Law Institute Victoria

31 March 2011

Christine McDonald
Secretary
Senate Standing Committee on Finance and Public Administration (Legislation Committee)
PO Box 6100
Parliament House
Canberra ACT 2600

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

Dear Ms McDonald,

Inquiry into Exposure Drafts of the Australian Privacy Amendment Legislation - Credit Reporting

The Law Institute of Victoria (LIV) welcomes the opportunity to provide comments on the Exposure Draft of the *Australian Privacy Amendment Legislation - Credit Reporting* (the Exposure Draft). Thank you for giving us more time in which to respond.

The LIV is Victoria's peak representative body for lawyers and those who work with them in the legal sector, representing over 14,500 members. The LIV's Administrative Review and Constitutional Law Committee is made up of legal practitioners experienced in administrative and constitutional law. Committee members have a special interest in Australia's privacy laws and how they impact on the rights and obligations of individuals.

The LIV has actively advocated change to Commonwealth privacy laws in recent years. In 2010, the LIV made submissions on 'The adequacy of protections for the privacy of Australians online',[1] and the 'Exposure Draft of the Australian Privacy Principles'.[2] The LIV also provided evidence at a public hearing and a supplementary submission on 'The adequacy of protections for the privacy of Australians online'.[3] We await the outcomes of these inquiries with interest.

General Comments on the Exposure Draft

We find the Exposure Draft to be overly long, complex and inaccessible. In our view, it focuses on the relationships and transactions between credit reporting agencies and credit providers and seeks to regularise current business practices with little thought or provision for the rights and interests of individuals and fundamental principles of privacy. There are minimal protections of individual people's privacy in the Exposure Draft. These minimal protections are likely to be underused or unenforced while they are embedded in such a technical and complex framework, and while they are so severely compromised by burdensome and costly requirements (eg requirements to opt out, instead of opt in (eg cl110(5)); requirement to renew banning period every 14 days (cl113), and 'not excessive' charges for access (cl120(6))).

The Exposure Draft could be improved by:

- expressly acknowledging an individual's right to know what is happening to her or his information,
- requiring individuals to be notified when their information is used or disclosed, and
- making the amendments and deletions set out below.

In our view, even with our suggested improvements, the Exposure Draft would still be inaccessible to the individuals whose interests are greatly impacted by its provisions and, in implementation, it would represent a missed opportunity to engage people and give them more genuine control over their information.

The Law Institute of Victoria is a member of

Law Institute of Victoria Ltd
ABN 32 075 475 731
Ph (03) 9607 9311 Fax (03) 9602 5270
Email lawinst@liv.asn.au
470 Bourke Street Melbourne 3000 Australia
DX 350 Melbourne GPO Box 263C Melbourne 3001
Website www.liv.asn.au

Comments on specific clauses in the Exposure Draft

We make the following comments on selective clauses of the Exposure Draft. Where appropriate, we would apply by analogy our comments on the provisions concerning credit reporting agencies in Part A Division 2 to other clauses containing the same language but with respect to the other entities covered in other Divisions in Part A of the Exposure Draft. For example, our comment on sub-clause 120(6) below applies also, by analogy, to sub-clause 146(6) concerning credit providers.

