Optus' submission to the

Senate Legal and Constitutional Affairs Committee

Inquiry into the

Privacy Amendment (Enhancing Privacy Protection) Bill 2012

July 2012

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1. Introduction

1.1 Optus appreciates the invitation to provide comments to the Senate Legal and Constitutional Affairs Committee ('the Committee') Inquiry into the Privacy Amendment (Enhancing Privacy Protection) Bill 2012 ('the Bill').

1.2 Optus' comments relate primarily to the credit reporting sections of the Bill (Schedule 2 and more specifically Part IIIA) and the Credit Reporting Code ('CR Code') that is required to be developed (under Schedule 3, Part IIIB, Division 3).

1.3 Optus' interest in this matter lies in the fact that we, like other telecommunications providers, are a class of credit provider, pursuant to a Determination made by the Privacy Commissioner.

1.4 We access and use credit reporting information in a different manner and commercial context than the more traditional types of credit providers, as we provide goods and services which can be used before payment is made, rather than providing 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).

1.5 Telecommunications providers operate in a highly regulated environment, of which the regime regulating credit information is only one aspect. Optus is keen to ensure that the credit reporting legislative regime which will exist under the new Privacy Act has regard to the different types of credit providers that will be subject to these rules, and takes into account the existing regulatory regimes that already apply in those sectors.

1.6 The Government has previously acknowledged this[1], and confirmed that it wished to allow for flexibility of approach, particularly within the new CR Code, to enable different sectors to follow the pre-existing requirements for each industry where possible, so long as there is an agreed minimum level of standards to provide consistency for consumers and ensure a minimum level of consumer protections regardless of industry sector. A prime example of an issue that is better dealt with in the CR Code than in the legislation, to allow for the existing sectoral obligations to apply, is the detail on how complaints are handled by credit providers.

1.7 Communications Alliance, the telecommunications industry association, is also making a submission to the Committee on behalf of its members. Optus is a member of Communications Alliance and endorses its submission.

1.8 We look forward to seeing the draft Regulations that are to accompany the Bill as soon as possible. It is difficult to fully interpret the new requirements that will apply under the amended Privacy Act without a draft of the Regulations available (as per submissions to the earlier Senate Inquiry[2]), but we trust these will be made available

[1] Comments made by Department of Prime Minister and Cabinet staff during the Credit Reporting Roundtable held in Canberra on 10 February 2011.

[2] Page 41 of the Senate Finance and Public Administration Legislation Committee's Report into the Exposure Drafts of Australian Privacy Amendment Legislation Part 2 – Credit Reporting (October 2011).

shortly and will assist in providing certainty on some aspects of the Bill, e.g. further clarity on some of the definitions.

2. Telecommunications providers are a class of credit provider

2.1 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.

2.2 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)[3]. 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.

2.3 Telecommunications companies use credit information in a vastly different way to banks and other financial sector entities. We are not a traditional lender or financier 'credit provider' – we provide what is sometimes referred to as 'trade credit'.

2.4 The 'trade credit' that we provide to our customers is solely for use of specific telecommunications products and services that we supply to credit-approved customers under a contract. 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. (Although there are some limited exceptions to this – handset or other equipment repayments, for example, which are generally paid in instalments over the term of a contract.) Accordingly, the credit we provide is characterised by its relatively small size (in comparison with bank loans, for example), the periodic frequency with which it is offered, and the obligation for the credit to be repaid in full over a short term.

3. Existing telecommunications regulations regarding credit and complaint handling

3.1 The Government has acknowledged the difference between licenced credit providers[4] and 'classes' of credit providers in determining which of the new comprehensive credit reporting data sets each should have access to. However, the Bill does not appear to take into account the existing legislative and regulatory obligations that already apply to the respective types of credit providers and the sectors in which they operate, e.g. banking and finance, utilities, telecommunications. Optus submits that this is an aspect that must be further considered, and that the Bill must be approached with a "whole of picture" approach, taking into account existing sectoral obligations.

3.2 The telecommunications industry, for example, is already heavily regulated and we have had enforceable industry codes of practice in place for many years which already deal with some of the matters in the legislation (such as provision of information to customers when credit is applied for or refused, or complaint handling) – in some

[3] http://www.privacy.gov.au/act/credit/deter4_06.html

[4] Providers licenced under the *National Consumer Credit Protection Act 2009*

instances with conflicting requirements. There is already a comprehensive consumer protection regime in place for telecommunications providers, with our key enforceable industry code having just been reviewed and registered by the Australian Communications and Media Authority.

3.3 We feel that the Government's original intention to allow industry-specific rules via the CR Code, for example on complaint handling mechanisms, is the best way to manage the wide variety of regulated industries that are credit providers and therefore subject to the Bill.

