21 September 2012

By email: Privacy.Consultation@ag.gov.au

Richard Glenn
Assistant Secretary
Business and Information Law Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Dear Mr Glenn

Discussion paper: Proposed regulations under the Enhancing Privacy Protection Bill

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

Briefly, we have made the following recommendations:

- we do not support the creation of regulations under paragraph (e) in the definition of consumer credit liability information. Creating such regulations would give credit providers access to information that they do not need to assess the credit worthiness of applicants, and that information could then be used for purposes which are not in the spirit of the Bill;
- if firms like Veda Advantage and Dun and Bradstreet are organisations which meet the definition of 'Credit Reporting Body' then we recommend that regulations for the definition of Credit Reporting Body at section 6(1) prescribe them as such;
- regulation should be made for subparagraph 6Q(1)(d)(ii) to provide that an overdue amount should be at least $500 before it can be considered 'default information';
- regulation should be made for paragraph 6V(2)(b) to provide that a partial monthly payment is considered a monthly payment if:
    - the amount of the payment is within a certain margin of error, perhaps 10 per cent of the full payment amount, and there is nothing to suggest the partial payment is not simply an innocent mistake; or
    - if listing the missed payment would be unfair in the circumstances.
- we suggest principles regarding the listing of schemes of arrangement and hardship applications; and
- we recommend a regulation be made for proposed subsection 6G(6) to clarify that a landlord is not a credit provider.

Our comments are detailed more fully below.

Consumer Action Law Centre
Level 7, 459 Little Collins Street Telephone 03 9670 5088 info@consumeraction.org.au
Melbourne Victoria 3000 Facsimile 03 9629 6898 www.consumeraction.org.au

ABN 37 120 056 484 ACN 120 056 484

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research 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.

Proposed subsection 6(1): meaning of Consumer Credit Liability Information

We do not support the creation of regulations under paragraph (e) in the definition of consumer credit liability information.

The definition of 'consumer credit liability information' in subsection 6(1) of the bill permits the disclosure of significant amounts of information about credit contracts entered by consumers. Paragraph (e) of that definition envisages allowing credit providers to disclose 'terms or conditions of the consumer credit that relate to the repayment of the amount of credit' (**paragraph (e) information**) as long as regulations prescribe the terms or conditions involved. Paragraph (e) information might include things like whether credit is secured, whether payments are interest only, whether a contract is interest free and for how long.

The rationale for allowing the disclosure of Consumer Credit Liability Information is to assist other credit providers to assess the creditworthiness of that consumer. Paragraph (e) information would go alongside a number of pieces of information available to credit providers to help them establish creditworthiness, including:

- the type of consumer credit the consumer already has;[1]
- the entry date and date of termination of the existing credit;[2]
- the maximum amount of credit available under existing contracts;[3] and
- information about the consumer's income and expenses (which can be sought directly from the consumer at the time of application)
- information about the applicant's purpose and objectives for seeking the credit.[4]

The Government's view (with which we agree) is that 'terms or conditions of the consumer credit that relate to the repayment of the amount of credit'

> ...are likely to be many and varied. Only those terms and conditions that would assist in determining an individual's credit worthiness are intended to be included.[5]

In our view, credit providers will not need the paragraph (e) information to assess creditworthiness of an applicant because, as discussed above, they will already have access to

[1] Subsection 6(1) of the Bill, definition of Consumer Credit Liability Information, paragraph (c).
[2] Subsection 6(1) of the Bill, definition of Consumer Credit Liability Information, paragraphs (d) and (g).
[3] Subsection 6(1) of the Bill, definition of Consumer Credit Liability Information, paragraph (f).
[4] Required to be considered by all credit providers by the National Consumer Credit Protection Act 2009.
[5] Parliament of Australia (2012) *Privacy Amendment (Enhancing Privacy Protection) Bill 2012: Explanatory Memorandum*, p 103. Accessed from http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4813

sufficient information to allow them to make this assessment. It follows that paragraph (e) information would not 'assist in determining an individual's credit worthiness' and so that information should not be disclosed.

If the Government disagrees with our position and decides to regulate to allow the disclosure of paragraph (e) information it is important that the regulations tightly prescribe:

- the specific pieces of information that can be disclosed;
- that the information can be disclosed only if it can be used for assessing credit worthiness and not for other purposes.

Once provided, Consumer Credit Liability Information is of considerable value to credit providers not only in assessing the credit worthiness of applicants but also in the marketing of credit. Lenders have sophisticated information systems designed to allow them to better understand their customers' product preferences and how profitable those customers may be to more effectively cross market products.[6] These systems draw considerable value from information already available to lenders and further information envisaged by paragraph (e) would be used in the same way.

We note that proposed section 20G of the Bill will prohibit the use of Consumer Credit Liability Information and repayment history information being used for direct marketing or pre-screening. But this prohibition will not stop credit providers from feeding any Consumer Credit Liability Information gathered into information systems which help target promotion of products. The Bill even appears to allow this use. For example, clause 20F and 21H together allow a credit provider to access information about an individual 'for a consumer credit related purpose of the provider in relation to the individual' and then use that information for 'the internal management purposes of the provider that are directly related to the provision or management of consumer credit by the provider'. We think it is consistent with 21H for those 'internal management purposes' to include entering the data received into an information system which could then assist with marketing products to the lender's customers (that is, a purpose 'directly related to the provision or management of consumer credit').

Using consumers' information in this way is not in our view aligned with the spirit of the Bill which is focused on allowing credit providers access to information for only a narrow range of purposes and not for marketing of credit. However, if paragraph (e) information is made available to credit providers there is nothing that will stop credit providers from using this information to indirectly assist with marketing.

