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Association of Building Societies and Credit Unions

Abacus
Australian Mutuals

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Ms Julie Dennett
Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600

Sent via: legcon.sen@aph.gov.au

Dear Ms Dennett

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

Abacus-Australian Mutuals is pleased to provide the following submission to the Senate Legal and Constitutional Affairs Committee inquiry into the *Privacy Amendment (Enhancing Privacy Protection) Bill 2012* (the Bill).

Abacus is the industry association for Australia's mutual banking institutions, representing 88 credit unions, 7 mutual building societies and six mutual banks.

Abacus members provide the full range of retail banking services and products.
Our members are Authorised Deposit-taking Institutions (ADIs) regulated by the Australian Prudential Regulation Authority under the *Banking Act 1959.*

The mutual banking sector has $83 billion in assets. Our members hold 8.4% of the new home loan market and 11.4% of household deposits, making them the fifth largest holder of household deposits in Australia.

The mutual sector's customer-owned business model focuses on the needs of its members and mutual ADIs consistently outperform other banking institutions in customer satisfaction rankings.

More comprehensive credit reporting
Abacus and its members support the introduction of more comprehensive credit reporting.

Comprehensive credit reporting is a logical addition to the Government's efforts to ensure responsible lending under the *National Consumer Credit Protection Act 2009*. Allowing lenders to access more complete credit data will be an important tool for lenders and, if effectively implemented, will have a pro-competitive impact on the lending market.

The focus of mutuals on the interests of their members makes them the most responsible lenders in the market. Bad debt ratios for mutual ADIs are consistently and substantially lower than ratios for other lenders, including the major banks, as reported by KPMG[1] and Standard & Poor's.[2]

[1] KPMG, Building Societies and Credit Unions: Financial Institutions Performance Survey, 2011
[2] Standard and Poor's, Australian Prime SPIN Index, January 2012

Comprehensive credit reporting is a powerful tool that can provide significant benefits to lenders and consumers alike. Access to more complete data helps level the playing field between large and small lenders as well as improving access to mainstream finance for those consumers currently forced to use fringe lenders.

However, access to this information brings significant responsibilities to those lenders seeking to use the expanded range of data. It is important that an appropriate framework is in place that protects the security of consumers' financial records and ensures that lenders only use data in ways contemplated by the proposed Bill.

Abacus strongly supports a legislative, regulatory and self-regulatory approach to implementing comprehensive credit reporting. Abacus believes that the focus of the legislation and regulatory instruments (including the proposed code of conduct) should be on safeguarding consumers – that is, ensuring consumer data is complete, that it is held securely and used appropriately.

Self-regulatory approaches should be encouraged for commercial arrangements between credit providers, credit bureaus and others.

Abacus recommends that sufficient time is provided to implement this safety net to ensure consumers are protected and that industry is able to implement the reforms in a sensible and measured way.

We have provided further comments on the credit reporting code of conduct and the implementation date below.

Credit Reporting Code

The Bill's credit reporting provisions cannot commence until a Credit Reporting Code is registered by the Privacy Commissioner. The code is a legal instrument binding credit reporting industry participants, and is enforced by the Privacy Commissioner.

Once the Act receives Royal Assent, it is expected that the Privacy Commissioner will formally request the credit reporting industry to develop a Credit Reporting Code. The development process requires public consultations to allow interested parties to contribute to the Code's development.

Abacus considers such a code is best suited to deal with:

- the protection of personal information;
- individual requests for access and correction of credit reports; and
- procedures to settle credit reporting disputes.

In the proposed Bill, APP 10 addresses the issue of ensuring the quality of personal information that can be collected is accurate, up-to-date and complete. Abacus members believe the extensive provisions in the Bill provide the appropriate regime for ensuring the quality of credit information.

We note various industry stakeholders support the inclusion of prescriptive rules, also known as reciprocity rules, in the proposed Code. These rules would govern the exchange of credit information between credit reporting bodies and credit providers.

Abacus supports the general principle of reciprocity in credit reporting, that is, a credit provider should only get access to the same level of data that it contributes, provided that there is a tiered framework for participation in the credit reporting regime.

We do not however see the case for the inclusion of commercial arrangements between credit providers and credit bureaus in the Government's regulatory framework. On our view, the Privacy Commissioner should focus its resources on the consumer protection elements of the reporting framework, not arbitrating commercial disputes between credit providers.

The Bill already provides a requirement for a credit reporting body to enter into agreements with credit providers and also provides for monitoring of these agreements. It is not appropriate in our view that the credit reporting code provide further duplicative requirements in regard to data provision by credit providers.

