



Submission to Senate Standing Committee on Environment,
Communications and the Arts
Keeping Jobs from Going Offshore
(Protection of Personal Information) Bill 2009

10 June 2010

1. Introduction

ADMA welcomes the opportunity to comment on the *Keeping Jobs from Going Offshore (Protection of Personal Information) Bill* (the Bill).

ADMA is concerned by this Bill and its ramifications for Australian industry.

ADMA notes Senator Fielding's intentions with respect to creation of this Bill are to protect personal information and jobs from being sent overseas¹.

Whilst the good sentiments of trying to protect the 248 call centre jobs that were sent offshore is admirable, ADMA submits that the proposed solution will result in the opposite result to that which is trying to be achieved.

ADMA submits that the most likely impact of the Bill proceeding will be more not less Australians losing their jobs, increasing the price of goods that the Australian public consumes and a significant loss of competitiveness for the Australian economy.

This submission is structured according to the three most significant concerns this Bill raises:

- 1) Implications of the Bill for Free Trade
 - a. Economic benefits of Free Trade
 - b. Contravention of current Free Trade Agreements
- 2) Significant, Far-reaching, Unintended and Undesirable Consequences
- 3) Cross-border transfer of Australian citizens personal information

¹ Senator Steve Fielding, Media Release, Fielding's Bid to Protect Aussie Jobs and Personal Data, Monday, October 26, 2009

2. About the Australian Direct Marketing Association

ADMA is the peak industry body of the Australian direct marketing industry.

ADMA was formed in 1966 and has during its 44 years of operation been involved in the formulation of law relevant to the direct marketing industry. Predominantly our focus has been the *Privacy Act 1988*, the *Spam Act 2003*, the *Trade Practices Act 1974* and the *Do Not Call Register Act 2006*.

ADMA has also been involved in co-regulatory and self-regulatory solutions over many years.

ADMA operates a Direct Marketing Code of Practice which is a self regulatory code. Compliance with the Direct Marketing Code of Practice is a pre-requisite of our membership. The Direct Marketing Code of Practice is overseen by an independent Code Authority.

ADMA's primary objective is to help companies achieve better marketing results through the enlightened use of direct marketing.

ADMA has over 500 member organisations including major financial institutions, telecommunications companies, energy providers, travel service companies, major charities, statutory corporations, educational institutions and specialist suppliers of direct marketing services.

Almost every Australian company and not-for-profit organisation directly markets, including unsolicited selling in one form or another, to its current and potential customers as a normal and legitimate part of its business activities and the ability to continue to conduct this activity underpins a good proportion of Australia's economic activity.

3 Implications of the Bill for Free Trade

3.1 Effect of the Bill on Free Trade

The Bill proposes a new approach to the transfer of personal information which would require that any organisation that wants to transfer personal information outside Australia would have to use one of two regimes if it is considering transferring personal information to a foreign country.

In situations where personal information will be transferred to a country where there are similar privacy protections to Australia, the organisation will have to:

- a) inform the individual of the intention to transfer personal information; and
- b) may proceed with the transfer if the individual does not object.

ADMA notes that there are very few foreign countries where similar privacy protections are in place with the only notable exceptions being those countries that are part of the European Union and subject to European Union Data Protection Directive.

Alternatively where there are situations where personal information will be transferred to a country which does not have a legislative framework that provides similar privacy protections as Australian privacy law, the organisation will be required to:

- a) inform the individual (whose personal information is proposed to be transferred) in writing of the:
 - i) intention to transfer the information to a country that has not been certified as having adequate privacy protections;
 - ii) the content of the information proposed to be transferred;
 - iii) the purpose of transferring the information;
 - iv) the identity of the receiving organisation(s);
- b) secure the individual's consent to the transfer, in writing, not more than 12 months prior to the transfer of the information.

The objective of such a significant and costly threshold that is prone to customer inertia and subject to the issues relating to customers simply not responding is clearly to significantly limit the number of instances where organisation will be permitted to transfer data overseas.

The effect of this limitation will be to reduce, potentially substantially, the ability of an Australian organisation to use international companies.

As a result the effect of this Bill in preventing organisations from using services offered by international companies is the creation of a protectionist regime. Further the effect of this Bill will be felt across almost every industry sector and be broad and significant.

3.2 Economic benefits of Free Trade

The economic benefits of free trade are well documented. The Centre for International Economics, Canberra & Sydney in the report it prepared for the Department of Foreign Affairs and Trade stated

" Trade liberalization, the lowering of tariffs and the removal of quotas, and the removal of restrictions on capital flows with the floating of the dollar, was an integral component of the broader series of economic reforms that occurred during the 1980s and 1990s. Taken together the reforms have left the average Australian family much better off with higher wages, higher levels of wealth, less exposure to unemployment and a greater range of opportunities for their children. "

The Centre for International Economics then went on to estimated that the benefits accrued from current free trade agreements

*"the rise in real income is around \$3900 per annum per working family. "*²

Further the Hon. Simon Crean MP, Australian Minister for Trade said

*"Job creation and sustainable economic growth are some of the main benefits of boosting global trade. "*³

ADMA submits that whilst the loss of 248 jobs is always a tragedy and can have profound effects on families, the appropriate policy response is not to introduce the measures outlined in this Bill. Rather governments must act to ensure that conditions are set so that those segments of the labour force that are subject to the most damaging effects of structural adjustment caused by trade liberalization receive suitable support and training. In addition, governments must ensure that policy settings are set to ensure that the economy can provide other employment opportunities quickly.

