ABN 50 005 617 318

# THE PRIVACY AMENDMENT (PRIVATE SECTOR) BILL

A SUBMISSION
TO THE

HOUSE OF REPRESENTATIVES
STANDING COMMITTEE
ON LEGAL AND CONSTITUTIONAL AFFAIRS

BY THE

INSURANCE COUNCIL OF AUSTRALIA LTD

MAY 2000

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## Summary of Recommendations

1. The proposal to make decisions by dispute resolution bodies subject to the proceedings of the Administrative Decisions (Judiciary Review) Act 1977 is at odds with the concept of self-regulation. It will introduce a level of legalism and formality which is inconsistent with an effective, consumer-friendly dispute scheme, without any attendant benefit to a complainant. It should be removed from the Bill.

2. The proposal to make decisions by dispute resolution bodies enforceable in the Federal Court may appear, at face value, to bring added power of recourse to a complainant. However, it is more likely to weaken the authority of a dispute resolution body to enforce its own decisions and apply sanctions. It should be removed from the Bill.

3. There will be no statutory restraints on the Privacy Commissioner's power to make guidelines relating to making and dealing with complaints under approved privacy codes. Any guidelines proposed by the Privacy Commissioner should be made subject to mandatory consultation and should, in turn, become disallowable instruments.

   The present proposals for powers granted to the Privacy Commissioner should be amended.

# The Privacy Amendment (Private Sector) Bill

# A Submission by the Insurance Council of Australia

## Introduction

The Insurance Council of Australia (ICA) is the representative body of the general insurance industry in Australia. ICA members account for over 90 per cent of total premium income written by private sector general insurers.

ICA members, both insurance and reinsurance companies, are a significant part of the financial services system. Recently published statistics from the Australian Prudential Regulation Authority (APRA) show that the private sector insurance industry generates direct premium revenue of $15.9 billion per annum and has assets of $47.7 billion. The industry employs about 26,000 people.

ICA members issue some 36 million insurance policies annually and deal with three million claims each year. The proposals contained in the Privacy Amendment (Private Sector) Bill have far reaching consequences for insurers and their customers.

ICA has followed closely the calls for reform of Australia's privacy laws and has responded positively to most of the views expressed variously by the Federal and State Governments and the Federal Privacy Commissioner. ICA was pleased to be represented in the consultative group which assisted the Privacy Commissioner in the preparation of the National Principles for the Fair Handling of Personal Information, issued in February 1998; and the revised version issued in January 1999.

More recently, ICA was represented in the Core Consultative Group which provided views to the Attorney General's Department on the development of proposed private sector privacy legislation.

As acknowledged in earlier papers released by the Attorney-General's Department, ICA responded to the Prime Minister's encouragement of business to establish privacy standards through the development of a voluntary code of conduct.

In August 1998, The General Insurance Information Privacy Principles were launched in Canberra by the Federal Attorney-General the Hon Daryl Williams, AM QC MP, in the presence of the Federal Privacy Commissioner, Ms Moira Scollay.

These Principles set the standards by which our industry collects, uses, stores and disposes of the personal information of its private customers. They reflect the view that privacy standards are best achieved by self-regulatory and voluntary means.

The Principles establish a privacy complaints resolution mechanism. They follow closely the guidelines established by the National Principles.

A copy of the General Insurance Information Privacy Principles (The Privacy Principles) is provided with this Submission, together with a copy of the Deed by which organisations voluntarily adopt them. See Appendix A.

ICA welcomed the Government's announcement, on 15 December 1998, that it will legislate to support and strengthen self-regulatory privacy protection in the private sector. However, ICA has concerns that some of the proposals put forward in the present Bill are at odds with the concept of industry self-regulation. They could totally impair the speedy, economical and efficient methods of dispute resolution, which our industry has firmly established and which are welcomed by Government, consumer bodies and the community. If implemented in the form proposed, they are more certain to discourage voluntary self-regulation.

This Submission explains these concerns. They fall under three headings:

- The effect of confirming a right to seek review under the Administrative Divisions (Judicial Review) Act 1977 of any decision made by a dispute resolution body;

- The effect of vesting the Federal Court with jurisdiction to enforce a determination made by a dispute resolution body;

- The extent to which the Bill provides the Privacy Commissioner with powers to intervene, override or direct the processes and procedures of a dispute resolution body.

These concerns have been expressed to the Attorney-General's Department in previous Submissions made by ICA in September 1999 and January 2000. These were made in response to the Information Paper released by the Attorney General's Department in September 1999. Copies are attached in Appendix B. The concerns set out in ICA's previous Submissions remain unresolved and should be considered as part of this present Submission.

