adma
Australian Direct Marketing Association

ADMA SUBMISSION
STANDING COMMITTEE ON LEGAL & CONSTITUTIONAL AFFAIRS

EXECUTIVE SUMMARY

Despite the specific concerns detailed in this submission, ADMA supports both the overall thrust of the Bill under review to 'Enhance Privacy Protection' and the purposes of its component parts to:

- Establish a new uniform set of Australian Privacy Principles

- Introduce positive credit reporting which is a reform made possible by advances in data management and information systems

- Introduce new powers for the Privacy Commissioner, which are appropriate for the increasing levels of data being used by business and government.

However, taking into account the current rapid-pace-of-change that we are experiencing with regard to technology and use of data, it is essential that any Privacy regime adopted in Australia be (i) technology neutral to ensure longevity of the provisions; and (ii) sufficiently balanced so that it achieves the stated objective of enhancing privacy protection whilst avoiding undue restrictions that would hinder Australia's ability to be a leading digital economy.

This balance has not currently been met with the current drafting. To achieve this, ADMA recommends amendments to address the following:

1. **Provide clarity rather than confusion**
    - The inclusion of a "prohibition" on direct marketing is confusing for both businesses and the consumer as it is not, in effect, a prohibition. Instead the provision *permits* direct marketing under certain defined conditions. Therefore, the term "prohibition" should be removed.

2. **Balance privacy protection with business innovation**
    - Provisions such as APP 7.3(d) include requirements that cannot be complied with in relation to certain technologies. This Principle requires that an opt-out

be provided to customers and prospects where personal information has been acquired from a party other than the individual. This causes difficulties with new communication channels such as social media, Twitter and online advertising. It is likely to become a more significant constraint to business innovation in future years as technology develops.

3. **Reconsider provisions that contradict the ability for companies to maintain accurate databases**
    - The proposed requirement to allow individuals to deal with a company on an anonymous or pseudonymous basis contradicts the requirement for organisations to keep personal information accurate and up-to-date.

4. **Reassess the implications of the proposed APP relating to overseas data disclosure**
    - The proposed new liability for companies that process or disclose data overseas is of concern to the increasingly prevalent cloud computing.

5. **Provide clarity around application of fines**
    - The proposed fines of $1.1 million without any limitation are of concern.

ABOUT ADMA

ADMA is the largest Association in Australia representing over 500 organisations that utilize or are involved with data-driven marketing and advertising. ADMA was established in 1966 and has since grown to represent marketers and advertisers across all channels and disciplines including mail, telephone, email, mobile, social media and online. ADMA has a Code of Practice that self-regulates the direct and digital marketing community and sets appropriate standards for the discipline. This is overseen by an independent Code Authority, chaired by John Wood, former Deputy Commonwealth Ombudsman and comprising four consumer and business representatives.

ADMA has played a significant role in developing and maintaining industry standards regarding marketing and the use of data in this regard.

DIRECT MARKETING

The term 'direct marketing' relates any form of marketing or advertising that is data-driven, accountable and measurable. The philosophy of direct marketing is to use data to effectively engage and communicate with customers according to their interests, preferences and needs.

Direct marketing originated in direct mail, but has expanded to include many other channels through which companies can engage with consumers on a one-to-one basis. This includes communication channels such as email, telephone, mobile, social media

and online.

The benefit of direct marketing is that it consumers receive relevant marketing and advertising based on interests and stated preferences, thereby avoiding irrelevant information.

The coverage and reach of the term 'direct marketing' is vast and this technique is used by the majority of businesses, government departments, political parties, not-for-profit organisations, religious organisations and others as a means of communicating with customers.

Direct marketing drives more than $1.7 billion worth of annual sales through the Australian economy. Globally, direct marketing expenditures are roughly estimated to exceed $400 billion.

BACKGROUND

ADMA has been an advocate of uniform national privacy legislation since the last century. At that time, ADMA made submissions to and appeared before the House of Representatives Committee on the Privacy Amendment Bill, which introduced provisions covering the private sector for the first time. The Attorney-General, the Hon Nicola Roxon, was a member of that Committee and played an active role in the detailed consideration of the legislation.

Now, it has become apparent that the Privacy Act needs to be updated to take account of technological advances particularly in data, collection, usage, storage and delivery. The lengthy inquiry by the Australian Law Reform Commission and the subsequent consultation by the Department of Prime Minister and Cabinet have been comprehensive. Unfortunately, as this review has taken place over a six-year period it has resulted in the tabling of legislation that is out-of-date and unable to deliver against the current objectives.

