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Standing Committee on Social Policy and Legal Affairs
Department of the House of Representatives
Parliament House
Canberra ACT 2600

Dear Committee Members,

Privacy Amendment (Enhancing Privacy Protection) Bill 2012

Thank you for the opportunity to submit written comments in relation to the Privacy Amendment Bill.

About CCLC

Consumer Credit Legal Centre (NSW) Inc ("CCLC") is an independent, community-based consumer advice, advocacy and education service specialising in personal credit, debt and banking law and practice. CCLC operates the Credit & Debt Hotline, which is the first port of call for NSW consumers experiencing financial difficulties, and the Insurance Law Service. We provide legal advice and representation, financial counselling, information and strategies, and referral to face-to-face financial counselling services, and limited direct financial counselling. CCLC took over 18,000 calls for advice or assistance during the 2011/2012 financial year.

A significant part of CCLC's work is in advocating for improvements to advance the interests of consumers, by influencing developments in law, industry practice, dispute resolution processes, government enforcement action, and access to advice and assistance. CCLC also provides extensive web-based resources, other education resources, workshops, presentations and media comment.

Our Submissions

General comments

CCLC strongly supports a general right to privacy for consumers. The proposed Bill represents a statutory authorisation for a consumer's privacy to be breached. In those circumstances it is essential that the Government ensure that:

1) There is an actual need for the intrusion
2) Consumers are more than adequately protected from inaccurate information being placed on their file
3) The system operates fairly
4) Negative information on a credit report fairly represents any default
5) Credit report agencies are fully accountable and audited regularly (at least every two years) at their own expense
6) Dispute resolution is evidence-based - If evidence cannot be produced within 30 days the listing is removed
7) Dispute resolution specifically includes the right to challenge listings when the listing was unreasonable in the circumstances
8) It accords with responsible lending obligations and the Government's objectives in this regard
9) It does not lead to consumer detriment i.e. consumers should not be worse off with the legislation then they were before
10) The Bill is consistent with the financial hardship objectives under the National Consumer Credit Protection Act and the Government's stated objectives on this point.

We are concerned that the above objectives have not been met in the Bill.

We also want to state that we are very concerned that consumers are generally not aware of the implications of this Bill. Of particular concern is the addition of repayment history data. In our experience, consumers react with alarm about a listing occurring when being one day late for a loan or credit card payment.

It is essential that there is a significant education program for the public before there is any move to collect repayment history data. As detailed in our submission below, repayment history data is almost definitely going to cause increasing costs for credit for those affected. Consumers need to be fully aware of this potential (significant) detriment and how they can avoid it.

Consumer Action Law Centre submission

We support the submissions of the Consumer Action Law Centre on Serious Credit Infringements, requests to correct information and complaint handling.

ACCAN Submission

CCLC also supports the contents of the ACCAN Submission and all of their recommendations.

Australian Privacy Foundation

We also support the submissions made by the Australian Privacy Foundation.

Comprehensive Credit Reporting Pilot

We are aware that a Comprehensive (Credit) Reporting pilot is currently being undertaken by most of the major lenders and one of the major Credit Reporting bodies.

The pilot involves a massive database of credit information about most Australian borrowers, carefully de-identified to avoid breaching the current Privacy Act controls. The database is being used to model the likely effect of comprehensive reporting.

Consumer groups and the Privacy Commissioner were consulted about the pilot, and could see value in the exercise, provided it was strictly managed.

We urge the Committee to seek a summary of the findings from the Credit Reporting Agency (which is administering the pilot), as we believe they are relevant to consideration of the merits of the proposed changes.

The Bill as part of a regulatory framework

The Bill only forms one part of the proposed regulatory framework on credit reporting. The other parts are:

1. The regulations
2. The Credit Reporting Code of Conduct
3. The appeal process and dispute resolution process of the Privacy Commissioner (as part of the Privacy Act)

We submit that reviewing just one part of the regulatory framework will mean that it is inevitable there will be matters not covered due to oversight or an expectation that the matter will be covered in another part of the regulation. A particular risk is an expectation that a range of matters will be covered by the Credit Reporting Code of Conduct when this may not be appropriate or even reasonable.

Recommendation

The Regulations and Credit Reporting Code should be drafted and considered before proceeding with enacting the Bill

Structure and drafting of the Bill

CCLC contends that the Bill is very difficult to read. We contend that this will make it difficult to use and apply.

