)(b)).

Amendment (34) Clause 13 - Removal of the Privacy Commissioner's power to determine a non-corporate credit provider to be a credit provider for the purposes of the Bill

As Amendment (12) provides for non-corporate credit providers to be regulated by operation of the provisions of the Bill, it is necessary to omit the existing provisions which would have enabled the Privacy Commissioner to determine non-corporate providers of credit to be "credit providers" for the purposes of the Bill. Proposed subsections 18K(5) and 18K(6) are therefore omitted. They will be replaced by new subsections which will empower the Privacy Commissioner to make written determinations as to the manner in which the permitted disclosures under subsection 18K(1) can occur. This will ensure appropriate scrutiny of the operation of these provisions in their day to day operation.

Amendment (35) Clause 13 - Proposed amendment to proposed subsection 18K(7)

This amendment is consequential upon Amendment (34) above.

Amendment (36) Clause 13 - Proposed new subsection 18L(1) - Limits on use by credit providers of personal information contained in credit reports etc

This amendment makes provision for the use by a credit provider of a commercial credit report for the purpose of assessing an application for the granting of consumer credit to an individual. This provision will meet the concerns of the credit industry that credit providers should be able to have access to an individual's commercial credit undertakings when assessing a consumer credit transaction. The Bill will allow this where the individual's consent is obtained in writing (see proposed new 18K(1)(b)).

This amendment will also permit credit providers to use credit reports to assess persons who are to be guarantors in respect of loans to be provided by the credit provider.

The amendment also makes provision for the use of a credit report by a credit provider for the purpose of collection of overdue payments, or to counter an individual obtaining, or attempting to obtain, credit by fraudulent means or evading, or attempting to evade, his or her credit obligations.

Amendment (37) Clause 13 - Proposed new subsections 18L(3)-(7) - Limits on use by credit providers of personal information contained in credit reports etc.

Proposed new subsection 18L(3) prohibits the use of a report or personal information derived from a report which does not constitute permitted contents of credit information files for the purposes of proposed new section 18E.

Proposed new subsection 18L(4) makes provision for the use of commercial credit information for the assessment of consumer credit applications where the individual concerned has specifically agreed in writing.

Proposed new subsection 18L(5) permits the Privacy Commissioner to determine the manner in which commercial credit information may be used in assessing an individual's application for consumer credit.

Proposed new subsections 18L(6) and 18L(7) provide that the Commissioner's determination will be required to be published in the Gazette and will be a disallowable instrument.

Amendment (38) Clause 13 - Proposed new section 18M - Information to be given if an individual's application for credit is refused

This amendment broadens the circumstances in which a credit provider must provide notice of reasons for refusing a credit application to circumstances where the refusal was based on information derived from a credit report. The existing clause imposed this requirement only in relation to information contained in credit reports. It also corrects a typographical error.

Amendment (39) Proposed amendment to new section 18M

This amendment is consequential on Amendment (38), above.

Amendment (40) Clause 13 - Proposed new subsection 18N(1) - Limits on disclosure by credit providers of personal information contained in credit reports relating to credit worthiness etc.

This amendment makes provision for a credit provider, who is or has been in possession or control of a credit report or has personal information derived from the report, to disclose that information to a credit reporter for the purpose of creating a credit information file, or inclusion of information on an existing file, or where the individual has agreed in writing to the disclosure of the information to another credit provider.

In addition, paragraph 18N(1)(c) makes provision for a credit provider to be able to disclose identifying information, together with information concerning current defaults, to a debt collection agency for the purpose of collecting overdue payments. Debt collectors will be able to be given information only by a credit provider. The information will be limited to that necessary to identify the individual and will relate only to currently outstanding debts.

Paragraph 18N(1)(e) provides that a credit provider may disclose a credit report or personal information where the credit provider believes on reasonable grounds that the person has fraudulently obtained credit or evaded credit obligations.

