COMMUNICATIONS ALLIANCE LTD

HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON SOCIAL POLICY AND LEGAL AFFAIRS

PRIVACY AMENDMENT (ENHANCING PRIVACY PROTECTION) BILL 2012

COMMUNICATIONS ALLIANCE SUBMISSION
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EXECUTIVE SUMMARY

Communications Alliance is pleased to have the opportunity to make a submission to the inquiry by the House Standing Committee on Social Policy and Legal Affairs into the Privacy Amendment (Enhancing Privacy Protection) Bill 2012 ("the Bill").

Communications Alliance members have an interest in this matter as telecommunications providers are a class of credit provider, according to a Privacy Commissioner Determination. However, the access to and use of credit reporting information by telecommunications providers is different to the use and access of more traditional credit providers. Communications Alliance members are therefore interested in ensuring that the legislative amendments take into consideration the requirements of different types of credit providers and the legal and regulatory obligations that already apply to those credit providers within their own industries.

About Communications Alliance

Communications Alliance is the primary telecommunications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, equipment vendors, IT companies, consultants and business groups.

Its vision is to provide a unified voice for the telecommunications industry and to lead it into the next generation of converging networks, technologies and services. The prime mission of Communications Alliance is to promote the growth of the Australian communications industry and the protection of consumer interests by fostering the highest standards of business ethics and behaviour through industry self governance. For more details about Communications Alliance, see http://www.commsalliance.com.au.

INTRODUCTION

Communications Alliance acknowledges that the current raft of changes to credit laws are the most substantial changes in this arena in over two decades. Given the far-reaching nature of these legislative amendments, it is crucial that the impacts of the changes are properly considered and their implementation is not rushed. It is particularly important to ensure there are no unintended adverse consequences for consumers due to the introduction of the amended obligations, so that the full consumer protection benefits of the amendments can be realised.

Telecommunications companies are not traditional 'credit providers'

Under the *Privacy Act 1988* (Cth) ('the Privacy Act'), the Privacy Commissioner is able to make a Determination that certain classes of corporations are to be regarded as credit providers for the purposes of the Privacy Act.

Telecommunications companies are deemed to be credit providers by virtue of such a Determination: the Credit Provider Determination No. 2006-4 (Classes of Credit Providers). This is due to the fact that telecommunications companies provide goods or services on terms that allow deferral of payment for at least seven days.

Telecommunications companies use credit information in a vastly different way to banks and other financial sector entities. They are not a traditional 'credit provider' – instead they provide what is sometimes referred to as 'trade credit'. That is, they provide goods and services to customers and allow them to pay after they have used the goods or services.

Any 'trade credit' provided is only for use of those specific telecommunications products and services. It is not discretionary credit which can be spent on anything (like a credit card) or a large loan of money (such as for a mortgage or a car loan). Further, the 'trade credit' is provided on a fixed payment cycle; that is, the customer is required to pay in full each month for the telecommunications services they have used.[1]

The above distinction between telecommunications companies (and other utilities) and the more traditional credit providers (financial lenders) is crucial to understand. The access to, recording of and use of credit information by telecommunications companies is entirely different to that of traditional credit providers – a distinction that is explored in more detail below.

The Bill does not take into account different industries or types of credit providers

One of the key concerns for Communications Alliance members is that the Bill seems to be have been prepared with no recognition of the different types of credit providers that exist, the different sectors and industries involved, and the different ways they all use credit information. As noted above, it is critical that such differences be taken into account, as many of the obligations that may be relevant to banks and other financial lenders do not translate into the telecommunications environment and vice versa. Based on the differences described above, Communications Alliance suggests that the Bill be reviewed with the following objectives:

(a) Determining whether each of the 'credit provider' rules is relevant across all industries; and
(b) If not, removing them from the Bill and instead allowing them to be dealt with in the Credit Reporting Code which is to be developed by a cross-sectoral industry group.

[1] There are some exceptions, such as handset and other equipment charges over the term of a contract, but this is still a fixed monthly amount due that month for the equipment used to access a telecommunications service.

Advice received from the Department of Prime Minister & Cabinet at the Credit Reporting Roundtable held on 10 February 2011 indicates that the government is supportive of a Credit Reporting Code which would contain different rules for each of the different 'credit provider' types/industry sectors.