Abacus understands that there are wide views within the credit reporting industry with respect to the inclusion of reciprocity rules in the Credit Reporting Code, but also note that the Government has not indicated that it is seeking to play a role in the adjudication of commercial data provision issues.

The Explanatory Memorandum to the Bill notes that these agreements would have a range of enforcement mechanisms available to deal with breaches of the agreement, up to and including termination of the agreement with the credit provider, removing the credit provider from the credit reporting system. These agreements are to include dispute resolution provisions to deal with differences between bodies and credit providers in relation to the enforcement of the agreements.

Abacus believes the Privacy Act itself provides the appropriate legal framework to protect an individual's personal information. We support the fact that the Act places strict controls on the collection, use and disclosure of that information by credit providers and credit reporting bodies.

In this context, Abacus is of the view that any commercial arrangements related to the authorised exchange of credit information between credit providers and credit reporting bodies, should be subject to section 20N rather than the Credit Reporting Code.

Division 5 - Complaints

Abacus is concerned about aspects of the proposed regime for handling complaints set out in Division 5 of the Bill, including:

- the regime's inconsistency with the complaints' handling requirements applicable to Australian Credit Licence [ACL] and Australian Financial Services Licence [AFSL] holders; and
- the imposition of broad obligations to notify third parties.

Inconsistency with ASIC regulatory requirements

As ACL and AFSL holders, our members are required by the *Corporations Act 2001* and the *National Consumer Credit Protection Act 2009* to have a dispute resolution system, including internal complaint or dispute resolution procedures, consistent with requirements made or approved by ASIC[3]. In turn, ASIC has developed detailed requirements, set out in *Regulatory Guidance 165 Licensing: Internal and external dispute resolution*[4], which Licensees must comply with in responding to complaints about the financial services they provide, and the regulated credit activities they engage in.

As ACL and AFSL holders, our members' systems, processes and procedures, staff training and customer communications have all been developed in accordance with the requirements

[3] See s912A, Corporations Act & S47, National Consumer Credit Protection Act 2009

[4] http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg165-published-20-4-2011.pdf/$file/rg165-published-20-4-2011.pdf

of the ASIC regime. The complaints our member receive are generally, or invariably, dealt with within this framework. This includes complaints about credit reporting matters, as well as complaints that involve credit reporting issues together with other issues relating to credit or financial products and services. Indeed, given the nature of our members' businesses, credit reporting issues typically arise for them with, or in the context of, other issues about credit products/ services subject to the ASIC regime.

The ASIC complaints-handling regime is rigorous and highly prescriptive. However, it is not consistent in all respects with the requirements for handling credit reporting complaints set out in Division 5. For instance, different timeframes apply. In addition, under the ASIC regime the obligation to give the complainant a written notice of having received their complaint, and a written decision on the complaint, does not apply in the case of complaints that are able to be resolved to the complainant's complete satisfaction within a 5-day period (a sensible concession, in our view, to the fact that many complaints are simple and easily resolved and do not require an extended process such as provided for in Division 5).

In our view, the complaint handling requirements of Division 5 should align with the ASIC regime as set out in *RG 165*. Alternatively, credit providers that are ACL or AFSL holders should be able to satisfy their Privacy Act complaints-handling obligations under Division 5 by complying, in the alternative, with their obligations as ACL or AFSL holders.

In our submission, the adoption of either of these approaches would not compromise privacy values and protections. However, it would allow ASIC-licensed credit providers to avoid the unnecessary cost and complexity associated with having to adhere to two different regimes. This includes the cost and complexity of having to apply two regimes to a single complaint in circumstances where the complaint involves elements regulated under both the ASIC-administered legislation and the Privacy Act.

Obligations to notify third parties

Abacus acknowledges credit providers' responsibility to address any problems relating to the credit information of an individual, or any other information that could be used in establishing an individual's eligibility for consumer credit that they collect, store, use and provide to third parties such as credit reporting agencies and other credit providers. We also acknowledge that, when investigating a credit reporting complaint, a credit provider may need to consult a credit reporting body or other credit provider, as 23B(2) envisages.

On the other hand, we have serious concerns about the apparent intention under the Bill, and in particular section 23C, to require credit providers to provide written notification to credit reporting bodies and other credit providers whenever the credit provider receives a complaint that "relates to" either credit reporting information that a credit reporting body holds, or credit information or credit reporting information that another credit provider holds.

Under 23C(3), such notification would be required to be provided both as soon as practicable after the complaint has been made, and as soon as practicable after a decision had been made about the complaint. We see no justification for these broadly scoped and onerous requirements, going well beyond information for which the credit provider can reasonably be regarded as being responsible for correcting.

