

***– National Access to Justice and Pro  
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**Reform of consumer credit law and privacy law in  
Australia**

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***Overview***

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- **Reform of Credit Law**
    - » COAG decision
    - » UCCC
    - » ASIC Licence
  
  - **Reform of Privacy Law (ALRC Report)**
    - » Credit Reporting Regulations
    - » Direct marketing [UPP 6]
    - » Pre-screening
  
  - **ARCA Code of Conduct**



## Context for reform

- "...Lenders could be seen as indirectly influencing an individual's path to financial difficulty. For example, the majority of people in this study with credit cards had received unsolicited credit limit increase offers and around half had accepted them. Acceptance in many cases occurred where there were pre-existing unhealthy ways of thinking and the offer provided the opportunity to access credit. Acceptance was also underpinned by a perception that 'it must be okay' because the lender had sent it out, coinciding with a behaviour of not reading the parameters of the offer. Once in financial difficulty, a small number of people felt powerless to negotiate with lenders, and said they received little understanding and flexibility from lenders overall."
  - » ANZ and AC Nielsen, *Understanding Personal Debt and Financial Difficulty in Australia*, November 2005, <[http://www.anz.com.au/aus/aboutanz/Community/Programs/pdf/ANZ\\_UPD\\_f\\_in\\_difficulty.pdf](http://www.anz.com.au/aus/aboutanz/Community/Programs/pdf/ANZ_UPD_f_in_difficulty.pdf)>.
- Role of lenders is acknowledged – so attention has turned to regulation and self regulation.



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## COAG Decision 2008

- **Phase One legislation in place by mid 2009.**
  - » Enacting the Uniform Consumer Credit Code (UCCC), into Commonwealth legislation.
  - » ASIC powers (see next slide)
- **Phase Two legislation in place by mid 2010.**
  - » Enhancements to specific conduct obligations to stem unfavourable lending practices, such as a review of credit card limit extension offers, interest rate caps etc.
  - » Regulation of the provision of credit for small businesses.
  - » Reform of mandatory comparison rates and default notices.
- **See:**
  - » Department of Treasury, *National Consumer Credit: Single, standard, national regulation of consumer credit for Australia*, October 2008, <[http://www.treasury.gov.au/documents/1381/PDF/NCC\\_Brochure\\_02102008.pdf](http://www.treasury.gov.au/documents/1381/PDF/NCC_Brochure_02102008.pdf)>.
- **See also:**
  - » NSW Office of Fair Trading, *Responsible Lending Practices in Relation to Consumer Credit Cards*, August 2008, <[http://www.fairtrading.nsw.gov.au/pdfs/About\\_us/Resolving\\_issues/Responsible\\_lending\\_RIS\\_2008.pdf](http://www.fairtrading.nsw.gov.au/pdfs/About_us/Resolving_issues/Responsible_lending_RIS_2008.pdf)>.
  - » Department of Treasury, *Financial Services and Credit Reform: Improving, Simplifying and Standardising Financial Services and Credit Regulation*, June 2008, <[http://www.treasury.gov.au/documents/1381/PDF/Green\\_Paper\\_on\\_Financial\\_Services\\_and\\_Credit\\_Reform.pdf](http://www.treasury.gov.au/documents/1381/PDF/Green_Paper_on_Financial_Services_and_Credit_Reform.pdf)>.



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## UCCC Reform

- The only responsible lending provision in the Uniform Consumer Credit Code (UCCC) is Section 70 (2)(l). It states that a court (on application) may reopen a credit contract that it believes is unjust. One of the factors it can take into consideration is:
  - » Whether at the time the contract, mortgage or guarantee was entered into or changed, the credit provider knew, or could have ascertained by reasonable inquiry of the debtor at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship.
- Note that this provision has proved to be difficult to use in practice. It does not require any proactive steps by credit providers and it usually involves considerable time, expense and legal representation to re-open a credit contract on the grounds that it is unjust.
- Most overseas jurisdictions have proactive responsible lending requirements.

