9 July 2012

By email: legcon.sen@aph.gov.au

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee members

Inquiry into the Privacy Amendment (Enhancing Privacy Protection) Bill 2012

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (**the Bill**).

Our submission concerns the changes relating to credit reporting and discusses three key topics:

- Serious Credit Infringements: We are strongly of the view that the Bill's proposed amendment to the definition of Serious Credit Infringement at proposed section 6(1) will not address the serious problems that this definition creates. We recommend that Government reconsider the joint proposal prepared by Veda Advantage and consumer advocates.
- Requests to correct information: We are pleased that the process for handling consumer requests for correction of information (in proposed section 20U) has been amended to remove the two-step complaint process which was in the previous exposure draft. However, we note that the procedure in proposed section 20U still does not meet the standard recommended by the Australian Law Reform Commission in *For Your Information* and accepted by the Government.
- Complaint handling: We strongly support the intent behind the complaint handling process at proposed section 23B, but we are concerned that the obligation may ultimately be counter-productive and have recommended an amendment.

We have also argued that any approach to listing hardship variations should be designed to ensure consumers are not discouraged from approaching their lenders and requesting hardship variations when needed.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. Consumer Action is also a nationally-recognised and influential policy and research

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body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

We also operate MoneyHelp, a not-for-profit financial counselling service funded by the Victorian Government to provide free, confidential and independent financial advice to Victorians experiencing financial difficulty.

Serious credit infringements: subclause 6(1)

A Serious Credit Infringement (**SCI**) is a listing on an individual's credit report indicating that, in the creditors opinion, the individual has behaved fraudulently in relation to consumer credit, or that the individual can be presumed to no longer intend to comply with their obligations under the contract. The SCI definition is in our view one of the most critical consumer issues in the Bill.

The Bill provides that an act can be considered a SCI if

> a reasonable person would consider that the act indicates an intention, on the part of the individual, to no longer comply with the individual's obligations in relation to consumer credit provided by a credit provider; and
>
> the provider has, after taking such steps as are reasonable in the circumstances, been unable to contact the individual about the act; and
>
> at least 6 months have passed since the provider last had contact with the individual.[1]

The six month waiting period is the only change to the SCI provisions since the exposure draft of the Bill was considered by the Senate Finance and Public Administration Legislation Committee in 2011.

It is difficult to understate the significance of a credit provider listing an SCI on a consumer's credit report. An SCI is the most serious type of listing that can be made apart from bankruptcy, and yet it is the only listing that can be made based purely on the opinion of a credit provider at a particular point in time.

Once made, an SCI will ordinarily remain on a credit report for seven years. They can be very difficult to remove earlier -- even if the consumer can demonstrate that, had the credit provider known all the circumstances, they would not have made the listing. Further, it is often the case that SCIs are listed merely because of an error, misunderstanding or breakdown in communications. For example, if a resident in a sharehouse enters a telephone contract and forgets to remove their name from the bill when they move out, they can have an SCI listed against them when other residents move out without paying the final bill. While individuals should try to protect their credit record by ensuring that their name is removed from certain accounts, this error should not lead to a 'black mark' for 7 years. We are also aware of SCI listings where the individual is overseas and is unaware of an unpaid account.

[1] Proposed subsection 6(1).

This current regulation around SCIs -- which allows such a significant listing to be made on a credit report with little or no direct evidence of misconduct -- is in our view disproportionate and grossly unfair.

When the Senate Finance and Public Administration Legislation Committee looked into the Exposure Drafts of this Bill in 2011[2], it considered a recommended reform to the Serious Credit Infringements provisions jointly proposed by credit reporting agency Veda Advantage and a number of consumer advocates (**the joint proposal**). That recommendation was to:

a. Delete the existing definition of *serious credit infringement;* add 2 new definitions

b. *Un-contactable default:* a default that is listed where the debtor has not responded and cannot be contacted throughout the life of the default.
    i. Duration on credit bureau – 7 years
    ii. If at any point the debtor contacts the creditor/default lister, then it is re-categorised as a standard default, duration of 5 years from the date of original listing

c. *Never paid flag:* a flag that can only be listed by telecommunications or utility credit providers after 60 days when the credit provider has
    i. never received any payment on the account; and
    ii. has reasonable grounds to believe that the consumer never had any intention to make a payment on the account.
    iii. The flag is removed at the end of 6 months and may be converted to an un-contactable default
    iv. The Code of Conduct will provide guidance on what 'reasonable grounds' might be including evidence that the consumer is un-contactable, and/or evidence of a pattern of dishonesty
    v. The Code of Conduct will provide guidance on how to deal with compassionate reasons why some consumers might be un-contactable (for example ill-health, mental health issues, language difficulties)

We supported this solution because we believe it:

- meets the needs of industry, because it allows credit providers to quickly list a consumer who may not intend to meet their obligations under a credit contract, or who may be a fraud risk; but
- balances consumer protections by avoiding SCIs being listed for seven years when that would be inappropriate.

