Hong Kong Bar Association's Response to the Privacy Commissioner for Personal Data's Consultation Document: Proposed Revisions to the Code of Practice on Consumer Credit Data ("the Code") for the Sharing of Mortgage Data for Credit Assessment

Background

1. The consultation document contains a short history of the Code: §§1.6 and 1.7.

2. An alternative account of the circumstances in which the Code was first promulgated and its subsequent amendment is to be found in *Global Privacy Protection The First Generation* (Edward Elgar, 2008), eds Rule & Greenleaf.[1]

3. It is important to recognise that the original version of the Code (gazetted in February 1998) was primarily an exercise by the Privacy Commissioner for Personal Data ("the PC") in "ring-fencing" the then relatively undeveloped (as compared with many other economies of similar financial sophistication) and, as a consequence, relatively privacy-benign practices, of Hong Kong's only consumer credit reference agency ("CRA") of significance, Credit Information Services Limited ("CIS").

4. The origins of CIS lay in the sharing between finance companies of data on equipment and vehicle leasing and hire-purchase. This was subsequently expanded, with the involvement of a variety of "Authorised Institutions", to include the sharing of "negative" credit consumer credit data, i.e. data in relation to consumer credit defaults, including credit card defaults.

5. Thus, the situation in 1998 was that (leasing and hire-purchase data aside) the only CRA worth the name in Hong Kong, CIS, held data only in relation to individuals who had defaulted on their consumer credit obligations (the minority of consumer credit users), i.e. it did not hold data in relation to individuals who had not defaulted on their consumer credit obligations (the majority of consumer credit users).

6. Even with regard to individuals who had defaulted on their consumer credit obligations, CIS's coverage fell far short of being complete since the largest retail bank in Hong Kong, HSBC, did not participate in sharing data (whether through CIS or otherwise).

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[1] Pages 247 and 248 by McLeish and Greenleaf: copy herewith.

7. In the original (1998) version of the Code the scope of data that was permitted to be provided to, and shared through, any CRA was limited, in essence, to the scope of data that was then being provided to, and shared through, CIS.

8. In this regard (and the other matters it covered), the Code was (as was intended) a "pro-privacy" initiative because (other than in relation to leasing and hire-purchase transactions) it prohibited CIS from collecting "positive" consumer credit data, i.e. data on individuals' consumer credit applications and obligations irrespective of any default.

9. The irony is that this "pro-privacy" initiative has been leveraged into a mechanism for legitimising "privacy-intrusion" in the following ways.

   (1) First, by providing (at the instigation of the HKCM) for a CRA to be permitted to collect "positive" consumer credit data in amendments to the Code in 2002 and 2004.

   (2) Second, because the HKMA first encouraged (in 1998) participation by all Authorised Institutions in sharing consumer credit data (targeting HSBC most importantly) and then (in 2005) required this.

10. It is also noteworthy that in 1998, TransUnion (one of the big three consumer reference agencies in the US) acquired a majority stake in CIS and renamed it TransUnion. It had and still has an effective monopoly of Hong Kong's consumer CRA business.

11. Since most adults in Hong Kong will have some form of consumer credit (if only in the form of a credit card), permitting the collection of "positive" consumer credit data represented a quantum leap in the number of individuals whose data were collected and held by, and shared through, TransUnion, particularly when this was coupled with the participation of all Authorised Institutions, including HSBC. It also provided TransUnion with the means to engage in profiling across all types of individual borrowers for the purpose of credit-scoring (as a value-added service for the participating institutions) with potentially adverse effects for individuals' ability to obtain credit, irrespective of any defaults.

12. The proposals contained in the Consultation Document to expand the scope of consumer credit data that credit providers be permitted to provide to TransUnion to

include "positive" consumer credit data in relation to residential mortgages and "positive" and "negative" consumer credit data in relation to non-residential mortgages, represent a further step in the "scope-creep" of consumer credit data that TransUnion would be permitted by the Code to collect and hold for sharing among credit providers.

13. The PC is at pains to point out that the proposals in the Consultation Document are being put forward, not by him, but by a body called the Consumer Credit Forum ("CCF") with the support of the HKMA. The CCF is described as a "joint forum" of the representative bodies of the different groups of credit providers in Hong Kong.

14. As a general rule, consumer credit providers will always argue they should be allowed to engage in the sharing of an ever wider scope of consumer credit data, claiming this increases the efficiency of the credit market and reduces the risk of defaults. The support of the HKMA is also of no surprise given its policy responsibilities and past role in increasing the sharing of consumer credit data through CIS/TransUnion.

15. Increasing the efficiency of the credit market and reducing the risk of defaults are laudable aims, but they are to be balanced against the privacy interests of the individuals whose data it is proposed to share, including individuals who have not defaulted, and may never default.

