Legal Aid QUEENSLAND

Submission to Senate Inquiry into the Exposure Draft of the Australian Privacy Amendment Legislation

Legal Aid Queensland (LAQ) makes the following submission to the Senate Inquiry into the Exposure Draft of the Australian Privacy Amendment Legislation. The submission relates to Part 2 – Credit Reporting only.

LAQ's civil law services provide community legal education, legal information, legal advice, extended assistance and casework services in relation to consumer issues.

LAQ provides advice to approximately 50,000 people each year across all legal areas. Around 30% of those advices are in relation to civil law issues. We also have a specialist Consumer Protection Unit (CPU) with a focus on consumer credit which is staffed by 3 full time lawyers. That unit provides direct advice to over 1000 Queenslanders each year and conducts limited casework to the extent our resources permit. The unit gives priority to matters where there may be a more wide-ranging beneficial effect for all consumers and where clients have been victims of consumer injustices.

LAQ welcomes the opportunity to comment on the proposed Australian Privacy Amendment Legislation – Credit Reporting. The comments focus on the following areas

- Access to credit reports – *sections 119* and *146*
- Correction of credit information – *sections 121* and *149*
- Complaint handling – *Division 5*
- Definition of 'Serious credit infringements' – *sections 180*
- Definition of 'default information' – *sections 182(2)*
- Definition of 'repayment history information' – *sections 187*
- Credit Reporting Code – development process

The above provisions provide critical protection to the vulnerable consumers we assist.

Important consumer protections will be contained in the regulation and the binding Credit Reporting Code. The legislation is just one part of a very complex jigsaw regulating credit reporting. For example it is proposed that the regulation can define further who may meet the definition of 'credit provider' under *s188*. There is considerable concern about the definition of 'credit provider' as any expansion of the term will considerably increase the number of entities who can access credit reporting. For that reason it is critical that a draft regulation is available when the legislation is debated to test whether the consumer protection safeguards envisaged by the Government are realised.

Accessing credit reporting and credit eligibility information

Individuals should have access to more than one free report annually.

If there is a cost imposed on individuals beyond the one free report, it should reflect the actual cost of provision.

Section119 limits the provision to one free credit report annually. *S146* which allows individuals to access credit eligibility information is not limited in the same way.

In our view limiting the number of free copies of credit reporting information may restrict the individual's ability to regularly check the accuracy of the information held about them. Individuals will also wish to check if an agreed amendment to the credit report was made. Whilst *sections 122* and *150* require credit reporting agencies or credit providers to advise individuals within a reasonable time if the correction has/has not been made, the individual may not be aware that there is a requirement to notify and may wish to check themselves.

In addition 'reasonable time' is not specified or defined. At a minimum, the regulation ought to include factors to be taken into account in assessing whether the 'time' was reasonable, for example, whether the request was urgent, the significance of the correction and/or personal characteristics of the individual who requested the correction.

Section 119(4) requires credit reporting agencies to provide the information within a reasonable period of time. Again 'reasonable' is not defined.

Section 119(6) requires that the charges for a copy of the report are not excessive. We are unsure what this means in practice. We would submit that it should be no more than the actual cost incurred by the credit reporting agency in providing the information to the individual.

We are unsure as to why credit providers do not have the same obligations imposed on them in relation to the provision of credit eligibility information as credit reporting agencies. By way of example there is no provision that requires credit providers to provide the information within a reasonable time.

Correction of credit information

Individuals must be provided within 30 days with evidence substantiating disputed information or be referred to an approved external dispute resolution scheme otherwise disputed information must be deleted or corrected.

The Australian Law Reform Commission (ALRC), in recommendation 59-8 of ALRC Report 108, titled "For Your Information – Australian Privacy Law and Practice", recommended that within 30 days, evidence to substantiate disputed credit reporting information must be provided to the individual, or the matter be referred to an external dispute resolution scheme recognised by the Privacy Commissioner. If these requirements are not met, the credit reporting agency must delete or correct the information on the request of the individual concerned.

The Government in its first stage response accepted the recommendation. The recommendation is not reflected in the draft legislation.

As was stated in the Government response, the recommendation was to ensure that **the onus of proving the accuracy or appropriateness of a listing in an individual's credit reporting information lies with credit providers and credit reporting agencies** and encourages the industry to resolve disputes in a timely manner.

