SENATE STANDING COMMITTEE ON FINANCE AND PUBLIC ADMINISTRATION

LEGISLATION COMMITTEE

Exposure Drafts of Australian Privacy Amendment Legislation

SUBMISSION

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SUBMITTER

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FINANCE AND PUBLIC ADMINISTRATION COMMITTEE

Exposure Draft Australian Privacy Principles

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QANTAS SUBMISSIONS IN RESPONSE TO THE EXPOSURE DRAFT AUSTRALIAN PRIVACY PRINCIPLES

1. Introduction

1.1 This submission is made by Qantas Airways Limited and its related bodies corporate including Jetstar Airways Pty Limited (together, **Qantas**) and relates to the exposure draft Australian Privacy Principles (**APPs**).

1.2 Qantas conducts its operations both nationally and internationally. It employs approximately 32,500 staff across a network that serves 140 destinations in 37 countries. Qantas collects, uses, stores, transfers and discloses personal information to and from local authorities, affiliates and other organisations located overseas. It is essential that it does this in order to provide its services, meet legislative requirements both in Australia and overseas and provide appropriate levels of security and safety for its passengers. Qantas has an extensive customer service network including sales and distribution, Customer Care and Loyalty (Qantas Frequent Flyer program and Jetstar Mastercard program), as well as domestic and international offices and airport services which collect, use, transfer and disclose personal information on a daily basis. It is inherent in the services offered by Qantas that it constantly needs to collect, use, transfer and disclose high volumes of data and other personal information.

1.3 The types of organisations to whom Qantas discloses personal information and from whom it collects personal information are many and varied. Some will be large sophisticated operations and others will be small businesses. Some will be located in countries which have advanced legislation relating to privacy whereas others will be situated in countries which have no such protection. Qantas is also required to disclose personal information of passengers and crew to government departments worldwide.

General comments

2. Structure and Drafting of the APPs

2.1 Qantas is concerned that the simple language and structure contained in the current National Privacy Principles (**NPPs**) has been abandoned in favour of a more verbose and complex set of principles which are more difficult to interpret and discern the intention and meaning of.

2.2 An example of unnecessary complexity can be found in proposed APP 2 which provides:

'***Australian Privacy Principle 2 – anonymity and pseudonymity***

(1) Individuals must have the option of not identifying themselves, or of using a pseudonym, when dealing with an entity.

(2) Subsection (1) does not apply if:

(a) an entity is required or authorised by or under an Australian law, or an order of a court or tribunal, to deal with individuals who have identified themselves; or

(b) it is impracticable for an entity to deal with individuals who have not identified themselves.'

This replaces NPP 8, which provides:

'*Wherever it is lawful and practicable, individuals must have the option of not identifying themselves when entering transactions with an organisation.*'

2.3 It is difficult to see why it is necessary to replace the simply expressed NPP 8 with APP 2 when the meaning is unchanged. Qantas submits that the drafting of the APPs should be revisited with a view to reverting to the simple format contained in the NPPs. We will be drawing attention to further examples of the difficulties arising from this new approach later in this submission.

2.4 Further, the inclusion of the introduction to the APPs has meant that APP 1 appears in section 2, APP 2 appears in section 3, and so on. The numbering of the APPs should be aligned with the section numbering in the legislation to avoid confusion about the applicable APP.

Submissions:

- The drafting of the APPs be reviewed with the aim of reverting to the simpler drafting style in the NPPs.
- The numbering of the APPs should be aligned with the section numbering in the legislation to avoid confusion about the applicable APP.

3. Definition of 'personal information'

3.1 '*Personal information*' is to be defined as information or an opinion about an identified individual, or an individual who is reasonably identifiable:

(a) whether the information or opinion is true or not; and

(b) whether the information or opinion is recorded in a material form or not.

3.2 The new definition in the Exposure Draft changes the concept of 'identity' to 'identification' and the Companion Guide provides some useful context for interpreting the amended definition.

3.3 Qantas submits that it would be helpful if the Explanatory Memorandum to the Bill includes the same explanation of the change to the definition of 'personal information' which was incorporated in the Companion Guide to the APPs to avoid debate as to the intended meaning of the new definition.

Submission: The Explanatory Memorandum to the amending legislation should include the explanation of the new definition of 'personal information' which is included in the Companion Guide to the APPs.