The existing clause was limited in that it only provided privacy protection for an individual's personal information where it was in a credit report in the possession or under the control of the credit provider.

Amendment (41) Clause 13 Proposed new subsection 18N(2A) - Limits on disclosure by credit providers of personal information contained in reports relating to credit worthiness etc.

This subclause requires credit providers, before disclosing reports to another person, to delete certain information from them. The information that has to be deleted will be any personal information contained in, or derived from, a credit report which is not within the authorised types of information set out in proposed section 18E. It will apply to credit reports or personal information derived from those reports collected before the commencement of the Act.

Amendment (42) Clause 13 - Proposed new subsection 18N(3) - Limits on disclosure by credit providers of personal information contained in reports relating to credit worthiness etc.

This amendment makes provision to enable the Privacy Commissioner to determine the manner in which a report or personal information derived from a report may be disclosed to another credit provider. The existing clause imposed this requirement only in relation to credit reports.

Amendment (43) Clause 13 - Proposed new subsection 18N(4) - Limits on disclosure by credit providers of personal information contained in reports relating to credit worthiness etc

This amendment is consequential to amendment (42). Any information derived from a credit report which is disclosed contrary to the Privacy Commissioner's determination will be regarded as being in breach of the Act.

Amendment (44) Clause 13 - Proposed new subsection 18N(7) - meaning of 'report' for the purposes of section 18N

This amendment ensures that the regulatory scheme established by the Bill will not apply to publicly available information. It also ensures that the limitations on disclosure by credit providers of personal information contained in reports relating to credit worthiness are within the Commonwealth's constitutional power.

Amendment (45) Clause 13 - Proposed new section 18NA - Limits on use or disclosure by mortgage insurers of personal information contained in a credit report

This is a new clause.

Proposed subsection 18NA(1) makes provision for limiting the use and disclosure by mortgage insurers of credit reports and personal information derived from those reports. A mortgage insurer will only be able to use a credit report or any information derived from a report for assessing whether to provide insurance to a credit provider in respect of mortgage credit provided to the individual the subject of the report.

Proposed subsection 18NA(2) makes provision for limiting the use or disclosure by trade insurers of credit reports or personal information derived from the report. A trade insurer will only be able to use a credit report or any information derived from the report to assess whether to provide insurance to a credit provider in respect of commercial credit given by the credit provider, or to assess the risk of the person defaulting on commercial credit in respect of which the trade insurer has insured the credit provider.

Proposed subsection 18NA(3) makes provision for mortgage insurers and trade insurers to be required to delete certain information from a credit report before using that report. The information that has to be deleted will be any personal information contained in the credit report, or derived from the report which is not within the authorised type of information set out in proposed section 18E.

Proposed subsection 18NA(4) provides that a mortgage insurer or trade insurer will be required not to disclose any personal information contained in a credit report unless disclosure of the information is required or authorised by or under law. It will be an offence to knowingly or recklessly breach the disclosure rules set out in the provision. On conviction, a fine not exceeding \$150,000 would be imposed by a court, (proposed new section 18NA(4)).

Amendment (46) Amendment to proposed section 18S

This amendment is consequential to the insertion of proposed new section 18NA (see amendment 45 above).

Amendment (47) Clause 13 - Proposed new subsection 18T(2)

The Bill originally required credit reporting agencies to delete from credit information files all information other than permitted contents (original subsection 18E(8)). In this context, the originally proposed subsection 18T(2) would have had the effect of providing the credit reporting industry with a 12-month period of grace in which to perform the deletions.

Proposed new subsection 18T(2) limits the application of the paragraph 18E(9)(b) requirement that a credit provider inform an individual that personal information might be given to a credit reporting agency to information acquired after the commencement of the Bill.

Amendment (48) Clause 15 - Proposed new section 28A - Functions of Commissioner in relation to credit reporting

This amendment is to ensure the Privacy Commissioner's powers are consistent with the duties conferred by section 11B.

