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

Submission by Telstra Corporation Limited – July 2012

Senate Legal and Constitutional Affairs Legislation Committee

Part IIIA - Credit Law Reforms 2012

Outline

Telstra welcomes the opportunity to comment on these proposed law reforms.

As an industry participant in this area, Telstra wishes to draw attention to a number of key areas that, in our view, still require further attention or clarification, namely:

- Australian link provisions
- Existing telecommunications regulation
- Differentiation of credit providers
- Credit reporting and the new data sets
- Dispute resolution
- Grace periods for payment deadlines
- The new Credit Reporting Code.

Australian Link Provisions

We are concerned at the provisions restricting the ability of credit providers to disclose credit eligibility to entities that do not have an 'Australian link' (in sections 21G, 21J, 21K, 21M and 21N), which appear in the Bill but which did not appear in the Exposure Draft – Credit Reporting.

The Australian Law Reform Commission's recommendation 54-5 (from Report 108) – which was accepted by the government in its 'First Stage Response' to that Report – referred to excluding the 'disclosure of credit reporting information to foreign credit providers'. No reference to "foreign service providers" was made. In order to align the Bill with recommendation 54-5, and not place unnecessary restrictions on industry partners, we encourage the government to consider removing the Australian link requirement from those provisions which do not involve disclosure to other credit providers, in particular sections 21G(3)(b) (related bodies corporate), 21G(3)(c) (credit managers), 21K (guarantors) and 21M (debt collectors). To the extent that the government remains concerned about enforcement of overseas providers' privacy breaches, consideration could be given to holding the Australian credit provider accountable for its service provider's conduct in the manner of the Bill's new section 16C.

We also request the government to make it clear that the Bill (even as currently drafted) does not intend to prevent the provision of credit eligibility information to overseas providers. To do so, the government could clarify in a supplementary explanatory memorandum that the following may apply:

- an overseas provider would have an Australian link where it is providing services to an Australian credit provider (i.e. carrying on business in Australia), and collects the credit eligibility information by a telephone or online process where the information originates from the credit provider in Australia (potentially involving an intermediate step with a cloud computing provider hosting the information on overseas servers) (i.e. collecting the information in Australia); and
- overseas providers may be considered persons 'in the service of' a credit provider and so provision of information to them would be a use rather than a disclosure (see section 8 and paragraphs 3.6, 10.22 and 10.24 of the Credit Reporting Advice Summaries) – the application of

section 8 alleviates any concerns the government may have about enforcement as the credit provider would be accountable for breaches by the overseas provider.

Particular concern also arises in relation to the Australian link limitation in sections 21J (4) and 21N (2) in respect of potential assignees and securitisation participants. As the market for debt purchasers and funders in Australia is limited, the ability to consider overseas alternatives is beneficial to Australian credit providers. However, overseas entities may have difficulty in properly evaluating a debt portfolio without access to the same information available to their local counterparts. We encourage the government to consider whether any of our suggestions above in relation to overseas providers could be extended to potential assignees and securitisation participants, for example clarifying that there can be circumstances where overseas entities could be considered to have an Australian link.

Existing telecommunications regulation

There are a range of consumer credit obligations with which telecommunication suppliers (Suppliers) must comply. Most predominantly is the ***Telecommunications Consumer Protection Code*** (C628) (the Code). This Code outlines rules that Suppliers must follow in relation to several subject areas, including credit management. The Code rules cover matters such as:

- undertaking credit assessments before supplying a new service
- providing certain types of information to customers about credit assessments, the risks if the customer will not be the principal end user of the services, acting as a guarantor, etc.
- the provision of credit control tools to assist customers to manage their expenditure levels
- advising customers prior to restricting, suspending or disconnecting their service
- not taking further credit management action over disputed amounts
- the behaviour of collections agents
- updating credit bureau files within certain timeframes
- assisting customers who are experiencing financial hardship

After an extensive 2 year review by key Industry participants and the relevant Consumer and Regulatory Bodies, the newly revised Telecommunications Consumer Protections Code was approved for registration by the ACMA in July 2012, and will come into effect on 1 September 2012.

In Telstra's view, there should be no inconsistencies between these various forms of regulation.

For example:

- **Dispute Resolution** - the existing dispute resolution offered by the Telecommunications Industry Ombudsman (TIO) is well recognised by consumers and offers adequate redress for any grievances they may have. The proposed new powers of the OAIC in this respect are confusing and duplicative.
- **Breach** – it is important to ensure that there will be no overlap between the various governance and regulatory regimes to which telecommunications providers are subject. Any overlap would risk suppliers being placed in a type of "perpetual breach" depending on the regulation being invoked. In addition, query whether penalties will be imposed simultaneously in relation to each regulatory regime or whether the "dominant" penalty will apply.
- **Inconsistency** – a firm statement in relation to the regulation that will prevail in the event of inconsistency is essential.
- **Co-operation** – It is important that there is co-operation and collaboration between the various government agencies charged with the governing of the regulatory bodies (for example: ACMA and OIAC and their respective Government departments & the Attorney General's Department)

Differentiation of credit providers (industry type)

Suppliers are deemed to be credit providers for the purposes of the Privacy Act by virtue of the ***Credit Provider Determination No. 2006-4 (Classes of Credit Providers)***. This allows Suppliers to participate in the current credit reporting regime. However, telecommunications companies are not credit providers under the new National Consumer Credit scheme or under its predecessor, the Uniform Consumer Credit Code.

