There will soon be a need further to increase the number of referees, and possibly to set up tribunals in country areas. Small Claims Tribunals are still very experimental in this country and it would be useful to review the Act after, say, two years. A careful comparison should be made with the other similar tribunals now set up in Australia and overseas. The areas which, in this writer's view, have not been fully or satisfactorily thought out are:

(a) Legal representation.
(b) The definition of "small claim".
(c) The restriction of tribunals to consumer/contract cases.
(d) The question of privacy of hearings.
(e) The qualifications of referees.
(f) The connexion between the Small Claims Tribunal and other courts. (Should jurisdiction be concurrent? If not, in which circumstances should the Small Claims Tribunal have exclusive jurisdiction?)
(g) The types of order that the Tribunal can make.
(h) Questions of "Conflict of law" (especially jurisdictional).

J. NEVILLE TURNER*

FAIR CREDIT REPORTS ACT 1975 (S.A.)

On 20th March 1975, the *Fair Credit Reports Act* (South Australia) was enacted. The original Bill, in a slightly differing form, had been on the books since 1st October 1974. Its stated aim is "to confer on consumers certain rights in relation to accumulated information that might be used to their detriment; and for other purposes".

In reality the legislation has two aims:

(i) to set certain standards with which reporting agencies would have to comply when collecting and transmitting information.
(ii) to give to consumers certain access and correctional facilities, presumably to secure some control by the consumer that what is collected is at least accurate.

The legislation comes to grips with neither aim. Hamstrung by a rather unkind reception by the Legislative Council, Mr L. J. King, the South Australian Attorney-General, finally remarked that the legislation was better than nothing at all in certain respects. The same comment, it is submitted, is probably true as a general statement.

The first aim is clearly designed to upset the more "infamous" and "pernicious" aspects of agency reporting. It relates directly with the privacy aspect of credit reporting—an aspect that had already been foreshadowed to some extent by the tabling of the *Privacy Bill* in 1974.

* Senior Lecturer-in-Law, Sub-Dean, Monash University.

Any legislation which has privacy within its ambit may be doomed to complexity or confusion. But the *Fair Credit Reports Act*, introduced in part to handle intrusions into privacy of consumers by credit bureaux entirely misses the mark.

It fails to state the obvious. The function of a credit bureau is to supply facts from which a credit provider (or trader) is able to make a rational business decision relating to an application for credit. Those facts should assist the provider and applicant in three ways. They should enable good credit risks to obtain credit. They should reveal the danger of an applicant over-committing himself or herself. They should also aid the detection of wilful defaulters. The information collected should in a positive way, have only those purposes as its basis. The information collected must be relevant to a decision to grant credit or not.

Instead of stating this, the legislation makes two assumptions. One, that information as to race, colour or religious or political belief and unfavourable information which has not been reasonably substantiated is the only material irrelevant to a decision to grant credit. Such an assumption is so unrealistic as to appear fanciful.

The second assumption is that in South Australia credit bureaux collect only relevant information. If that be so, one might cynically ask "Why legislate?"

In any case, no evidence was adduced or even referred to which convincingly demonstrated that such was the situation. In what has come to be an accepted feature of most discussions concerning the activities and operations of credit bureaux with special regard to privacy, the debates in the South Australian parliament rang with an all too familiar air of ignorance.

Several parliamentarians recounted American tales of computers, their errors, their "bigness" etc. without, for instance, saying that no credit bureau in Australia has computerized consumer credit files. Certainly a few insurance companies and finance institutions operate computers but even those are relatively unsophisticated.[1] The tales are American in origin, tales which are directed to proving the exact opposite of the assumption apparently made in this legislation: that credit bureaux (in the United States) collect data which is both irrelevant and endemic to privacy interests.

Most people are familiar with the notoriety of American credit bureaux. Congressional and Senate hearings, Miller's classic "Assault on Privacy"[2] and innumerable news stories have seen to that. Two illustrations accurately summarize the attitude to the U.S. credit reporting industry. One is the often quoted comment made by Black in "*Buy Now, Pay Later*":

> "If your name is not in the records of at least one credit bureau, it doesn't mean you don't rate. What it does mean is that you are under twenty-one or dead."[3]

[1] For example, the Banks computerized records relating to Bankcard contain only the barest of bank records and are not cross-referenced to credit bureaux.

[2] A. R. Miller, *The Assault on Privacy* (Ann Arbor: University of Michigan Press, 1971).

[3] H. Black, *Buy Now Pay Later* (1961) p. 37.