4. Definition of 'Australian law'

4.1 References to '*Australian Law*' appear throughout the APPs, including in the following sections:

(a) APP 2(a)

(b) APP 3(3)(a)

(c) APP 3(5)(a)

(d) APP 5(2)(c)

(e) APP 6(2)(b)

(f) APP 8(2)(c)

(g) APP 9(1)(a)

(h) APP 9(2)(c)

(i) APP 11(2)(c)

(j) APP 12(3)(g)

4.2 '*Australian Law*' is given an extended definition in section 15. The confining of laws to Australian laws fails to recognise that organisations operating in foreign jurisdictions are often required to collect, disclose and use personal information under the laws of those jurisdictions. Qantas submits that the APPs should be amended to recognise that entities may need to deal with personal information in ways required under laws of other jurisdictions and that such dealings should not be regarded as an interference with their privacy.

Submission: That the expression 'Australian Laws' be deleted and be replaced with the expression 'Applicable Law', being laws (including legislation, regulations, directions and rules) applicable in a relevant jurisdiction.

5. Definition of 'serious'

5.1 References to *'serious'* appear throughout the APPs, including in the following sections:

(a) APP 3(3)(b)(i)

(b) APP 3(3)(c)(i)

(c) APP 6(2)(c)(i)

(d) APP 6(2)(d)(i)

(e) APP 8(2)(e)(i)

(f) APP 8(2)(f)(i)

(g) APP 9(2)(d)(i)

(h) APP 9(2)(e)(i)

(i) APP 12(3)(a)

(j) APP 12(3)(h)(i)

5.2 Qantas submits that references to *'serious threats'* or *'misconduct of a serious nature'* throughout the APPs should be amended to remove the reference to *'serious'*.

5.3 Qantas takes the view, for example, that any threat to the life, health or safety of a passenger which necessitates the gathering of sensitive information should be sufficient to justify an exception. The question of '*seriousness*' will always be subjective and Qantas believes that its employees should not be placed in the position of having to make such a judgment if they reasonably believe that a threat exists and it will be unreasonable or impractical to obtain consent.

5.4 The proposed requirement of *'misconduct of a serious nature'* imposes a subjective element which may give rise to differences in interpretation. One example in the context of Qantas' activities relates to misconduct of passengers on flights or in terminals who are affected by alcohol and become rude or abusive to staff or other passengers. If these are regular passengers, such as those working in remote areas, it may be necessary to warn their employer that if the conduct continues Qantas will refuse to carry those individuals. This may result in the employee being warned by the employer that if he or she is precluded from making flights they will lose their employment. In Qantas' view and in the interests of its employees and passengers Qantas cannot be expected to predict whether such misconduct would be found to constitute '*serious misconduct*'.

Submission: That the expression 'serious threat' be deleted and be replaced with the expression 'threat'.

Submission: That the expression 'misconduct of a serious nature' be deleted and be replaced

with the expression 'misconduct'.

Comments on Particular APPs

6. APP 2 – Anonymity and Pseudonymity

6.1 Please refer to the general comment made at paragraph 2 above in relation to the language adopted.

7. APPs 3 & 4 – Collection of Solicited and Unsolicited Personal Information

7.1 The provisions relating to collection of personal information now distinguish between the collection of '*solicited*' personal information and '*unsolicited*' personal information. This distinction has resulted in a far more verbose principle than NPP 1. The proposed new principles are difficult to interpret and the distinction appears to be unnecessary and artificial.

7.2 The overarching requirement, regardless of whether information is solicited or unsolicited, is for the information to be '*necessary for or directly related to, one or more of the entities' functions or activities*'. Qantas submits this requirement provides sufficient protection for individuals and that the provisions relating to collection of unsolicited personal information and the requirement to destroy or deidentify that material when it does not meet the above requirement do not need to be contained in a separate principle.

7.3 We also note that proposed APP 3(1) equally applies to sensitive information and APP 3(2)(a)(i) merely repeats the provisions contained in APP 3(1). This is another example of unnecessary verbiage in the proposed APPs. Another example is APP 3(5) which is intended to replicate NPP 1.4. We suggest that NPP 1.4 is clearer and less verbose.

7.4 In addition, while the requirement in relation to collection of sensitive information largely reflects the current NPP 10, Qantas submits that there are two difficulties which should be addressed in the APPs.

