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Senate Finance and Public Administration Committee
PO Box 6100
Parliament House
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Australia

By Email fpa.sen@aph.gov.au

Dear Sir/Madam

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

Consumer Credit Legal Service (WA) Inc (CCLSWA) is a non-profit community legal service specialising in credit, banking and financial services in general. CCLSWA provides legal advice, assistance, and representation to low income, vulnerable, and disadvantaged consumers of financial services. We also have an interest in general consumer law and have advocated on various consumer issues over a long period of time.

CCLSWA also represents consumers where to do so would be in the public interest. As part of our public interest role, the service is active in community legal education and policy and law reform.

We are pleased to provide a brief submission to the Inquiry into Exposure Drafts of the Australian Privacy Amendment Legislation: Credit Reporting.

In summary, the Exposure Draft contains some significant improvements to the regulation of credit reporting. We are particularly pleased to see the tightening of dispute resolution procedures and the introduction of civil penalties for privacy breaches.

However, CCLSWA is concerned about some aspects of the Exposure Draft that we predict may impact negatively on Australian consumers if adopted in its current form. We recognise the introduction of safeguards to consumers such as credit provider's membership to EDR Schemes, however these measures will not counteract possible future problems.

Definition of Credit Provider

The definition of 'credit provider' adopted in the Exposure Draft includes banks and organisations or small business operators where a substantial part of that business involves the provision of credit. Section 188(2) also provides that other small business operators may be credit providers if they provide credit in connection with the sale of goods, the provision of

services or the hiring, leasing or renting of goods. The repayment must be delayed in full or part for at least 7 days to be a credit provider in accordance with this section.

The definition adopted in the Exposure Draft is largely reflective of the definition currently used by the Office of the Australian Information Commissioner. 'Credit provider' is currently defined in the Privacy Act and by virtue of the Privacy Commissioner's Declaration to include corporations involved in the hiring, leasing or renting of goods where payment is deferred at least 7 days.

We are concerned that this expansive definition of 'credit provider' currently used and proposed to continue in the Exposure Draft will enable unsophisticated 'credit providers' to list defaults and access consumers' credit information files without understanding the credit reporting system or its effects on consumers. In our opinion, this increases the possibility of privacy breaches. Anecdotal evidence from the CCLSWA Advice Line suggests that this is already the case.

Case Study

CCLSWA's client had a significant amount of work carried out at her dentist. When the client received the bill, she disputed that some of the items listed were carried out. The client paid the part of the bill that she agreed she was liable for but refused to pay for the disputed items. Before the dispute was resolved, the dentist listed a default on her credit information file. The disputed part of the bill was \$220.00.

Given that it is reasonably common to be denied credit on the basis of relatively small defaults such as the one described in the above case study, it is vitally important that any individual or organisation that is able to list defaults has a broad understanding of the privacy laws, disclosure requirements and the nature and practical effect of credit reporting provisions.

It is entirely inappropriate for a default to be listed while liability is being disputed. However, some businesses use the credit reporting system as a debt collection tool regardless of any dispute over liability. Often the threat of a default listing will cause consumers to abandon their disputes and make payments that they do not feel they are liable to pay.

The above case study is not an isolated case. CCLSWA Advice Line has taken complaints from consumers who have had credit applications affected by defaults listed by small businesses such as dentists, veterinarians and video shops. In our opinion, enabling these small businesses to list defaults is inappropriate due their limited knowledge and experience of credit reporting provisions and privacy laws.

The potential for a whole range of unsophisticated 'credit providers' to materially affect consumers' ability to obtain credit without having the understanding of the privacy laws is concerning.

In addition, many of the 'credit providers' for the purpose of credit reporting do not have to comply with Australia's credit legislation, the *National Consumer Credit Protection Act 2009* and its Schedule 1, the National Credit Code (NCC). The NCC does not generally apply to the credit providers caught under Section 188(2) of the Exposure Draft. This is confusing for businesses and consumers. In our opinion, a streamlined approach to the application of credit laws and credit reporting laws is desirable.

CCLSWA would like to see the definition of 'credit providers' restricted to those listed in Section 188(1) of the Exposure Draft.

