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The Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Colleague,

Privacy Amendment (Enhancing Privacy Protection) Bill 2012 – Review of Credit Reporting

We refer to the Committee's enquiry into the *Privacy Amendment (Enhancing Privacy Protection) Bill* 2012 ("Enhancement Bill") and more particularly your email dated 16 August 2012 requesting further information. You have sought our response to three questions.

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

The criteria upon which Financial Services Providers determine eligibility for credit is varied and complex. We do not have a concluded view as to whether positive reporting, such as the recording of repayment histories, will provide a significant improvement in credit assessment and the evaluation of credit risk.

Accordingly we are unable to form a view as to whether the accessing and recording of additional personal information as proposed by the Enhancement Bill "strikes the right balance".

Several submitters, including the Financial Ombudsman Service, argued that there are complex issues of jurisdiction between external dispute resolution schemes and/or regulatory regimes operating across a range of industry sectors. Does the Bill properly take into account the multiplicity of jurisdictions and regulatory regimes?

In summary, the Bill seeks to deal with the multiplicity of jurisdictions and regulatory regimes by trying to make it as simple as possible for the consumer to make a complaint in the first instance. In my view, however, this does not result in a simple solution for the consumer in having that complaint easily resolved. The best person to resolve a dispute is the one who made the listing in the first place because they have all of the available information at their finger tips. Where the credit provider making the listing does not resolve the dispute, then the external dispute resolution scheme that is best placed to review that decision is the one to whom that credit

provider belongs so that it compel the provision of the information necessary to resolve the dispute.

As we noted in our submission, we are concerned that the regime proposed by the Enhancement Bill will prove impractical. In our submission we gave an example of the problem. We note a similar example, to the same effect, was provided by the Australian Retail Credit Association at page 12 of its submission. The example FOS provided was as follows:

A complaint is made by consumer C with Bank A that default information it holds is incorrect. Bank A refused C credit on the basis of that default information. That default information was listed on C's personal information file by another body, Energy Provider B.

Bank A enquires as to the accuracy of that information from Energy Provider B and is told that the information is correct. The complainant is unhappy with the response and takes the matter to Bank A's EDR scheme. Energy Provider B is not a member of that EDR Scheme.

In those circumstances the EDR Scheme will not be able to properly investigate the dispute as it will be unable to access the relevant information which is held by Energy Provider B, and not by its member, Bank A. All Bank A's EDR scheme will be able to do is consider if Bank A has followed an appropriate process in dealing with the request, but it will not be able to solve the consumer's main problem, which is correcting any wrong information at its source

The appropriate forum for the complaint would be the EDR Scheme to which Energy Provider B is a member. The Enhancement Bill does not take into account the issue that Bank A's EDR scheme (let us assume it is FOS) has no power under its Terms of Reference to obtain any information from, or make any decision effecting Energy Provider B. Accordingly it will not be able to resolve the dispute on behalf of C.

In our view the appropriate regime is for C's complaint to be initially referred to the organisation that *listed* the disputed personal information, Energy Provider B and, if the matter is not resolved at that point, then referred to that organisation's EDR scheme which will have power to obtain relevant information and determine the dispute.

The Financial Ombudsman Service states 'it is unfortunate that the Bill has not dealt with the issue of the interrelationship between the hardship provisions [in the *National Consumer Credit Protection Act 2009*] and default listings [in the Bill]'. How do you suggest that this issue be addressed in the regulatory framework?

FOS is of the view that it is important that consumers be encouraged, rather than discouraged, from making a hardship application as soon as possible. The sooner

the application is made, the more options there are available to credit providers to implement proposals that will assist the company overcome their financial difficulties. These discussions should be conducted in an environment where a consumer who genuinely wishes to come to a solution can do so by co-operating with their credit provider. If a customer seeking genuine assistance can be credit listed before the outcome of their application is known, it may discourage them from approaching their credit provider.

It is our view that either the Enhancement Bill or the Code of Conduct should set some parameters as to a Financial Services Providers obligation to properly consider any application by a borrower for financial difficulty assistance before default listing that borrower. For example, the Mutual Code of Banking Practice (which covers many credit unions and building societies) specifically provides at clause 24.2 that a Financial Services Provider subject to that Code will not enter a default listing while the Financial Services Provider is considering a financial difficulty application.

FOS accepts that this is a complex issue. Financial Services Providers that are members of FOS are subject to requirements to consider applications for financial assistance. The obligation to receive, and give real consideration to, an application to vary a borrower's obligations due to financial difficulty arise:

a. under Federal Law – the National Credit Code,

b. under codes of conduct – the Code of Banking Practice and Mutual Code of Banking Practice,

c. as a matter of good industry practice in the financial services sector.

