



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

Submission by the Australian Communications Consumer
Action Network to the House Standing Committee on
Social Policy and Legal Affairs



August 2012

About ACCAN

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of communications services for all Australians.

ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN activates its broad and diverse membership base to campaign to get a better deal for all communications consumers.

Contact

Danielle Fried, Disability Policy Adviser

Suite 402, Level 4
55 Mountain Street
Ultimo NSW, 2007
Email: [REDACTED]
Phone: (02) 9288 4000
Fax: (02) 9288 4019
TTY: 9281 5322

Contents

Executive Summary	4
Credit reporting – Exemptions for users of relay services	5
Credit reporting – Credit listing	7
Cross-border disclosure	9
Breach notifications	10
Other issues.....	11
List of recommendations.....	12

Executive Summary

ACCAN thanks the Committee for the opportunity to provide comments to the Inquiry into Privacy Amendment (Enhancing Privacy Protection) Bill 2012 ('the Bill').

ACCAN has concerns about a number of aspects of the Bill.

These include:

1. While we welcome the exemption in the Credit Reporting Schedule for users of the National Relay Service (NRS), this exemption should be expanded to include non-NRS relay services.
2. Some aspects of the Credit Reporting Schedule are unduly onerous for consumers of telecommunications.
3. Cross-border disclosure requirements must be enhanced to ensure Australians' privacy in an era of increasing globalisation and off-shoring.
4. Breaches should be reported to the Privacy Commissioner; serious breaches should be reported to the person/s affected.

Response to Inquiry into Bill

1. Credit reporting: Exemptions for users of relay services

ACCAN is pleased that the Bill includes an exemption for users of the National Relay Service¹ (NRS), which provides a phone solution for people who are Deaf, hearing-impaired or speech-impaired, allowing them to make real-time phone calls to the wider community. The NRS is funded by a levy on eligible telecommunications companies, and provided by two separate private providers under contract to the Commonwealth.

However, reforms do not go far enough to ensure that users of all relay services, not only the NRS, are able to make calls unimpeded by credit reporting privacy concerns.

1.1 Background

The two NRS contracts are currently administered by the Australian Communications and Media Authority (ACMA) but this responsibility will soon be transferred to the new Telecommunications Universal Service Management Agency (TUSMA).

The NRS facilitates, through the use of a relay officer who acts as a 'middleman', phone calls between people who are Deaf, hearing-impaired or speech-impaired, and the wider community. Users with disability may use a range of technologies to make or receive NRS calls.

One issue which is frequently reported by NRS users is that certain organisations either refuse to take their call via the NRS, or handle these calls in what appears to be a discriminatory manner, citing credit reporting privacy concerns.

The proposed change to the Act would therefore be most welcome to these disability communities. Specifically, Subdivision B, Division 2 (credit reporting), subdivision B, 6L, paragraph 3 (lines 11 and 12 of page 63 of the Bill), states that the definition of an access seeker as someone "who is authorised in writing by the individual to deal with a credit reporting body or credit provider" does not apply "to a person who provides the National Relay Service".

1.2 Proposed further reform

However, this amendment does not apply to users of relay services which are not (currently) part of the NRS. For example, ACCAN is aware of two non-NRS relay services currently operating, both provided by the Australian Communication Exchange (ACE). (ACE, a not-for-profit organisation, is also contracted to the Commonwealth to provide the NRS.) Other organisations may wish to provide relay services in the future, either free or on a fee-for-service basis, as happens in other countries, such as in Brazil² and Japan³.

As with NRS services, these relay services require the use of a relay officer.

¹ NRS, 2012. 'Stay in Touch', last accessed 18 July 2012; www.relayservice.com.au

² Viavel Brasil, 2012, last accessed 18 July 2012; <http://www.brasilviable.com.br>

³ Japan Signers Service, 2012, last accessed 18 July 2012; <http://www.japan-jss.com/>

The two non-NRS relay services currently operating in Australia are:

- a) A captioned telephony relay service, also known as CapTel⁴. This is used by people with hearing impairment who use their own speech on the telephone. Captioned telephony allows the hearing-impaired person to make and receive calls using either a specialised landline handset or, in certain circumstances, a regular handset plus another device with an internet connection. The hearing-impaired person can both listen to the other party's speech, and read what the other person says. This technology is particularly useful for older people with acquired hearing loss.
- b) A video relay service⁵ (VRS) for Auslan (Australian Sign Language) users. This is used by Deaf Australians, many of whom have English as a second language (with Auslan as a first language) and for whom accessing text-based relay services is difficult, uncomfortable or unfeasible.