Often individuals challenge inaccurate listings when they are informed, as part of an application for credit, that their application was rejected on the basis of information contained in a credit report. In those circumstances it is critical that evidence substantiating the listing is provided in a timely manner or the listing corrected as there is often some urgency.

Consumers have sought advice from LAQ where they are purchasing a home or a car and are unable to complete the purchase because the lender has refused to give them a loan because of an inaccurate listing. This can result in considerable hardship if the listing is inaccurate and not removed quickly.

Section 149 (2) of the draft legislation inadequately addresses the recommendation in that it provides that if an individual requests correction of a credit report, and the **provider** (we assume this is the credit provider) is satisfied that the information is inaccurate then the provider must take reasonable steps to correct the information within 30 days of the making of the request.

Section 121 (2) of the draft legislations mirrors *section 19(2)* except that it applies to credit reporting agencies rather than credit providers.

These sections do not require credit providers or credit reporting agencies to provide evidence substantiating the listing nor does it require the removal of the listing if the evidence is not provided.

In our view it is equally important that these time frames not only apply to credit providers and credit reporting agencies but also to matters referred to external dispute resolution schemes. In some instances consumers are waiting many months to have issues addressed through the external dispute resolution scheme and as a result incorrect listings are not removed for considerable periods of time. This results in significant harm to the consumer.

In relation to delay the legislation could incorporate a mechanism for consumers to receive compensation for any loss occasioned by the delay in correcting information in their credit file. This will ensure that credit providers are more careful before they list, the credit reporting agency is more careful in identifying the right party when recording a default listing and the external dispute resolution scheme prioritises those cases where time is of the essence.

Complaint handling

All credit reporting agencies should belong to an approved external dispute resolution (EDR) scheme.

LAQ is concerned that whilst credit providers who wish to access credit reporting information are required to belong to an approved EDR scheme, credit reporting agencies are not.

Membership of an EDR scheme ceases once the member is in liquidation. If an individual has a complaint about an inaccurate listing and the credit reporting agency refuses to remove the listing, and the credit reporting agency is not a member of an approved EDR scheme, the individuals only avenue of redress is through the Information Commissioner (formerly The Privacy Commissioner).

This avenue of redress has proved inadequate in the recent past. LAQ’s Consumer Protection Unit has not lodged any complainants to the Privacy Commissioner on behalf of clients for the last four years. For example, in the case of OneTel, there were many credit reporting complaints but the Telecommunications Industry Ombudsman was unable to make determinations against OneTel once they were in liquidation. This caused significant consumer detriment.

Serious Credit Infringements

A ‘serious credit infringements’ listing should be restricted to those circumstances where fraud is established.

In the alternative only credit providers who are ‘licensees’ for the purpose of *The National Consumer Credit Protection Act 2009* should be able to list if certain criteria are met.

Serious credit infringements remain on credit reports for 7 years. This is longer than bankruptcy information or any other type of default information.

In our view the definition of serious credit infringement (*s180*) attempts to address 2 distinct scenarios, the individual or group acting fraudulently ((a) and (b) of the definition) and other individuals who have left an address or changed phone numbers without advising the lender ((c) of the definition).

We support the listing of a serious credit infringement in relation to those individuals who have acted fraudulently.

In relation to individuals who have left an address or changed phone numbers without advising the lender we believe that listing a serious credit infringement is a very harsh policy response, particularly where the consumer may not know of the debt or the consumer makes contact soon after the listing is made.

This is particularly the case in relation to utility accounts. Consumers have complained to LAQ that they were unaware that they had outstanding telephone accounts. Given that the industry can back bill for a period of up to 180 days (a reduction to 100 days is currently being debated as part of the review of the *Telecommunications Consumer Protection Code*), it is not surprising that individuals may legitimately believe that they have paid a final account with a provider.

As the legislation is currently drafted, if the provider listed a serious credit infringement in those circumstances, the individual could not ask for its removal because the credit provider need only show that the individual did not pay and they had taken reasonable steps to contact the consumer.

Other issues that have arisen are where the individuals move and then realise a few weeks or months later that they have not received a final account from a utility provider. They contact the utility provider, pay the account and then subsequently discover that a serious credit infringement was listed. The legislation as currently drafted does not allow the removal of the serious credit infringement in those circumstances.

There are a myriad of other circumstances where consumers may not be contactable. For example illness, overseas travel, looking after sick relatives.

In our view the harsh effects of the listing of a serious credit infringement could be ameliorated in a number of a ways.