Access to Credit Reports

Free access each 12 months

There should be a specific provision in the Bill to allow a consumer to access their credit report more than once a year when:

1. The consumer has a dispute about information on a credit report; and
2. There is an allegation of fraud

In particular, a consumer may check their credit report find an inaccuracy and raise a complaint. There is no provision in the Bill for the consumer to receive another free copy of their credit report to confirm the dispute has been resolved.

Recommendation

Section 20R is amended to include free access in the event of a complaint.

Making access work for consumers

The only way to ensure that consumers check their credit report regularly and identify inaccuracies is to make access very easy and free. Free access to a credit report is currently difficult for consumers. The identification requirements can be much higher for free reports then paid reports. This is unfair. The access can be very difficult to find on the credit reporting agencies website when, in contrast, the paid report is easy to find.

It is essential that the Government prescribes guidelines for access to free credit reports to ensure consumers do have access to this service. These guidelines can be in the regulations but it is essential that a reference is included in the Bill to ensure there is power to make those guidelines.

Recommendation

Section 20R is amended to include a power to make regulations on how a credit reporting agency gives access to a free credit report. These regulations could include a requirement that the credit report be available over the internet and the identification requirements are equivalent to the identification requirements for paid access.

Comprehensive reporting – the new 5 data sets

Following ALRC Recommendation, the Bill now includes 5 new data sets to be included on credit reports. CCLC supports the inclusion of the following data: date account opened, type of account, date account closed, current limit on the open credit account.

CCLC does not support the inclusion of the 5th data set of repayment history. This is discussed in further detail below.

Repayment history

The Explanatory Memorandum at page 3 asserts that more comprehensive reporting will:

..lead to decreased levels of overindebtedness and lower credit default rates"

There is no evidence to support this conclusion. In fact, there is evidence that overall indebtedness increases with the introduction of more comprehensive credit reporting.

There are a number of reasons why CCLC is opposed to the inclusion of repayment history:

1. It won't always lead to more responsible lending decisions
2. It has the potential to entrench hardship
3. Credit providers have alternative methods of accessing repayment history information, and there is no evidence to suggest that the absence of repayment history is causing significant problems in the market, therefore its inclusion is not justified from the privacy perspective
4. It will lead to more risk based pricing, which will entrench disadvantage
5. It will be burdensome on consumers
6. There will be potential problems with accuracy
7. Repayment history problems do not necessarily reflect credit worthiness
8. These are unchartered waters in Australia and there may be unforeseen negative effects on the economy.

1. Repayment history information won't always lead to more responsible lending decisions, and may in fact be used to *justify* lending decisions that would otherwise be insupportable

Many countries already have full file credit reporting. In particular, the United States of America has full file credit reporting, as does the United Kingdom. That system did nothing to stop irresponsible lending in those countries where record levels of housing repossessions and personal debt are wreaking havoc on the economy. The only way to ensure responsible lending is to introduce comprehensive credit legislation to this effect which has now happened[1]. The ALRC Report broadly supported this proposition:

> *"Arguably, one lesson that may be drawn from the US subprime lending experience is that the availability of comprehensive credit reporting information, on which to base proper risk assessment, will not necessarily produce responsible lending, The availability of risk assessment tools do not dictate lending policies – lenders do."*[2]

While the first four pieces of additional data recommended by the ALRC clearly assist with promoting responsible lending, provided they are collected and used within a robust responsible lending regulatory framework, we argue that the repayment history information proposed to be collected may facilitate continued irresponsible lending.

We foresee three main possible uses of repayment history data:

1. To refuse credit where a potential borrower otherwise appears to have capacity to pay because of a poor repayment history;
2. To grant credit where the application would otherwise be refused or borderline because of a good repayment history; and
3. To offer differential pricing according to repayment history.

While all of the three uses are potentially advantageous to credit providers, only the first really promotes responsible lending. Further, the first use is only relevant in those cases where the applicant has a poor payment history but has never incurred a default, as the latter would often result in refusal of credit under the current system[3]. We submit that this advantage is far outweighed by uses 2 & 3, the consequential loss of consumer rights (no notice or period in which to rectify as currently apply in relation to a default) and other concerns outlined in this submission. The second scenario above is discussed in the following paragraphs and the third is covered in section 3 below.