The inclusion up-front of 'industry-type' is crucial as it permits at that threshold point a segregation of telecommunications and utilities companies from providers of traditional 'credit'. There should be scope within the proposed legislative framework to accommodate and reflect the different regimes under which 'credit' providers operate while maintaining the integrity of the ultimate legislative regime.

Credit Reporting and the new Data Sets

It has been proposed that credit providers and bureaus would have access to five additional data sets, namely:

1. **the type of each credit account opened (for example, mortgage, personal loan, credit card);**
2. **the date on which each credit account was opened;**
3. the current limit on each open credit account;
4. the date on which each credit account was closed; and
5. repayment history information (the **Fifth Data Set**).

With respect to each of the data sets above, relating them to Suppliers (and adopting the numbering above):

1. Suppliers provide a "utility service". It should not be necessary to further define the type of account which Suppliers provide given the essential nature of their service.
2. there can be a number of different dates given the variety of ways in which customers can procure the service from a Supplier. For instance, a customer can be connected simply by using the internet, can be connected by calling the service provider or can go to a service providers' dealership. However, in essence the date on which the consumer credit is entered into for the purposes of Suppliers is the day on which the customer is actually connected as opposed to the day on which the customer signs or enters into a contract. We would propose that the draft legislation be amended to include the words "or the relevant service is connected" to address this issue.
3. this item is not appropriate for providers of telecommunications services as Suppliers are required by law to provide the services
4. this should practically be the day on which the customer ceases to be connected to the service. Again, we would propose the inclusion of the words "or the relevant service is disconnected" to address this issue
5. in relation to the Fifth Data Set, in order to provide the required information, Suppliers would be subjected to wholesale new systems design and compliance costs in order to provide this information. Telstra submits that a more practical solution would be to provide Suppliers and utilities with an "opt in" option. The advantages of this data set from Suppliers and utilities include:
   - This data would provide an insight as a lead indicator to the providers of traditional credit of customer behaviour and or distress.
   - Whilst Suppliers and utilities are not traditional credit providers their access to this data set of information would likely play a part in not *contributing further* to a customer in distress – i.e. best to avoid default than wait for it to occur again and again
   - The ACMA, TIO & Consumer advocates increasingly are asking Suppliers to implement Spend Management tools (TCP Code July 2012) and this opt in

would provide insight to proactive suppliers in assisting customers manage the number of services and features relative to their capacity to pay.

- Unlike traditional Credit providers the discretionary nature of the ability to spend is not present with a Telecommunications company (e.g. large retail spend on Credit Card or Personal Loan) nor are the average financial commitments of a Supplier which the NCCP was created to govern.

- In this respect we draw attention to the New Zealand model of access to the fifth data set. It provides the flexibility for Suppliers & utilities to access the 5th data element in defined ways of use, provides clean guidelines on the obligations of users whilst delivering the social benefits to the community. It acknowledges that a black and white approach to access is not in the greater interest of the community.

Dispute Resolution

The ***Telecommunications Industry Ombudsman*** is a free and independent alternative dispute resolution scheme for small business and residential consumers in Australia with unresolved complaints about their telephone or internet services, including dealing with complaints relating to credit provisions. ***The Telecommunications (Consumer Protection and Service Standards) Act 1999*** requires carriers and eligible carriage service providers to join the TIO scheme.

The existing dispute resolution offered by the TIO is well recognised by consumers and offers adequate redress for any grievances they may have. Any further external dispute resolution schemes that may be imposed on the telecommunications industry could lead to confusion as to the best scheme for consumers to follow and may not necessarily offer any greater or quicker means of resolving disputes.

Grace periods for payment deadlines

Telecommunications companies believe it is only reasonable and prudent to allow for a grace period, that is, for a certain amount of days to elapse after a payment deadline before any credit action is taken. This reflects the fact that there may be a number of reasons as to why a consumer may not have paid on a specified date which are not due to credit concerns. Further, imposing a requirement on companies to take action immediately (such as reporting action) would be unduly burdensome as it is highly likely that any such action would need to be reversed within a matter of days.

The CR Code

The OAIC can veto the developed code and create its own. It is not required to provide reasons for a decision not to register the CR Code. We do not consider this a reasonable outcome. Any Code should be the result of an open and transparent consultative process and not at the determination of one office.

Conclusion

We appreciate the opportunity to provide our comments on the proposed reforms and would be pleased to participate further in any subsequent discussions or considerations.

Telstra Corporation Limited
July 2012