

Mr Richard Glenn
Assistant Secretary
Information Law and Policy Branch
Attorney-General's Department
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Dear Mr Glenn

ACCESS TO CREDIT REPAYMENT HISTORY INFORMATION

The Insurance Council of Australia (*Insurance Council*)¹ supports the government's proposed reforms to allow credit repayment history information to be included in an individual's credit information file as part of more comprehensive credit reporting. However we are concerned that the provisions of the Credit Reporting Exposure Draft (the Exposure Draft) unnecessarily restrict the ability of lenders mortgage insurers (LMIs) providers to access this information. We appreciate the opportunity that the Insurance Council's General Manager Regulatory Policy, Mr Anning, had to discuss these concerns with you on 1 December 2011.

We submit that because LMI providers rely on credit reporting information when determining:

- whether to underwrite credit risk of a borrower;
- whether to vary loans;
- when to conduct risk assessments; and
- insurance and reinsurance arrangements;

section 135 of the Credit Reporting Exposure Draft needs to be amended so that a credit provider is **not** precluded from disclosing payment history information to a LMI provider and once the information is disclosed, a LMI provider is permitted to use that information.

Currently LMIs can access the information that the lender has on a potential borrower. In some circumstances LMIs see all the lender information, including the loan application. Alternatively, where a delegated underwriting authority is in place, LMIs may not see the

¹ The Insurance Council of Australia is the representative body of the general insurance industry in Australia. Our members represent more than 90 percent of total premium income written by private sector general insurers. Insurance Council members, both insurers and reinsurers, are a significant part of the financial services system. September 2011 Australian Prudential Regulation Authority statistics show that the private sector insurance industry generates gross written premium of \$35.1 billion per annum and has total assets of \$113.9 billion. The industry employs approx 60,000 people and on average pays out about \$104 million in claims each working day.

Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

lender information at the time of application but have the right to audit customer files, at which point they can see all the lender information. Some LMIs conduct such audits on a monthly basis.

It is also important to note that LMIs use credit reports and assessments to underwrite the risk on loans. In effect, LMIs are taking on the same risk as the lender when they make a decision to provide LMI. Access to credit reporting information is therefore crucial for LMIs to enable them to accurately and sensibly assess risk.

The Insurance Council and its LMI provider members strongly urge the Commonwealth Government to allow LMI providers to continue to have access to the same credit reporting information as credit providers, including repayment performance history. LMI providers should be able to access this information directly from credit reporting agencies as well as from credit providers.

The Exposure Draft and the Senate Standing Committee on Finance and Public Administration Report

Subsection 135(1) of the Credit Reporting Exposure Draft deals with use or disclosure of credit eligibility information and provides that a credit provider who holds credit eligibility information must not use or disclose the information other than in line with the exceptions provided for in the section. Subsection 3 contains the following exceptions:

135(3) Subsection (1) does not apply to the disclosure of credit eligibility information about the individual if:

- (a) the disclosure is a permitted CP disclosure in relation to the individual; or*
- (b) the disclosure is to a related body corporate of the credit provider; or*
- (c) the disclosure is to a person:
 - (i) who manages credit provided by the credit provider for use in managing that credit; and*
 - (ii) who is not acting as an agent of the provider; or**
- (d) both of the following apply:
 - (i) the credit provider believes on reasonable grounds that the individual has committed a serious credit infringement;*
 - (ii) the provider discloses the information to another credit provider or an enforcement body; or**
- (e) both of the following apply:
 - (i) the disclosure is for the purposes of a recognised external dispute resolution scheme;*
 - (ii) a credit provider or credit reporting agency is a member of the scheme; or**
- (f) the disclosure is required or authorised by or under an Australian law, or an order of a court or tribunal; or*
- (g) the disclosure is a disclosure prescribed by the regulations.*

(4) However, if the credit eligibility information about the individual is, or was derived from, repayment history information about the individual, the credit provider must not disclose the information under subsection (3).

Civil penalty: 2,000 penalty units.

Subsection 135(4) therefore clearly precludes a credit provider from disclosing repayment history information to a LMI provider.

The Commonwealth Government's intention to limit a LMI provider's access to repayment history information is of great concern for the Insurance Council's LMI members.

We understand that the Government is seeking to encourage informed and prudent lending practices. The Government response to the Australian Law Reform Commission's (ALRC's) Privacy Report noted that "the Government agrees with the ALRC's view that the predictive value of this extra data set will lead to more informed lending practices, which in turn will result in greater efficiency and effectiveness in consumer credit lending"².

LMI providers currently exert market discipline and encourage prudent lending practices in the Australian mortgage market. LMI provides an important 'second set of eyes' for this industry. Limiting access to information in credit reports limits the industry's ability to perform this function and therefore does not align with the Government's stated policy intention.