In circumstances where a credit provider has identified (from a credit report or application) that a potential customer has, for example, a car loan and three credit cards with cumulative limits that equal or exceed the applicant's apparent current ability to pay, the credit provider, without further information may decide to decline the customer's application, or to take further steps to ascertain the status of the customer's accounts. The credit provider may then decline the application or insist perhaps that one or more

[1] See National Consumer Credit Protection Act
[2] ALRC Report, page 1838, paragraph 55.149
[3] In some circumstance individuals with default listings are offered higher priced credit under the current system – see 3 below.

accounts be closed and replaced with the new account. If the same credit provider was able to simultaneously access the repayment history on all those accounts, and found that it was highly reliable, it might be tempted to skip those other processes and simply approve the application.

Consumer Credit Legal Centre and other service providers regularly see clients who have excellent repayment histories on credit card accounts, or lines of credit secured by their home, as a result of making repayments and then spending the same funds again by drawing down on the account. These borrowers meet their repayment obligations very reliably but drive up the balance of their debt over time until they exceed their credit limit (in fact, in our experience, it is often these customers who are offered credit limit increases on credit card accounts). We also see clients who maintain a number of credit cards without problems until such time as they hit a "rough patch" financially, at which point they "max out" all available credit, resulting in severe financial stress. Both these categories of borrower could pass the "reliable payer" test with ease for extended periods prior to the ultimate crisis point.

While repayment history information is undoubtedly of considerable value to credit providers in refining their decisions making processes, those processes are necessarily set up to maximise profit while maintaining an acceptable level of risk. The outcome of that process is not necessarily the same as the outcome sought by government in promoting responsible lending. Further, in boom times the profit factor tends to predominate and the risk factor to be underplayed.

Without repayment history information available through the credit reporting system, credit providers have the choice of making the more risk averse decision, that is declining applicants with existing high cumulative limits/obligations, or taking more trouble to obtain this information directly from the applicant, or other credit providers (with appropriate privacy consents). With this information easily and cheaply available, there is a risk they will use it to lend more extensively rather than more responsibly. Further, a good repayment history will allow credit providers to continue to target "revolvers" in the credit card market[4], and to use the repayment history information to *justify* their lending decisions if challenged by the regulator, or the consumer, under the responsible lending regulatory regime.

2. The collection of repayment information has the potential to entrench hardship

Consumers fall behind in repayments for many reasons, often as a result of genuine financial hardship.

[4] "Revolvers" is the term applied to borrowers who carry a continuing balance on their credit card from month to month, thereby paying interest, often at fairly high rates, in addition to fees and charges.

An important aspect of responsible lending is responding appropriately to borrowers in financial hardship. It is not in the interests of the community or the economy that borrowers in short-term difficulty are faced with expensive and drastic enforcement measures that inhibit their ability to get back on track. Allowing some flexibility for borrowers facing longer-term problems can also produce benefits if, for example, assets can be sold privately for full value, or commitments rearranged to maximise the amount recovered rather than force the borrower into bankruptcy (often a total loss for the credit provider).

Major industry codes of practice (such as the Code of Banking Practice, Mutual Banking Code of Practice and the Mortgage Finance Association of Australia Code of Practice) already include obligations in relation to working with customers in financial difficulty. Some obligations in relation to financial hardship as a result of a change in circumstances are enshrined in the law. ARCA and its members have acknowledged this as an issue but the Bill does not specifically deal with this issue.

At present, a person who is in default and applies for hardship assistance prior to a default listing being made (that is 60 days minimum from the date of the default) has the opportunity to make and adhere to a repayment arrangement and completely avoid a default listing. In our experience borrowers rarely approach lenders to discuss financial hardship, or seek advice, until they have missed payments or made several late payments, usually resulting in reminders and defaults notices from the credit provider (such notices often providing the impetus for seeking advice). Further, those few borrowers that do try to be proactive are not always dealt with well by the credit provider (some people are told to call back when they are actually in default). This means that under the proposed system of repayment history reporting such borrowers will necessarily have an impaired credit file, even if their difficulties are temporary and they completely rectify their arrears within a reasonable period.

It is noted by the proponents of repayment history data collection that "*one missed payment*" may be "*mitigated by the balance of the individual's overall repayment history*".[5] In our experience borrowers in genuine financial hardship do not have one missed payment, but a cluster of late or insufficient payments across a range of accounts.