Ambiguity of "court proceeding information"

In Western Australia, summonses are routinely listed on consumers' credit information files. For reasons that are unclear, the listing of summonses appears to be unique to Western Australian consumers. To the best of our knowledge other States and Territories do not list summonses on credit information files.

Case Study

CCLSWA's client was involved in a dispute with a garage about her liability for work carried out as a result of the garage pumping the wrong fuel into her vehicle. The garage demanded payment for the repair work and the client refused. The garage started legal proceedings, however did not serve the summons on the client or proceed to take the matter to court. The client's liability remains in dispute, however the summons that was issued but never served has been listed on the client's credit information file and will remain there for 4 years. The Garage is refusing to remove the summons or discontinue proceedings. The client has been unable to refinance her mortgage due to the summons.

The above case study highlights how the listing of summonses can significantly impact on consumers' ability to obtain credit even though their liability has not been established. It is a mere allegation. The listing of summons is inherently unfair. Anyone can start legal proceedings against an individual whether there is merit to the claim or not.

Currently, a summons remains on a credit information files for 4 years even if proceedings are discontinued or the claim is unsuccessful. Credit providers lending criteria is routinely preventing consumers with summons on their credit information file from obtaining credit regardless of whether a claim is successful.

CCLSWA has made several unsuccessful attempts to establish why this is happening in Western Australia and (to the best of our knowledge) not other States and Territories.

We are concerned that the practice of listing summonses on credit information files will continue in Western Australia due to the ambiguous definition of 'court proceeding information' in the Exposure Draft. 'Court proceeding information' is permitted content on credit information files.

Section 180 of the Exposure Draft defines 'court proceeding information' as 'information about a judgment of an Australian court (a) that is made or given against the individual in proceedings (other than criminal proceedings); and (b) that relates to any credit that has been provided to, or applied for by, the individual'.

'Information about a judgment' could be interpreted widely to include the originating summons, as currently appears to be the case. For reasons stated above, we are of the opinion that summonses should be precluded from permitted content of credit information files.

We commend the inclusion of Section 180 (b) that restricts the listings of 'information about a judgment' to those actions 'that relates to any credit that has been provided to, or applied for by, the individual'. Under the current regime, summonses not relating to credit contracts are being listed on credit information files in Western Australia.

CCLSWA would like to see summonses specifically precluded from permitted content of credit information files.

We also note that on the occasions that we have raised this issue with the Office of the Privacy Commissioner, it has refused to consider the issues raised on the basis that the issue is outside of its jurisdiction as court judgments and summonses are public information and therefore not part of the 'credit information file'.

Given that Section 181 of the Exposure draft includes court proceeding information about the individual and publicly available information about the individual in its definition of credit information, we would hope that the Australian Information Commissioner considers this information within its dispute resolution jurisdiction.

Transborder Data Flow

Section 101 of the Exposure Draft sensibly restricts its operation to credit that is or has been provided, or applied for, in Australia. This restriction on cross border data flow reduces the prospect of privacy breaches. Transborder data flow contains inherent risks of compromised data integrity and security. Where disputes occur, it is very difficult to resolve when dealing with another country.

However, we note that The Honourable Brendan O'Connor MP states in his letter to Senator Helen Polley on 31 January 2011 that;

"There are some matters relating to restrictions on foreign credit information or credit providers outside Australia that have not been included in the exposure draft. These require further consideration and are yet to be drafted.

Further consideration is also required for provisions allowing credit reporting information to be shared with New Zealand. These provisions will be drafted following further inter-governmental negotiations with the relevant New Zealand authorities."

Sharing credit reporting information with New Zealand seems to be contrary to Section 101 of the Exposure Draft and it is unclear of what benefit this would be to Australian consumers. It may increase the risk of data inaccuracies and cause problems for Australian and New Zealand consumers residing in Australia who dispute content from a listing originating in New Zealand.

It is unclear on what basis the Australian Government thinks it would be beneficial to share this information with New Zealand. At the very least, it would be desirable for there to be dispute resolution mechanisms within Australia for disputes relating to credit reporting by New Zealand institutions.

Thank you for the opportunity to comment.

Yours sincerely

Consumer Credit Legal Service (WA) Inc