Jack Anderson, well known newspaper correspondent reported in December 1973:[4]

> "One credit report on an insurance applicant states that she is promiscuous in her actions due to the fact that she has child born out of wedlock and she is seen entertaining male companions on the beds of her apartment."

From further observations, Anderson concluded:

> "The insurance and credit industries insist such sexual gossip appear only rarely in credit reports, but we found titillating tidbits in case after case."

Of course, reference to the U.S. position is not all that surprising when one realizes that there has been no detailed study released thus far on the activities of Australian credit bureaux. Documentation of industry operations here is almost exclusively of tidbits of stories of people being given the wrong rating because of identity confusion.

Mr De Garis, Leader of the Opposition in the Legislative Council was typical of this approach when he stated:

> "W. G. Lazlett in his book "*The Recovery of Small Debts*" says that in Australia at present there is a lack of sophistication in the credit reporting industry. The lack of sophistication in the storage, collection and withdrawal of information will soon be refined as changes take place in our increasingly credit-oriented society, and this will demand a more centralized service and an increase in storage and withdrawal efficiency."[5]

This same prognosis has been made by many, including academics, in relation to the American situation. It goes thus:

- A computer can store information in smaller areas than manually operated systems;
- It is economic to record more pieces of information since it would be wasteful not to utilize full economies of scale made possible by the computer;
- Consequently, data will be recorded which previously it was considered uneconomic to collect;
- The more data held, the more likely is the abuse to the individual.

The conclusion to be inferred from this evidence is two-fold: (i) information that is collected will not always be relevant to the making of decisions we are talking about; (ii) even if the information is relevant, a good case can be made out that some types of information collected invade a citizen's privacy; that a right to invade privacy at present exists.

It is submitted that such a conclusion does not warrant the treatment this topic is given by the Act. It warrants much more.

It is further submitted that the legislation could have been strengthened by the inclusion of two simple measures.

[4] J. Anderson, *The Credit Snoop in America* (Melbourne Herald, 6th December, 1973).

[5] South Australia, *Parliamentary Debates*, Legislative Council, 20th November, 1974, 2101.

First, there might have been a list of prescribed types of information which can be collected and stored, and not a list prohibiting other sorts of information. Secondly, a Tribunal to which a credit reporting agency could apply if it wished to collect a certain type of information, might have been set up.

Neither suggestion is without precedent. The first is the approach adopted in Ontario by Bill 23 of 1971.[6] The second is an adaptation of the recommendations of the *Morrison Report on Privacy.*[7] It would involve, for instance, the creation of an administrative tribunal constituted of expert opinion upon credit bureau operations, consumer affairs and privacy. This type of set-up provides a safety valve for the situation where the credit reporting agency is able to discharge the onus of proving that collection of certain types of information is justifiable.

Control over input and consequently output of information may also be achieved by access, disclosure and correction facilities. This reasoning works on the assumption that if a credit reporting agency is subject to some public scrutiny, then it will conform to standards rationally selected by the public.

For this reason the legislation had the second aim previously stated: to provide rectification facilities so that consumers may have the opportunity to know why there has been a refusal to grant credit.

Rectification facilities can be conveniently divided into (a) Access and disclosure; and (b) Correction facilities.

(a) *Access and Disclosure*

Section 7 of the Act imposes duties upon both traders and reporting agencies.

A trader is defined by s. 4 as "(a) any person or firm carrying on trade or commerce; (b) any person who lets any land or premises". A trader who has denied a consumer a prescribed benefit (defined in s. 4 as "(a) a benefit of a commercial nature; (b) a benefit in or affecting employment; or (c) a lease of land or premises or a licence conferring a right to occupy land or premises" or has granted a prescribed benefit upon terms that are not as favourable as those normally given and has or has had in his possession in the last six months a consumer report made by a reporting agency, the trader must inform the consumer of the fact of the possession, so long as the consumer requests it.

This section previously did not rest on the requirement that a consumer must request the report before he is notified of it. The trader was obliged to notify the consumer as soon as practicable. It is considered that this alteration has made the section anomalous in that it appears difficult to request a report before one is notified of its existence.

Further strength was sapped from the proposed legislation when the Council objected to the requirements of clause 7(2). It was originally

[6] See R. Baxt and A. C. Cullen, editors. *Consumer Credit—The Challenges of Change* (Sydney: CCH Australia, 1974) p. 207 for the list of items that an Ontario bureau can collect.

[7] H. Morrison, *Report on Privacy*, P.P. No. 170, N.S.W. E.g. para. 84.

proposed that a trader was under the further obligation to disclose the substance of a report and the name and address of the reporting agency if the consumer had obtained or sought to obtain a prescribed benefit and then requested details of any reports.