## Part A: Judicial Review of any determination made by the adjudicator under an approved privacy code - effect on the general insurance industry scheme

Participation in The Privacy Principles is not compulsory. General insurance companies and other organisations who wish to participate do so by executing a deed of adoption. By executing such a deed an organisation accepts significant obligations. Among the key obligations are those set out in clause 2 of the standard form of deed of acceptance, which provides (in part) as follows:

"2.1 The organisation agrees to accept The Privacy Principles.

2.2 The organisation shall:
- (a) participate in the Complaints Scheme;
- (b) participate in the Compliance Scheme;
- (c) abide by any determination of IEC or the Privacy Compliance Committee made in accordance with this Deed, the Complaints Scheme or the Compliance Scheme."

In the development of the Complaints Scheme, it was common ground between representatives of industry and consumer interests that the following were imperatives:

- Unqualified acceptance and implementation of decisions by participating organisations;
- Avoidance of legal technicalities and formalities; and
- Full access for the consumer to the scheme **without cost.**

It is submitted that if the Bill proceeds, each of those imperatives will be lost.

### Automatic acceptance of decisions

On the assumption that the Privacy Principles becomes an approved privacy code, the effect of the amendments to the **Administrative Decisions (Judicial Review) Act 1977** ("the ADJR Act") set out in item 1 of Schedule 2 of the Bill will be that any person aggrieved by a decision made by the Privacy Compliance Committee may apply to the Federal Court or the Federal Magistrates Court for an order of review of the decision (see s.5 of the ADJR Act).

The conferral of this right of review necessarily negates the principle that participating organisations automatically accept and implement decisions of the Privacy Compliance Committee and accordingly is unacceptable.

## Legal technicalities

The scheme for complaint resolution and enforcement contained in the Privacy Principles is one which does not confer on participating organisations (or complainants) any right of review or appeal. Sanctions for an organisation which fails to implement a decision include the naming of the organisation in the Annual Report which IEC is obliged to make on the operation of the Privacy Principles including compliance. Further, clause 6.2 (a) of the standard deed of adoption empowers the board of IEC to terminate the deed of adoption executed by the defaulting organisation, thus effectively expelling that organisation from the Scheme.

None of these processes involves litigation or excessive formalities or technicalities. By contrast, the Bill proposes that any party aggrieved by a scheme decision may seek a review of that decision under the ADJR Act. It cannot seriously be argued that proceedings under that Act are in any way simple.

There are nine separate grounds set out in section 6 (1) of the Act and many of those grounds are technical in nature. Indeed, one of those grounds (ground 6(1)(e)) requires nine explanatory paragraphs to explain what is meant by "an improper exercise of a power". The fact that the Bill, in order to create the right of review, has to resort to a legal fiction (namely deeming an approved privacy code to be a statute or statutory instrument) adds a further layer of complexity.

Indeed this resort to legal fiction itself raises serious constitutional and practical issues. All (or by far the great majority) of the decisions currently reviewable under the ADJR Act are decisions made by a Commonwealth official or a body actually deriving its existence from a Commonwealth statute. This is totally consistent with the historical background to the ADJR Act. The Act is designed to improve on the remedies available at common law to citizens wishing to challenge decisions of the executive or of bodies established by government. There are grounds for concern as to how this legislation will operate when applied to decisions made by a body which is not connected with the Crown and is not created by an enactment.

Important questions will arise such as the liability of the decision-maker for costs and the extent to which the decision-maker actively participates in the ADJR hearing. These issues will further complicate the review proceedings and could expose the decision-maker to significant costs.

There is a further problem. The Scheme rules for dealing with complaints and enforcement were drafted on the premise that participating organisations are bound by and will implement any determination made concerning them. These Scheme rules (which were approved at the same time as the Privacy Principles themselves) will require substantial revision if the principle of automatic acceptance and implementation of scheme decisions is breached. Put simply, the terms of clause 2.2 (c) cannot exist side by side with the right to seek review under the ADJR Act. However, it is repeated that any watering down of that principle will impair the basic tenet that participants are solely and totally responsible for ensuring that consumers get the benefits of the Privacy Principles.

## Overview by the Privacy Commissioner

The Privacy Commissioner will have the power to approve privacy codes such as the General Insurance Information Privacy Principles. This will include examination and approval of complaints resolution schemes and an ongoing overview of complaints resolution decisions made by an adjudicator such as the Privacy Compliance Committee.