The failings of the legislation, which ADMA is seeking to address, are largely due to:

- the fact that at the time the review commenced in 2005, many of the tools, resources and technologies we now use to communicate on a daily basis did not exist – e.g. social media sites such as FourSquare, Twitter and Pinterest.
- the Bill has attempted to introduce specific rules for certain activities (e.g. marketing). By moving away from the 'principles-based' approach and instead introducing 'specific provisions' the Bill struggles to apply to new advances rendering it restrictive and in some instances inapplicable.

What is required is a principles-based regime that provides a well-balanced, responsible and forward-thinking approach to data protection as is required in a digital world.

ADMA contends that the amendments it is proposing in this submission will both ensure technological neutrality enabling business to communicate with their customers via both traditional marketing channels as well as digital channels including online and social media without diminishing the consumer protections in the legislation.

ADMA RECOMMENDATIONS AND PROPOSED AMENDMENTS

ISSUE 1 - APP 7: Direct Marketing Principle

Prohibition on Direct Marketing

1.1 The Privacy Act is intended to be a broad "principles–based" legislation that applies to all relevant organisations that collect and utilize personal information. Strictly speaking therefore, it is not appropriate therefore to have a specific marketing provision included in the legislation. To do so alters the foundation and objective of the legislation and opens the door for other specific activities to be regulated under privacy law. This is neither desirable or intended. However, ADMA understands that it is the Government's intention to include this Principle and with that in mind ADMA makes the following submission.

1.2 The form and shape of the Direct Marketing Principle has been changed at the eleventh-hour to become a "Direct Marketing Prohibition" i.e. the first time that the proposition of a direct marketing "prohibition" has been proposed was in the Bill introduced to Parliament. At no other time during the six-year consultation period has such a "prohibition" been suggested.

1.3 Altering the proposed APP 7 to now include a "prohibition" on direct marketing directly contradicts (i) the purpose of the new principle, which is to ***permit*** direct marketing under the circumstances detailed (ii) the Attorney-General's stated intention to "include <u>clearer</u> and tighter regulation of the use of personal information for direct marketing".

1.4 Including the term "prohibition on direct marketing" is confusing and misleading

(a) **Consumers will be confused**: by stating there is a "prohibition" on direct marketing when, in fact, marketing is *permitted* will cause confusion to consumers. The general public will be under the impression that direct marketing is no longer allowed but they will still be receiving such communications. This will lead to confusion, complaints and customer dissatisfaction. ADMA strongly contends that such confusion and complaint generation must be avoided and the legislation must be clarified.

(b) **Businesses will be confused**: Businesses will also be confused by the statement that 'direct marketing is prohibited'. Marketers and compliance professionals alike will struggle to make sense of the provision and will be unclear whether they are permitted to contact customers by direct marketing or not. This is undesirable, particularly taking in to account the scope of activities and communications that fall within the definition of direct marketing (as outlined above).

(c) **Marketing suppliers will be impacted by the inaccuracy**: The vast array of businesses that are involved in the media, marketing and advertising supply chain will lose business due to the misconception that direct marketing is "prohibited". This will in turn impact on jobs and the economy. ADMA strongly contend that this is unacceptable in view of the fact that direct marketing is <u>permitted</u> and the negative impact on business is due to inaccurate and misleading drafting.

1.5 In summary, ADMA believes for the reasons stated above, that the Direct Marketing Principle should be removed. However, as the Government has stated its intention to proceed with this approach ADMA submits that the wording of APP 7 be revised to

(i) ensure it accurately reflects the legal position that direct marketing is permitted under certain conditions

(ii) remove the word 'prohibition which is confusing for consumers and businesses alike

(iii) deliver on the Attorney-Generals stated intention to clarify the legislation rather than cause additional confusion.

1.6 To achieve this, ADMA recommends that the Government revert to its previous, more practical, clear, positive drafting that was in the Exposure Draft or by adopting the drafting recommended by ADMA in Annex 1.

ISSUE 2 – APP 7(3)(d) – Use of personal information collected by a third party

2.1 APP 7.3 (d) relates to the circumstance where personal information collected from a party other than the individual is used for marketing purposes. In this situation, the proposed APP requires that certain requirements must be adhered to. These are listed in APP 7.3 (a) – (e);

2.2 Of concern is the requirement listed in APP7.3 (d) – i.e. where personal information is collected from someone other than the individual it may used for marketing purposes <u>providing that</u> "in each direct marketing communication with the individual

(i) the organisation includes a prominent statement that the individual may make such a request; or

(ii) the organisation otherwise draws the individual's attention to the fact that the individual may make such a request".

