



Australian Government

Office of the Privacy Commissioner

Explanatory Statement

Credit Provider Determination

No. 2006-5 concerning
Indigenous Business Australia

October 2006

Explanatory Statement

IBA Determination

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*.

This explanatory statement refers to Credit Provider Determination No. 2006-5 – concerning Indigenous Business Australia (IBA Determination) issued under section 11B(1)(d)(ii) of the *Privacy Act 1988* (Cwlth) (the Privacy Act).

Authority for making the determinations

The authority for the Privacy Commissioner (the Commissioner) to make the IBA Determination rests in section 11B(1)(d)(ii) and section 28A(1)(d) of the Privacy Act. Section 11B(1)(d) states:

- (1) For the purposes of this Act ... a person is a credit provider if the person is:
 - (d) an agency that:
 - (i) carries on a business or undertaking that involves the making of loans; and
 - (ii) is determined by the Commissioner to be a credit provider for the purposes of this Act.

Section 28A(1) 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.

Description of consultation

In October 2005, the Commissioner made a one year credit provider determination to operate from 31 October 2005 to 30 October 2006, allowing time for public consultation with stakeholders regarding a credit provider determination for IBA. In making the current IBA Determination, the Commissioner has undertaken a review of that determination. The review included issuing a public invitation for submissions to a consultation paper titled: *Review of Credit Determinations Consultation Paper No. 2 – Indigenous Business Australia*¹ (the Consultation Paper).

The purpose of the consultation was to ascertain stakeholders' views regarding the operation of the IBA Determination, any new issues that may be relevant and the terms upon which any new determinations should be cast.

¹ Link to [Review of Credit Determinations Consultation Paper No. 2 – Indigenous Business Australia](http://www.privacy.gov.au/act/credit/index.html#cpd) on the OPC website at www.privacy.gov.au/act/credit/index.html#cpd

The Office of the Privacy Commissioner (OPC) received 9 written submissions from industry organisations, consumer organisations and other government agencies and statutory authorities.

The submissions to the review all supported the current IBA Determination and suggested it be made for an indefinite period of time or a minimum of five years. The Consultation Paper and the submissions are included as related documents in the Report.

Purpose and operation

The purpose of Credit Provider Determination No. 2006-5 – concerning Indigenous Business Australia is to determine that the applicant, Indigenous Business Australia (IBA), is an Australian government agency that carries on the business or undertaking that involves the making of loans and, as such, is a credit provider pursuant to section 11B(1)(d)(ii) of the Privacy Act.

This Determination continues the effect of *Determination 2005 No. 1 Privacy Act 1988, s.11B(1)(d)(ii)- concerning Indigenous Business Australia* (Determination 2005 No.1), which expires on 30 October 2006.

By being granted credit provider status under the terms of the IBA Determination, IBA will be permitted to conduct credit reporting in accordance with Part IIIA of the Privacy Act. In particular, it may be able to directly access an individual customer's credit report, held by a credit reporting agency for purposes including: assessing the loan application, 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 or serious credit infringement listing in relation to the loan, or making corrections to information they have previously reported in relation to the loan.

Background to the Classes Determination

Indigenous Business Australia (IBA) is a statutory authority established under Part 4 of the Aboriginal and Torres Strait Islander Commission Act 1989 (Cth) (the ATSIC Act). It is also a federal government agency subject to the Privacy Act. On 16 March 2005 the Australian Parliament passed the Aboriginal and Torres Strait Islander Amendment Bill 2005 transferring to IBA the Indigenous Housing Fund and Business Development Program formerly administered by the Aboriginal and Torres Strait Islander Commission (ATSIC).

By these measures, IBA assumed the housing and business loan functions formerly performed by ATSIC, Aboriginal and Torres Strait Islander Services (ATSIS), and the Department of Employment and Workplace Relations (DEWR), respectively. The legislation effecting these changes came into force on 24 March 2005.

On 22 March 2005, IBA applied for a determination under s.11B(1)(d)(ii) of the Privacy Act to the effect that IBA carries on the business or undertaking that involves the making of loans and, as such, is a credit provider.

The Privacy Commissioner made Determination 2005 No. 1 Privacy Act 1988, s.11B(1)(d)(ii) - concerning Indigenous Business Australia on 20 October 2005, taking effect on 31 October 2005.

The term of the current IBA Determination is five years, taking effect on 31 October 2006 and ends on 30 October 2011.

ATSIC, ATSI and DEWR at various stages shared responsibility as credit providers for the provision of loans under the Indigenous Housing Fund and the Business Development Program, respectively. The following three determinations, which no longer apply, were issued to these agencies:

- Credit Reporting Determination: 1999 No. 1 Privacy Act 1988, s.11B(1)(d) - concerning the Aboriginal and Torres Strait Islander Commission
- Determination 2003 No.3 Privacy Act 1988, s.11B(1)(d)(ii) - concerning the Aboriginal and Torres Strait Islander Services
- Determination 2004 No. 1 Privacy Act 1988, s.11B(1)(d)(ii) - concerning the Department of Employment and Workplace Relations

These determinations have all now been revoked. The IBA Determination will be the only credit determination that applies to IBA.

Public interest and other relevant considerations

In their submissions to the Consultation Paper, consumer groups, industry participants and other government agencies supported the current IBA Determination. The submissions to the Consultation Paper have also supported the public interest and other relevant considerations which the Commissioner's gave for making the previous IBA Determination.

The Commissioner believes that these same considerations are relevant to the current determination, including that:

- IBA continues to perform the same lending functions in relation to the Indigenous Housing Fund and Business Development Program that ATSIC, ATSI and DEWR, performed previously. The same considerations that were deliberated in the previous determinations (in 1999, 2003 2004 and 2005) continue to be relevant.
- IBA has advised that its prudent lending policy is facilitated partly by timely access to a customer's credit report when it assesses a loan application and in cases where it is necessary to collect payments that are overdue. If IBA was not granted credit provider status it advises that, because some of its customers live in remote areas of Australia, there could be a delay of six to eight weeks while customers apply to a credit reporting agency to obtain a copy of their credit report which the individual must then forward to IBA. Lastly, IBA would not be able to list with a credit reporting agency that a customer was overdue with a payment or had committed a serious credit infringement.
- The timely provision of a customer's credit report to IBA assists a customer in establishing to the satisfaction of IBA that he or she has an established credit history and is an acceptable credit risk, and assists the customer to compete with other buyers on an equal footing in purchasing homes or businesses on the open market.
- The Australian National Audit Office (ANAO) issued an audit report in relation to IBA including findings in relation to privacy issues in 2005. In

making the current determination the Commissioner is satisfied that IBA has taken steps to implement the ANAO recommendations.

- The Commissioner has also taken into account that the Office of the Privacy Commissioner (OPC) has not received any complaints relating to IBA as a credit provider. Furthermore, the OPC has not received any reports from other regulators or industry or consumer organisations with complaints handling functions, including those providing submissions to the review of the IBA Determination, regarding IBA's operations as a credit provider.