An impaired credit history will limit the ability of consumers in hardship to refinance/restructure their commitments in order to improve their ability to meet their repayments. While we are acutely aware of the perils of refinancing in response to financial difficulty, particularly where loans are taken out on worse terms by desperate and vulnerable borrowers, there are many legitimate forms of loan refinancing and restructuring that consumers in financial difficulty currently take advantage of. The most obvious and topical example is the significant number of borrowers trapped in high interest home loans while interest rates offered by other lenders are more competitive. It would be a serious injustice, and in fact counter to government policy in relation to

[5] ibid, page 1822, paragraph 55.88

competition, to trap consumers in high cost loans because of a less than perfect repayment history, when they would be in a far better position to meet their repayments on a lower interest loan.

Clearly there is a balancing act to be performed in relation to balancing appropriate responses to hardship with a fair and accurate system for reporting defaults, and indeed alerting other potential lenders to hardship problems. However, a sudden death policy of immediate consequences for late repayment does not strike this balance. We submit that the current arrangements where defaults are not listed for *at least* 60 days, with the borrower being notified of the likely consequences of their continuing default prior to listing, and being given the opportunity to make and adhere to a repayment arrangement, strikes that balance.

Recommendation

Credit providers should not have any ability under the Bill to list a consumer as being in behind in their repayments where the consumer has made appropriate arrangements with the lender to vary their obligations.

3. Credit providers have alternative methods of accessing repayment history information, and there is no evidence to suggest that the absence of repayment history is causing significant problems in the market, therefore its inclusion is not justified from the privacy perspective

The ALRC Report stated that "*any proven economic benefit [of more comprehensive credit reporting] still needs to be balanced against individual privacy rights and the risk of breach of those rights. An appropriate balance needs to be struck between efficiency in credit markets and privacy protection."*[6]

Credit providers have long argued that they cannot lend responsibly because they are not aware of all the accounts held by a borrower unless they are voluntarily disclosed on a loan application. This is a valid argument as it is not realistic to expect lenders to contact every other lender in the market to determine whether a potential borrower has undisclosed commitments. The same argument does not apply to repayment history information.

Most applications could effectively be dealt with as they are at present, with acceptance or rejection turning on the credit score derived from the application, the credit report and client's historical relationship with the credit provider, although there would be additional information available on the credit report to detect relevant omissions from credit applications.

[6] Ibid, page 1839, paragraph 55.151

While lenders have argued that repayment history data is very predictive and therefore of considerable use to them, they have not established that there are significant problems in market created by the lack of this information. We submit that the key areas of problematic lending in Australia have resulted from:

- The policy of not seeking updated financial information from borrowers when extending further credit, most evident in credit limit increases on credit cards;
- Reliance on poor proof of income/capacity to pay, particularly for some low-doc products;
- High loan to valuation ratios in a booming property market;
- Oversights and omissions in application information supplied by borrowers/brokers; and
- Fraud (often facilitated or perpetrated by brokers/introducers)

This proposition also finds support in the ALRC report in relation to the US. In commenting on the US sub-prime crisis and its relationship to comprehensive credit reporting, the ALRC report quotes from an article aptly titled "Where was FICO?….":

> "*FICO scores are built on data gathered by the three big credit bureaus. The score is heavily influenced by the amount of debt a borrower already has and* ***by payment history…*** *But mortgage lenders got a little too confident in FICO and failed to give adequate weight to two other factors in a mortgage application:* ***how much the borrower is putting down*** *and* ***how well he has documented his income****."* [7] *[emphasis added]*

None of the problems listed above would be addressed by providing access to repayment history data on credit reports. Many of them would be addressed, however, by the implementing 4 data sets (and not repayment history) with responsible lending legislation. There is therefore no policy justification for the additional invasion of privacy required to implement the repayment history recommendation.

4. Reporting repayment histories is likely to increase risk-based pricing and to increase the pool of consumers facing higher borrowing costs as a consequence

Risk based pricing already exists in Australia, for example:

- "Non-conforming" lenders in the home loan market[8], who offer higher priced loans to borrowers who are "credit impaired", or otherwise fail to conform to the lending criteria of mainstream lenders;

[7] ibid, at 1318, paragraph 55.148

[8] Many of these lenders have had to reduce their lending, or withdraw altogether from offering new loans, as a result of the credit crunch. They may, however, return to the market when global funding conditions improve at some point in the future.

