Consumer Credit
Legal Centre NSW

May 2012

Senate Legal and Constitutional Affairs Legislation Committee

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

Questions on Notice to Consumer Credit Legal Centre NSW (submission 51)

1. **Does the Bill strike the right balance between protecting an individual's personal information and ensuring that sufficient information is available to assist a credit provider to determine an individual's eligibility for credit?**

CCLC is of the view that this Bill does not strike the right balance for the following reasons:

- There is no public policy justification for the addition of repayment information to the credit reporting bureau. While it is clear that this information has commercial value to the lending industry, this does not equate to sufficient reason to justify the breach of privacy involved. Our primary reason for this is that we think the other information to be included in credit reports is sufficient for lenders to make a responsible lending decision. No further additional information is necessary. Further, credit providers can ask a client to provide statements on other accounts as any time if they are of the view that this information would be useful. Undisclosed credit accounts can cause problems for lenders in making an accurate assessment of the person's ability to pay. Repayment history information on the other hand may be completely misleading (where the person has used other credit to meet repayments for example, they may have a great repayment history but no real capacity to pay in the longer term - or where the person is consistently late but never ultimately misses a payment a poor repayment history may not be indicative of a lack of capacity to pay at all). Further, repayment history information sharing has the potential to result in considerable detriment to consumers (unwarranted refusal of credit, increases in differential (or risk based) credit pricing) and possible unforeseen consequences.
- Credit reports often contain inaccurate information, or information which has been unfairly included in the circumstances. The evidence of the Financial Ombudsman Service is that in the 2011/12 financial year alone they uncovered systemic errors resulting in the amendment of 4506 incorrectly made credit listings, the removal of

7,720 incorrectly made credit listings and the removal of 2,770 incorrectly made serious creditor infringement listings. This is among FOS members alone. While FOS members make up a significant proportion of the credit and finance industry (particularly by volume of transaction as they include the major banks), there are many other types of entity able to list information with a credit reporting body that are not covered by FOS.

This means that must be robust and timely procedures for consumers to access and correct/dispute the information in their credit reports to ensure that they do not suffer unwarranted and potentially costly rejection for credit. CCLC submits that the Bill is instead inadequate on a number of issues as already set out in our submission:

- Free access is limited to once every 12 months and does not include additional access where the consumer believes on reasonable grounds that there is a disputed listing;
- The "reasonable period" which must elapse between notifying a consumer that they may be default listed is not defined;
- The minimum amount that can be listed is too low leading to disproportionate consequences;
- Statute barred debts can remain on the system beyond the period in which they are enforceable (as a result of delayed listing);
- There is very little to reflect the recommendation of the ALRC that listings should be substantiated within a specified time-frame – the Act should specify (or empower the regulations to specify) the categories of evidence required to substantiate a listing and if adequate substantiation is not provided within the required time (preferably 30 days as recommended by the ALRC) then the listing should be **removed** (only substantiated but nonetheless disputed listings should be referred to EDR);
- There is no capacity to remove a listing that unfair and misleading in the circumstances;
- Utility defaults can affect a person's ability to obtain credit and for a disproportionate period (should be reduced from 5 years to 2 years for the retention of utility);
- Debt Agreements that have been declared void remain on the system;
- CRB's are not require to be members of an EDR scheme leading to potential gaps in the framework for complaints and corrections;
- There is the capacity for consumers to be severely disadvantaged where a credit provider has ceased to be a member of an EDR scheme or goes out of business – it should be clear that disputed listings by credit providers that are no longer current members of EDR should be removed immediately;
- The system is at risk of being manipulated by credit repair agencies at considerable cost to both consumers and credit providers;

- There is no specific frequency specified for vital system audits;
- There is no specific power for the Privacy Commissioner to approve or ban CRB's as appropriate given the pivotal and powerful role they play;
- The Privacy Commissioner is not an effective regulator

2. Does the Bill properly take into account the multiplicity of jurisdictions and regulatory regimes?

There will be a multiplicity of dispute resolution schemes available to consumers depending on their credit reporting dispute. We contend that this is unavoidable given the industry and membership structure of dispute resolution schemes. The Bill has mandated membership of a dispute resolution scheme which means consumers will have access to dispute resolution which is crucial in getting access to justice.

