



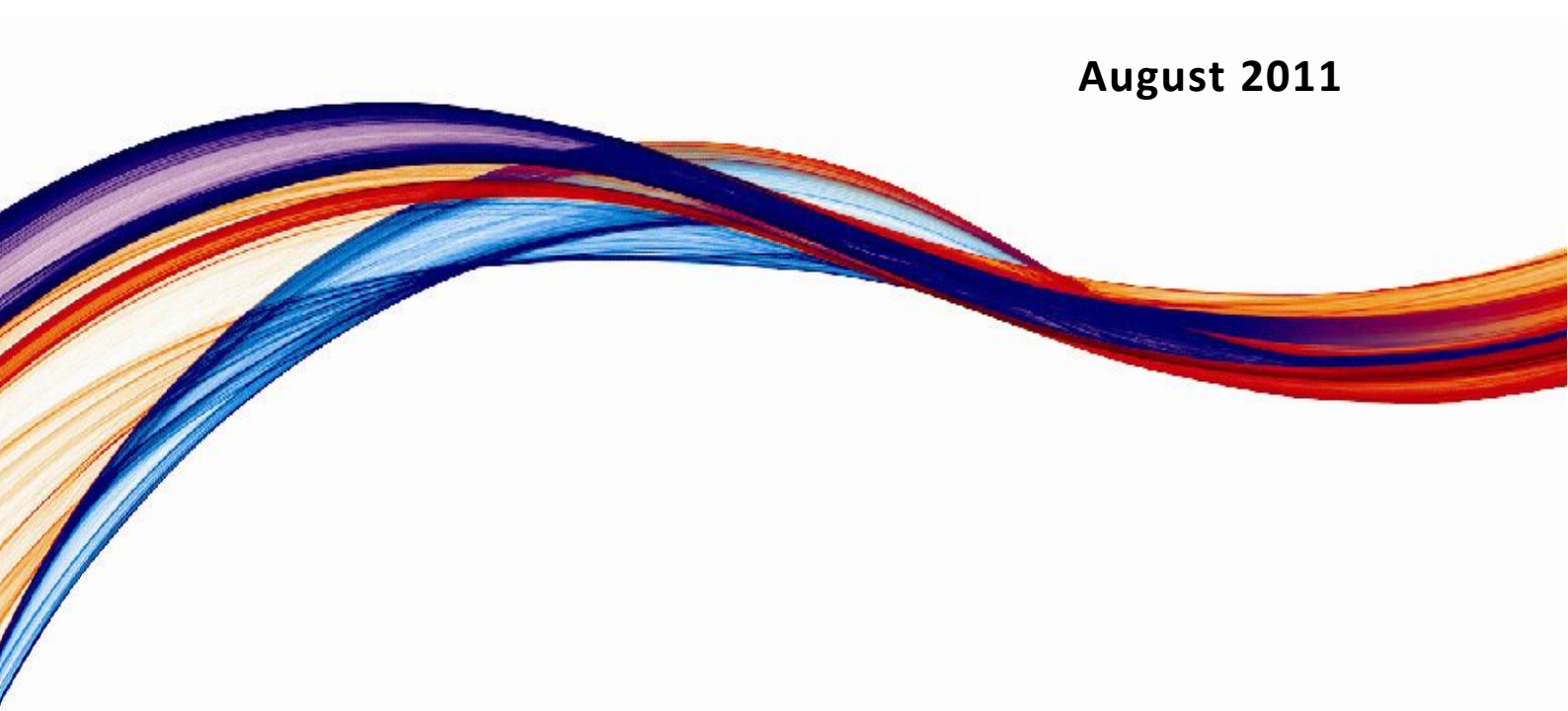
Australian Government

Office of the Australian Information Commissioner

Explanatory Statement Credit Provider Determination

No. 2011-3 (Indigenous Business Australia)

August 2011



Explanatory Statement

Credit Provider Determination No. 2011-3 (Indigenous Business Australia)

This explanatory statement fulfils the Privacy Commissioner's obligations under section 26(1) of the *Legislative Instruments Act 2003* (Cth).

This explanatory statement refers to Credit Provider Determination No. 2011-3 (Indigenous Business Australia) (the IBA Determination) made under section 11B(1)(d)(ii) of the *Privacy Act 1988* (Cth) (the Privacy Act).

Purpose and operation

The IBA Determination has effect from 31 October 2011 to 30 October 2014. It has the same effect as Credit Provider Determination No. 2006-5 (Indigenous Business Australia) (the 2006 IBA Determination) which expires on 30 October 2011.

The IBA Determination determines that Indigenous Business Australia (IBA), an agency that carries on a business or undertaking that involves the making of loans, is a credit provider for the purposes of the Privacy Act.

The purpose of the IBA Determination is to determine that IBA is a 'credit provider' for the purposes of the Privacy Act. By being determined as a credit provider for the purposes of the Privacy Act, IBAs are permitted to conduct credit reporting in accordance with Part IIIA of the Privacy Act and the *Credit Reporting Code of Conduct*¹. For example, it can access credit reports held by credit reporting agencies for particular purposes, including assessing a loan application, collecting a payment on an overdue loan, listing an overdue payment or serious credit infringement in relation to a loan and making corrections or additions to information previously reported in relation to a loan.

Authority for making the determination

The authority to make the IBA Determination is contained in sections 11B(1)(d) and 28A(1)(d) of the Privacy Act.

Section 11B(1)(d) of the Privacy Act 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.