Mutuals are committed to the prompt and fair resolution of complaints, as set out in the Mutual Banking Code of Practice[5]. Where a complaint relates to credit information for which our members are not responsible for, mutuals will advise the complainant in writing of which other parties could deal with the complaint.

[5] http://www.abacus.org.au/images/stories/publications/mbcop/MBCOP_Booklet_-_Jan_2010.pdf

Abacus recommends the Bill be amended to clearly state that a credit provider has an obligation to respond to a complaint about information for which they have responsibility, and in cases where they are not actually involved in the complaint, credit providers should have a responsibility to advise the complainant in writing of the parties that could deal with the dispute.

Commencement of the Bill

The provisions in the Bill relating to APPs, credit reporting, privacy codes and other amendments to the Privacy Act will commence nine months after the Act receives Royal Assent.

The Senate Committee is expected to hand down its report into the Bill on 14 August 2012, and the House Committee will report on the Bill on 21 September 2012. It is reasonable to expect the Bill will be finalised by the end of 2012, at the earliest. The passage of the Bill is the first part of a lengthy process to finalise the entire legal framework that will reform the Privacy Act.

Abacus expects the draft regulations will be subject to an adequate consultation process before they are finalised. In addition, the Credit Report Code must be developed, and approved and registered by the Australian Privacy Commissioner, as detailed previously in this submission.

If the Bill was to be passed at the end of 2012, there will not be adequate time to finalise the regulations and the credit reporting code within nine months. The passage of the Bill, the formalisation of the regulations and the adoption of the industry Code of Conduct all need to be completed before smaller credit providers will be able to commit resources to system changes.

The passage of the legislation is very important but it is not the definitive moment at which the implementation clock commences to count down. Accordingly, to ensure mutuals and other smaller credit providers have adequate time to comply with the Bill's new obligations, Abacus recommends the Bill be amended to allow for its commencement at least 12 months from when the Credit Reporting Code is registered by the Privacy Commissioner.

Australian Privacy Principle 5: Notification of the collection of personal information

Abacus is concerned that the operation of APP 5 could be inconsistent with *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) tipping off obligations. Section 123 of the AML/CTF Act requires that an institution must not disclose to any non-AUSTRAC person that a suspect matter report (SUSMR) has been lodged, or that a suspicion has been formed that a SUSMR needs to be lodged.

There are other laws prohibiting disclosure of information to an individual, such as the law prohibiting disclosure of information about a monitoring order under s223 of the *Proceeds of Crime Act 2002* (Cth).

APP 5 however requires that an APP entity that collects personal information be required to inform the individual that their personal information is being collected.

To overcome this conflict, Abacus recommends that APP 5.1 be amended to include after "circumstances", "unless prohibited by an Australian law or a court/tribunal order", or words to that effect.

APP 5 has also omitted the exception that appeared in NPP 1.5. Abacus proposes that the exception be reintroduced, namely the obligation to notify the affected individual of the collection of personal information when the notification will pose a serious threat to the life or health of any individual.

This exemption has been utilised by Abacus members in the past in a number of rare, but dangerous cases. For example, when dealing with joint account holders in abusive relationships, there have been instances were Abacus members have been approached by an individual wanting to know the new contact details of their former spouse. During the course of those discussions with the mutual, the individual has made threats to harm their former spouse. In such cases, we believe a credit provider should have no obligation to inform the individual making these threats that information about that conversation may be collected and disclosed to Police, or other authorities. Abacus recommends that there is a good public policy foundation to continue this exemption, without any corresponding public detriment.

6G Meaning of *credit provider*
Abacus recommends the term 'bank' be removed from section 6G(1)(a) and replaced with 'authorised deposit-taking institution'. Under the *Banking Act 1959*, only authorised deposit-taking institutions – banks, credit unions and building societies – may operate a banking business. This amendment will ensure all institutions authorised to operate a banking business under the *Banking Act*, will clearly be identified as credit providers in the Bill, avoiding any disadvantage to ADIs that are not banks.

21G Use or disclosure of credit eligibility information
Under section 21G(6), a written note must be made if a credit provider uses or discloses credit eligibility information. Given credit providers routinely use this information for assessing loan applications, the requirement to make a written note when a credit provider uses eligibility information appears to go beyond what's necessary. Abacus recommends this section be amended to ensure credit providers provide a written note only if credit eligibility information is *disclosed*.

Thank you for the opportunity to provide this submission to the Committee. Please contact , Senior Policy Adviser, on to discuss any aspect of this submission.

Yours sincerely

MARK DEGOTARDI
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