Given that one in six Australians has a hearing loss; that with the ageing of the population, hearing loss is projected to increase to one in every four Australians by 2050⁶; and that access in Auslan is vital to members of the Deaf community⁷, both captioned telephony and VRS are essential services for these groups – so essential that ACCAN would like to see them as part of the NRS. This may not be the case for some time. In the meantime, these relay users appear to be omitted from these important reforms to credit reporting.

We are also concerned that other relay services may arise in the future, due to changes in technology, demography or funding, which do not fall under the NRS, and that users of these services would also then fall outside the remit of the currently proposed reforms.

ACCAN nonetheless recognises that non-NRS relay providers are not subject to the same governance and accountability obligations that are required of the NRS. We would certainly not want to see people with disability, an already disadvantaged group, further disadvantaged by scams or breaches of privacy. To that end, and given that the number of non-NRS relay services is likely to remain small, a solution is for the Minister for Broadband, Communications and the Digital Economy to make a determination upon request on a case by case basis for each new non-NRS relay service as it arises. A list of services which have received a successful determination could be made available by the Office of the Australian Information Commissioner in order to ensure that financial and other institutions would be fully aware that they would not be breaching the Act by handling calls via these relay services.

⁴ Australian Communication Exchange, 2012. 'Captioned telephone trial', last accessed 18 July 2012; http://www.aceinfo.net.au/index.php?option=com_content&view=article&id=6&Itemid=17

⁵ Australian Communication Exchange, 2012. 'Video relay service', last accessed 18 July 2012; http://www.aceinfo.net.au/index.php?option=com_content&view=article&id=5&Itemid=16

⁶ Access Economics, February 2006. 'Listen Hear! The economic impact and cost of hearing loss in Australia', last accessed 18 July 2012; <http://www.audiology.asn.au/pdf/listenhearfinal.pdf>

⁷ Deaf Australia, 19 November 2010. 'Auslan policy', last accessed 18 July 2012; http://www.deafau.org.au/info/policy_auslan.php

Recommendation 1:

That Subdivision B, Division 2 (credit reporting), subdivision B, 6L, paragraph 3 (lines 11 and 12 of page 63 of the Bill) be amended to “Subparagraph (1)(b)(ii) does not apply to a person who provides the National Relay Service *or any other recognised telecommunications relay service for people with disability as determined by the Minister for Broadband, Communications and the Digital Economy*”.

Recommendation 2:

That a list of all non-NRS relay services which are exempt through a ministerial determination be made available by the Office of the Australian Information Commissioner.

2. Credit reporting – credit listing

Credit listing of telecommunications consumers is a growing issue. Most consumers of utilities such as telecommunications are listed for a previous debt related to a closed service. This issue is particularly alarming given the high proportion of credit default listings involving telecommunications. For example, in 2005, telecommunications companies were responsible for 62 per cent of all credit default listings⁸. In that year, almost 600,000 people were rated as possible credit risks for not paying mobile phone or internet bills as low as \$20⁹.

Many of these consumers first become aware of their listing through being refused credit, often many years after the listing of the debt. It can be related to a closed account which they had assumed had been paid. The penalty for what is often a very small amount may well be the denial of a home or business loan which is out of all proportion to the actual debt.

It is our understanding that the nature of the debt listing arrangements is that the service provider has no option other than listing all uncollected debts in order to gain access to the credit information listed by the credit agencies. This means that an amended invoice issued after a closure of an account is often never seen by the customer but is then listed as a default.

Further, an increasing number of consumers – almost a fifth of the population, in fact - use a mobile device as their main, or only, telecommunications device¹⁰. Some of these consumers may move home or small business premises frequently, increasing the

⁸ ‘Telecommunications debt listings increase by 63 per cent’, Vantage – The Newsletter of Baycorp Advantage, previously at http://www.baycorpadvantage.com/vantage/debt_recovery/telecommunications_debt_listings_increase.aspx, quoted in Consumer Credit Legal Centre (Inc), April 2007. ‘Credit reporting – getting it right for consumers; last accessed 27 July 2012; <http://www.cclcnsw.org.au/wp-content/uploads/2010/02/Credit-Reporting-Getting-it-right-for-consumers.pdf>

⁹ ‘Phone debt a credit risk’, *The Sunday Times*, 8th January 2006, quoted in Consumer Credit Legal Centre (Inc), April 2007. ‘Credit reporting – getting it right for consumers; last accessed 27 July 2012; <http://www.cclcnsw.org.au/wp-content/uploads/2010/02/Credit-Reporting-Getting-it-right-for-consumers.pdf>

¹⁰ Roy Morgan Research, 2012. ‘Rapid decline in Home Telephones as more choose mobile only amongst Mobile Phone owners’, last accessed 18 July 2012; <http://www.roymorgan.com/news/press-releases/2012/1567/>

likelihood that bills go missing and a default listing ensues. There needs to be a mechanism in place for default listings to be challenged when the consumer has no opportunity to be notified about the imminent default listing.