2.3 The requirement to include an opt-out statement in each direct marketing communication is not possible with regard to all marketing and advertising channels due to space constraints. E.g. – online advertisements, banner ads, twitter feed etc.

2.4 More compliance issues regarding this requirement will arise in the future as communication channels evolve and advance. This will give rise to many more examples where the inclusion of an opt-out is not possible due to the channel, technology or medium.

2.5 ADMA would be please to provide detailed examples of its concerns with this provision as supplementary submission or at a public hearing if the Committee so wishes.

2.6 In summary, APP 7.3(d) needs to be amended so that it can apply to every channel, is future proof and easy to apply across multiple technologies.

2.7 ADMA's proposes a minor amendment to APP7.3 to address the issues raised – this has been included in Annex 1.

2.8 ADMA contends that its suggested amendment to APP 7 will meet the Attorney-General's intention of clearer tighter regulation by first clarifying that direct marketing is not actually prohibited and second providing certainty and consistency for the opt-out requirement in a technologically neutral manner.

ISSUE 3 – ANONYMITY & PSEUDONYMITY

3.1 ADMA is concerned that the requirement that organisations provide individuals with the opportunity to deal anonymously or under a pseudonym will impact on the ability for organisations to keep their databases accurate and up-to-date as required by the proposed APP10.

3.2 In addition to impacting organisation's ability to maintain accurate data, the requirement to accept pseudonyms also:

- Prevents organisations from knowing whether they have duplicate records on their database resulting in consumers being sent multiple

communications – which is an annoyance to consumers and a cost to business

- Makes managing opt-outs and other customer preferences extremely difficult where an individual has multiple pseudonyms across different databases within an organisation;
- Encourages unsuitable practices, such as anonymous slanderous commentary on recommendation sites and other social tools, which could have a significant business impact.

3.3 ADMA submits that the provisions regarding anonymity should be retained but submits that the provisions regarding pseudonymity should be removed from the legislation due to the impact on accuracy of data.

ISSUE 4 - CIVIL PENALTIES

4.1 ADMA is concerned that the wording of the penalty provisions are too open-ended and in the case of a data breach a court could theoretically impose unlimited fines because it provides for 'such pecuniary penalty for the contravention as the court determines to be appropriate'.

4.2 ADMA has recommended to the Government that the legislation include:

- Clarity to Section 13G by adding a definition of a “serious” interference with privacy as meaning ‘reckless or willful and intentional’;
- Introduction of a “reasonableness threshold” that is used to assess whether the organisation did everything it could to prevent the interference with privacy.
- A requirement that the court consider all relevant circumstances pertaining to the breach including whether the entity had appropriate systems, practices and processes in place to protect against such breach;
- Where an entity is deemed to have the appropriate systems, practices and processes in place, provisions that require due consideration to be given as to whether:
    - the contravention arose as a result of a “mistake” that was outside the organisations control (in recognition of the fact that no system can operate without error or variation all the time).
    - the company was itself subject to a crime, such as hacking by a third party, when a breach has occurred.

ISSUES 5 - RESOURCES OF THE PRIVACY COMMISSIONER

5.1 ADMA is aware that concerns have already been expressed in the Parliament about the adequacy of the resources provided to the Office of the Australian Information Commissioner in general and the Privacy Commissioner in particular

to carry out the new functions and activities contained in the Bill.

5.2 This was a problem following the introduction of the National Privacy Principles covering the private sector for the first time. Complaints to the Privacy Commissioner were taking six months to process, which undermined confidence in the effectiveness of the new privacy regime.

5.3 It is to be hoped that the Government will increase the budget for the AOIC commensurate with the new powers and functions contained in this legislation.

SUMMARY

In conclusion, ADMA supports the premise of the privacy reforms and the objective to "enhance privacy". However, we urge the Committee to consider the recommended changes to ensure

- (i) the new provisions are clear to both business and consumers and do not cause confusion
- (ii) the provisions will not become unduly restrictive as technology and communication channels evolve and progress; and
- (iii) that Australian Privacy legislation has longevity and supports the growth of a digital economy.

ADMA would be pleased to appear before the Committee to provide further detail to the points raised in this submission.

Yours sincerely,

Jodie Sangster
Chief Executive Officer