Given that fairness issues arise mainly in relation to those credit providers who are not subject to the responsible lending criteria under the National Consumer Credit Code (generally utilities or other service providers), those entities should not list a serious credit infringement unless they can establish fraud (i.e. meet criteria contained in (a) and (b) of the definition) .

In relation to those credit providers subject to the *National Consumer Credit Protection Act 2009* (the *Credit Act*), the legislation could provide that they could list for serious credit infringement that meets the criteria contained in (c) if the following additional criteria were met

- The amount overdue was more than $500; and
- The amount was overdue for more than 60 days.

In addition, the legislation could provide that the credit provider must remove the listing if the basis on which they formed the view that the person indicated an intention not to pay was not reasonable if all the facts were known to the credit provider at the relevant time.

Repayment History Information

LAQ support for repayment history information was linked to the introduction of a responsible lending framework. The responsible lending framework is currently inadequate.

LAQ does not support hardship flags.

LAQ supported allowing more comprehensive credit reporting, such as repayment history if the precondition of the introduction of a responsible lending framework was met. The *Credit Act* does not provide responsible lending requirements for all types of consumer credit. In our view the reporting of repayment histories should be delayed until at least the commencement of phase 2 of the current credit reforms and a more comprehensive responsible lending framework has been introduced.

Hardship Flags

The issue of repayment history and negotiated variations to contracts represents significant “data creep”. The industry has suggested that where a varied agreement is made a hardship flag should be included in an individual’s credit report.

LAQ is opposed to hardships flags. The reasons for this are perhaps best illustrated by the following examples where consumers are requesting the tailoring of an existing credit product:

Example

> *A borrower is $100,000 ahead on their home loan repayments, on an original loan of $180,000 entered 6 years previously. There is no general capacity to redraw the amount borrowed but repayments are based on an outstanding balance of $160,000 rather than the borrower’s actual outstanding balance of $60,000. The borrower wishes to reduce the minimum monthly payment because she wants to send her children to private school and take more holidays. The borrower is not in financial hardship. She is merely tailoring her loan. Whilst the lender has indicated that they would not pursue her if she made partial repayments, under the new credit reporting arrangements she would risk a repayment history listing.*

This practice of consumers is very common. Who decides whether the borrower is in hardship? The above example maybe relatively easy to distinguish but could require the borrower to provide evidence that they are not in financial hardship. Such an imposition is an unacceptable interference in their privacy.

Example

> *The borrower above approaches her lender as she is about to go on maternity leave. She wishes to change the payments she is making because she expects that there may be hidden costs associated with the birth and staying at home or she wishes to extend her maternity leave beyond her paid maternity leave period.*

Who decides whether she is in hardship?

Further examples include borrowers who are overseas or in hospital, borrowers wanting to suspend credit card repayments and borrowers who are moving and do not want to think about making or missing payments for a period of time.

The industry has indicated that it wishes to distinguish between formal and informal variations. We assume that an informal variation is an oral as opposed to a formal written variation. Each of the above examples could be negotiated either on an informal or formal basis. Distinguishing hardship based on formal or informal variations to contracts is not helpful and will not assist consumers or lenders.

Even where there is genuine hardship, hardship flags are a disincentive to enter into hardship arrangements. Borrowers will try to refinance, or do anything to avoid it, if they know a hardship flag will be placed on their credit report. Imprudent refinancing is already an issue for our clients.

Example

> *A borrower had a number of debts, about $15,000 of which were unsecured debt not attracting interest. The debts included telecommunication, utility and other accounts. She refinanced because she was worried amongst other things about credit reporting. The costs associated with refinancing and losses associated with paying interest were over $10,000.*

In the example above, the consumer had a right to access the hardship policies of the utility providers which may have seen her pay off the utility accounts over time and saved her a substantial amount of money. If hardship flags were accepted she would have no choice but to refinance because it is very likely that a hardship flag would at the very least make it more difficult for her to borrow or she would have to pay significantly more for credit (risk based pricing).

Variations

Individuals should be able to apply to vary their contract prior to missing even one payment, adhere to that variation and get back on track without ever having a blemish on their credit report.

In our view repayment history should show missed payments until such time as a variation is agreed between the lender and the consumer. Repayment histories should reset to zero from the date the first varied repayment is due while the agreed arrangement is adhered to by the consumer.