¹*Credit Reporting Code of Conduct* and Explanatory notes issued by the Privacy Commissioner under section 18A of the Privacy Act, September 1991 and including all amendments as at March 1996.

Section 28A(1) of the Privacy Act 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.

Section 6 of the Privacy Act defines 'Commissioner' to mean 'the Information Commissioner within the meaning of the *Australian Information Commissioner Act 2010*'.

Section 12 of the *Australian Information Commissioner Act 2010* (Cth) (AIC Act) provides that the Privacy Commissioner has the 'privacy functions' (which are defined in section 9(1)). However, section 12(4)(f) of the AIC Act provides that the Privacy Commissioner may only undertake the making, variation or revocation of a determination for the purposes of paragraph 28A(1)(d) of the Privacy Act with the approval of the Australian Information Commissioner.

The IBA Determination has been made by the Privacy Commissioner. For the purposes of section 12(4)(f) of the AIC Act, the Australian Information Commissioner has approved the Privacy Commissioner making the IBA Determination.

Background to the IBA Determination

IBA is a statutory authority established under Part 4 of the *Aboriginal and Torres Strait Islander Act 2005* (Cth). As a federal government agency, it is also subject to the Privacy Act.

The functions of IBA include administration of the Home Ownership Program and Business Development and Assistance Program. Responsibility for these two programs was transferred to IBA from the Aboriginal and Torres Strait Islander Commission in 2005.

IBA first applied for a Credit Provider Determination in 2005 and a determination was issued in October 2005 for one year. The 2006 IBA Determination was issued without substantive change in October 2006 for a period of five years.

Earlier related Credit Provider Determinations were made in 1999 (Aboriginal and Torres Strait Islander Commission), 2003 (Aboriginal and Torres Strait Islander Services) and 2004 (Department of Employment and Workplace Relations). These determinations are no longer in force.

At the time of making this Determination, the Senate Finance and Public Administration Committee is conducting an inquiry into exposure drafts of Australian Privacy Amendment Legislation, including an exposure draft of proposed new credit reporting provisions (Senate Committee inquiry).

If the new credit reporting provisions are passed in their current exposure draft form, the IBA Determination is likely to become redundant because:

- the Australian Government proposes removing the Australian Information Commissioner's determination power in relation to the 'credit provider' definition, and

- subsection 188(1)(d) of the exposure draft provides that an agency is a credit provider if it carries on a business or undertaking that involves providing credit and it is prescribed by the regulations (which are yet to be released).

It appears that IBA may need to be prescribed in the regulations in order to continue to participate in the credit reporting system as a credit provider once the new credit reporting provisions commence.

Consultation

Prior to making the IBA Determination, the Office of the Australian Information Commissioner (OAIC) undertook a review of the 2006 IBA Determination which expires on 30 October 2011.

The OAIC released a consultation paper² for public comment as part of the review. The purpose of the public consultation was to obtain stakeholders' views regarding whether or not a new determination in relation to IBA should be made, whether the terms of the determination should be amended, and the duration of any such determination.

Comment was invited from industry participants, peak industry bodies, consumers groups, Government departments and Indigenous bodies. The consultation paper was available on the OAIC's website during the consultation period.

The OAIC received four written submissions in response to the consultation paper. The submissions are available on the OAIC website³.

Reasons for the decision

In making the IBA Determination, the Privacy Commissioner took account of:

- the operation of the 2006 IBA Determination
- the submissions received in response to the consultation paper, and
- the Senate Committee inquiry and the potential impact of the exposure draft of new credit reporting provisions on the IBA Determination.

The Privacy Commissioner was satisfied that there was no reason not to make a new determination in relation to IBA and no reason to amend the terms of the 2006 IBA Determination. The Privacy Commissioner therefore decided to make the IBA Determination, with the same effect as the 2006 IBA Determination, for a period of three years.

The Privacy Commissioner noted:

- that each submission received by the OAIC supported the making of a new IBA Determination on the same terms as the 2006 IBA Determination

²*Review of Credit Provider Determination: Consultation Paper No. 2 – Indigenous Business Australia* is available at <http://www.oaic.gov.au/publications/papers.html>.

³http://www.oaic.gov.au/news/consultations.html#previous_consultations.

- that the OAIC received no comments or evidence demonstrating problems with the operation of the 2006 IBA Determination
- that neither the OAIC nor the former Office of the Privacy Commissioner have received any complaints relating to IBA as a credit provider
- that IBA itself submits that it has acted in accordance with its obligations under the Privacy Act
- that IBA continues to perform the same lending functions that it performed when the 2006 IBA Determination was made, and as were performed by the Aboriginal and Torres Strait Islander Commission, the Aboriginal and Torres Strait Islander Services and the Department of Employment and Workplace Relations previously when those bodies were the subject of earlier credit provider determinations. Therefore the same considerations that were deliberated in the previous determinations (in 1999, 2003, 2004, 2005 and 2006) continue to be relevant
- IBA's statement that the timely provision of a customer's credit report to IBA assists a home or business enterprise loan customer to quickly obtain credit by satisfying IBA that he or she has an established credit history and is an acceptable credit risk, and assists that customer to compete with other buyers on an equal footing in purchasing homes or pursuing business opportunities on the open market, and
- a submission that IBA plays an important role in enabling policy implementation to assist Indigenous Australians to transition into home ownership and pursue entrepreneurial opportunities through the provision of loans and other supports.