There needs to be an improved system of consumer protection so that a mechanism to identify credit risk is not compromised by a failure of an invoicing system operated by a telecommunication company. There needs to be an improved system of consumer protection so that failure to pay a minor amount is not punished by the denial of a major life opportunity.

This view is supported by the Australian and New Zealand Ombudsman Association. Chairwoman Clare Petre has been publicly quoted as saying, "Often they didn't even know that they had been credit-listed until they had applied for a mortgage or a credit card or a business loan and then they found they had been credit-listed for small amounts, were denied that credit and lost deposits, were not able to start up their business and so experienced quite severe consequences."¹¹

ACCAN recommends that there be a specific notification requirement related to the intention to credit list and that this requirement be such that all reasonable attempts to contact the customer with a specific warning should be a prerequisite to credit listing. ACCAN does not believe that a generalised warning on a final invoice that failure to pay may result in credit listing is a sufficient notice.

Further, the timing of the credit listing should have a relationship to when the debt was incurred. ACCAN understands that the Telecommunications Industry Ombudsman (TIO) has adopted the approach that an overdue account should not be credit listed more than one year after the account due date, and that this approach is being adopted by some other industry ombudsman schemes.

There should be a minimum amount below which credit listing should not be allowed. The extension of a scheme originally designed for the benefit of credit providers and the artificial definition of utility providers such as telecommunications services and credit providers has created the anomaly of credit refusal being applied to relatively minor and old debts that the consumer was not even aware of. ACCAN believes that at the least a minimum amount before listing should be \$300. This would ensure that small utility debts are excluded from a listing regime.

Finally, ACCAN supports a sliding scale of credit listing. At the moment the period of listing is the same no matter what the credit default is, so an unpaid bill for a telecommunications account of \$180 results in the same 'punishment' as a default on an \$80,000 loan. This is clearly disproportionate. A preferred approach would be a period of listing which is related to the amount of the default. Alternatively, the default listings for telecommunications products could be two years from the date of the default, rather than five years, which is disproportionately large considering the product.

¹¹ ABC News, 23 July 2012. 'Ombudsmen concerned by debtor blacklists', last accessed 27 July 2012; <http://www.abc.net.au/news/2012-07-23/ombudsman-concern-small-debt-credit-ratings/4148476>

Recommendation 3:

That the Act is amended to include a mechanism to allow consumers to challenge default listings if they have not received prior notification about an imminent default listing.

Recommendation 4:

That there be a specific notification requirement related to the intention to credit list and that credit listing cannot take place until all reasonable attempts to contact the customer with a specific warning have been exhausted.

Recommendation 5:

That the Act mandates that an overdue account should not be credit listed more than one year after the account due date.

Recommendation 6:

That the Act mandates that \$300 be the minimum amount below which credit listing should not be allowed.

Recommendation 7:

That there be a sliding scale of credit listing, so that the period of listing is related to the amount of the default; or that the default listings for telecommunications products be listed as two years from the date of the default, rather than five years.

3. Cross-border disclosure: APP 8

ACCAN has concerns regarding the proposed Australian Privacy Principle 8: Cross-Border Disclosure. Personal consumer information must be protected as a matter of paramount security. Australian telecommunications consumers expect that any personal information provided to Australian telecommunications businesses will be protected by Australian privacy law. As telecommunications customer service functions are increasingly being outsourced off-shore it is of particular concern to ACCAN and our members that the amendments to our privacy laws will allow for businesses to freely practice cross-border sharing of personal consumer information. ACCAN does not endorse the amendment which as written allows for discretionary determination by business without consumer consent.

In order to provide the greatest levels of consumer privacy, and safety, consumers must be given prior knowledge of privacy protections in the overseas jurisdiction to which their personal information is to be sent. This must be stated clearly in any contract that consumers enter into, in order that they may make informed decisions prior to consent.

An example of how personal consumer information may be compromised in the context of the telecommunications sector involves the proposed new regime for Pre-paid Mobile Identity Verification. Current proposals for the new regime allow for telecommunications providers to verify consumer identity via access to a government document verification scheme. As most of our major telecommunications providers currently outsource this type of back-office administration off-shore, there is potential for breaches of Australian consumer personal information if these off-shore jurisdictions do not have adequate privacy legislation.

Recommendation 8:

APP 8 should be reworded to reflect a much higher level of protection. We direct the Committee to the Australian Privacy Foundation submission for further discussion on the shortcomings on APP 8.

4. Breach notifications

Consumers of telecommunications have been victims of a number of well-publicised breaches in the past year, many of these due to a lack of security leading to hacking incidents¹². Users of online facilities, including social media sites, have been particularly affected.