7.5 First, as discussed at paragraph 5 above, Qantas submits the reference to a 'serious threat' in APP 3(3)(b)(i) should be removed. Second, there will be occasions when Qantas collects sensitive information (including health information) provided by a third party where it is impracticable to obtain consent from the individual about whom it is given. This is typically the case, for example, when a carer provides health information about a passenger when booking a flight. Qantas submits that the consent exception should be expanded to include the situation where consent can be reasonably inferred from the circumstances of the collection.

Submission: That the distinction in APPs 3 and 4 between the collection of solicited and unsolicited personal information be removed, by deleting APP 3(6) and APP 4.

Submission: That APP3(2) be expanded to include the situation where consent can be reasonably inferred from the circumstances of the collection.

8. APP 6 – Use or Disclosure of Personal Information

8.1 The use and disclosure principle in the APPs permits disclosure if the entity believes it is necessary to lessen or prevent a '*serious*' threat (previously imminent and serious) to an individual's life, health or safety and (a new provision) it is unreasonable or impracticable to obtain the individual's consent. It is now also proposed that personal information can be used or disclosed if there is reason to suspect misconduct of a serious nature.

8.2 Qantas supports these changes but has two concerns. The first relates to the requirement that a threat be serious before use or disclosure can be made under APP 6(2)(c). We have set out in paragraph 5 above of these Submissions why we believe this requirement should not be included.

In addition Qantas believes the exception would be better expressed as *'the entity reasonably believes that the use or disclosure will lessen or prevent a threat…*'.

8.3 Second, under Part VIA of the existing Privacy Act, certain personal information is permitted to be collected, used and disclosed in the event of emergency and disaster situations. In order to utilise this provision, the Prime Minister or other Minister must make a written emergency or disaster declaration. The Companion Guide to the APPs states that this part of the existing Privacy Act will be replicated in the new Privacy Act.

8.4 Qantas is concerned that there may be situations of emergency or disaster, for example, an air incident resulting in injuries where it would be desirable to release personal information to authorities and concerned others, but which falls short of a disaster which would require the invoking of the powers under Part VIA of the Act. Qantas submits that a provision be included permitting disclosure and use of personal information when, in the reasonable opinion of the entity, it is necessary for or will assist in an appropriate response to an emergency or disaster.

8.5 As also discussed at paragraph 5 of these Submissions, Qantas believes that the reference to '*misconduct of a serious nature*' in APP 6(2)(d) is overly restrictive and an organisation should be permitted to use and disclose personal information if it believes any misconduct that relates to its functions or activities has occurred and it reasonably believes it is necessary for it to take appropriate action.

8.6 For the reasons set out in paragraph 9 below, Qantas does not understand why APP 6(5)(a) applies and why a separate regime has been applied to the use of personal information for direct marketing.

Submission: That the expression 'serious threat' in APP 6 (2)(c)(i) be deleted and be replaced with the expression 'threat' and the wording revised to read *'the entity reasonably believes that the use or disclosure will lessen or prevent a threat…*'.

Submission: That a provision be included which permits use or disclosure of personal information when, in the reasonable opinion of the entity, it is necessary for or will assist in a response to an emergency or disaster.

Submission: That the expression 'misconduct of a serious nature' in APP 6 (2)(d) be deleted and be replaced with the expression 'misconduct'.

9. APP 7 – Direct Marketing

9.1 APP 7(2)(a) and (b) provides that an organisation may use or disclose information for the purpose of direct marketing where:

(a) the personal information is collected from the individual; and

(b) the individual would reasonably expect the organisation to use or disclose the information for that purpose.

9.2 APP 7(3)(a) and (b) provides that an organisation may use or disclose information for the purpose of direct marketing if:

(a) the organisation collected the information from:

(i) the individual and the individual would not reasonably expect the organisation to use or disclose the information for that purpose; or

(ii) a person other than the individual; and

(b) either:

(i) the individual has consented to the use or disclosure of the information for that purpose; or

(ii) it is impracticable to obtain that consent.

9.3 Qantas submits the above drafting is convoluted and may cause confusion. In particular, Qantas does not understand why personal information collected for the purposes of direct marketing is treated any differently to personal information collected for other purposes. Qantas sees no need for APP 7 to be included as a separate principle, as it is merely a subset of the requirements relating to the use and disclosure provisions of APP 6. Qantas submits that information used for the purposes of direct marketing need not be treated under a separate regime to personal information subject to the use and disclosure provisions under APP 6 as this distinction may cause confusion and uncertainty.

