



SUBMISSION IN RESPONSE TO THE *PRIVACY AMENDMENT (ENHANCING PRIVACY PROTECTION) BILL 2012*

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Level 2, 164 – 170 Hunter Street
NEWCASTLE NSW 2300
PO Box 84
NEWCASTLE NSW 2300

Tel: 02 4040 9122
Fax: 02 4929 7996
Web: www.hunterclc.org.au

Hunter Community Legal Centre

Hunter Community Legal Centre (HCLC) was established in 1992. HCLC operates on recurrent funding from the Commonwealth Attorney General's Department and the Children's Court Assistance Scheme. HCLC provides free legal advice, both in person and over the telephone, to people who live, work or study in the Hunter Valley, Newcastle, Lake Macquarie, Port Stephens, Great Lakes and Taree regions. HCLC also provides legal advice, assistance and court representation to disadvantaged people in the above areas, who meet the criteria for ongoing assistance.

HCLC's Family Law Program provides a free duty solicitor service for unrepresented parties in the Newcastle Family Court and Federal Magistrates Court and free advice to parents undertaking family dispute resolution, as well as by appointment in separation, divorce and parenting matters. HCLC also auspices the Hunter Children's Court Assistance Scheme which provides support to young people and their families who are attending the Children's Court in the Hunter Region. HCLC provides Community Legal Education involving seminars, workshops and presentations to community groups, community sector workers and young people on a range of legal matters.

HCLC also provides a Law Reform program in which solicitors undertake law reform project work and prepare submissions on various issues as they arise. HCLC has recently been approached on a number of occasions by persons who have had disputes with various credit providers that have resulted in notations being made on their credit information files. As a result, HCLC makes the following submissions in relation to the proposed amendments to the *Privacy Act 1988* contained in the *Privacy Amendment (Enhancing Privacy Protection) Bill 2012*.

Summary

This submission seeks to address issues arising from the *Privacy Amendment (Enhancing Privacy Protection) Bill 2012*. The following key issues are addressed by this submission:

Contents of credit information files

We note that the inclusion of notations relating to inquiries by consumers about obtaining credit and small overdue payments operate to disadvantage consumers attempting to obtain credit. We submit that these categories of information, if they are to continue to be recorded on credit information files, should be subject to further conditions in the way in which they are recorded.

Serious credit infringements

We note that the proposed amended Act does not address the severe consequences of a serious credit infringement being noted on a consumer's credit information file. Consequently, we submit that amendments relating to requirements be fulfilled before a serious credit infringement notation is included on a consumer's credit information file, including a requirement to remove such notations in certain circumstances and limits on the types of credit for which a serious credit infringement notation can be made.

Consumer awareness

There is a lack of consumer awareness in relation to the existence and content of credit information files. We submit that there should be further amendments that require more extensive contact to be made by credit reporting bodies to consumers.

Credit Reporting

Credit reports are used in making decisions that can have profound and lasting effects on consumers.¹ The results to an individual of being denied credit can range from minor annoyance, shame, emotional distress and friction in relationships, to the complete collapse of a person's financial situation.² This initial denial of credit can cause consumers to access 'fringe' credit where rates of up to 1600% p.a. interest are charged.³ This situation is aggravated by a lack of awareness among consumers of the existence and content of credit information files, with many consumers

¹ Australian Law Reform Commission, *For Your Information*, Report No 108 (2008) 52.23.

² Consumer Credit Legal Centre, *Credit Reporting: Getting it right for consumers* (2007) 4.3.5.1.

³ *Ibid.*

becoming aware of negative notations on their files only when they are refused credit.⁴ While the amendments proposed in the Bill embody important progress in relation to the inclusion of ‘positive’ information, information accuracy, complaints procedures, civil penalties and damages, this submission provides recommendations to make the credit reporting process as accessible to consumers as possible while still balancing the needs of credit providers and credit reporting bodies to have sufficient information to engage in responsible lending.

Contents of credit reports

Two key concerns arise in relation to the categories of information that can be recorded on credit information files. The first is the inclusion of records of inquiries about obtaining credit made by consumers. The second is the inclusion of notations relating to small defaults.