3.4 Whilst we support the consistency of approach that the Bill is attempting to achieve, its unintended consequence is the creation of inconsistencies in other areas. For all regulated industries, this will institute dual complaint handling processes – one to be followed for credit complaints and another process for all other types of complaints. Given the telecommunications industry already has comprehensive and detailed complaint handling requirements under the Telecommunications Consumer Protections Code and the Telecommunications Industry Ombudsman Scheme, imposing new and different obligations just for credit complaints will create an administrative burden for telecommunications providers, and confusion for telecommunications customers, who should be able to have a consistent experience with their telecommunications provider regardless of the nature of their complaint.

3.5 Requirements to deal with different complaints in different ways will also lead to increased compliance risks for providers, as the process to be followed will rely on both frontline and escalated complaint handling staff classifying complaints as the 'correct' type of complaint in that instance, to ensure the right timeframes and processes are followed for that particular complaint.

3.6 In addition, we are concerned that the prescriptive complaint handling requirements set out in the Bill (such as the requirement for written acknowledgement of complaints and then written confirmation of the outcomes of complaints) are very rigid and reflect an out-dated method of interacting with customers. Such restrictive practices do not take into account the multitude of ways in which customers are able to contact their providers in the digital environment.

3.7 Optus' customers, for example, can contact us in person via our shopfronts, by telephone, by mail, by email, via our website, via our smartphone apps, by web chat, by Twitter or by Facebook. Indeed, we exist in an industry which is always searching for the next medium and next technology to allow Australians to communicate more comprehensively, more easily, and using a method of their choosing. Our experience is that customers expect telecommunications providers to allow for multiple means of communication, and that if a customer contacts us via a particular method of communication, they expect a response via that same method.

3.8 It is therefore disappointing to see rigid obligations in the Bill that require providers to give written notice to their customers on a number of occasions during a complaint investigation. In Optus' view, this lack of flexibility is unlikely to facilitate the fast and efficient resolution of complaints using the customer's preferred form of communication, and may instead lengthen and complicate the complaint handling process, and increase a customer's frustration with that process.

3.9 The Telecommunications Industry Ombudsman has recently been reviewing its own practices for complaint handling, and has found that less formal and administrative complaint handling processes has led to quicker resolution times for customers and higher customer satisfaction levels[5].

3.10 The Bill's prescriptive complaint handling processes also do not appear to contemplate that some complaints may be able to be resolved on the spot. Optus' approach to complaint handling – and, indeed, our obligation under the Telecommunications Consumer Protections Code - is to attempt to resolve a complaint on first contact wherever possible. It would seem counterintuitive to therefore require both written acknowledgement and written confirmation of outcomes when a complaint has been resolved immediately for the customer, e.g. on the initial telephone call.

3.11 In fact, other pieces of legislation are currently undergoing review to identify the implications of, and how our laws should adapt to and regulate, the ever-changing communication methods and technologies of the digital age. It would be unfortunate if privacy laws were left out of the process of modernisation and consequently left behind. Out-dated and inflexible requirements will reduce the likelihood of a consumer making a complaint, increase their frustration with the process, and impose an administrative burden on both industry and consumers that could otherwise be avoided.

3.12 Optus proposes that the detail about complaint handling be removed from the Bill, and replaced with a requirement that complaint handling processes be dealt with in the CR Code which is to be developed. The CR Code will be able to more easily set out the minimum requirements for complaint handling, but allow for different industry sector approaches according to the existing regulatory regimes in each of the banking, telecommunications and utilities sectors (which all have their own existing Ombudsman schemes, for example). The result will be a universal minimum standard, with an even higher water mark set by additional regulation in some industries, rather than a one-size-fits-all legislative approach.

3.13 In addition, codes of practice are more easily future-proofed than legislation, and can be quickly and easily amended over time when needed, to deal with practical issues arising from the implementation of the Bill, the experience of consumers in relation to their credit complaints, and the introduction of presently-unknown technologies or communication practices.

3.14 It is our view that removing the prescriptive complaint handling requirements from the Bill and instead requiring that complaint handling be addressed in the CR Code will:

[5] From TIO Talks, No. 2, 2012 (available from http://www.tio.com.au/__data/assets/pdf_file/0018/82026/TIOTalks_No2_2012_web.pdf): "A reasonable interpretation is that consumer satisfaction was driven by [matters including] the reduction in time to resolve the complaint. All these factors have resulted in a better complaint handling experience for consumers and providers."