16. The PC recognises that the proposals in the Consultation Document have "serious implications on data protection and privacy" (§1.16).

17. The PC does not, however, express any views (preliminary or otherwise) on whether the proposals comply with the provisions of the Personal Data (Privacy) Ordinance (Cap 486) ("the Ordinance") even though:

    (1) the PC is tasked to "monitor and supervise compliance with the provisions" of the Ordinance (s 8(1)(a)): and

    (2) by virtue of s 12 of the Ordinance, the purpose of the Code is to provide "practical guidance in respect of any requirements under this Ordinance imposed on data users."

18. Instead, the PC raises six specific "privacy issues" for consultation (§1.18 & Part V) without specifically identifying the requirements of the Ordinance to which they relate.

Relevant Provisions of the Ordinance

19. The provisions of the Ordinance of greatest relevance to the proposals in the Consultation Document are those of Data Protection Principle 1 ("DPP 1") and Data Protection Principle 3 ("DPP 3") in Schedule 1 of the Ordinance.

20. DPP 1 provides (insofar as is most relevant) as follows:

> "1. **Principle 1 - purpose and manner of collection of personal data**
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> (1) Personal data shall not be collected unless-
> (a) the data are collected for a lawful purpose directly related to a function or activity of the data user who is to use the data;
> (b) subject to paragraph (c), the collection of the data is necessary for or directly related to that purpose; and
> (c) the data are adequate but not excessive in relation to that purpose ..."

21. DPP3 provides:

> "3. **Principle 3 - use of personal data**
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> Personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than-
> (a) the purpose for which the data were to be used at the time of the collection of the data; or
> (b) a purpose directly related to the purpose referred to in paragraph (a)."

22. Pursuant to s 4 of the Ordinance, a data user (i.e. a person who controls the collection, holding, processing and other use of personal data (s 2(1)) is required to comply with the Data Protection Principles, including DPP1 and DPP3.

Issue 1: Types of Mortgage Loan to be Covered

23. In §1.18(a) this issue is expressed as follows:

> "Whether it is necessary and not excessive for the CRA to hold the additional mortgage data [that would be] contributed by the credit providers, namely, positive mortgage data in respect of residential properties, and both positive

and negative mortgage data in respect of non-residential properties (CRA already holds negative mortgage data in respect of residential properties)."

24. This issue involves proposals for the consumer credit mortgage data that TransUnion would be permitted to collect to be expanded to include:

(1) mortgage data in relation to non-residential property, i.e. car park spaces, retail, commercial and industrial property; and

(2) positive mortgage data in relation to both residential and non-residential property.

25. The justification given for these proposed changes (at §4.21) is that they:

"will allow a more comprehensive credit assessment of a borrower and the subsequent calculation of the debt servicing ratio."

26. However, since it is proposed that the only positive mortgage data to be shared through TransUnion is Mortgage Count, i.e. the total number of mortgage commitments an individual has (including as personal guarantor), the proposed changes would not of themselves provide "a more comprehensive credit assessment of a borrower" or "calculation of the debt servicing ratio".

27. The lender would still have to ask the individual borrower for details of each mortgage in the borrower's "Mortgage Count" (e.g. amount of mortgage loan outstanding, repayment amount, loan to value ratio etc) in order to arrive at its credit assessment of the borrower and/or calculate the borrower's debt servicing ratio.

28. This begs the question of why the credit provider cannot simply ask the borrower for his Mortgage Count in the first place. The answer is the credit provider can and usually does ask the borrower for this. Why, then, go to all the trouble of providing this information through TransUnion with the "serious implications on data protection and privacy" this would entail?

29. The answer is that, in this regard, TransUnion would act as a credit "checking" agency, to confirm (or not as the case may be) that the borrower is being truthful with respect to the Mortgage Count he or she provides to the credit provider.

30. It follows, therefore, that the justification for adding to the data TransUnion may collect as being "necessary and not excessive" in accordance with DPP1(1) should depend on:

(1) the importance to the assessment of individuals' creditworthiness of the additional types of data it is proposed to permit TransUnion to collect, hold and share; and

(2) the degree (if any) to which borrowers are not truthful about the matters to which the additional data relate.

31. No evidence is presented in the Consultation Document on the extent to which individuals are taking on mortgages in relation to non-residential property or delinquency rates in relation to such mortgages[2] (and, hence, the importance of this to their creditworthiness). Nor is any evidence presented that there is significant problem of borrowers being untruthful about the number of mortgages they have.

32. In the absence of proper supporting evidence, the case for saying the additional data it is proposed TransUnion be permitted to collect are "necessary and not excessive" (for the purpose of assessing the creditworthiness of the individuals to which the data relate as required by DPP1(1)) does not begin to be made out.