The Bill does not take into account existing credit-related obligations

There is also no recognition in the Bill that long-established credit-related regulations exist in several of those industries. The Bill seeks to impose new obligations which conflict with standard practice in those industries and will lead to consumer confusion and inconsistent approaches. For an example, see our comments below regarding complaint handling obligations.

It is important to understand the environment into which this Bill is being introduced. As noted above, many of the sectors who will need to comply with this legislation already have a multitude of obligations in this space.

Telecommunications companies already have a range of consumer credit obligations with which they are required to comply, which are in force today. In addition to all current legislative obligations, the Communications Alliance *Telecommunications Consumer Protections* Industry Code (C628:2012) ('the TCP Code') outlines rules that telecommunications providers must follow in relation to several subject areas, including credit management.

These rules cover matters such as:

- undertaking credit assessments before supplying a new service;
- providing certain types of information to customers about credit assessments, the risks if the customer will not be the principal end user of the services, acting as a guarantor, etc;
- the provision of credit control tools to assist customers to manage their expenditure levels (e.g. usage notifications, pre-paid service options, call barring options, hard caps, shaping of broadband services, etc);
- Consumers will receive usage notifications when 50%, 85% and 100% of the allowance of the included value of a mobile or broadband internet plan has been used;
- advising customers prior to restricting, suspending or disconnecting their service;
- not taking further credit management action over disputed amounts;
- the behaviour of collections agents;
- updating credit bureau files within certain timeframes; and
- assisting customers who are experiencing financial hardship.

The Code is registered with the telecommunications industry regulator – the Australian Communications and Media Authority (ACMA) – which means that the ACMA can take enforcement action against any provider who does not comply with the Code.

Communications Alliance believes that further consideration of the existing legal and regulatory obligations on credit providers from different sectors needs to occur before the legislation is finalised. Matters already dealt with under pre-existing schemes should:

(a) be removed from the legislation and instead be dealt with under the Credit Reporting Code, which will allow flexibility for different sectors, in keeping with their existing obligations; or

(b) contain exemptions in the legislation for those classes of credit providers who already have pre-existing industry requirements.

RESPONSES TO SPECIFIC FEATURES

1. Definition of Credit Provider

Communications Alliance seeks guidance on the definition of credit provider, and whether telecommunications companies are caught by the definition in the Bill.

As noted above, under the Privacy Act, the Privacy Commissioner is able to make a Determination that certain classes of corporations are to be regarded as credit providers for the purposes of the Privacy Act.

Telecommunications companies are deemed to be credit providers by virtue of such a Determination: the Credit Provider Determination No. 2006-4 (Classes of Credit Providers).

Whilst the definition of credit provider in the Bill is certainly broad enough to capture classes of credit providers, such as telecommunications providers, we note that the Exclusions listed in s 188(6) of the Bill state that "...an organisation or small business operator is not a *credit provider* if it is included in a class of organisations or operators prescribed by the regulations."

Given the Regulations remain to be drafted, Communications Alliance queries whether telecommunications providers, as a class of credit providers, are in fact captured by this legislation. We would appreciate advice on this matter.

If telecommunications providers are to be required to comply with this new legislation, then it needs to be re-written to allow sufficient flexibility for different sectors, or be simplified and have more matters dealt with under the Credit Reporting Code for this same purpose.

2. Complaint Handling

As noted above, the Bill does not appear to take into account the different sectors that are deemed 'credit providers' nor the legislative or regulatory obligations that already apply to each of those different sectors.

The inclusion in the Bill of legislative obligations which relate to how complaints should be handled is a prime example of this.

Communications Alliance strongly suggests that the complaint handling obligations for credit providers be removed from the Bill and instead be dealt with via the industry Credit Reporting Code which is to be developed, to allow different industries to manage such complaints within their existing regulatory frameworks.

Telecommunications providers are already subject to a well-established regulatory scheme which includes specific obligations on complaint handling under our registered TCP Code, breaches of which can result in enforcement action by the ACMA. In addition, telecommunications providers are required to be members of the Telecommunications Industry Ombudsman (TIO) Scheme, which we understand to be the largest ombudsman scheme in the country.