1. Sub-clauses 106(1), 108(1), 110(1), 115(1):
    - the general prohibitions on the collection, use or disclosure of credit information about an individual should apply to any and all entities, including small businesses, rather than relying on any inferred prohibition under the Australian Privacy Principles.
    - we are of the view that all entities should be covered by the general prohibitions notwithstanding the offences and penalties imposed on entities under clause 160.
    - general prohibitions would be more direct than the indirect and unnecessarily complex approach taken to this issue under clause 160.
2. Sub-clause 106(6):
    - the exception for credit liability information attained prior to an individual turning 18 should be clarified so that it is apparent whether this concerns only details of contracts or if it extends also to defaults or payments prior to turning 18.
3. Sub-clauses 108(5), 110(7)(if retained, see comment 5 below), 132(5) and 135(6):
    - in addition to being required to make written notes of disclosure and use of credit reporting information, credit reporting agencies should also be required to notify the relevant individual.
    - the requirement of documenting uses and disclosures is of little consequence unless the individual knows that these uses and disclosures are occurring. Individuals should be provided with more knowledge, and therefore control, over the use and disclosure of their information.
    - without knowledge of disclosures, it would be difficult if not impossible to enforce. For example, the prohibition on use and disclosure of false or misleading credit reporting information in clause 117 or the ability to make requests under sub-clause 110(5).
4. Clause 110:
    - sub-clauses after clause 110(1) (see comment 1 above) should be deleted.
    - we question why direct marketing should be allowed in this context. Credit reporting allows entities the use of credit information they would not otherwise have. In effect, credit providers can 'pool' the information they collect through a credit reporting agency.
    - the pooling of information may be justifiable in the context of ensuring only those who are able to repay debts are granted credit and to ensure that credit is repaid and to avoid fraud. However, the 'pooled' information should not then be available to credit providers to help them identify potential customers, especially if the credit reporting agencies are profiting from it.
    - information collected for one legitimate purpose should not then be sold and used for purposes which are beneficial to companies without the consent of individuals.
5. Sub-clause 110(5):
    - if this sub-clause is retained (see comment 4 above), it should reflect sub-clause 8(2)(c) of the Exposure Draft of the Australian Privacy Principles by requiring the credit reporting agency to provide 'a simple means' by which an individual can request that a credit reporting agency that holds credit information about the individual not to use the information for direct marketing purposes.
    - for example, when a 'pre-approval' letter is sent under the branding of a credit provider, it should: (a) clearly identify the credit reporting agency to which a request not to use the information should be sent and (b) explain the process for making such a request.
6. Sub-clauses 113(3) and (4);
    - it is onerous and cumbersome to require individuals to apply for an extension to a ban period every 14 days.
    - the ban period should apply until after appropriate investigations have been conducted and concluded.

7. Sub-clause 115(4):
    - rules relating to the use by a credit reporting agency of de-identified information should include a prohibition on a credit reporting agency charging for the information.
    - allowing information to be used for the purposes of research is justified because there is a public benefit. It should not be used as a way of financially benefiting credit reporting agencies.
8. Sub-clause 120(6):
    - this clause permitting 'not excessive' charges should be amended to prohibit *any* charges for requests from people seeking access to their information. If charges are to be permitted, they should be 'reasonable'.
    - credit reporting agencies make a business out of collecting and disclosing individuals' credit information. As the ultimate 'suppliers' of that information, individuals should have access to that information whenever they want without charge.
    - permitting 'not excessive' charges (with no explanation of what that means) removes any chance of individuals being empowered to keep track of their own information.
    - compliance with the requirements on credit reporting agencies under the Exposure Draft cannot be properly monitored if the very people with the most interest in compliance (ie the individuals who are the subject of the information) are charged for access to that information if it is sought more than once in 12 months.
9. Clause 126:
    - the requirement on credit reporting agencies to destroy credit reporting information in cases of fraud is predicated on the credit reporting agency being satisfied of the matters set out in sub-clause 126(c).
    - clause 126 should be amended to provide for a right of review or complaint (see comment 10 below) with respect to any decision of an agency that it is *not* satisfied of the matters set out in sub-clause 126(c).
10. Clause 157:
    - the grounds for complaint should be amended to include a ground where 'the agency is not satisfied of the matters set out in sub-clause 126(c)' (see comment 9 above).

We would welcome the opportunity to discuss with you the issues raised in this submission at any future hearings scheduled for the inquiry.

Please contact me, or , Lawyer for the Administrative Law and Human Rights Section on or at in connection with this matter.

Yours sincerely,

Caroline Counsel
President
Law Institute of Victoria

[1] See LIV Submission to Senate Standing Committee on Environment, Communications and the Arts on 'The adequacy of protections for the privacy of Australians online' (29 July 2010) at http://www.liv.asn.au/Membership/Practice-Sections/Administrative-Law---Human-Rights/Submissions/The-adequacy-of-protections-for-the-privacy-of-Aus?glist=0&rep=1&sdiag=0.

[2] LIV Submission to Senate Finance and Public Administration Committee on 'Exposure Draft of the Australian Privacy Principles' (19 August 2010) at http://www.liv.asn.au/Membership/Practice-Sections/Administrative-Law---Human-Rights/Submissions/Exposure-Draft-of-the-Australian-Privacy-Principle.aspx?rep=1&glist=0&sdiag=0&h2=1&h1=0.

[3] See LIV Submission to Standing Committee on Environment and Communications on 'The adequacy of protections for the privacy of Australians online' (20 December 2010) at http://www.liv.asn.au/Membership/Practice-Sections/Administrative-Law---Human-Rights/Submissions/The-adequacy-of-protections-for-the-privacy-of-(1).aspx?rep=1&glist=0&sdiag=0&h2=1&h1=0.