33. Unless and until such a case is made out on the basis of compelling evidence, the proposals to expand the mortgage data TransUnion is permitted to collect must be rejected because it has not been shown that DPP1(1) would be complied with, let alone that the PC's "serious implications on data protection and privacy" should be overridden. As things stand, the proposals are a "solution" to an unproven problem. It may well be convenient for credit providers to be able to access additional mortgage data, including Mortgage Count, but convenience cannot outweigh the "serious implications on data protection and privacy".

34. The other "privacy issues" raised in the Consultation Documents are addressed in the following without prejudice to the foregoing conclusion.

[2] The evidence on delinquency rates for residential mortgage loans (in §4.15) supports the conclusion there is little cause for concern individuals are becoming over-indebted in this regard.

Issue 2: Types of data to be contributed by credit providers to the CRA and to be accessed by credit providers

35. In §1.18(b) this issue is expressed as follows:

> "Whether it is appropriate to restrict the amount of positive mortgage data contributed by the credit providers to the CRA in line with the latter's operational needs, and to restrict the access of such data by credit providers (upon the credit applicants' written consent) to the Mortgage Count ..."

36. In accordance with DPP1(1), the test to be applied in determining the scope of personal data that credit providers should be permitted to transfer to "the CRA", i.e. TransUnion (which must correspond to the scope of personal data that TransUnion is permitted to collect from credit providers) is not TransUnion's "operational needs", it is whether that scope of data is "necessary and not excessive" for the purpose of assessing the creditworthiness of individuals.

37. It is recognised, of course, that in order for TransUnion to be able to provide its credit reference services it has "operational needs" such as the need to identify the individuals to whom the data relate with reasonable certainty. So long as "operational needs" correspond to requirements that are essential for carrying out TransUnion's operations there should be no conflict with the "necessary and not excessive" requirement of DPP1(1). If, however, "operational needs" are equated with "operational convenience", conflicts with the "necessary and not excessive" requirement of DPP1(1) are likely to arise.

38. Assuming for current purposes (contrary to the conclusion reached on Issue 1) that TransUnion should be permitted to collect the additional personal data in relation to mortgages proposed by the CCF, the restriction of access by credit providers to the Mortgage Count only is supported. This is all a credit provider requires to know in order to check the borrower is being truthful about the number of his or her existing mortgage commitments, which is the basis for the credit provider to make its further enquiries with the borrower as to the details of his/her mortgage commitments in order to calculate the debt servicing ratio of the borrower and assess his or her overall creditworthiness.

Issue 3: Contribution of pre-existing mortgage data by credit providers to the CRA

39. This issue is expressed in §1.18(c) as follows:

"Whether it is appropriate for the additional mortgage data in respect of pre-existing mortgages at the time of the implementation of the proposal to be contributed to the CRA, with or without the prior explicit notification to the consumers."

40. This issue goes to compliance with DPP3 since "contribute" equates to "transfer" and the "transfer" of personal data is a use of personal data.[3]

41. By virtue of DPP3, credit providers may not (without the prescribed consent of the data subject) transfer to TransUnion personal data for any purpose other than the purpose for which the personal data were to be used at the time of the collection of the personal data or a purpose directly related thereto.

42. The objection on DPP3 grounds to the transfer to TransUnion of additional types of mortgage data that have already been collected by credit providers is that at the time such data were collected, credit providers were not permitted to transfer the data to TransUnion. On this basis, *ipso facto* the transfer of such data to TransUnion to enable it to provide its credit reference service cannot have been a purpose for which credit providers collected the data concerned.

43. The CCF has anticipated this objection. In §4.25, it states that based on legal advice from solicitors and Senior Counsel "the industry is of the view that the contribution of Contributed Data [i.e. the mortgage data the CCF is proposing that credit providers transfer to TransUnion] by credit providers ... is within ambit of data protection principle 3." The basis for this conclusion is (it is argued) that the original purpose for the data were/are collected by credit is "granting and maintaining the mortgage loan" whereas the purpose of transferring the data to TransUnion is "ensuring ongoing creditworthiness of the customer", which is said to be directly related to the original purpose.

44. This argument, however, ignores the expectations of the individuals who provided the data concerned to credit providers at a time when such data could not be transferred to TransUnion because the Code did not permit this.

45. In his own guidance on how he interprets DPP3, the PC says the following:

[3] The definition of "use" in relation to personal data in s 2 (1) of the Ordinance refers.

