



## Explanatory Statement

### Credit Provider Determination No. 2006-1 (Assignees)

This Explanatory Statement has been drafted for the purpose of fulfilling the Office of the Privacy Commissioner's obligations under section 26(1) of the *Legislative Instruments Act 2003*.

#### 1. PURPOSE

The purpose of *Credit Provider Determination No. 2006-1 (Assignees)* (this Determination) is to determine that a corporation which acquires the rights of a credit provider with respect to the repayment of a loan (whether by assignment, subrogation or other means) shall, in relation to that loan, be regarded as the credit provider for the purposes of the Privacy Act 1988 (the Privacy Act). A corporation deemed to be a credit provider by virtue of the Determination is regarded as the credit provider to whom the loan application was submitted, or who provided the loan.

This Determination affects those businesses which are not already credit providers by virtue of paragraphs (a) or (b)(iii) to (iv) of s. 11B(1) of the Privacy Act.

Section 11B(1)(c) extends the operation of this Determination to assignees that are not a corporation and deems such persons credit providers.

This Determination continues the effect of *Determination 2003 No.2 Privacy Act 1988, s.11B(1)(b)(v)(B) – concerning assignees* dated 14 February 2003 which lapses on 24 February 2006. The new Determination is substantively the same as all of the previous four Determinations issued over the past 11 years.

By being granted credit provider status the assignee is able to conduct credit reporting, but only in relation to the assigned loan. In particular, it will be able to directly access an individual's credit report, held by a credit reporting agency in some circumstances. If it needs to, an assignee will be permitted to directly access a credit report held by a credit reporting agency in accordance with Part IIIA of the Privacy Act and the *Credit Reporting Code of Conduct*, for such purposes as: collecting a payment on the loan that is overdue; listing either an overdue payment or a serious credit infringement in relation to the loan; updating as paid an existing default listing in relation to the loan; and making corrections to information it, or the assignor, has previously reported in relation to that loan.

## 1.1 Provisions for Credit Provider Determinations

Section 11B of the Privacy Act defines “credit providers”. Credit providers that can conduct credit reporting include banks and certain other private sector organisations. Section 11B(1)(b)(v)(B) also allows the Privacy Commissioner to determine that a corporation that carries on a business or undertaking involving the provision of loans, (including the provision of loans by issuing credit cards), is a credit provider if it is included in a class of corporations.

“Credit” is defined in section 6(1) to mean a loan sought or obtained by an individual from a credit provider in the course of the credit provider carrying on a business or undertaking as a credit provider, being a loan that is intended wholly or primarily for domestic, family or household purposes.

## 1.2 Authority for making this Determination

Determination 2005 No.1 is made under s.11B(1)(b)(v) (B) of the Privacy Act. Section 11B(1) states:

- (1) For the purposes of this Act ... a person is a credit provider if the person is:
  - (b) a corporation (other than an agency)
  - (v) that
    - (A) carries on a business or undertaking that involves the provision of loans (including the provision of loans by issuing credit cards); and
    - (B) is included in a class of corporations determined by the Commissioner to be credit providers for the purposes of this Act.

Section 28A(1)(d) states that the Commissioner has the following function in respect of credit reporting:

- (d) to make such determinations as the Commissioner is empowered to make under section 11B or Part IIIA.

## 1.3 Document incorporated by reference

The following document is incorporated by reference in this Determination and is attached as an appendix to this statement.

- *Determination 2003 No.2 Privacy Act 1988, s.11B(1)(b)(v)(B) – concerning assignees* dated 14 February 2003 which lapses on 24 February 2006 (Attachment A).

## 2. REASONS FOR MAKING THE DETERMINATION

### 2.1 Background to Determination

The term of the new Determination is limited to approximately six months in order that the Privacy Commissioner may undertake consultation with stakeholders affected by this Determination, including individual credit consumers and their representatives, privacy advocates, businesses which sell, purchase or otherwise assign debts incurred by individuals, and credit reporting agencies. The purpose of the consultation is to ascertain

stakeholders' views regarding the operation of current and related previous Determinations, and the terms upon which any new Determination should be cast.