Where a borrower disputes that such an application has not been properly considered they may apply to FOS. FOS receives approximately 6,600 financial difficulty applications each year.

However, not all credit providers as defined by the *Privacy Act* 1988 (or the Enhancement Bill) are bound by regulatory obligations to consider requests for financial hardship assistance.

In addition, with the exception of clause 24.3 of the Mutual Code of Banking Conduct, the various sources of financial difficulty obligations do not specify the inter-relationship between the effects of those obligations upon a Financial Services Provider's entitlement to list a mount that is 60 days overdue as a default listing.

FOS has developed its own guidance as to how it will approach default listings where there is an issue of the borrower being in financial difficulty. We attach our current approach.

It is important to recognise that this approach has been tailored to disputes that are received with respect to FOS members, who are subject to the financial difficulty

obligations set out above. Different considerations may apply in other sectors. In that context we note that the definition of credit provider in the *Privacy Act* 1988 is an extended one and applies to many organisations that are not members of FOS and are not regulated as credit providers under the National Credit Code, Code of Banking Practice or Mutual Code of Banking Practice.

If the Committee has any further questions, please do not hesitate to contact me.

Yours Faithfully

Philip Field
Ombudsman – Banking & Finance

Credit Listing Disputes

Where a customer is experiencing financial difficulty

Can an FSP credit list its customer whilst financial difficulty negotiations are continuing?

Although the Privacy Act allows an FSP to default list a borrower where the amount listed is overdue by at least 60 days and a demand has been made for payment, it may not always be appropriate to do so. The NCC, Code of Banking Practice, Mutuals Code of Banking Practice and good industry practice place some obligation upon an FSP to work with a borrower to try to help the borrower overcome their financial difficulties.

FOS takes the view that this obligation requires an FSP to make a genuine attempt to deal with an Applicant's request for assistance due to financial hardship and make reasonable efforts, in co-operation with the borrower, to reach a commercially sensible resolution. In this context, where a borrower is in default but has made a request for hardship assistance the FSP should not default list the debtor:

(a) while the hardship application is under consideration by the FSP;

(b) where the debtor has genuinely put forward a reasonable hardship variation request and the FSP has not given it reasonable consideration.[1]

In considering the reasonableness of the debtor's request, consideration is to be given as to whether the debtor has made a genuine attempt to comply with the contract including whether they have complied with earlier hardship variation agreements, and whether they have made reasonable efforts to make whatever payments they can.

Can an FSP default list a customer if they are currently complying with a financial difficulty repayment arrangement?

The varied repayment arrangement would usually have the effect that the debtor is no longer overdue in making payments.

In some circumstances, the FSP will allow the debtor to vary their repayments. An FSP may accept the varied repayment plan but without prejudice to its rights under the

[1] The Mutuals Code of Banking Practice specifically provides at clause 24.2 that an FSP subject to that Code will not enter a default listing while the FSP is considering a financial difficulty application or request.

contract and that acceptance of those payments does not replace the debtor's obligations under the contract. In that circumstance, some FSP's take the view that the contract remains in default, so allowing the default listing.

However it is FOS's view that in this latter situation, the entering into an agreement with the debtor for a revised repayment arrangement means that the past default has been satisfactorily resolved and it would be unfair of an FSP, having reached such agreement with the debtor, to then act in an apparently inconsistent manner by treating the debtor as in default and entering a default listing.

An exception to this would be if the debtor was fully aware that the FSP's agreement to accept varied repayments would not stop the FSP treating the debtor as in default and entering a default listing. Actual knowledge is required – the FSP should inform the debtor prior to reaching agreement that it is a condition of the agreement that a listing will be made. That term should then be included in the written variation agreement.

What are the requirements for an FSP to credit list the customer if the repayment arrangement has fallen over?

Where the debtor has entered into a varied repayment arrangement and then subsequently defaults on that new arrangement, the FSP can list the default on the debtor's credit file, provided the requirements for a default listing were complied with prior to entry into the repayment arrangement. In that case, the FSP can list the debtor for the previous arrears, including any accelerated amount less repayments made.

The exception to this is where there has been substantial compliance with the new repayment arrangement and the debtor's conduct is such that they would be viewed as having acted reasonably in the circumstances. In those circumstances the previous default may be viewed as having been waived and the subsequent default treated as a 'fresh' default, so restarting the default listing process.

Usually this would arise where the debtor has made significant repayments over a substantial period of time and upon falling into default on the new arrangement has made reasonable efforts to deal with those defaults with Financial Services Provider.