It is our view that complaints from telecommunications customers about credit issues should be handled in accordance with the standards required for handling all types of telecommunications complaints. The Bill seeks to implement different obligations solely for this type of complaint, which will lead to customer confusion and an impost on telecommunications providers who will have to upgrade systems, change processes and retrain staff all so that credit complaints can be dealt with in a different manner to all other telecommunications complaints. This simply does not make sense and is not a beneficial outcome for consumers, who will get different responses in different timeframes via different mechanisms for their complaints to their telecommunications provider.

The TCP Code already contains thorough complaint handling rules for the telecommunications industry and is consistent with the Australian Standard on Complaint Handling. (The requirements in the Complaint Handling chapter of the TCP Code, which has recently been revised, have been determined having regard to the Australian Standard – Complaint Handling AS ISO 100002-2006.) The rules in the TCP Code are more far-reaching than those in the Bill, including matters such as:

- how telecommunications providers must handle complaints
- that they must have documented complaint handling policies
- customers receive a unique reference number/identifier to track their complaint and an indicative timeframe for resolution
- immediate acknowledgement of a telephone or in-person complaint and all other complaints to be acknowledged within 2 working days
- complaints will be resolved within 15 working days from receipt of the complaint or as soon as practicable in all circumstances
- faster handling of urgent complaints
- more explicit advice to consumers on external avenues of recourse, including the TIO
- that credit action must be ceased whilst complaints about disputed charges are being investigated
- that written complaints must be acknowledged within 5 working days of receipt
- that complaints should be resolved upon first contact if possible, but within 30 days if not
- that complaints should be escalated internally or to the TIO if the customer remains dissatisfied

One of the benefits of the TCP Code rules are that they allow telecommunications providers to take into account the manner in which the customer wishes to be communicated with. As the companies providing these very services directly to the customer, telecommunications customers often prefer to deal with their telecommunications providers via the telephone or via email, and increasingly via social media – such as on Twitter or Facebook.

The Bill does not even contemplate the option that a customer may not want to enter into a formal, drawn out, exchange of correspondence. It simply insists that credit providers who receive a complaint must write to customers, both after receipt of the complaint and after investigating a complaint. It also requires that complaints be resolved within 30 days unless the customer has agreed to a longer period in writing. In our view, such requirements neither provide a good customer experience nor do they reflect the current communication technologies available to consumers. In fact, it would appear that a reliance on such a formal process actually makes it more difficult for consumers to receive a prompt response to their complaints.

It is for these reasons that the members of Communications Alliance propose that the complaint handling obligations for credit providers be removed from the Bill and instead be dealt with in the industry Code, whereby complaints can be dealt with in accordance with:

(a) pre-existing rules that apply to different industries, and
(b) in a manner that is more realistic and reflective of how customers communicate with their providers.

In taking this approach, it will also remove some of the inconsistencies between the Bill and existing legislative and regulatory obligations in the non-banking sectors, and remove issues of conflict whereby providers may be caught under their existing industry obligations and new, different obligations under the Bill requirements.

3. Disclosing credit information for individuals under 18 years of age

Telecommunications services, especially mobile phones, are used by people of every age in the community, including individuals under the age of 18.

In the majority of circumstances, the account holder is over 18 but the account holder provides the phone to a minor in much the same way as supplementary credit cards are issued to under 18 year olds.

However, in some circumstances, mobile or internet services are provided to under 18 year olds – either where a parent or guardian acts as a guarantor, or the child is emancipated.

The Bill does not allow for the collection or disclosure of credit information about individuals under the age of 18. As noted above, some people under 18 years or age are using telecommunications services and paying for these services and, in doing so, building a good credit history.

Telecommunications providers have received advice that they cannot discriminate against people based on their age. Therefore, if a customer under the age of 18 can demonstrate an ability to pay for a telecommunications service, they will generally receive this from their provider. The concern for Communications Alliance members is that credit reporting information provided to the credit reporting agencies occurs on an automated basis, and there is currently no technical capability to exclude the credit reporting information of customers under the age of 18 from data automatically transferred to the credit reporting agencies.

Communications Alliance members therefore believe this new obligation requires further consideration, as compliance will require a substantial investment from the telecommunications industry.