- Higher priced, store-based credit (often offered "interest free") which in our experience is made available to a larger pool of low income borrowers than other forms of credit;
- Small amount loans from small suburban outlets that invariably cost significantly more than loans from mainstream institutions[9].

While some access to non-mainstream products may be desirable for the economy, particularly for some business ventures, risk-based pricing for consumer loans has the potential to create an undesirable consumer divide, with some borrowers reaping the benefits of lower borrowing costs while others, often those least able to afford it, are pushed further into hardship by higher borrowing costs.

We are concerned that while collecting repayment history information on credit files may lead some lenders to make more responsible lending decisions, it will also increase the practice of risk-based pricing by other lenders[10], and increase the pool of borrowers forced to rely on these higher priced products. This means that some consumers, particularly those who have encountered repayment difficulties, may face higher interest rates on future borrowing. Risk based pricing has the potential to amplify that financial hardship and potentially increase bankruptcies.

In the US consumers who miss repayments risk their interest rate being increased on existing accounts (the "universal default clause"). There is no equivalent practice in Australia at present, but there is no legal impediment to it being introduced, provided it is adequately disclosed in the contract and appropriate privacy notifications are given to facilitate ongoing access to the borrower's credit report. This practice is abhorrent and flies in the face of moves to improve industry processes for managing financial hardship. *"Universal" or "cross default" clauses should be specifically prohibited.*

Recommendation
Universal default clauses are banned in the Bill.

5. Keeping track of detailed repayment history information will be burdensome on consumers

We submit that it is unnecessarily burdensome on consumers to have their full repayment histories documented for 2 years. It will cause uncertainty for consumers. With the current system, subject to notable exceptions, consumers broadly know if their credit report is impaired or not without checking it. This would not be true with the

[9] While some of the higher cost of such loans is justified by the higher comparative cost per dollar lent of offering low amount loans, in our experience there is often a risk based pricing component also.

[10] Several submissions in response to the ALRC Discussion Paper mentioned the role of comprehensive reporting in promoting/facilitating risk-based pricing. For example, the Master Card/ACIL Tasman Report quoted at page 1813, paragraph 55.57 and NAB quoted at page 1815 at paragraph 55.65.

inclusion of 24-month repayment history information. Consumers will be uncertain whether a late payment will mean no access to credit. Consumers can only check their credit report for free once a year. So, if they apply for credit more than once a year, consumers may be in for an awful surprise. This may have the effect of dampening consumer confidence, which would be counterproductive.

It will also mean that consumers will need to regularly check their credit report. This will be a burden on consumers that they currently do not have. Many consumers will also believe it is unfair that their credit history is affected simply because of an oversight.

If the repayment history provisions are retained, lenders should be required to make a notification to the consumer in line with any notification to a CRB so that consumers are made aware of the impact of their repayment behaviour on their credit file. This would also be a cue for a consumer to raise a timely dispute in the effect the information was incorrect (For example, consumer paid earlier than the payment was recorded on the account).

6. Potential problems with accuracy created by the higher volume of information

The more data on a credit report, the greater the chance of inaccuracies. This will lead to more disputes, seriously inconveniencing consumers and taking up industry resources.

Consumers will also need to keep far more detailed records of their repayment history in order to have appropriate evidence in the event of a dispute. This will be very difficult for those consumers who struggle with financial literacy and general organisational skills, again exacerbating existing disadvantage.

7. Repayment history problems do not necessarily reflect credit worthiness

Consumers also miss payments for reasons that have no bearing on a person's credit worthiness. These include cases involving billing disputes, lost, stolen or wrongly re-directed mail, banking errors, and identity theft. Even minor oversights, such as failing to take into account the number of days for a B-Pay transaction to be processed could impact on a consumer's credit report depending on the definitions adopted.

8. These are unchartered waters in Australia and there may be unforeseen negative effects on the economy

One major problem is that no matter what the intention of parliament is, it is possible that unless the legislation is very prescriptive, credit providers will use the information in an unintended way or for an unintended purpose.

Recommendation

The 5th data set of repayment history is removed from the Bill

In the alternative (and as a second best option only), there should be a suite of protections to minimise the potential harm of this dataset including – a 21 day grace period before missed payments are notified; notification to the consumer on the next statement of any less than perfect repayment history notification to a CRB; clear definition of missed payment which excludes any agreed repayment variation or arrangement met by the consumer.