The Finance and Public Administration Committee found that this proposal had 'some merit' because it would allow some flexibility where a debtor re-establishes contact with the credit provider. That committee also found that the joint proposal

[2] The Senate, Finance and Public Administration Legislation Committee (2011), http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=fapa_ctte/priv_exp_drafts/index.htm

> has the advantage of providing a more appropriate response to the vast majority of matters which are currently dealt with as serious credit infringements that arise from telecommunications and utilities debts.[3]

The committee was concerned however that this proposal did not provide a response to situations where intentional fraud was involved (unlike the present SCI definition).[4] The committee recommended that

> consideration be given to a change of approach in dealing with serious credit infringements to allow for those listings, not relating to intentional fraud, to be dealt with in a different manner.[5]

The Australian Government accepted that recommendation and responded by inserting the requirement that (except where the listing is in response to fraud) the credit provider could not list a serious credit infringement unless six months had elapsed since they last had contact with the debtor.[6] We do not believe this is a sufficient response.

It appears that the intent of the six month waiting period is to ensure that credit providers attempt for at least that period to make contact with the consumer and so avoid listing an SCI inappropriately. In its response to the Finance and Public Administration Committee's recommendation, the Government stated that the six month waiting period amendment:

> addresses the Committee's concern that an individual may move, for example at the end of a tenancy, and is not contactable simply because the credit provider does not have a forwarding address. The individual may also believe that all bills have been paid and be willing to pay the outstanding amount.[7]

However, the six month waiting period will not achieve that aim. It does not require credit providers to attempt to make contact with the consumer or even review the appropriateness of a SCI listing after six months, it only requires that they wait six months to list the SCI.[8] The amendment proposed by Veda and consumer advocates is a more effective and proportionate response because it requires a 'never paid' flag to be automatically removed after six months (although a default would remain) and for 'uncontactable defaults' to be removed if contact is re-established at any point with the consumer.

The Government's response also suggested that they were not overly concerned with the prospect of SCIs being listed incorrectly because the

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[3] Senate Finance and Public Administration Committee (2011), paragraph 4.22.
[4] Senate Finance and Public Administration Committee (2011), paragraph 4.22.
[5] Senate Finance and Public Administration Committee (2011), recommendation 8, paragraph 4.23.
[6] Australian Government (2012) *Government Response to the Senate Finance and Public Administration Legislation Committee Report: Exposure Drafts of Australian Privacy Amendment Legislation: Part 2 - Credit Reporting,* page 5. Accessed from http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=fapa_ctte/priv_exp_drafts/index.htm
[7] Australian Government (2012), page 5.
[8] We have previously recommended a six month 'grace period' on SCIs, but our proposal would have required credit providers to actively reconsider the appropriateness of the listing and was suggested as part of a broader range of protections.

> correction and/or complaints provisions can be used by an individual to request removal of an incorrect listing of a serious credit infringement.[9]

Again, we believe the joint proposal provides a better response. The joint proposal is sensible because it recognises that if a listing is made in response of a lack of contact between creditor and debtor (which is the case for most SCIs) then that listing should be removed when contact is re-established. This solution seems to us to meet the needs of industry (listings can be made quickly to indicate that a consumer is a significant risk) while also including balanced consumer protections.

In contrast, the Government's response (requiring consumers to challenge the listing):

- places a burden on consumers to remove even those listings which should never have been made;
- does not appear to create any advantages for industry; and
- may not allow 'incorrect' listings to be removed at all: we assume that by 'incorrect' the Government means listings that should not have been made if the credit provider knew all of the circumstances. However, it is quite legitimate under the current SCI definition for a credit provider to list an SCI if, at a particular point in time, the provider cannot contact the customer and believes that the customer does not intend to meet their obligations. There is no requirement for credit providers to remove the listing if contact is re-established or the credit provider is given new evidence to show the customer is willing to pay their debt. It follows that the consumer may not be able to remove these listings through a complaint.

We note the concerns of the Finance and Public Administration Committee that our proposed solution does not specifically address conduct which has been determined to be fraudulent. However, we do not believe that this is a genuine limitation of the joint proposal -- in practice, credit providers do not use SCIs in this way.

As far as we understand, most credit providers or credit reporting agencies do not make conscious efforts to consider whether conduct is fraudulent, rather they simply list SCIs because they cannot contact the debtor who is in arrears. In many cases it won't be at all clear to the credit provider whether or not a fraud had occurred. While we understand that it may be appropriate for credit providers to warn to other credit providers if fraudulent activity may have occurred, we believe that our proposed solution allows that through the 'never paid' flag. This flag expires after six months (and can then be replaced with an 'uncontactable default'), but we believe this is reasonable. Without a court determination of fraud, such listings should not be able to remain on a credit report for more than six months.

For the reasons above, we do not believe it is necessary to retain the 'fraudulent conduct' avenue for listing SCIs. If credit providers wish to have a credit reporting listing that specifically indicates fraud, then we would suggest it should be supported by a robust system that allows a 'fraudulent conduct' listing only if:

- the listing refers to conduct found to be fraudulent by a court; or
- the listing only appears for a very short period, is supported by persuasive documentary evidence held by the credit provider and is removed immediately when the consumer re-establishes contact.