"In assessing whether the act in question is done for a '*directly related purpose*" and thus covered by DPP3(b), the Commissioner will take into account factors such as:

- the nature of the transaction giving rise to the need for using the personal data; and

- the reasonable expectations of the data subject."[4] (emphasis supplied)

46. The PC followed this guidance in the recent Octopus case, in which he concluded that the provision of the personal data of Octopus Rewards Scheme member to third parties for monetary gain did not amount to a "directly related purpose, applying the test of reasonable expectation of Members on the use of their personal data."[5]

47. Applying the same test here, the transfer of the new types mortgage it is proposed credit providers be permitted to transfer to TransUnion that has already been collected (prior to the proposed change to the Code to permit this) would be contrary to DPP3 because at the time the data were collected the data subject would not have expected this to occur due to the fact this was not permitted.[6]

48. It should also be noted the PC has no power to derogate from the requirements of the Ordinance in a code of practice: s 12 of the Ordinance.

49. On this basis, it would not be sufficient for the purposes of compliance with DPP3 for data subjects to be given "prior explicit notification" of the transfer. What would be required is the "prescribed consent" of the data subjects for the transfer of such data to TransUnion. By virtue of s 2(2) of Ordinance, "prescribed consent" means (in summary) express consent given voluntarily that has not been withdrawn by notice in writing.

50. It follows, therefore, that not only has it not been demonstrated that the proposals would comply with DPP1(1) (see response to Issue 1 above), they would also contravene DPP3 if the PC's own guidance as to its application is followed.

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[4] §7.25 of *Data Protection Principles in the Personal Data (Privacy) Ordinance – from the Privacy Commissioner's perspective*, Office of the Privacy Commissioner for Personal Data, August 2007.

[5] §3.40 of the PC's Report Number R10-9866, 18 October 2010.

[6] The fact that the scope of consumer credit data that may be transferred to TransUnion has previously been expanded to include data that had already been collected were included (§4.24) does not mean this complies with DPP3.

Issue 4: Use of Mortgage Count for general credit assessment on or after implementation

51. This issue is expressed in §1.18(d) as follows:

> "Whether it is appropriate to permit, subject to consumer' written consent, access to the additional mortgage data by the credit providers to evaluate not only mortgage loan applications but also to assess other new consumer credit applications as well as review and renewal of the consumers' existing credit facilities."

52. The proposal that the written consent of data subjects be required prior to access by credit providers to the (proposed) additional mortgage data does `nothing to address the DPP3 objection in the above response to Issue 3 since the DPP3 objection relates to the transfer of the (proposed) additional data to TransUnion (which of necessity would precede any access).

53. Once mortgage data are transferred to TransUnion, they may, consistent with DPP3, be used for the purpose for which they were transferred (or a directly related purpose) without any consent (written or otherwise) from the data subject.

54. DPP3 provides for a minimum level of privacy protection with respect to the use of personal data.

55. The proposed requirement for consent under current consideration is to be supported as a further level of privacy protection and is to be welcomed accordingly.

Issue 5: Transitional Period

56. In §1.18(e), this issue is described as follows:

> "Whether 24 months is an appropriate transitional period before access to the additional mortgage data is allowed for the purpose of general portfolio reviews of consumers' credit worthiness."

57. The written consent proposal considered under Issue 4 includes written consent: "to review ... the consumers' existing credit facilities". It is not clear how (if at all) this is considered to differ from "general portfolio reviews of consumers' credit worthiness." as referred to in Issue 5.

58. Even if there is a difference of substance, no or no sound justification has been advanced for not making access for the latter purpose subject to prior written consent by borrowers as is proposed for the former purpose.

59. Whether a credit provider wishes to access the (proposed) additional mortgage data "to review ... the consumers' existing credit facilities" or for "general portfolio reviews of consumers' credit worthiness" (assuming there is a difference of substance between the two), this should require the prior written consent of the individuals concerned.

60. Accordingly, the proposed transitional period is opposed and a requirement of prior written consent is proposed in its place.

Issue 6: Implementation safeguards

61. This issue is described in §1.18(f) as follows:

> "What and how additional privacy safeguards should be imposed upon the CRA and the credit providers commensurate with an enlarged credit database and greater sharing and use of the mortgage data."

62. The PC's proposal (in §5.45) for an independent compliance audit to be carried out by TransUnion within 6 months of the implementation of any changes to the Code arising from the current exercise is supported. The terms of reference of the audit ought to be subject to the PC's approval as should the terms of reference of TransUnion's annual overall compliance audits.

63. The PC's proposal (in §5.46) for periodic IT security audits to be conducted by TransUnion is also supported. A recurrent time period of not less than once a year ought to be set and, again, the terms of reference ought to be subject to the PC's prior approval.

64. In addition, irrespective of the outcome of this consultation exercise in both cases, credit providers should also be required to undertake annual audits on their compliance with the Code and report to the PC any breaches of the Code by them (whether discovered as a result of the audits or otherwise) within 14 days of their being identified.