Inquiries

Under the Act as currently in force, when a consumer inquires about obtaining credit a notation is placed on that consumer’s credit information file, with no corresponding information as to the outcome of the inquiry recorded (such as whether the inquiry was withdrawn or credit was refused).⁵ This often leads future potential credit providers to assume credit was refused and as such presents a significant deterrent to consumers shopping around and comparing a number of quotes for the provision of credit.⁶ As the proposed amended Act provides for the inclusion of ‘positive’ information relating to a consumer’s current and past credit facilities and repayment history,⁷ there will be no need for the listing of inquiries on credit information files as the extra positive information will “allow credit providers to make a more robust assessment of the credit risk and assist credit providers to meet their responsible lending obligations”.⁸

Recommendation 1

⁴ Ibid.

⁵ *Privacy Act 1988* (Cth) s 18E(1)(b)

⁶ Consumer Credit Legal Centre, above n 2, 4.3.5.4.

⁷ Privacy Act (Enhancing Privacy Protection) Bill 2012 (Cth) cl 69 (proposed s6N).

⁸ Explanatory Memorandum, Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (Cth) 3.

Inquiries by consumers should not be recorded in credit information files. This information will no longer be necessary if the proposed positive information is recorded in credit information files.

Recommendation 2

If inquiries are to be recorded in credit information files, a notation indicating the outcome of the inquiry should accompany the listing. The absence of this information leads to the assumption by credit providers that previous inquiries have been refused by other potential credit providers and makes it more likely a consumer will be refused credit regardless of whether the inquiry was refused or voluntarily withdrawn by the consumer.

Small overdue payments

Under the Act as currently in force, there is no minimum default amount before a notation can be made on a consumer's credit information file, meaning even very small defaults can be listed. This is of particular concern as these small listings often result from billing errors or failures to change contact details, and the consumer may become aware of the notation only when they are refused credit, often resulting in the loss of an investment opportunity or the need to obtain fringe credit.⁹

Recommendation 3

A minimum threshold should be introduced before an overdue payment can be listed on a consumer's credit information file. It is our submission that this threshold should be \$500 excluding interest, to prevent consumers being unable to obtain mainstream credit for an extended period of time due to relatively small defaults. We submit that a default of \$500 is relatively small, compared to the implications of being unable to obtain mainstream credit for a period of five years.

Recommendation 4

Increased contact with consumers should be required of credit providers. Contact should be made by the credit provider both when a default occurs and when a notation is listed on the consumer's credit information file. The initial contact should be in writing and detail the steps the consumer must take to rectify the default, the effect of failure to do so and how the default can be disputed. If no action is taken by the consumer and no response to the initial contact is received within 10 working days, attempts to contact the consumer by telephone should be required.

⁹ Australian Law Reform Commission, above n 1, 56.26.

Serious Credit Infringements

A serious credit infringement is a category of notation that can be made on a consumer's credit information file where the credit provider is unable to contact the consumer and/or believes that they have, or have attempted to, fraudulently obtain credit, or are attempting to avoid paying a debt.¹⁰ The notation remains on a consumer's credit information file for seven, rather than five, years as afforded for the majority of credit notations.¹¹ Further, a notation under the proposed s6(1)(c) is based on the opinion of the credit provider and the inability to contact the consumer,¹² leading to the potential for serious credit infringements to be listed where there is a failure by a consumer to update their contact details. This is of particular concern in relation to utility defaults where defaults are generally smaller and failure to update details with these credit providers is more common than for other credit, such as car or home loans.¹³ In share houses, for example, where one tenant may have a utility provided to the premises in their name for use by all members of the household but fail to notify the utility provider when they leave the house, they may unknowingly become liable for the utility usage of the remaining tenants. The current protections afforded to consumers to ensure serious credit infringements are not mistakenly or unnecessarily listed on their credit information file are insufficient in light of the severe and lasting effects of such a listing.