Court Proceedings Information

Currently, all of the credit reporting agencies put public information about a court judgment on a consumer's credit report. Section 6M defines credit which is then used in the definition for Court proceedings Information.

There are a number of examples of judgment that have nothing to do with credit, for example:

- Disputes such as motor vehicle accidents where a person's insurance company decides to take over proceedings to dispute liability;
- A different but related issue is where an insurance company delays in processing a claim, resulting in legal proceedings issuing against the policy holder;
- Debt collections for non-payment of a range of services including late DVD fines

None of the above examples fit the definition of credit. The first two are completely beyond the control of the consumer and involve no late payment or other behaviour relevant to creditworthiness at all. Yet they are listed and it is arguable they can continue to be listed after enactment of the Bill. For the sake of certainty, the Bill should specifically prohibit a CRB using any publicly listed court information unless it fits within the definition of credit and credit information contained in the Bill.

Recommendation

The Bill should specifically state that the only information about court proceedings that can be listed on a consumer's credit report is that information as defined in the Bill.

The definition of default information (6Q)

Section 6Q(1)(a) and (b) causes problems for consumers as it allows credit providers to subvert the process to disadvantage consumers. The main requirements to be met under the Bill to list a default are:

a) The individual is at least 60 days overdue in making the payment: and
b) The provider has given written notice to the individual informing the individual of the overdue payment and requesting the individual pay the overdue payment.

The problem with this drafting is that it is possible for the credit provider to:

1) Wait till the debt is 60 days overdue; and
2) Issue a notice (as required by 6Q(b));
3) Then list immediately

This is procedurally unfair as it is the notice that is important in notifying the consumer that there actually is a default! It is more than possible to be unaware of the default simply because there was a bank error in direct debits for example.

Recommendation

Section 6Q(1)(b) is amended to require that 30 days must have elapsed from the date of the notice. This requirement is consistent with section 88 of the National Consumer Credit Protection Act

Section 6Q(d) lists the overdue payment as being $100 or such higher amount as is prescribed in the regulations.

CCLC contends that the overdue payment amount listed in the Bill should be $300 not $100. There are a number of reasons why it is important to set the overdue amount at $300:

1. The overdue amount needs to be commensurate with the detriment caused by a default listing. A listing for $200 being a small amount remains on a consumer's credit report for 5 years. This is a severe detriment for a small amount of money overdue.

2. The overdue amount needs to reflect rising loan amounts. Many years ago $100 would be a reasonable amount but now as loans get larger, it is inappropriate to list a default over such a small overdue amount. For example, it is possible to have a home loan and an investment loan and suddenly be unable to refinance due to a mix up at the bank on the payment amount over a 60 day period in the amount of $200 on a $400,000 home loan.

3. There are a number of utilities where it is very common for consumers struggling with living expenses and other financial hardship to be a bit behind on payments. As it stands that "bit behind" in the Bill would be $100. With rising electricity prices and problems with capping costs on mobile phones, it is essential that consumers are given a bit more leeway than $100 overdue before they are prevented from getting a home loan, credit card, personal loan etc. for 5 years.

Recommendation

Section 6Q(d)(i) is amended to $300.

In section 6Q(1)(c) and (2)(e) the credit provider cannot list a default if the credit provider is prevented by the statute of limitations from recovering the amount of the overdue payment. The problem with this is that the credit provider could list the default after 5 years and 11 months and then the listing would apply to a debt that is statute barred for most of the listing period.

Recommendation

Amend the Bill so that a consumer can apply for a listing to be removed from their credit report on the grounds that the credit provider is prevented by the statute of limitations from recovering the amount.

Credit Reporting Businesses

CCLC has previously submitted that there are problems with having multiple unlicensed credit reporting bodies in Australia. Anyone can set up as a credit reporting business. This means that very small organisations can start collecting limited information. It can also lead to numerous scams where that organisation could charge a fee for removal of the information.

It is essential that CRBs must be licensed and approved by the Privacy Commissioner. It is also important that the Privacy Commissioner has the power to remove a licence or right to be a credit reporting body for consumer protection reasons or privacy breaches.

Recommendation

The Bill should specifically amend the definition of CRB to an organisation approved as a credit reporting business by the Office of the Australian Information Commissioner.

A new section to be added giving the Privacy Commissioner the power to prohibit a credit reporting body from operating.