If there is no default listing prior to a hardship application being made, then there should not be a default listing provided an arrangement can be made and kept to, even if the negotiations extend beyond the 60 days.

If a default is already listed and a hardship arrangement made then it is appropriate that once the new arrangement is in place it is noted against the default information *s184*.

Default Information

The legislation should be amended to ensure that statute barred debts are not listed.

The ALRC recommended and the government accepted that statute barred debts should not be listed on credit reports (see recommendation 58-1 ALRC Report 108). The draft legislation does not allow a credit provider to list default information in relation to an overdue payment if the provider is prevented from bringing legal proceedings against the individual to recover the amount of the overdue debt - *S182(2)(e)*.

Unfortunately the limitation of actions legislation in various states do not prevent the credit provider from bringing proceedings. Instead the law provides a complete defence to a consumer on the ground that the debt is statute barred.

To clarify the position, we would support an amendment that if the individual has a complete defence under any limitation of actions legislation, the credit provider is unable to list.

In addition, it appears that the restriction in the legislation is limited to the party that provided the credit so that an assignee of the debt or the debt collector may be able to list

Credit Reporting Code – development process

LAQ supports the development of a single Credit Reporting Code.

We note that the legislation requires the development of a *Credit Reporting Code* (*the Code*). It is intended that industry drive the development of *the Code*.

We are concerned that it is not in consumers' best interests for industry to drive the development of a credit reporting code which is not purely directed to intra industry issues unless there are adequate consumer safeguards.

Consumer related industry codes are the most appropriate form of regulation where:

- the code will respond more quickly to consumer detriment than legislative processes;
- industry and consumers can work together to achieve better outcomes for consumers than those which would be provided under a legislative process;
- the code addresses gaps in the current consumer protection framework;
- industry and consumers are willing to work together;
- consumers and industry have equal bargaining positions;
- consumers are adequately resourced to participate in the code development process; and
- the code development process is independently managed.

In addition, codes do not offer adequate consumer protection where despite the existence of the code there are consistently large numbers of complaints and or widespread non-compliance with the code. To ensure compliance with the code it is vital that an independent code monitoring and compliance body be established which is able to actively monitor the performance of the industry. The body and its staff should be funded by industry members who access the available credit reporting information.

The major industry participants are currently in the process of developing a credit reporting code. They have established a committee to oversee the development of this code. The Committee members comprise a balance of industry and consumer representation and a neutral chair. The independent committee has appointed an independent reviewer to manage the process.

We strongly reject any proposal to have more than one credit reporting code. We have particular concerns about any suggestion that the telecommunications industry could develop its own code, or rely on the current telecommunication codes. Consumer experience suggests that telecommunications industry codes have been ineffectual in delivering an appropriate 'baseline' in consumer protection and compliance culture.

The telecommunications codes have taken significant time and resources to develop, and even when finalised have very few signatories.

Section 106 of the *Telecommunications Act (1997)* provides that compliance with an industry code is voluntary unless the Australian Communication and Marketing Authority (ACMA) directs a particular participant to comply with a registered code. Most codes have a maximum of 2-3 signatories - and in some cases none. The keystone consumer protection document, the *Telecommunications Consumer Protection Code* (*TCP Code*), has only two signatories.

As a signatory to the code, these two providers are bound by the *Communications Alliance Code Administration and Compliance Scheme*.

The *TCP Code* places no obligation on the industry body, Communications Alliance, to monitor complaints, monitor compliance, undertake routine compliance with signatories or identify systemic code issues and breaches. However it does require that Communications Alliance handle complaints about code signatories in accordance with the Communications Alliance Code Administration and Compliance Scheme. Communications Alliance is required to report on this Scheme, including the incidence of signatory's compliance and signatories reporting on compliance to the public via its newsletter and Annual Report. Communications Alliance has not reported publicly on compliance with the *TCP Code* despite the scheme being in existence for more than 10 years.

In our view the inability of the telecommunications industry to develop adequate consumer safeguards is reflected in the level of complaints. The Telecommunications Industry Ombudsman recently reported receiving 87,264 new complaints in the last 6 months of 2010 - a 9% increase on the previous 6 months. This included 19,000 issues relating to the failure of companies to follow through with promises they had already made to resolve complaints - an increase of 23%.

Conclusion

Vulnerable consumers in Queensland will greatly benefit from the proposed reforms. If the amendments suggested above are made those protections will be significantly enhanced.