² Centre for International Economics, *Benefits of trade and trade liberalization*, prepared for the Department of Foreign Affairs and Trade, May 2009, www.TheCIE.com.au, page 20

³ The Hon Simon Crean MP, Media Release, Minister Crean to push Doha and benefits of trade in Europe, 26 May 2010

3.3 Contravention of current Free Trade Agreements

ADMA submits that the Bill will introduce measures which may place the Australian Government in contravention of its international treaty obligations.

Specifically, the Bill may contravene the Australian Government's obligations under the World Trade Organisation (**WTO**) General Agreement on Trade in Services (**GATS**). The Bill may also contravene the Government's obligations under various bilateral and plurilateral Free Trade Agreements (**FTAs**).

A contravention of the GATS would expose Australia to the risk of dispute settlement within the WTO by any aggrieved WTO member country. Such dispute settlement does have the potential to give rise to diplomatic tensions and would run a risk of Australia being found to have contravened international law. If a finding were made against Australia, any requirement to repeal the Bill could be enforced via the threat of trade sanctions.

ADMA also submits that analysis should be conducted with respect to the impact that this legislation will have on the arrangements Australia has with its ASEAN partners.

For these reasons, it is imperative that the International Law and Trade Branch in the Office of International Law in the Attorney-General's Department as well as the appropriate branch of the Department of Foreign Affairs and Trade conduct a review of the Bill prior to it being considered further.

4 Significant, Far Reaching, Unintended and Undesirable Consequences

Whilst the stated objective of the Bill is to address call centres and other forms of business processing operations the Bill has much greater potential application to have significant, far-reaching, unintended and undesirable consequences.

The Bill's requirement for express and affirmative consent is not limited to the transfer of data in relation to the operation of a foreign call centre. Rather, the Bill potentially applies to any cross-border data flow.

Cross-border data flows are essential to a wide range of potential services and applications.

The Bill therefore has the potential to create serious issues for a diverse range of industries that may need to convey personal data to offshore locations.

The Bill has the potential to cause real harm to any industries that are heavily dependent on cross-border personal data flows, including the travel industry. Under the bill, a travel company that sells holidays to foreign countries over the internet will now have to send the individual a written notice seeking their permission in writing to transfer their information to the foreign airline, hotels and car rental companies the individual has elected to use.

This legislation will retard some of the significant efficiency gains that are provided by technology including the ability to participate in the Digital Economy and purchase products on-line.

Other technology related products and services that could be impacted are cloud computing offerings, telecommunications services (such as Blackberries) and international telecommunications service offerings, and Internet based applications and services.

By way of example, Internet application providers such as Facebook, Hotmail, Gmail and YouTube would all be subject to the Bill and could experience significant difficulties in implementing practical mechanisms for compliance.

ADMA notes that a Regulatory Impact Statement has not been conducted for this Bill. Given the broad reaching consequences of this Bill, ADMA submits that a Regulatory Impact Statement should be conducted.

5 Cross-border transfer of Australian citizens' personal information

The *Privacy Act 1988* includes significant protections with respect to the cross-border transfer of personal information. These protections are specified in National Privacy Principle 9.

ADMA notes also that the Australian Law Reform Commission (ALRC) put forward in its report, Australian Law Reform Commission Report 108, *For Your Information: Australian Privacy Law and Practice*, October 2009, eight recommendations for changes to National Privacy Principle 9.

The new regime, once enacted, will provide even stronger protections to consumers in situations where personal data may be transferred to other countries.

ADMA notes that the Australian Law Reform Commission conducted extensive consultation with multiple stakeholders on cross-border data flows. Input from the Office of the Federal Privacy Commissioner as well as those of consumers, government agencies and businesses was sought and considered.

The privacy protections that are advanced as part of this Bill do not seem to have been subject to the same level of rigour. The unintended consequences as outlined in both section 3 and 4 are the result.

6 In Summary

ADMA acknowledges the good intentions of this Bill in trying to prevent losses of Australian jobs and address perceived concerns about the transfer of personal information to foreign countries. However ADMA is very concerned by the manner in which this Bill tries to meet these objectives.

The Bill, if enacted, will almost certainly have the completely opposite effect to that which it is trying to achieve. More concerning though is the risk of significant unintended consequences that could have serious repercussions for Australia's economic performance and the relationships we have with many of our trade partners.

ADMA strongly urges that the Senate Committee reject the main proposals of this Bill.