Determinations made by the Privacy Compliance Committee will be published regularly and made available to the Privacy Commissioner. In these circumstances the Privacy Commissioner will have complete opportunity to monitor the trend of determinations and be satisfied that decisions are being made fairly and effectively.

In the light of the Privacy Commissioner's ability to maintain a monitoring surveillance of Scheme determinations, the proposal to make these decisions also subject to the ADJR process is an unnecessary bureaucratic overload.

It will give rise to unnecessary legalism and formality without any attendant benefit to the complainant. It should be removed from the Bill.

## Consumer access to the complaint resolution process to be at no cost

This is a well-established principle of modern dispute resolution schemes to which ordinary consumers have access. It is one of the benchmarks set out in the DIST standards and, further, is one of the requirements of ASIC policy statement 139.

Where an organisation applies for review of a determination of the Privacy Compliance Committee favourable to the consumer, the consumer may have to formally oppose the application in order to protect the potential benefits of the determination. This effectively means that consumers will have to incur considerable costs in attempting to retain the benefits of that determination. In this way, the Bill will derogate from the principle that consumers must enjoy full access to the complaints scheme without cost and accordingly this aspect of the Bill is also unacceptable.

## Part B: Proceedings in the Federal Court or Federal Magistrates Court to enforce a determination - effect on the general insurance industry scheme

These provisions do not appear at first glance to have the same extent of potential to conflict directly with the imperatives described above, principally because the provisions do not enable the participating organisation to apply for a review of a determination.

Nonetheless the provisions have the potential to water down the present unqualified obligation of an organisation to implement a determination, simply because they create a mechanism or process to be followed when an organisation has failed to implement a determination.

ICA is concerned that this will be interpreted as in some way "normalising" a decision by an organisation not to implement of its own initiative but leave it up to the complainant or the Privacy Compliance Committee to institute enforcement proceedings in the Federal Court. The enforcement provisions combined with the right of review provisions may well create doubts as to the validity of any proposed exercise of IEC's powers to name a "defaulting" organisation or to terminate the organisation's deed of adoption, at least in a case where no enforcement proceedings have been taken. ICA can see no good reason why its Privacy Compliance Committee should have to resort to Federal Court proceedings prior to exercising powers of naming and/or effective expulsion of a defaulting organisation.

The problems of costs arise again in connection with the enforcement provisions. Who is to meet the complainant's costs or, for that matter, the adjudicator's.

On closer examination, the option of enforcement in the Federal Court does impinge upon the imperatives of automatic acceptance of determination and consumer access without cost and accordingly is unacceptable.

This proposal should be removed from the Bill.

## Part C: Powers of the Privacy Commissioner

The Bill confers considerable powers on the Privacy Commissioner for the approval of privacy codes and the making of guidelines about privacy codes. In relation to the powers of approval (and revocation) of privacy codes, the provisions are prescriptive. However, the interaction between the criteria for code approvals and the power to make guidelines essentially provides substantial additional discretion to the Commissioner. New section 18BF (1)(b) enables the Commissioner to make guidelines relating to **making and dealing with complaints** under approved privacy codes. There does not appear to be any statutory constraints on the Commissioner's power to make such guidelines. More to the point, it appears that the so-called guidelines become mandatory standards. This arises because new section 18BB (3)(ii) requires the Commissioner to be satisfied that the procedures in a proposed code for making and dealing with complaints **must** meet the Commissioner's guidelines for making a dealing with complaints if the code is to be approved.

Thus it appears on careful examination, that the Commissioner has the widest discretionary power over the complaint handling procedures of approved code schemes. Any guidelines proposed by the Privacy Commissioner should be made subject to mandatory consultation. Equally, they should be disallowable instruments.

## Conclusion

The foregoing provisions of the Bill are strongly opposed by the General Insurance Industry. In their present terms the will:

(a) Destroy the present arrangement under which participating organisations simply must implement determination, under sanction of public naming and, if appropriate, expulsion from the industry Complaints scheme;

(b) Create considerable legal complexity and formality in the areas of review and enforcement of determinations;

(c) Expose consumers wishing to defend or enforce determinations in their favour to considerable costs; and

(d) vest in Privacy Commissioner unfettered discretion to dictate the manner in which complaints are dealt with.

These issues are fundamental to industry supported complaint resolution schemes. If these aspects of the legislation are to remain, ICA believes the best interests of insurers and of consumers will be in ICA abandoning its own Scheme and simply submitting to the default scheme. Thus, the Government's stated objective of providing a framework of support and certainty for industry self-regulatory codes will have failed.