4. Comprehensive Reporting

Under the anticipated comprehensive reporting regime it has been proposed that credit reporting agencies and credit providers would collect and disclose five additional comprehensive data sets, namely:

(a) the type of each credit account opened (for example, mortgage, personal loan, credit card);

(b) the date on which each credit account was opened;

(c) the current limit on each open credit account;

(d) the date on which each credit account was closed; and

(e) repayment history information (the Fifth Data Set).

We will address each of these items individually below.

(a) The type of each credit account opened

As previously noted, telecommunications companies provide a product or service to their customers. Whilst it will require investment in systems changes to enable telecommunications providers to provide information to the credit reporting agencies on the types of credit accounts opened, Communications Alliance members are supportive of this so long as the requirement is simply to advise that it is a telecommunications service that has been provided and not more detailed advice (e.g. a post-paid mobile service, a home phone service, an internet service, etc), as this is irrelevant to the customer's credit history and introduces unnecessary complexity for telecommunications providers.

In relation to this item (and others noted in this submission), any matters that result in a need to change IT systems, retrain staff or amend internal processes will require an appropriate timeframe for implementation. IT systems changes especially may take a couple of years to implement as businesses need to seek funding, identify and build the needed changes and retrain users of the systems.

(b) The date on which each credit account was opened

Communications Alliance members have advised that, whilst this will also require IT system changes, they should be able to meet this new requirement. However, it will be important to define exactly when an account for a telecommunications service is 'opened' – for example, upon the application being approved, when the SIM card is activated (for a mobile service), upon first use, etc.

(c) The current limit on each open credit account

This item raises some major concerns for Communications Alliance members, as most telecommunications services do not have 'credit limits' as such. Instead, telecommunications customers have access to a vast range of different products, services, pricing plans and spend control tools, depending on their needs.

As an example, a mobile customer can choose a pre-paid or a post-paid pricing plan. That customer might also choose to bar calls to international destinations or to premium services. They may be with a provider who allows them to check their usage online, or their provider may send them notifications when they have used up 80% of the included value on their pricing plan. Similarly, a broadband internet customer may choose a provider or a plan that throttles their speed rather than charging for excess usage.

All telecommunications providers are required to make available spend management tools for their customers – this is a requirement of the TCP Code.

A 'credit limit' – as used in the banking and financial sectors, indicates a cut-off point where additional 'credit' is no longer available to customers. This does not currently exist with post-paid telecommunications services (although pre-paid services do function in this way). The networks and billing systems of Communications Alliance members simply do not function in this manner.

Communications Alliance members suggest, as an example, that the 'contract limit commitment' could be disclosed for this element, if applicable. That is, for a post-paid mobile plan, the total amount committed to over the term of the contract be provided as the credit limit.

(d) The date on which each credit account was closed

This item raises concerns for Communications Alliance members, who have advised that it would be difficult to comply with this requirement even were IT systems changes to be implemented. As with item (b) above, if this requirement were to be imposed on telecommunications companies, it would be important to define exactly when an account for a telecommunications service is 'closed'. Many telecommunications services can be 'deactivated' or unused for some months before actually being disconnected or having the telephone number or email address cancelled.

A customer's account that is suspended for non-payment may be automatically reinstated upon payment of the overdue amount. The definition of when a service is disconnected or closed may therefore differ depending on the product in question (e.g. a mobile service, a home phone or an internet service) and the individual provider's processes.

(e) Repayment history information (the Fifth Data Set)

Communications Alliance members understand that only holders of an Australian Credit Licence (under the *National Consumer Credit Protection Act 2009* [NCCP Act]) will be allowed to disclose repayment history information to credit reporting agencies. As telecommunications providers are not subject to the NCCP Act and are not holders of Australian Credit Licences, they will neither be required nor permitted to disclose repayment history information. Our members recommend following the New Zealand approach whereby Non Traditional Credit Providers have the option of disclosing and receiving repayment history information without being required to hold an Australian Credit Licence under the NCCP Act, subject to the appropriate safeguards.