A Determination concerning assignees was first made in 1995, then re-issued without substantive amendment in 1997, 2002 and 2003. The Determination issued in 2003 was made for three years until 24 February 2006.

The initial Determination was made following representations from a mortgage insurer taking assignment of a loan upon the default of a borrower. The mortgage insurer was concerned that as an assignee it would be able to conduct credit reporting in relation to such a loan as if it were the original credit provider. Consultation was conducted by the Office at the initial stage and subsequently prior to the making of the Determination in 1997 at which time peak industry bodies expressed strong support for its renewal. At that time no objections were raised by the Credit Reporting Consultative Group or other interested parties. The then Commissioner observed prior to the making of the 2003 Determination that there were no problems encountered with the operation of the 1997 and 2002 Determinations.

The then Commissioner also observed, however, that the issue of "double listing" by assignees should be further considered upon review of that Determination. "Double listing" occurs when an assignee again lists a previous payment default (or serious credit infringement) on an individual's credit report held by a credit reporting agency when the loan is taken over by an assignee.

## **2.2 Public interest and other relevant considerations**

In considering making a short-term Determination, the Privacy Commissioner has taken account of section 29 of the Privacy Act. Section 29 requires the Commissioner in the performance of her functions and the exercise of her powers under the Privacy Act to have due regard to the protection of important human rights and social rights that compete with privacy. In particular, the Commissioner has taken account of the following matters.

- a) It is in the public interest that assignees continue to have access to the credit reporting system regulated by Part IIIA of the Privacy Act and the Credit Reporting Code of Conduct while consultation occurs with stakeholders affected by this Determination on any new issues that may be relevant, and with regard to the terms upon which any new Determination should be cast. In particular, during the consultation stage, assignees as credit providers should be permitted to manage existing delinquent loan accounts by conducting credit reporting in accordance with Part IIIA of the Privacy Act and the Credit Reporting Code of Conduct.
- b) Customers with existing listings on their credit reports held by a credit reporting agency should continue to benefit by this continuing access by assignees to the credit reporting system, including by assignees being able to update existing customer default listings when overdue accounts are paid in full. In this way, the public

interest is served by individuals being able to demonstrate to potential lenders through access to their credit reports held by a credit reporting agency that they have an acceptable credit history and are an acceptable credit risk.

The Privacy Commissioner has concluded that it is substantially in the public interest to make this Determination for a period of approximately six months during which time consultation will occur with stakeholders affected by this Determination.

### **3. ATTACHMENT**

#### **Attachment A:**

*Determination 2003 No.2 Privacy Act 1988, s.11B(1)(b)(v)(B) – concerning assignees dated 14 February 2003 (which lapses on 24 February 2006).*

## **Determination 2003 No.2 PRIVACY ACT 1988, s.11B(1)(b)(v)(B) – concerning assignees**

Under s.11B(1)(b)(v)(B) of the *Privacy Act 1988*, I DETERMINE that:

1. A corporation which acquires the rights of a credit provider with respect to the repayment of a loan (whether by assignment, subrogation or other means) shall, in relation to that loan, be regarded as the credit provider for the purposes of the Act.
2. A corporation deemed to be a credit provider by virtue of paragraph 1, above, shall, for the purposes of the Act, be regarded as the credit provider to whom application for the loan was made, or who provided the loan.
3. This determination relates to those corporations which are not already credit providers by virtue of paragraphs (a) or (b)(i) to (v) of s. 11B(1) of the Act.
4. This determination represents a continuation of Determination No. 2 of 2002 which expires on 24 February 2003.
5. This determination shall take effect on 25 February 2003 and shall lapse, unless continued by a further determination of the Privacy Commissioner, on 24 February 2006.

MALCOLM CROMPTON  
Federal Privacy Commissioner

14 February 2003

## **DETERMINATION 2003 No. 2 UNDER s.11B(1)(b)(v)(B) – CONCERNING ASSIGNEES: REASONS FOR DETERMINATION**

### **Background**

Determination No. 2 of 2003 represents a continuation, without amendment, of Determination No. 2 of 2002; this was effectively a continuation of Determination No. 1 of 1997, which was a continuation of Determination No. 1 of 1995.