9.4 Qantas submits that it would be far clearer if the current approach in the NPP 2.1 was adopted and any specific requirements relating to direct marketing were included in APP 6.

9.5 Another difficulty is that different provisions apply depending upon whether the information is collected from the individual or from some other person. In many cases it may not be possible to determine the original source of the personal information collected. Qantas submits that individuals are adequately protected by the requirements that:

(a) either:

(i) they would reasonably expect the direct marketing activity; or

(ii) they have provided consent or it is impracticable to obtain consent before the particular use; and

(b) they can opt-out at any time and this is drawn to their attention.

9.6 Qantas strongly submits that the APPs could be considerably simplified if the above requirements were included in APP 6 in clear language rather than superimposing a separate new principle which contains a different approach to the same general requirements.

Submission: That APP 7 be deleted and instead appropriate direct marketing requirements be included in APP 6 in the same way as they are included in NPP 2.1.

10. APP 8 – Cross-Border disclosure of Personal Information

10.1 APP 8 provides that, where a cross-border disclosure of personal information occurs, the entity will have to '*take such steps as are reasonable in the circumstances to ensure that the overseas recipient does not breach the*' APPs.

10.2 The proposed provision seems to be extremely broad and Qantas is concerned that a foreign entity may not agree to bind itself to this extent. For this reason Qantas submits that the wording contained in the present NPP 9(f) is more appropriate. This would require the overseas recipient to hold, use and disclose the personal information in a manner which is consistent with the APPs.

10.3 The proposed new provisions also make Qantas responsible for the actions of others in countries which are not subject to the protections similar to those contained in the APPs. It appears to have been assumed that in these circumstances protection can be provided by the organisation entering into appropriate contracts with the overseas entity. Qantas submits that in many cases this may not be possible.

10.4 A common example of a circumstance where a cross-border disclosure of information occurs is where a group booking is made for international flights, accommodation and related services such as stopovers, internal flights, car hire and accommodation. In order to arrange this, Qantas will have to disclose the personal information of the group members to each of the relevant service

providers as well as local customs and immigration authorities. Further, such service providers may also transfer the information to other countries where their customer or passenger databases are held. In such circumstances Qantas would normally seek to, but it may not always be practicable to, require each service provider and authority to enter into binding contracts which include the relevant privacy obligations.

10.5 Further, under APP 8 (2)(a)(ii), Qantas would not only have to determine that the overseas recipient is subject to a scheme substantially similar to the APPs, but it would also have to determine the effectiveness of that scheme. Qantas submits this requirement is too onerous for an Australian entity to comply with and should be removed.

10.6 Qantas notes the following provisions in current NPP 9.1(c) and (d) are not included in the APPs. These are:

'*(c) the transfer is necessary for the performance of a contract between the individual and the organisation, or for the implementation of pre-contractual measures taken in response to the individual's request; or*

(d) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the individual between the organisation and a third party.'

If these provisions were reinserted the concerns expressed above would be of less concern. Accordingly, Qantas submits that there should be similar exemptions under APP 8(2).

Submission: That the expression in APP 8(1) *'to ensure that the overseas recipient does not breach the Australian Privacy Principles*' be deleted and replaced with *'to require the overseas recipient to hold, use and disclose the personal information in a manner which is consistent with the Australian Privacy Principles (other than APP 1)*.'

Submission: That APP 8(2) include the following exemptions:

- 'the transfer is necessary for the performance of a contract between the individual and the organisation, or for the implementation of pre-contractual measures taken in response to the individual's request'; and
- 'the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the individual between the organisation and a third party.'

Submission: That APP 8(2)(a)(ii) be removed.

11. APP 13 – Correction of Personal Information

11.1 APP 13(3) provides that if an organisation corrects personal information which it has disclosed to a third party, it must 'take such steps (if any) as are reasonable in the circumstances' to give any entity, to whom it disclosed that information, notification of that correction if requested by the individual.

11.2 To prevent the scope for misuse, Qantas submits that there should be exceptions for frivolous or unduly onerous requests. For example, in the case of a name change due to marriage, the responsibility to notify such changes to relevant parties should remain with the individual, rather than the entity.

Submission: That APP 13 include an exception to the requirement to correct an individual's personal information where that request is frivolous or unduly onerous.