Telecommunications providers believe that such an approach would make a positive contribution to this new data element by being able to opt-in to disclose repayment history information to the credit reporting agencies. Such a contribution, whilst not complete, would benefit not only the telecommunications sector but also the utilities and Financial Services sectors.

5. Interactions with the Credit Reporting Agencies

With these credit reforms being the most substantial changes in over 20 years, it is vital that the impact of the new reforms on the interactions between credit providers and the credit reporting agencies need be fully explored and understood. The new legislation will not only have impacts for consumers, credit reporting agencies and credit providers, but will also impact the relationships and business processes between credit reporting agencies and credit providers, as well as the relationships between credit providers and their customers.

With the increase in the amount and regularity of information being exchanged between credit reporting agencies and credit providers under the new legislation, further consultation is required on what changes are required to IT systems, processes and staff training (to name a few of the major areas for consideration). In particular, with the exchange of the more detailed information in the new data sets, it is critical that this data is appropriately handled and protected.

Many issues are yet to be resolved, and we understand that some of these issues will be determined in the new Credit Reporting Code – which is yet to be developed. Communications Alliance members acknowledge that the development of this Code will be an important step in clarifying the roles of the credit reporting agencies, the processes to be followed by credit providers and the consumer protections and minimum standards that will apply to all credit providers.

Communications Alliance members are participating in the development of the Credit Reporting Code with our colleagues from other industry sectors.

6. Australian Link Provisions

Communications Alliance members are concerned at the introduction of provisions restricting the ability of credit providers to disclose credit eligibility to entities that do not have an 'Australian link', which appear in the Bill but which did not appear in the Exposure Draft – Credit Reporting which was reviewed by the Senate's Finance and Public Administration Legislation Committee in 2011.

The prohibition on disclosure of any credit-related information to organisations that do not have an Australian link will have major impacts for companies with existing off-shore call centres and data processing facilities.

We note that the Australian Law Reform Commission's recommendation, which was accepted by the government in its 'First Stage Response' to that Report, referred to

excluding the 'disclosure of credit reporting information to foreign credit providers'. No reference to foreign service providers was made. In order to align the Bill with this recommendation, and not place unnecessary restrictions on outsourcing, we encourage the government to consider removing the Australian link requirement from those provisions which do not involve disclosure to other credit providers. To the extent that the government remains concerned about enforcement of offshore privacy breaches, consideration could be given to holding the Australian credit provider accountable for its service provider's conduct in the manner of the Bill's new section 16C.

We also request the government to make it clear that the Bill (even as currently drafted) does not intend to prevent the provision of credit eligibility information to offshore service providers. To do so, the government could clarify in a supplementary explanatory memorandum that the following may apply:

- an offshore service provider would have an Australian link where it is providing services to an Australian credit provider (i.e. carrying on business in Australia), and collects the credit eligibility information by a telephone or online process where the information originates from the credit provider in Australia (potentially involving an intermediate step with a cloud computing provider hosting the information on offshore servers) (i.e. collecting the information in Australia); and
- offshore service providers may be considered persons 'in the service of' a credit provider and so provision of information to them would be a use rather than a disclosure.

It is not clear to us why credit-related information is seen as requiring additional protections over and above that afforded to all other personal information (including sensitive personal information), which will not be subject to the same increased obligations as are applied to credit-related information alone, by virtue of the 'Australian link' test.

The telecommunications industry understands the need to ensure the privacy of customer personal information that is disclosed to off-shore partners, and manages this obligation in compliance with the Privacy Act's existing transborder data flow requirements, via stringent contractual obligations.

Given the above, and that all use of personal information, including credit-related information, will be subject to the Australian Privacy Principle (APP) on cross-border disclosure of personal information, we recommend that the Committee consider deleting the 'Australian link' requirements from the Bill, or at the very least investigate further the impact this will have on existing off-shore arrangements and request that an impact assessment be carried out on the introduction of such a requirement.

Published by:
COMMUNICATIONS
ALLIANCE LTD

Level 9
32 Walker Street
North Sydney
NSW 2060 Australia

Correspondence
PO Box 444
Milsons Point
NSW 1565

T 61 2 9959 9111
F 61 2 9954 6136
TTY 61 2 9923 1911
E info@commsalliance.com.au
www.commsalliance.com.au
ABN 56 078 026 507