ADDITIONAL COMMENTS BY THE AUSTRALIAN GREENS

1.1 The Australian Greens support the aims and objectives of the *Privacy Amendment (Enhancing Privacy Protection) Bill 2012* (the Bill), in particular the unification of the National Privacy Principles and the Information Privacy Principles into the new Australian Privacy Principles that apply to both Commonwealth agencies and private sector organisations.

1.2 This Bill amends the *Privacy Act 1988* (Cth) (the Act) and has been developed following numerous reviews and inquiries, which have included significant consultations with stakeholders. However, as was pointed out during this inquiry process, the reforms have been a long-time coming; for example, this is the first major reform to credit reporting since its introduction in the 1990s.

1.3 While there was majority support for the contents of this Bill amongst stakeholders, some concerns were expressed that although this Bill did improve 'on the current position, and that is because it is an important step towards that goal of harmonisation and simplification' it could not necessarily be said 'that it was an enhancement'.[1] Indeed, three different stakeholders expressed some concerns that this Bill was a 'missed opportunity' as it did not go far enough in either streamlining provisions or providing consumers and citizens with better protections.[2]

1.4 Changes to Australian law to modernise, strengthen and streamline privacy and credit reporting provisions are important. In doing this, we need to be careful that we strike the right balance between privacy rights and the free flow of information.

1.5 The Australian Greens strongly support the strengthening of Australian law to ensure enhanced compatibility with our obligations under international human rights law. As a signatory to the International Covenant on Civil and Political Rights (ICCPR), Australia has an obligation to promote and protect the right to privacy. Article 17 of the ICCPR provides that:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.

1.6 In signing up to the ICCPR, Australia has agreed to take all necessary steps to respect, protect and fulfil human rights.

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1 Ms Miller, *Committee Hansard*, 21 August 2012, p. 45.

2 Ms Ganopolsky, Ms Miller and Professor Greenleaf, *Committee Hansard*, 21 August 2012, pp 46 and 51.

1.7 We agree with the findings and recommendations made by the Committee's Report and make the following additional comments, which are directed at improving consumer protection and privacy rights.

Repayment history provisions

1.8 Firstly, we agree with the objection to the repayment history provisions raised by the Consumer Credit Legal Centre (NSW) Inc (CCLC NSW). As CCLC NSW highlighted, the main reason for the repayment history provisions is that credit providers require this information so that they can deal with managing risk, including risk-based pricing. This will not result in positive outcomes for consumers as it may cause some consumers, particularly low income and disadvantaged consumers, to be faced with higher costs of credit.

1.9 The CCLC NSW highlighted that there is insufficient evidence to show that more comprehensive reporting will 'lead to decreased levels of over-indebtedness and lower credit default rates'.[3] Indeed, CCLC NSW contends that there is evidence that 'indebtedness increases with the introduction of more comprehensive credit reporting'.[4] Furthermore, CCLC NSW was very strongly opposed to the repayment history provisions for a number of additional reasons, including: their potential to entrench hardship; the lack of evidence to suggest that the current situation, which does not provide for repayment history to be made available, is causing any problems in the market; and, the likelihood they would lead to risk-based pricing, which will entrench disadvantage by leading to a higher cost of credit for those least able to afford it.[5]

1.10 The Australian Greens are concerned that while the repayment history provisions may benefit credit providers, they will not benefit vulnerable consumers and as a result we query the necessity of inclusion of these provisions in the Bill. We recommend that, in light of the evidence provided by consumer advocates, the Government reconsider inclusion of the fifth dataset relating to repayment history. If the Government decides to include more comprehensive credit reporting we are of the view that the Government should consider introducing better consumer protections to monitor and minimise the impact of this dataset, particularly so that consumers experiencing socio-economic disadvantage and poverty are not worse off. Various consumer advocates provided suggestions during the inquiry about how to do this, and in addition to those submissions we say that further thought should be given to better regulation and/or monitoring of credit providers and how they deal with risk-based pricing and its impact on vulnerable consumers.

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3 Explanatory Memorandum, *Privacy Amendment (Enhancing Privacy Protection) Bill 2012*, p. 3.

4 CCLC NSW, *Submission 51*, p. 5.

5 CCLC NSW, *Submission 51*, p. 5.

Definition of 'serious credit infringement'

1.11 The Australian Greens also agree with comments made by the Consumer Action Law Centre (CALC), and supported by CCLC NSW, that the 'amendment to the definition of 'serious credit infringement' at proposed section 6(1) will not address the serious problems that this definition creates'.[6] A serious credit infringement is, apart from bankruptcy, the most serious type of listing that can be made and it will ordinarily remain on a credit report for seven years. It is very significant and has substantial ramifications for individuals. It is therefore essential that such listings are proportionate to the type of credit infringement, and are accurate and based on clear evidence.