We note this issue was briefly discussed in the report on the Exposure Draft released by the Senate Committee on Finance and Public Administration. In relation to section 135 of the Exposure Draft, the Committee stated that:

*7.32 The committee does not consider that section 135 requires amendment to allow for the disclosure of credit eligibility information derived from repayment history information. The Government was clear in its intention to limit access to repayment history. As to problems with embedded data, the committee considers this to be a data management issue and not one which should impact on the credit reporting system. Similarly, the committee does not consider that management of their portfolios by mortgage insurers or debt collectors is a matter for the credit reporting system.*³

We submit that the Committee failed to give sufficient consideration to the issue. LMI providers place significant reliance on credit reporting information when:

- Determining whether or not to underwrite the original credit risk of a particular borrower - LMI providers have no direct contact with the consumer, either during the establishment or duration of the home loan credit contract. Application information provided by the credit provider and/or an independent credit report from a credit reporting agency are fundamental for an LMI provider to assess whether or not to underwrite a credit risk;

² Australian Government (2009) First Stage Response to ALRC Privacy Report, October 2009, p106

³ Senate Finance and Public Administration Legislation Committee (2011) Exposure Drafts of Australian Privacy Principles Amendment Legislation Part 2 – Credit Reporting, October 2011, p133

- Loan Variations - During the life of a loan, it is often necessary for the LMI provider to obtain up to date credit information, such as when assessing hardship or loan variation applications;
- Conducting risk assessment and management involving securitisation, credit scoring, portfolio analysis, reporting and fraud prevention;
- Arranging insurance and reinsurance.

LMI Providers, Credit Licences and Responsible Lending Obligations

LMIs are required to hold a credit licence and are therefore subject to the following general conduct obligations under the *National Consumer Credit Protection Act 2009*⁴ (the NCCP Act):

- engage in credit activities efficiently, honestly and fairly;
- comply with relevant laws;
- comply with any conditions of the credit licence;
- manage conflicts of interest;
- must have an internal dispute resolution procedure that complies with ASIC standards;
- must ensure representatives comply with the credit legislation;
- must ensure representatives are adequately trained and are competent to engage in the credit activities authorised by our licence; and
- have adequate arrangements for compensating persons for loss or damage suffered because of a contravention of the NCCP Act by the licensee or its representative

It is important to remember that LMI is a business to business insurance product. LMI providers have no direct contact with the consumer in either the establishment or the ongoing management of the home loan credit contract. LMI providers work directly with lending institutions through the establishment and management of the mortgage and not with the borrower.

The LMI provider moves into a direct role with the consumer (the borrower) only after:

- there has been a default on the home loan
- the lender has taken possession
- the property has been sold
- the LMI has paid the shortfall to the lender; and

⁴ National Consumer Credit Protection Act 2009 Section 47

- the lender has assigned to the LMI (or the LMI provider is subrogated for the lender in relation to) any ongoing rights of the lender against the consumer for the personal debt still outstanding under the home loan contract.

If the borrower defaults on the mortgage and the LMI provider pays out on the insurance to the original credit provider, the LMI provider stands in the shoes of the credit provider in regards to their rights and obligations under the mortgage. It is for this reason that LMI providers need to have a credit licence. It is illogical that an LMI provider is expected to take on the legal position of a party that had access to more information about the borrower at the time that the mortgage was provided.

At this point, the nature of the direct arrangement between the LMI and the borrower then more readily resembles a debt recovery arrangement and is not the management of a credit contract with a borrower. Where a default occurs and once the LMI provider has paid the lender's claim, the LMI provider will contact the borrower to ascertain the borrower's financial position in order to assess whether any recovery action is worthwhile.

Recoveries by LMI providers against borrowers for the outstanding personal debt are a very small part of the LMI business. It is not the practice of the LMI providers to pursue borrowers in this situation unless it is clear that the borrower has additional assets (for example if the home loan was for investment purposes).

When the Government foreshadowed restrictions on access to repayment history in its response to the ALRC's recommendations for a new privacy regime, we understood the rationale to be the protection of consumers from the irresponsible pushing of credit. Consequently, use of repayment information was tied to the existence of responsible lending obligations. However, this caution need not apply to an LMI provider's assessment of whether to provide mortgage insurance.

LMI Providers Use of Credit Information

Typically, the LMI provider will establish and agree underwriting criteria with lenders to enable it to determine if particular loans are acceptable risks. LMI providers therefore require access to the same range of information as the lender in order to assess the level of risk.

Currently the Privacy Act 1998 specifically allows credit information to be disclosed to mortgage insurers (or LMI providers) by both credit reporting agencies (section 18K) and credit providers (section 18N).

Furthermore, in the Government's First Stage Response to the ALRC report, in response to recommendation 57-1, the Government stated:

*The Government agrees that the current drafting in Part IIIA of the Privacy Act in relation to the way that credit providers and credit reporting agencies can use and disclose credit reporting information is overly complicated and confusing. **The Government is committed to redrafting the use and disclosure provisions to continue to allow the current practices of credit reporting agencies, credit providers, mortgage and trade insurers and debt collectors.** These permitted*

*uses and disclosures will be outlined in a clearer and more consistent way⁵.
(emphasis added)*

As outlined above, the current practices of mortgage insurers when assessing an application for LMI is to utilise the same information as that used by the lender to assess the application for credit. We are concerned that the effect of removing the ability of LMI providers to access the full suite of information has not been fully considered.

The Insurance Council and its LMI provider members strongly urge the Commonwealth Government to allow LMI providers to have access to the same credit reporting information as credit providers, including repayment performance history.

LMI providers should be able to access this information directly from credit reporting agencies as well as from credit providers.

If you would like to discuss this issue, please contact the Insurance Council's General Manager Policy – Regulation, Mr John Anning, on 02 9253 5121 or janning@insurancecouncil.com.au.

Yours sincerely



Robert Whelan
Executive Director & CEO

⁵ Australian Government (2009) First Stage Response to ALRC Privacy Report, October 2009, p115