ACCAN is concerned that the Bill does not appear to include any requirement for instances of breaches to be reported either to the person/s affected or to the Privacy Commissioner. While the instances above were reported by the media, the community has no way of knowing whether other serious breaches have occurred.

ACCAN understands that a mandatory breach notification framework is being considered. However, we ask that such a framework be made an essential component of the Act. This is in line with other jurisdictions, such as Europe and most states of the United States. Such a framework should not be overly onerous for either entities or the public, but instead must ensure that both the Privacy Commissioner and the person/s affected are notified, so that they are aware of any measures they might themselves need to undertake, as well as providing some assurance to the Privacy Commissioner as to what actions have been taken by an entity to mitigate against such a breach recurring.

As to whether defences to contraventions should extend to inadvertent disclosures where systems incorporate appropriate protections, ACCAN endorses the submission in this matter of our member, the Australian Privacy Foundation (APF) which has expertise in generic privacy issues.

¹² N. O'Brien, December 31, 2011. 'Angry customers still on hold over Telstra privacy breach, in *Sydney Morning Herald*. Last accessed 18 July 2012; <http://www.smh.com.au/technology/technology-news/angry-customers-still-on-hold-over-telstra-privacy-breach-20111231-1pg5s.html#ixzz20vZ3NVOT>

B. Grubb, July 6, 2012. 'Customer privacy is not negotiable': Telstra boss admits leaking customer data', in *Sydney Morning Herald*. Last accessed 18 July 2012; <http://www.smh.com.au/technology/technology-news/customer-privacy-is-not-negotiable-telstra-boss-admits-leaking-customer-data-20120706-21lzo.html#ixzz20va5CXv7>

B. Braiker and J. Halliday, 7 June 2012. 'eHarmony, Last.fm hit by same hackers that leaked LinkedIn passwords', *The Guardian*. Last accessed 18 July 2012; <http://www.guardian.co.uk/technology/us-news-blog/2012/jun/07/blogpost-eharmony-linkedin-hacked-leaked?INTCMP=ILCNETTXT3487>

Recommendation 9:

That a two-step process be implemented, and be enshrined in the Act, to ensure that all significant breaches are reported to the Privacy Commissioner, and that serious breaches are also reported directly to the affected person/s.

Recommendation 10:

That the Committee endorse the recommendations made by the APF in its submission in relation to “inadvertent breaches”.

5. Other issues

In preparing this submission, ACCAN has worked closely with our member, APF. ACCAN endorses the position of the APF in relation to the thirteen proposed Australian Privacy Principles (APPs). ACCAN has publicly stated our serious concern about the use of codes in the telecommunications sector – they can be undermined by industry, to the detriment of consumers. We note that the APF has also had major concerns about the use of codes both generally and under the existing Privacy Act, but that the new Part IIIB included in this Bill should ensure that in future, Privacy Act codes can only strengthen rather than weaken privacy protection in both the private and Commonwealth public sectors and government agencies.

Recommendation 11:

That the Committee endorse the recommendations made by the APF in its submission.



List of recommendations

Recommendation 1:

That Subdivision B, Division 2 (credit reporting), subdivision B, 6L, paragraph 3 (lines 11 and 12 of page 63 of the Bill) be amended to “Subparagraph (1)(b)(ii) does not apply to a person who provides the National Relay Service *or any other recognised telecommunications relay service for people with disability as determined by the Minister for Broadband, Communications and the Digital Economy*”.

Recommendation 2:

That a list of all non-NRS relay services which are exempt through a ministerial determination be made available by the Office of the Australian Information Commissioner.

Recommendation 3:

That the Act is amended to include a mechanism to allow consumers to challenge default listings if they have not received prior notification about an imminent default listing.

Recommendation 4:

That there be a specific notification requirement related to the intention to credit list and that credit listing cannot take place until all reasonable attempts to contact the customer with a specific warning have been exhausted.

Recommendation 5:

That the Act mandates that an overdue account should not be credit listed more than one year after the account due date.

Recommendation 6:

That the Act mandates that \$300 be the minimum amount below which credit listing should not be allowed.

Recommendation 7:

That there be a sliding scale of credit listing, so that the period of listing is related to the amount of the default; or that the default listings for telecommunications products be listed as two years from the date of the default, rather than five years.

Recommendation 8:

APP 8 should be reworded to reflect a much higher level of protection. We direct the Committee to the Australian Privacy Foundation submission for further discussion on the shortcomings on APP 8.

Recommendation 9:

That a two-step process be implemented, and be enshrined in the Act, to ensure that all significant breaches are reported to the Privacy Commissioner, and that serious breaches are also reported directly to the affected person/s.

Recommendation 10:

That the Committee endorse the recommendations made by the APF in its submission in relation to “inadvertent breaches”.

Recommendation 11:

That the Committee endorse the recommendations made by the APF in its submission.