Recommendation 5

A credit provider should be required to take the following steps before listing a serious credit infringement on a consumer's credit information file:

1. Send a notification to the consumer's last known address containing details of the default, how it can be rectified, consequences of failing to do so, and how the default can be disputed.
2. Make at least two attempts to contact the consumer by telephone including searching the white pages for a relevant entry (this would be considered 'reasonable steps' under the new definition of 'serious credit infringement' in s 6(1) of the proposed amended Act).
3. If these attempts to contact the consumer are unsuccessful and the credit provider reasonably believes the consumer fraudulently obtained the credit or is attempting to avoid the debt, a

¹⁰ *Privacy Act 1998* (Cth) s 6; *Privacy Act (Enhancing Privacy Protection) Bill 2012* (Cth) cl 63 (proposed s6(1)).

¹¹ *Privacy Act 1998* (Cth) s 18F(2)(g); *Privacy Act (Enhancing Privacy Protection) Bill 2012* (Cth) cl 72 (proposed s20W(b)).

¹² *Privacy Act 1998* (Cth) s 6; *Privacy Act (Enhancing Privacy Protection) Bill 2012* (Cth) cl 63 (proposed s6(1)).

¹³ Consumer Action Law Centre, Submission to Senate Finance and Public Administration Committee, *Submission regarding Exposure Drafts to Australian Privacy Amendment Legislation*, 30 March 2011, 6.

default listing may be made. The credit provider must attempt to contact the consumer when this entry is made and inform them the listing will be changed to a serious credit infringement notation 90 days after the default was listed if the consumer fails to contact the credit provider during that time.

4. After 90 days from the default listing the notation should be changed to a serious credit infringement if the credit provider has received no correspondence from the consumer and believes they have fraudulently obtained the credit or are attempting to avoid the debt.

Recommendation 6

Where a consumer the subject of a serious credit infringement notation contacts the credit provider and makes arrangements for the payment of the debt, the credit provider should change the notation to a default notation with an associated reduction in its maintenance on the credit information file from seven years to five, backdated to the original default listing. This facility should be available to the consumer at any time within the seven year period from the date the serious credit infringement notation is made. This will enable consumers to avoid a lasting serious credit infringement notation in circumstances where the default was not an attempt to fraudulently obtain credit or avoid a debt.

Recommendation 7

A serious credit infringement should be removed from a consumer's credit information file if they can establish that, had all of the circumstances been known at the time the listing was made, it would not have been reasonable to list the default as a serious credit infringement. The Office of the Australian Information Commissioner should be able to make a determination of whether the listing was reasonable on application from the affected consumer.

Recommendation 8

Defaults owed to utility providers should not be listed as serious credit infringements. Relative to other forms of credit (such as house and car loans) these types of defaults are more easily incurred without the knowledge of the consumer and failures by consumers to update their contact details are more likely to occur. Accordingly, the likelihood of a serious credit infringement notation occurring in circumstances where there has been no intention to fraudulently obtain credit or avoid a debt is relatively high in relation to utility providers, making credit infringement notations inappropriate in relation to this type of credit.

Consumer Awareness

Surveys of consumers and consumer advocates indicate a lack of awareness among Australian consumers of many features of the credit reporting system, including how to obtain a copy of their credit information file, what can be recorded in the file and the length of time a notation can remain on the file.¹⁴

Recommendation 9

A credit reporting body should notify the consumer of the following at the time of opening a credit information file in the consumer's name:

1. The contact details of the credit reporting body
2. A brief outline of the credit reporting system and the role of credit information files
3. What information the file will record and for how long it will be recorded
4. How the consumer may access a copy of their credit information file
5. How the consumer may go about complaining about a notation on their file, or having an erroneous entry corrected
6. A copy of the credit reporting body's policy about the management of credit reporting information under s20B of the proposed amended Act

Conclusion

While the proposed amendments to the *Privacy Act 1988* contained in the *Privacy Amendment (Enhancing Privacy Protection) Bill 2012* are expected to improve credit reporting processes for consumers, further amendment is required to enable consumers to have adequate access to the credit reporting system and strike an appropriate balance between the privacy of consumers and the need for credit providers to have information in order to engage in responsible lending. Those further amendments require focus on the content of credit information files, significant changes to the recording of serious credit infringements and steps to ensure consumers are more aware of the credit reporting system and their own ability to obtain credit.

¹⁴ Consumer Credit Legal Centre, above n 2, 7.2.