[9] Australian Government (2012), page 5.

We are strongly of the view that the Government should reconsider the joint proposal. The Government's proposed changes will not solve current problems with the SCI system, and we believe it is likely that our solution could be acceptable to both industry and consumer parties.

Requests for correction of information: proposed section 20U

We are pleased that the process for handling consumer requests for correction of information (in proposed section 20U) has been amended to remove the two-step complaint process which was in the previous exposure draft.[10]

The current exposure draft requires that, if a consumer requests information on their credit report be corrected and the credit reporting body declines, the credit reporting body must inform the consumer they may refer their request either to external dispute resolution or the Privacy Commissioner.

We strongly approve of the new obligation on credit reporting bodies who decline a request to not only provide reasons for declining but to provide evidence substantiating the correctness of the listing.[11] This corrects a serious weakness with the previous exposure draft which only required the credit reporting body to make a decision on whether it was satisfied of the information's correctness, and did not require them to actually investigate whether the information was correct or not.

However, we note that the procedure in proposed section 20U still does not meet the standard recommended by the Australian Law Reform Commission (**ALRC**) in *For Your Information* and accepted by the Government.[12] Under the ALRC recommendation, a credit provider who failed to either provide evidence to substantiate the listing or refer the matter to external dispute resolution within 30 days would be required to correct the information as requested.

Obligations on credit providers and credit reporting agencies to deal with complaints: proposed section 23B

Proposed section 23B places obligations on credit providers and credit reporting agencies to deal with complaints made to them within certain timeframes and through a certain process. The process in 23B applies to complaints made against credit reporting bodies or credit providers under proposed section 23A in relation to 'an act or practice engaged in' by that business.

We strongly support the intent behind 23B, because it aims to prevent credit providers and credit reporting agencies buck-passing complaints between themselves (which has been a big problem to date) and limits the risk of consumers dropping out of the complaints process because they do not know where to complain. However, we are concerned that the obligation may be too broad in that it can place an obligation on a non-involved party, and that party may be reluctant to assist.

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[10] This problem is explained in the report of the Senate Finance and Public Administration Committee (2011) at paragraphs 5.7-5.12.

[11] Proposed paragraph 20U(3)(b)

[12] Australian Government (2009) *Australian Government First Stage Response to the Australian Law Reform Commission Report 108*, p 128. Accessed from http://www.dpmc.gov.au/privacy/alrc_docs/stage1_aus_govt_response.pdf.

In particular we are thinking of situations where:

- credit is refused by a credit provider (firm A); and
- the credit was refused because of a listing made by another credit provider (firm B) and held by a credit reporting body (firm C); and
- the consumer objects to the listing and makes a complaint to firm A.

If firm A is a large institution it may be able to deal appropriately with the complaint, but it is possible that it could be a small telecommunications company, for example. While firm A would have a legal obligation to resolve the dispute between the other parties, it is unlikely to have a 'commitment' to do so. This could lead to poor service for the consumers involved.

We recommend that the obligation to resolve a complaint should lie with the first party to be contacted by the consumer which is actually involved in the subject of the complaint. This would usually be the relevant credit reporting agency, or the credit provider which made the listing.

However, to ensure that consumers don't 'fall through the cracks', a credit provider or credit reporting agency which did not have any role in the subject of the complaint, should have an obligation to advise the consumer of the parties which could deal with the dispute.

Should this amendment be made, firm A in our example above would be obliged to inform the consumer that they could complain to firm B or C and provide the contact details for those firms.

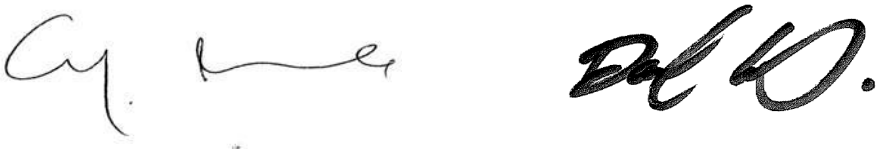
Hardship

We understand that other consumer advocates intend to submit views to the Committee on whether credit reports should record that a consumer has approached their credit provider requesting a hardship variation. A hardship variation is a change to the consumer's obligations under a credit contract which allows a consumer who has encountered financial hardship to make smaller repayments (or no repayments at all) for a certain period.

We believe that any process relating to hardship variations should be designed to ensure that consumers are not discouraged from contacting their credit provider when they are in hardship or left worse off because they request a hardship variation. There has been significant work over previous years by consumer advocates, industry ombudsman schemes and industry to encourage consumers to contact creditors early if they are experiencing a change in circumstances. If consumers thought that requesting a hardship variation could have a negative impact on their credit history, we would likely see a decrease in those making early contact with their credit provider.

Please contact David Leermakers on 03 9670 5088 or at david@consumeraction.org.au if you have any questions about this submission.

Yours sincerely
CONSUMER ACTION LAW CENTRE



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