- ensure minimum standards of complaint handling across all sectors of credit providers;
- permit such matters to be approached on a "whole of picture" basis;
- enable consistency of approach for providers when dealing with any complaints made to their organisations (ensuring simpler processes for staff, less systems changes and reduced compliance risk);
- permit consumers to make their own choices about how they submit their complaints and contact credit providers; and
- be simpler for consumers and lead to quicker resolution of their complaints (surely this must be the ultimate goal for consumers, industry and government).

4. Comprehensive credit reporting – new data sets

4.1 Optus supports the introduction of the new data sets in the Bill which will provide a more comprehensive view of a customer's credit history and better enable credit providers to determine the level of credit risk a customer poses and minimise fraudulent applications.

4.2 We believe, however, that there is further work to be done to clarify the exact information that credit providers will be expected to submit on some of these items, as they appear to be geared primarily towards banking and finance products, rather than the myriad of goods and services provided by other classes of credit providers. We understand that the Government intends that the majority of that work will occur as part of the development of the CR Code, but the Explanatory Memorandum to the Bill (p103) does also refer to some information being included in the Regulations, which are not yet available for review.

4.3 We flag this matter for the Committee's reference to ensure that the varying types of 'credit' offers are considered in the Committee's deliberations on the Bill. To illustrate, the current definition of "consumer credit liability information" refers to the type of credit, the day on which the credit is entered into, the terms and conditions relating to repayment of the credit, the maximum amount of credit available to the customer and the day on which the credit is terminated.

4.4 For the telecommunications industry, it will be difficult in most cases to provide a figure for the maximum amount of credit available to a customer. Each case will be different and will depend on the product(s) the customer takes up, the length of their contract term, the pricing plan and plan inclusions, whether there are handset repayments in addition to the pricing plan, how they use their service and how much they use their service. The only easily-defined figure telecommunications providers could provide would be the minimum total cost of their contracted service (as required by the component pricing provisions in the Australian Consumer Law).

4.5 Finally, the Bill prohibits the disclosure between credit reporting bodies and non-licenced credit providers of repayment history information. Optus submits that, just as this information is intended to assist licenced credit providers to meet their responsible lending obligations, this information would be equally valuable to non-licenced credit

providers who would be able to use it to better understand a consumer's credit situation and make more informed decisions on what products and services should be provided to them. Optus therefore requests that the Committee consider making this information available to non-licenced credit providers on an optional basis. (We submit that it should not be mandated on non-licenced credit providers, but those who wish to access it should have the option to do so.) Appropriate consumer protections surrounding access to that data by non-licenced credit providers could be dealt with in the CR Code.

5. Australian Link

5.1 Optus has serious concerns about the introduction in this Bill of the concept of 'Australian link' in Schedule 2. 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.

5.2 This concept was not included in the previous Exposure Draft which was reviewed by the Senate's Finance and Public Administration Legislation Committee, nor does it appear to have been considered in the Regulation Impact Statement submitted to the Office of Best Practice Regulation. The Explanatory Memorandum to the current Bill states (p6) that "The term 'Australian link' is used to define the entities that are subject to the operation of the Act…", but in fact the use of the term in relation to credit information is more far-reaching.

5.3 It is not clear to Optus 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.

5.4 Optus is critically aware of the need to ensure the privacy of customer personal information that is disclosed to its off-shore partners, and is vigilant in managing this in compliance with the Privacy Act's existing transborder data flows requirements, via stringent contractual obligations imposed by Optus on those partners.

5.5 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, Optus recommends 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.

6. Conclusion

6.1 Optus appreciates the opportunity to submit comments, and looks forward to the introduction of the enhanced privacy and credit legislative regime.

6.2 We are eager to understand the full legislative regime that will apply, and therefore await the draft version of the Regulations for review.

6.3 We ask the Committee to consider the different types of credit providers captured by the legislation and the different industry sectors this will apply to. The existing legislative and regulatory frameworks across those sectors should be taken into account as the Committee reviews the Bill, particularly in relation to the more prescriptive requirements of the Bill – such as the complaint handling obligations.

6.4 As per the initial views expressed by the Government, we feel that the best approach is to enable complaints to be dealt with via existing industry-specific complaint handling mechanisms, and Optus therefore proposes that the details of how complaints should be handled should be removed from the Bill and instead be dealt with by the CR Code.

6.5 We submit that access to repayment history information should be made available to non-licenced credit providers on an optional basis, subject to sufficient consumer protections that should be outlined in the CR Code.

6.6 Finally, Optus proposes that the Australian link provisions, which have appeared without warning in the Bill since the previous Exposure Draft was made available, be deleted. Alternatively, we request that the Committee undertake further investigation of the impact this will have on Australian credit providers with off-shore operations , and the cost/benefit of this requirement over and above the existing cross-border disclosures contained in Australian Privacy Principle 8.