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24 December 2012

The Committee Secretary
The Senate Select Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra 2600 by email to: legcon.sen@aph.gov.au

Dear Committee Secretary,

EXPOSURE DRAFT HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012

Thank you for the opportunity to provide this submission to the Committee in relation to the *Exposure Draft Human Rights and Anti-Discrimination Bill 2012* (the Bill).

1. Background

The Australian Finance Conference (AFC) is Australia's national finance industry association. Members of the AFC and its affiliated body the Australian Equipment Lessors Association include finance companies, banks, motor vehicle financiers and leasing companies. Membership lists are attached for the information of the Committee. Our Members provide credit to consumers and businesses, by way of housing loans, personal/consumer loans, commercial loans, credit cards, motor vehicle finance and equipment finance. This submission is made on behalf of our Members in the capacity of credit providers and therefore focuses on the exception to age discrimination which is set out in clause 39(4) of the Bill. This exception permits, subject to certain conditions, age discrimination in relation to the provision of credit.

We understand that the intention of the Government is not to change significantly the current anti-discrimination laws or the policy underlying them, but instead to simplify and clarify the legislative framework. Anti-discrimination legislation such as the *Age Discrimination Act 2004* recognises, by means of exceptions, that certain potentially discriminatory conduct should not be unlawful and that a person's attributes may be relevant to particular circumstances. We note that the Bill proposes a general approach to exceptions that would replace some specific exceptions, but retains some of the current exceptions in order to provide certainty while a body of law develops in relation to the concept of "justifiable discrimination". Relevant to our Members in this regard is the retention of the current credit exception to age discrimination.

2. Credit Assessment Tools

Prudent credit providers carefully assess the creditworthiness of loan applicants to ensure that borrowers are not overcommitted and that they have the capacity to meet their credit obligations. In this respect, lending is inherently discriminatory, but without some level of risk-based discrimination, the lending industry would not be viable.

To assist in this process, specialised credit assessment tools have been developed over many years by lenders and by third party service providers. These tools are likely to include a wide

range of factors (such as occupation, time at current job and address, age, previous credit history, ownership of assets, number of dependants, savings history and existing financial commitments) which make up an overall creditworthiness picture of an applicant. The methodologies used to develop these proprietary credit assessment tools are likely to be based on complex actuarial and statistical data which has been gathered and analysed over a long period. We understand that it is very unlikely that any single variable such as age would result in a recommendation to reject a credit application. Rather, an applicant's age might prompt a lender to ask for additional information to support the person's ability to meet their loan commitments. This might be because they are too young to have a sufficient credit or employment history or because they are approaching retirement age and it is appropriate to establish that will be able to meet a lengthy loan commitment.

We support the inclusion in the Bill of the credit exception in sub-clause 39(4), subject to the concern detailed below in relation to the condition imposed under sub-clause 39(5)(a)(iii).

3. Disclosure of Actuarial and Statistical Data

The Bill proposes that, in general terms, the credit exception to age discrimination will be subject to sub-clause 39(5)(a) which requires that:

(i) the discrimination is based on actuarial or statistical data on which is it reasonable to rely; and

(ii) the discrimination is reasonable having regard to the data and other relevant factors; and

(iii) the data has been made available, on request, to the person who claims they were discriminated against.

Paragraphs (i) and (ii) of sub-clause 39(5)(a) are equivalent to provisions in Section 37 of the *Age Discrimination Act 2004.* However paragraph (iii) represents a potentially significant amendment to the credit exception. This is because the Bill does not carry over the specific power under Section 54 for the Age Discrimination Commissioner or the President of the Human Rights Commission to require disclosure of the source of actuarial or statistical data on which any age discrimination is based. Instead, paragraph (iii) would give a credit applicant the right to request access to this data.

We believe that this is an inappropriate change to the current position and one which may have an adverse impact on credit providers and their ability to develop and use credit assessment tools. This is because these tools contain highly complex and valuable "commercial-in-confidence" data which is proprietary to the entity which developed them. The continued viability of these tools could be undermined if they were made widely available or disclosed to members of the public without proper confidentiality requirements in place, even though it is unlikely that someone without specialist knowledge could extract any information from such data which would be meaningful or of any practical use to them in understanding whether their loan application has been rejected on the basis of age.

Although Section 54 of the current legislation has not been carried over into the Bill, Clause 107 will give the Australian Human Rights Commission a general power to require a person to provide information or produce a document if the Commission reasonably believes it is relevant to the investigation of a complaint. The Commission will be subject to confidentiality obligations under clause 193 in relation to such information or documents; and under sub-clause 197(3)(i) the Commission will be able to make orders restricting publication of information and documents to prevent the unreasonable disclosure of confidential commercial information. We believe that clause 107 will provide sufficient protection against inappropriate use of actuarial or statistical data by credit providers, without the need for a credit applicant to be able to request access it.

4. Submission in Relation to the Credit Exception to Age Discrimination

In relation to the credit exception to age discrimination, the AFC believes that the proposal to allow a credit applicant access to valuable "commercial-in-confidence" actuarial or statistical data which may underlie a credit decision is an unnecessary and inappropriate change from the equivalent provision in the *Age Discrimination Act 2004*.

We further believe that sufficient protection against inappropriate use of actuarial or statistical data by credit providers will be provided by clause 107 which gives the Commission power to require production of information or documents relevant to a complaint about age discrimination by a credit provider.

We therefore submit that the condition set out in sub-clause 39(5)(a)(iii) should not apply to the credit exception to age discrimination.

If you would like to discuss our response, please contact me by email to or on the phone number set out above.

Yours truly,

Ron Hardaker
Executive Director

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