Given that lenders do not appear to need paragraph (e) information to assess credit worthiness, and that this information will presumably be used for other purposes which are not in the spirit of the bill, we recommend that paragraph (e) information should not be made available at all.

Subsection 6(1): Meaning of Credit Reporting Body

We understand the meaning of 'Credit Reporting Body' to include firms such as Veda Advantage and Dun and Bradstreet (to the extent that they collect, hold and distribute

[6] We discuss this in more detail in our report *Profiling for Profit: A Report on Target Marketing and Profiling Practices in the Credit Industry.* See chapter 5 in particular.

information on the credit worthiness of individuals). Clause 6P, which defines the meaning of 'Credit Reporting Business' appears to confirm this.

However, the discussion paper suggests the opposite when it says at paragraph 36 that

> It is proposed that the regulations would not prescribe any agencies because currently there are no agencies which carry on a credit reporting business.

If firms like Veda Advantage and Dun and Bradstreet are organisations which meet the definition of 'Credit Reporting Body' then we recommend that regulations prescribe them as such. It is important that all credit reporting bodies are named in regulation so that their obligations under the law are clear.

Subparagraph 6Q(1)(d)(ii): meaning of default information

At present, proposed section 6Q provides that information about a payment can be considered default information if (among other things) an overdue amount is equal to or more than $100 (or a higher amount prescribed by the regulations). We recommend that the regulations prescribe that an overdue amount should be raised to $500 (or $300 at the very least) before it can be considered 'default information'.

Leaving the threshold at $100 would mean that being 60 days overdue on a single phone bill (or partially overdue on an energy bill) could lead to a default being listed on a person's credit report (as long as the other conditions of proposed subsection 6(1) were met). This is inappropriate—a default listing for this level of breach would have a considerable impact on a consumer without providing any significant value to credit providers, as it would not in itself reflect on the credit worthiness of an individual. An overdue amount of $500 is a more realistic point at which to allow listings as it is may be more likely to indicate a genuine risk to a prospective credit provider. Even at this level a missed payment may not indicate a real risk. For example, a single energy bill of over $500 may not be paid for innocent reasons (it may have been sent to the wrong address, or the consumer may unexpectedly be away from home for an extended period).

If the Government is not inclined to increase the amount to $500, we suggest that it should be raised to at least $300. This figure has the benefit of being consistent with the ruling of the Australian Energy Regulator that an energy retailer cannot disconnect a consumer for non payment where the amount owing is less than $300.[7] We also note that the Energy and Water Ombudsman NSW has recommended that the minimum amount outstanding that can be listed on a credit report should be raised to $300.[8]

[7] Australian Energy Regulator (2012) *Minimum Disconnection Amounts*. Accessed from http://www.aer.gov.au/node/9518.

[8] Energy and Water Ombudsman NSW (2011), submission to Senate Finance and Public Administration Committee regarding exposure draft of the Bill. Accessed from http://www.ewon.com.au/ewon/assets/File/Submissions/2011/EWON_Sub_Senate_CreditReporting_0311.pdf

Whether the Government decides to raise this amount or not, it is important that the amount at paragraph 6Q(1)(d) is reviewed frequently to ensure it remains suitable or, preferably, indexed to CPI (or a similar index).

Paragraph 6V(2)(b): repayment history, partial monthly payments and missed payments

Proposed section 6V defines 'repayment history information' to include information about whether or not the individual has met obligations to meet monthly repayments. Section 6V(2) would allow regulations to be made to deem a partial monthly payment to be considered a monthly payment for the purposes of an individual's repayment history information. The discussion paper indicates that Government does not intend to introduce regulations that would allow a partial payment to be considered a monthly payment because

> an individual's repayment history is intended to demonstrate whether an individual is able to consistently meet his or her obligations regarding a credit account.

While we accept this reasoning, there will be situations where an individual is willing and able to consistently meet their repayment obligations but fail to meet those obligations as a result of an innocent mistake. A person may unintentionally make a partial monthly payment, for example, by entering an incorrect figure when paying a bill online.

We recommend that the regulations provide that a partial payment that is within a certain margin of error (perhaps 10 per cent of the full amount) should be considered to be a monthly payment unless there are other factors to indicate that the partial payment is other than an innocent error.

We also recommend that regulations could introduce a general fairness principle in regards to missed payments or partial payments under 6V(2). This regulation would provide that missed payments or partial payments should not be considered repayment history information if it would be unfair under the circumstances. Circumstances where a listing may be unfair could be where payments are missed because the consumer has been directly affected by a natural disaster. The Credit Reporting Code could provide necessary detail about what would amount to unfairness.

Schemes of arrangement and hardship applications

We agree with the intent expressed at paragraph 58A of the discussion paper (which reproduces text from the Explanatory Memorandum to the Bill) that care should be taken to ensure credit reporting processes do not discourage consumers from seeking hardship variations.

We are also of the view that if a contract is varied by agreement by both parties (whether because of hardship or any other reason) then a credit report should only ever reflect the repayment performance of a consumer under the current (varied) contract. That is, if a default is listed on a credit report, that default should immediately be removed if parties to the contract agree to a variation which means the consumer is no longer in default.

Any regulations regarding schemes of arrangement or hardship applications should reflect these principles.

Proposed subsection 6G(6): bodies which are not credit providers

We recommend that a regulation be made under section 6G(6) to provide that landlords are not credit providers. A large landlord could feasibly argue it is a credit provider if it is receiving rent in arrears, despite this not appearing to be the intent of the Privacy Act. Such a regulation would be consistent with the existing provision at section 6G(5) of the Bill which provides that real estate agents cannot be considered a 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

David Leermakers
Senior Policy Officer