It is essential that a credit reporting body have adequate policies and procedures. There is no way to ensure the policies and procedures are adequate unless they are reviewed and approved by the Privacy Commissioner.

Recommendation

Add an extra section to 20B being 20B(7) the policies and procedures are to be reviewed and approved by the Privacy Commissioner.

It is essential that CRBs deal with complaints by requesting evidence from credit providers. Simply relying on the assertion of a credit provider that a listing is accurate is not an adequate complaints process. In our experience, CRBs do not request evidence in regard to a listing. This is just lazy complaint handling and completely inadequate.

Recommendation

Section 20B(4) is amended to include a new point (i) information on what evidence a CRB will request to verify a listing.

Direct Marketing and Pre-screening

CCLC contends that the use of credit reporting information to facilitate pre-screening is an unnecessary breach of privacy. It is abhorrent to use the credit reporting system for marketing.

It would be our contention that direct marketing and pre-screening should be prohibited.

We also contend that the utility of pre-screening should be reviewed in light of the recent amendments to the National Consumer Credit Protection Act on unsolicited offers of credit. The Act now specifically prohibits unsolicited offers of credit unless the consumer has opted in. It is our understanding that many consumers have not chosen to opt-in. In these circumstances, the need for pre-screening advocated by industry is now considerably less. Further, pre-screening in the Bill seems to contradict the good work by Government in improving consumer protection for consumers in regard to unsolicited credit offers.

Recommendation

The Bill should prohibit all direct marketing and pre-screening. In the alternative, consumers should be given the option to opt-out of pre-screening and direct marketing.

Ban period (20K)

CCLC can understand the intention behind the ban period. The problem is that it will not work to protect consumers in the event of identity theft or fraud. In our experience, identity theft does not usually occur when a wallet or purse is stolen but usually by professional people who get the information in other ways. The consumer is usually unaware until they are being debt collected.

So the ban period only addresses a small part of the problem. The larger problem is getting the incorrect listings fixed. This needs to be addressed in complaints handling.

Section 20N Integrity of Credit Reporting Information

The ways to ensure that credit reporting information is accurate is to:

1) Encourage access for consumers to their credit report. That access should be free and simple. *CCLC has addressed this issue above.*
2) Conduct regular audits of the information being provided and require evidence. *These audits must be compulsory for credit reporting bodies and credit providers. Regularity of the audits needs to be specified.*
3) Require evidence to be provided for all disputed listings in complaints. *To be addressed in complaints handling.*

Recommendation

Section 20N(3)(b) is amended to add after audits "at least annually".

Complaints handling and corrections

Recommendation 59-8 of the ALRC Report stated that evidence to substantiate the disputed credit reporting information must be provided...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 accepted this recommendation. The Bill does not reflect this recommendation. As stated previously, it is essential that a credit provider be able to produce evidence to verify the accuracy of the listing to maintain the integrity of credit reports.

The ALRC recommendation also reflects the need for procedural fairness. The credit reporting system operates on an "honour basis", that is, credit providers are trusted and there are no checks on reported information. To balance this, consumers must be able

to reasonably insist that this information be verified. This is a completely reasonable expectation as the credit provider has an obligation to ensure the information listed is accurate and must have processes in place to ensure it is.

Recommendation

Section 20T and 21U are amended to add an additional section requiring the CRB to request evidence of the disputed listing from the CP or the CP to produce evidence. The information must be provided within 30 days of the request. If not provided within 30 days the CRB must remove the disputed listing or CP must remove the listing.

Another major problem for consumers is default listings or repayment history listings in circumstances where a reasonable person would consider the listing to be unfair.

There are a number of circumstances where the consumer is unable to pay because of matters arising that are completely out of their control. Some examples are:

1. Natural disasters
2. Bank error in processing a direct debit or Bpay
3. Fraud
4. Illness and hospitalisation
5. Mail theft

It is essential that consumers have access to a mechanism to challenge a listing on the grounds of fairness.

Recommendation

A new section in 21V should be added that enables a consumer to request the correction of a listing on the grounds that it would be unfair and misleading in the circumstances for the listing to remain uncorrected.

Retention Periods

Default Information

The retention period for default listings is 5 years. CCLC contends that is reasonable for credit information to be held for 5 years as loans are usually sizable and at least medium term facilities. CCLC contends that it is unreasonable and excessive to hold default information on utilities and other debts (that are not credit as defined under the National Consumer Credit Protection Act) for that long.

