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The Secretary
House of Representatives Committee on
Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

INQUIRY INTO PRIVACY AMENDMENT (PRIVATE SECTOR) BILL 2000

AAPBS is the peak industry body for building societies in Australia and therefore has a significant interest in the Privacy Amendment (Private Sector) Bill 2000 ("the Bill").

We are appreciative of the opportunity to comment on the Bill and set out below our views:

Part IIIA Privacy Act

Our primary concern relates to the inter-relationship between the existing Part IIIA of the Privacy Act 1988 and the National Privacy Principles ("NPP").

It is now clear that the Commonwealth does not intend to repeal Part IIIA despite the proposed application of the NPPs to the private sector. It is our view that Part IIIA should in fact be repealed on the enactment of the new regime for the following reasons:

1. it will often be impossible to classify information and segregate it for different treatment under the two regimes;

2. the scope of the NPPs completely covers the field; and

3. there are inconsistent obligations under the two regimes.

Some examples of the inconsistencies between the two regimes that would cause considerable confusion and would make cost-effective compliance almost impossible are as follows:

- Part IIIA does not impose any restrictions on the use of personal information (except in relation to credit reports under section 18L). NPP 2.1, on the other hand, restricts the use of all other types of personal information.

- There are specific concessions in the credit reporting provisions of the Privacy Act regarding certain uses and disclosures involving agents and securitisation programmes. There are no such concessions under the NPPs.

- Under Part IIIA, credit providers only have an obligation to provide access to credit reports. Under NPP 6, however, they would have an obligation to provide access to all other personal information. Also, the rules relating to access are quite different under both regimes.

- The obligation under NPP 1.3(b) to advise that the individual can gain access to information will be misleading to the extent that it does not apply to personal information subject to Part IIIA.

- It is unclear whether the NPPs would have particular regard for the relationship between related corporations. Section 18N(d) of the Privacy Act, on the other hand, authorises disclosures of credit sensitive personal information to related corporations.

- Part IIIA (eg. sections 18K, 18N and 18P) provides for several legitimate purposes where the disclosure of personal information is permitted. NPP 2 only allows certain types of disclosure depending on the "primary" or "secondary" purpose of the disclosure.

We note that other jurisdictions which have comprehensive regulation of privacy for the private sector have not made specific provision for credit reporting. While it is recognised that the specific sensitivity of credit related personal information may warrant special treatment in certain circumstances, this can best be achieved by modifications to the general regime rather than by retaining Part IIIA.

Privacy codes not made mandatory

Industry is very supportive of the Bill's intention not to make privacy codes mandatory, but instead allow industry to adopt voluntary codes approved by the Privacy Commissioner. This approach is consistent with the position adopted by the draft Financial Services Reform Bill.

It would be a fallacy to suggest that codes should be made mandatory in order to "flesh out" legislative provisions. It is not the role of codes to second guess the intention of Parliament in enacting a piece of legislation. Legislation and regulations should be self-contained and precise. The Bill is intended to be comprehensive in its coverage and is not grounded on general principles and ambiguous themes which may otherwise benefit from the elaboration that a code could provide. Indeed, it amply covers the field in this area, thus obviating the need for non-legislative mechanisms to provide interpretation and elaboration.

It is, in our view, a fundamental principle of parliamentary sovereignty that a code not usurp the legislative force of a duly enacted law.

Permitted contents of credit information files

If Part IIIA of the Privacy Act is not to be repealed, we ask that consideration be given to expanding the permitted contents of credit information files under section 18E to include overdrawn savings accounts. Presently, section 18E(1)(b)(vii) is limited to cheques (for less than $100) that have been dishonoured at least twice.

Savings accounts become overdrawn for a number of reasons, but the one that concerns industry is in relation to EFTPOS and ATM transactions. These transactions cannot be dishonoured as such and, due to time lag in the electronic systems which apply to these transactions, many accounts become overdrawn.

Some account holders when informed that their account is overdrawn as a result of an ATM or EFTPOS transaction will bring their account into order. Others, however, refuse to do so and, given the amounts involved and the costs of litigation, it is not practical to pursue many individual cases. This results in tens of thousand of dollars being written off each year.

Section 18E does not presently allow for such a listing. Industry considers this a serious omission and requests that section 18E be amended so as to allow a credit reporting agency to include in an individual's credit information file the fact that an individual has overdrawn his/her savings account (without approval) as a result of non-cheque transaction and has not repaid the amount within a reasonable time of being asked to.

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