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## ASIC Licence

- **ASIC Licence requirements**
  - » Establishing a national licensing regime to require providers of consumer credit and credit-related brokering services and advice to obtain a licence from ASIC.
  - » ASIC to be sole regulator of credit with enhanced enforcement powers.
  - » General conduct requirements including responsible lending practices.
  - » Mandatory membership of EDR body
- **Precedent – CBA 2006**
  - » ASIC called for banks to adopt responsible lending practices. This followed an investigation by ASIC into personal loans arranged for borrowers in Far North Queensland, the Torres Strait, and some remote parts of South Australia. The investigation found that the eligibility criteria used by CBA to assess personal loans in these areas resulted in some loans leaving borrowers over-committed and unable to afford the repayments.
  - » ASIC stated: 'There is a need for all financial institutions to adopt responsible lending practices. ASIC encourages all lenders that haven't already done so recently, to review their lending guidelines to ensure that they are fair and effective'.
  - » **See:**
    - ASIC, *CBA agrees to change lending practices in remote Indigenous communities*, 19 January 2006, <<http://www.asic.gov.au/asic/asic.nsf/byheadline/06-010+CBA+agrees+to+change+lending+practices+in+remote+indigenous+communities?openDocument!>>.

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## ***Privacy Law Reform***

- **Recommendation 54–1** The credit reporting provisions of the *Privacy Act* should be repealed and credit reporting regulated under the general provisions of the *Privacy Act*, the model Unified Privacy Principles, and regulations under the *Privacy Act*—the new *Privacy (Credit Reporting Information) Regulations*—which impose obligations on credit reporting agencies and credit providers with respect to the handling of credit reporting information.
- **Recommendation 54–2** The new *Privacy (Credit Reporting Information) Regulations* should be drafted to contain only those requirements that are different or more specific than provided for in the model Unified Privacy Principles.

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## ***ALRC: Amount of Credit Reporting Information***

- **Recommendation 55–1** The new *Privacy (Credit Reporting Information) Regulations* should permit credit reporting information to include the following categories of personal information, in addition to those currently permitted in credit information files under the *Privacy Act*:
  - » (a) the type of each credit account opened (for example, mortgage, personal loan, credit card);
  - » (b) the date on which each credit account was opened;
  - » (c) the current limit of each open credit account; and
  - » (d) the date on which each credit account was closed.
- **Recommendation 55–2** Subject to Recommendation 55–3, the new *Privacy (Credit Reporting Information) Regulations* should also permit credit reporting information to include an individual's repayment performance history, comprised of information indicating:
  - » (a) whether, over the prior two years, the individual was meeting his or her repayment obligations as at each point of the relevant repayment cycle for a credit account; and, if not,
  - » (b) the number of repayment cycles the individual was in arrears.
- **Recommendation 55–3** The Australian Government should implement Recommendation 55–2 only after it is satisfied that there is an adequate framework imposing responsible lending obligations in Commonwealth, state and territory legislation.

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## **ALRC: Direct marketing [UPP 6]**

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### ■ UPP 6. Direct Marketing

- » 6.1 Improved test for existing customers:
  - Individual would reasonably expect the organisation to use or disclose the information for the purpose of direct marketing
- » 6.2 Weak test for other consumers likely to be applied online:
  - (ii) information is not sensitive information and it is impracticable for the organisation to seek the individual's consent before that particular use or disclosure; [followed by usual opt-out provisions]

- Missed opportunity for opt-in at time when the public has turned against behavioural tracking and direct marketing

- Also, very weak test for providing key information:

- » (d) if requested by the individual, the organisation must, where reasonable and practicable, advise the individual of the source from which it acquired the individual's personal information.

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## **ALRC: Pre-screening**

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- **Recommendation 57–3** The new *Privacy (Credit Reporting Information) Regulations* should prohibit the use or disclosure of credit reporting information for the purposes of direct marketing, including the pre-screening of direct marketing lists.

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## **ARCA Code of Conduct**

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- **Recommendation 54–9** Credit reporting agencies and credit providers, in consultation with consumer groups and regulators, including the Office of the Privacy Commissioner, should develop a credit reporting code providing detailed guidance within the framework provided by the *Privacy Act* and the new *Privacy (Credit Reporting Information) Regulations*. The credit reporting code should deal with a range of operational matters relevant to compliance.
  
- Australasian Retail Credit Association (ARCA) has drafted a code and has begun consultation with stakeholders.
  - » <<http://www.arca.net.au/>>