We contend that the retention period for default information on a consumer's credit report for utilities should be two years because:

1. Utilities are paid on a month by month basis for a service. This means the amount outstanding and the risk for the credit provider is minimal. The vast majority of utilities bills are paid on time and in full after each bill.
2. 5 years is an unreasonably long time for a consumer not being able to get credit because of the late payment of a mobile phone bill. The detriment to the consumer is disproportionate to the default.
3. As a result of the mobility of consumers and the complexity of the utilities market (for example multiple telecommunications providers and services per household; door to door sales of energy leading to vulnerable clients accidentally signing with multiple providers or paying the wrong provider)- there are more likely to be genuine billing and payment errors in these markets.

Recommendation

Section 20W is amended to make the retention period 2 years from the date of the listing of the default for credit that is not regulated by the National Consumer credit Protection Act.

Retention Period for Personal Insolvency Information (20X)

Section 20X 4 (b)(ii) requires the retention of information about a Debt Agreement declared void by order (of the Court). If a Court orders a Debt Agreement to be void this means that it should not have been made and should be of no effect. This decision should be reflected on the consumer's credit report with the removal of the listing to reflect the order.

Recommendation

Section 20X is amended to make it clear that debt agreement information is removed from a consumer's file once the Debt Agreement is declared void.

External Dispute Resolution (EDR)

The Bill does not require CRBs to be members of an approved EDR scheme. Veda Advantage has voluntarily become a member but Dunn & Bradstreet is not a member.

CRBs need to be members of EDR Scheme because consumers need to have the ability to get the decision of a credit reporting body reviewed by an independent body.

Recommendation

The Bill must be amended to make membership of an approved EDR scheme compulsory

for CRBs.

CCLC strongly supports a requirement that membership in an EDR Scheme is compulsory for all credit providers. The Bill covers this at 21D. It also follows that failure to be in EDR should also mean that the credit provider is unable to access the credit reporting system. This is not clear in the Bill.

A major problem for consumers is when a credit provider goes into liquidation. It is very difficult to raise a dispute in those circumstances. The credit provider's liquidator often outsources debt collection to a debt collector. The credit provider also ceases to be a member of an EDR.

Recommendation

An obligation on credit reporting bodies to check membership of an EDR and refuse access if the credit provider is not a member. It should also mean that all relevant credit report listings are removed if the credit provider is not a current member of a registered EDR.

Short Term High Cost Credit Loans and leases

A number of providers of short term high cost loans (sometimes called payday loans) and leases for goods pride themselves on not checking a consumer's credit report before providing credit.

It is important that consumers are specifically protected from these types of credit providers failing to access credit report for lending decisions but then listing defaults at a later point in relation to the same loans. Although this may be covered in the Credit Reporting Code of Conduct under reciprocity, there is a risk it will not be covered.

Consumers should be offered certainty that if a credit provider will not check a credit report that this also means they cannot list. This assists in encouraging responsible lending.

Recommendation

The Bill is amended to provide that if a credit provider does not check credit information they cannot default list.

Credit Repair Services should be banned

Concerns are raised in the ALRC Report about "credit repair" services, which assist consumers in overseas jurisdictions to *scam* the rules to clear their credit report in the

absence of any real cause for complaint. The time limit for substantiating information is exploited by the credit repair service flooding credit providers with more complaints than they can possibly handle in the time frame permitted, forcing the relevant information to be withdrawn from the individual's credit record. CCLC has received calls from consumers who have been asked to pay significant sums for credit repair services in Australia. We do not know how these services are currently operating, but we submit that they should be prohibited. Either the individual has a legitimate cause for complaint that can be dealt with through the free dispute resolutions services required under the proposed legislation or they do not. In the latter case, any "service" that purports to be able to clear a consumer's credit report is either making misleading representations or engaging in some form of illegal or otherwise illegitimate activity.

Recommendation

The Bill is amended to add a section giving the Privacy Commissioner the power to determine that a particular organisation is a credit repair agency (to be defined) and that organisation is banned from making complaints on behalf of consumers to a credit reporting body, registered EDR, credit provider and/or the Privacy Commissioner.

If you have any questions or wish to discuss our submissions, please do not hesitate to call the writer as detailed below.

Yours faithfully,

Katherine Lane
Principal Solicitor
Consumer Credit Legal Centre (NSW) Inc.
[redacted]