1.12 CALC expressed concerns with the amendment to the Bill that requires that a serious credit infringement cannot be listed unless six months has elapsed since the credit provider last had contact with the debtor. It appears that the intent of this change is to ensure that credit providers attempt to make contact with the debtor so as to avoid an incorrect listing. By its intent, the amendment seeks to enhance consumer protections. However, as CALC points out, there is no guarantee that this amendment will achieve its purported aim as the credit provider is not required to be proactive and attempt to make contact; the only requirement is that the credit provider waits six months before listing a serious credit infringement.

1.13 CALC referred to a previous submission by consumer advocates that the definition of 'serious credit infringement' should be replaced with two new definitions: 'un-contactable default' and a 'never paid' flag. CALC indicated that this would be 'a more effective and proportionate response'[7] and would involve the 'never paid' flag being removed after six months and converted to an 'un-contactable default'. Under an 'un-contactable default', if at any point the debtor contacts the creditor, this is re-categorised to a standard default. While we understand that a previous inquiry highlighted that this suggestion does not take into account the serious nature of intentional credit fraud, we say that further consideration should be given to improving this definition to encapsulate better consumer protections as suggested by CALC. If the Government feels that it is necessary to retain a listing that reflects the serious nature of intentional fraud, it could consider a system that allows for a 'fraudulent conduct' flag where there is clear and compelling documentary evidence, or conduct has been found to be fraudulent by a court of law.[8]

Timing of default listings

1.14 In relation to proposed paragraph 6Q(1), the Australian Greens are of the view that a default listing should not occur until at least 30 days after a default notice has been given. In practical terms, this gives a borrower sufficient time to receive the notice (which may be subject to the vagaries of the post), contact the credit provider and/or try to rectify a default before a listing can be made, and is consistent with other

6 CALC, *Submission 5*, p. 1.

7 CALC, *Submission 5*, p. 4.

8 CALC, *Submission 5*, p. 5.

credit laws. This recommendation was made by the CCLC NSW. The submission of the Australian Communications Consumer Action Network also suggested that a listing should not occur until the credit provider has made 'reasonable attempts' to contact the debtor and provided a 'specific warning' regarding the default listing.[9]

'Determinations' by the Australian Privacy Commissioner

1.15 Finally, we note significant concerns raised by the Australian Privacy Foundation (APF) and CCLC NSW regarding the lack of determinations that have been made under section 52 of the Act. As a result of this history, the APF is apprehensive about the effectiveness of new reform under section 96, which provides 'a right of appeal to the Administrative Appeals Tribunal against decisions by the Commissioner to make a 'determination' of a complaint under s 52(1) or (1A)'.[10] In its view, 'this new right of appeal is of little use unless complainants can require the Commissioner to make formal decisions under'[11] section 52 of the Act, and it recommends that:

> The Privacy Commissioner should be required to make a determination under s52 wherever a complainant so requests, and for complainants to be informed that they are entitled to such a formal resolution of their complaint.[12]

1.16 The Australian Law Reform Commission (ALRC) in its *Report 108: For your information – Australian privacy law and practice* made a similar recommendation in 2009.

1.17 The Office of the Australian Information Commissioner (OAIC) provided a supplementary submission to the inquiry and noted that the Government had specifically rejected the recommendation of the ALRC in 2009 on the ground that as an independent statutory officer the OAIC 'should be responsible for exercising the administrative decision making powers under the Privacy Act'.[13] While we understand the tension here, and the importance of promoting and respecting the independence of the OAIC, we believe it would be prudent for the Government to reconsider this matter and conduct a review of the functions and powers of the OAIC in relation to its system for managing complaints, conciliations and determinations.

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9 Australian Communications Consumer Action Network, *Submission 50*, p. 7.

10 APF, *Submission 49*, p. 4.

11 APF, *Submission 49*, p. 5.

12 APF, *Submission 49*, p. 4.

13 OAIC, *Supplementary Submission 47*, pp 6-7.

Recommendation 1

1.18 The Government should reconsider inclusion of the fifth dataset relating to repayment history. If the Government decides to include more comprehensive credit reporting, it should also consider what additional consumer protections are necessary to monitor and minimise the impact of this dataset.

Recommendation 2

1.19 Further consideration should be given to improving the definition of 'serious credit infringement' with a view to enhancing consumer protections as suggested by CALC. If the Government is of the view that it is necessary to retain a listing that reflects the serious nature of intentional fraud, it should consider a system that allows for a 'fraudulent conduct' flag where there is clear and compelling documentary evidence, or conduct has been found to be fraudulent by a court of law.

Recommendation 3

1.20 Twelve months after the enactment of this Bill, the Government should conduct a review as to the effectiveness of the OAIC's system for managing complaints, conciliations and determinations.

Recommendation 4

1.21 Proposed new subsection 6Q(1) should be amended so as to require an appropriate amount of time, of at least 30 days, to have elapsed from the date that written notice is given before a default listing is made.

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Australian Greens