### ***History of the determination***

In March 1993, the Privacy Commissioner received a request for a determination from a mortgage insurer for a determination under section 11B(1)(b)(v)(B) of the Act, to enable a corporation which acquires the rights of a credit provider with respect to the repayment of a loan to be regarded as a credit provider for the purposes of the Act. The request arose from concerns about the situation where a mortgage insurer takes assignment of a loan after the borrower defaults.

It was submitted that a mortgage insurer which takes assignment of a loan from a credit provider should thereafter be regarded as the credit provider in respect of that loan. This would entitle the mortgage insurer to obtain access to consumer credit reports and consumer credit information in relation to that loan, as if it had provided the loan in the first instance.

Before issuing the original determination, the then Privacy Commissioner undertook extensive consultation on the substance of the matter. Following consultation, it was felt that the determination should not be limited to mortgage insurers but should have a general application to businesses which acquire the rights of credit providers.

Further consultation on the determination was undertaken prior to the making of Determination No. 1 of 1997; during which peak industry bodies expressed strong support for its renewal. Correspondingly, no objections were raised by the Credit Reporting Consultative Group or other interested parties. In addition, the Office had not encountered problems in the operation of the original determination.

As noted in the Reasons for Determination No. 2 of 2002, the Office encountered no problems with the operation of Determination No. 1 of 1997. This has remained the case over the past year.

### **Operation of the determination**

Resulting from the original consultation process, the decision was taken to issue a determination that a corporation which acquires the rights of a credit provider with respect to the repayment of a loan (whether by assignment, subrogation or other means) shall, in relation to that loan, be regarded as a credit provider for the purposes of the Privacy Act.

With regard to notices given and consents obtained by the credit provider under the terms of the loan, it was envisaged that these would be taken to have been given or obtained by a business deemed to be a credit provider by virtue of the determination.

As noted in the Reasons for Determination for the previous determinations, under section 11B(1)(b)(v)(A) one of the conditions which must be satisfied before the Privacy Commissioner can determine a class of corporations to be credit providers is that those corporations carry on a business or undertaking involving the provision of loans. As such, the determination does not extend, for example, to an agent that collects debts on behalf of a credit provider.

While the determination is directed to a certain class of corporations, the application of the determination is extended by virtue of section 11B(1)(c) to non-corporations which meet the criteria which apply to corporations under section 11B(1)(b).

### **Current issues**

During 2002 and early-2003, the Office engaged with various stakeholders in the credit reporting sector on a range of issues. This was foreshadowed in the Reasons for Determination for Determination No. 2 of 2002, namely that the Office would be further considering other issues relating to the credit reporting sector (including issues relating to Determination No. 1 of 2002), and then looking at whether these issues have a bearing on the current determination. This does not appear to be the case.

An issue that has been brought to the attention of the Office, however, is that of 'double listing', involving occasions where a consumer's non-payment of a debt is listed with a credit reporting agency, whereafter that debt is taken over by another organisation/credit provider and the debt is effectively re-listed with a credit reporting agency. Such occurrences, which are not permitted by the Act, can result in an individual having the one debt listed in the credit reporting system for longer than the permitted five year period.

Businesses should regard this as an early indication that they need to review their practices in this area. At this stage, there is an opportunity for credit providers and credit reporting agencies to improve practice themselves, rather than requiring a move toward more regulatory compliance activity or legislative change that delivers greater oversight. This issue, however, clearly needs to be kept under notice, and is highlighted for further consideration on review of this determination.

Currently, I remain of the view that the operation of the determination continues to be appropriate.

## **Determination**

In light of the issues considered above, in my view it is appropriate to issue a further determination, in unchanged terms, in respect to corporations acquiring loans by assignment, subrogation or other means and their relationship with the credit reporting system.

As to the life of the determination, I take the view that it should not be open-ended. I have therefore decided that the determination should be made for a period of 3 years commencing on 25 February 2003 and lapsing, unless continued by a further determination, on 24 February 2006.

MALCOLM CROMPTON  
Federal Privacy Commissioner

14 February 2003