There should be only one relevant regulator and that is the Office of the Australian Information Commissioner. We contend that there are inherent problems with the internal conflict between the regulator accepting and deciding disputes and its role as the regulator. We also continue to have serious concerns about the efficacy of the OAIC as a dispute decision maker (only 2 decisions in the last 10 years) and its efficacy as a regulator.

In our view, as credit reporting is financial services based the better regulator would be ASIC. We also contend that the dispute resolution part of the Privacy Commissioner would better serve consumers as a separate and independent body (or Tribunal), separate to the regulator whether it be OAIC or ASIC.

3. How do you suggest that this issue [the interrelationship between the hardship provisions in the NCCP Act and default listings in the bills] be addressed in the regulatory framework?

There are two issues here:

1. The listing of default information while a hardship request is pending.

As rightly pointed out by FOS, it is currently considered best practice for credit providers to refrain from taking any enforcement action, including listing a default with a credit reporting business, while considering a consumer's request for hardship. This is consistent with obligations under the Banking Code of Practice, the Mortgage Industry Association of Australia Code of practice, and the ABACUS Mutual's Code of Practice. It is also explicit in Credit Ombudsman Service's Rules. These Codes and FOS and COSL's interpretation of best practice are also consistent with the hardship variations provisions of the National Credit Code which recognises that consumers can face unforeseen changes of circumstances throughout the life of a loan and should be given a reasonable opportunity to vary their contract provided they get back on track within a reasonable period. CCLC submits that the Privacy Bill should be consistent with this.

Specifically Section 21D(3)(d) of the Bill should have a 3rd sub-clause as follows:

21D(3)(d)(iii) - the credit provider is not limited from commencing enforcement proceedings under subsection 89A(2) of the National Credit Code as amended by the Consumer Credit Legislation Amendment (Enhancements) Bill 2012.

Clause 6Q(1) should also be amended consistently with the above.

2. The interaction of repayment history and hardship variations.

CCLC submits that it would be inconsistent with the National Credit Code and general contract law to list a consumer as having missed a payment, or payments, in circumstances where the contract has been legitimately varied, either by consent between the parties, or because the consumer has exercised his or her rights to seek a variation on grounds of hardship. Consumer and creditors may agree to vary a contract for a variety of reasons of which hardship is only one (for example a debtor may wish to pay a lump sum in advance as opposed to periodical payments for a period because they are going overseas). A borrower who complied with such an agreement could not then be reported as having missed payments while they were overseas. A hardship variation under the National Credit Code requires that the borrower must reasonably expect to be able to discharge his or her obligations if the terms of the contract were changed (section 72) – that is the money must still be repaid within a reasonable time. In these circumstances it is fair, logical and consistent with the objects of the law (to give people in financial hardship a reasonable opportunity to get back on track without penalty) to treat a hardship variation in the same manner as any other variation of the contract.

While there is no need to reflect this in the Act itself (the detail of the repayment history regime is not included in the Act itself, only the power to collect and share this category of information), there should be a clear indication in the explanatory memorandum that the repayment history regime should be consistent with the National Credit Code and contract law. A varied contract creates new obligations and it is those new obligations against which the consumer's obligations should be measured for repayment history reporting purposes. Put simply, if a credit contract is varied for any reason (hardship or otherwise) then a consumer's repayment history should not show a missed payment provided the varied contract is being complied with.

This would not affect missed payments prior to the variation (which would remain for two years as usual).

Regards

Katherine Lane
Principal Solicitor

Consumer Credit Legal Centre (NSW) Inc