On the other hand, the reporting agencies' duties which are imposed by virtue of s. 8 were not subjected to quite the same scrutiny.

A reporting agency must disclose all the information in its files and to whom it has been given, it must supply copies of any consumer reports, written or oral if a consumer so requests. The original bill did cast upon the reporting agency a duty to disclose its sources of information, but after vigorous debate this was deleted.

An important feature of s. 8 is that any information disclosed under the Act must be in readily intelligible form. Not only does this guard against the future of computerized files but also prevents the presentation of abbreviated material to a consumer in purported compliance with the Act.

Nevertheless, there appears two ways that the legislation might be improved.

First, the legislation places no limit upon the length of time an agency may take to disclose the obligatory information. Similar Queensland legislation puts a limit of 14 days.[8] The U.S. Act[9] requires that disclosure be made during business hours and upon reasonable notice. It might be argued that the use of the concept of reasonableness in s. 6 implies that the same concept could be used in this context. One can, however, only express surprise that the matter is left undefined—on behalf of consumer interests and of the interests of the commercial world.

Secondly, more precise requirements to settle disputes might have been in order. The U.S. Act requires that an agency must provide an employee to explain and discuss the recorded information, while the consumer is permitted to be accompanied by a friend (see s. 610(c) and (d)). This provision, as has been pointed out by Professor Morrison, may tend to isolate the parties into confrontation rather than co-operation. This grim scenario Professor Morrison paints, it is submitted, is more imaginative than factual. It assumes that a person who spends time checking his files will have a propensity to sue for defamation. It is submitted that a more congenial atmosphere is likely to be the case.

(b) *Correction facilities*

By s. 9 a reporting agency must investigate a dispute which alleges inaccuracies or the storing of incomplete information. It must do so within a reasonable period, and within thirty days inform the consumer of the result.

Where the result of the investigation is an alteration to the file, all persons who have been supplied with a consumer report containing the inaccuracy within the preceding sixty days before the amendment (effective

[8] *Invasion of Privacy Act* 1971 (Qld.).
[9] *Fair Credit Reporting Act* 1970 (U.S.A.).

thirty days before the dispute) must be notified in writing of the nature of the inaccuracy. Section 9(5) provides for an appeal to the Credit Tribunal against any failure on the part of the reporting agency to make any deletion, amendment, etc. It is noteworthy that the Credit Commissioner may represent the consumer at these proceedings. The Credit Tribunal then makes orders as it thinks just, pursuant to s. 9(7). Any consumer report issued pending the determination of the objection must carry a notation drawing attention to the dispute.

This complex correction procedure represents one of the most effective features of this Act. Importantly, it tends to mitigate the failure to provide any civil remedy directly to the consumer.

Equally as importantly, however, it does not mitigate the fact that use of these facilities is dependent upon a consumer knowing what is in his files. This aspect, it is submitted, has not been properly dealt with. If credit bureaux are to commercially exploit interferences with confidential relationships then they ought to bear the cost of helping the consumer to be aware of the contents of any files concerning himself.

Criticisms might also be made about provisions which are incidental to the aims as stated of the legislation. For instance, the definition of a "reporting agency" and a "consumer report" are probably inadequate.

A reporting agency means "(a) a person, or body of persons that for fee or reward furnishes consumer reports to traders or (b) a person or body of persons that (i) carries on the business of banking or (ii) whose only or principal business if the lending of money declared by the Regulations to be a reporting agency for the purposes of this Act". It no longer includes a group of traders who set up on a co-operative basis, as is the case in Sydney.

Moreover, the reference to banking and lending institutions is not as rigorous as first thought: the institutions have to be "named" if they fit into that part of the definition.

A "consumer report means a communication of credit information or personal information (or both)". The breadth of this definition is no doubt disheartening to a few people.

However, in such a short note as this, there is not the space to discuss, although incidental, significant areas of the legislation.

Conclusion

These criticisms of the Fair Credit Reports Act have been on the basis that certain features are lacking. For example, there might have been a Privacy, Watch-dog type body created to liaise between business and consumer interests. But probably the most important thing to remember is that next to Queensland, South Australia is only the second jurisdiction in Australia to legislate in this area. Victoria has had the *Information Storages Bill* on the books since August 1971 and the recommendations of the *Molomby Report on Fair Credit Consumer Laws* since early 1972. Perhaps it's time.

GREG BANKS*

* B.Juris, LL.B. (Hons.) Monash University.