

## Enforcement

### Background

- 10.1 As was noted in Chapter 1, the Bill aims to implement a ‘light touch’ privacy regime, one that will support and strengthen self-regulatory privacy protection in the private sector.<sup>1</sup>
- 10.2 With this aim in mind, the Bill enables the Privacy Commissioner to approve privacy codes. Privacy codes may be developed by organisations or groups of organisations and may be tailored to their particular circumstances. The Privacy Commissioner may only approve privacy codes if they meet, at a minimum, the standards set out in the National Privacy Principles (NPPs).<sup>2</sup>
- 10.3 Privacy codes may include provision for industry based code adjudicators who may hear and determine complaints made against organisations subject to the code. Clause 18BB(3) of the Bill sets out the matters that the Privacy Commissioner must be satisfied about before he can approve the procedures for making and dealing with complaints in an industry code. These include that the code provides for the appointment of an independent adjudicator to whom complaints may be made and that the determinations, findings, declarations, orders and directions that the adjudicator may make under the code after investigating a complaint are the same as those that the Commissioner may make after investigating complaints.

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1 The Hon Daryl Williams AM QC MP, Attorney-General and Senator the Hon Richard Alston, Minister for Communications, Information Technology and the Arts, *Joint Press Release*, 15 December 1998.

2 The National Privacy Principles are set out in Appendix D of this report.

- 10.4 In the absence of a provision for a code adjudicator in an approved privacy code, the Privacy Commissioner will perform that role.
- 10.5 Both the Privacy Commissioner and approved code adjudicators will have the power to issue determinations in relation to a particular act or practice of an organisation in the event that a complaint of a privacy breach is substantiated. This could include a range of actions such as a provision of monetary compensation, an apology or an agreement to improve privacy protection measures. In the event that a determination is not complied with, the individual concerned, the Privacy Commissioner or the relevant code adjudicator may apply to the Federal Court or the Federal Magistrates Service for enforcement of the determination.
- 10.6 Figures 1 – 4 on at the end of the chapter provide an outline of the progress of a complaint from the perspective of both a complainant and a respondent in the event that an individual wishes to complain about a breach of privacy. The outlines draw from what is envisaged by the provisions of the Bill.
- Figure 1 – process for complainant if the complaint is lodged with the Privacy Commissioner
  - Figure 2 – process for complainant if the complaint is lodged with a code adjudicator
  - Figure 3 – process for respondent if the complaint is lodged with the Privacy Commissioner
  - Figure 4 – process for respondent if the complaint is lodged with a code adjudicator
- 10.7 The Committee notes that the process appears to be more straightforward for a respondent than for a complainant. It also notes that there appear to be stages in the process at which decisions can be made as to the future of the complaint and from which no appeal is provided for. Other stages leave open only an appeal under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR). There also appears to be one instance where the only course for an aggrieved respondent is either an appeal under ADJR or non-compliance with a determination.
- 10.8 A number of other issues were raised with the Committee in relation to the enforcement regime. These include:
- general effectiveness;
  - the lack of appeal rights in some instances;
  - the use of ADJR as the only mechanism of appeal in other instances, including in relation to approved privacy codes;

- the powers available to the Privacy Commissioner to independently monitor, audit and take action against organisations;
- whether the functions conferred on the Privacy Commissioner have the potential to conflict with one another;
- whether the enforcement regime should include a capacity for the Privacy Commissioner to impose civil penalties; and
- the cumbersome and time-consuming nature of the process for handling complaints.

10.9 However, the Committee is able to comment on one suggestion that was put to it by the Insurance Council of Australia and the Australian Bankers' Association concerning consultation by the Privacy Commissioner. This is discussed in paragraphs 10.11 and 10.12 below.

## Powers of the Privacy Commissioner

- 10.10 The Committee received submissions suggesting that the Privacy Commissioner should be able to monitor or audit privacy codes and the decisions of code adjudicators operating under them to ensure greater consistency in decision making.<sup>3</sup> This may assist in preventing differing interpretations of the NPPs by code adjudicators leading to the creation of different levels of protection of privacy for individual in different industries.
- 10.11 In addition, the Committee received evidence from the Insurance Council of Australia and the Australian Bankers' Association about the impact of clause 18BF of the Bill.<sup>4</sup> The Insurance Council of Australia recommended that paragraph 18BF(1)(b) be amended to require the Privacy Commissioner to consult all affected stakeholders before issuing guidelines relating to the making and dealing with complaints under approved privacy codes.<sup>5</sup>
- 10.12 As these guidelines must be complied with before the Commissioner may approve a privacy code, it would appear to be appropriate to ensure that adequate consultation takes place.

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3 See for example Australian Privacy Charter Council, *Submissions*, p.S252; Communications Law Centre, *Submissions*, p.S333; Health Issues Centre, *Submissions*, p.S356.

4 Insurance Council of Australia, *Submissions*, p.S429; Australian Bankers' Association, *Submissions*, p.S558.

5 Insurance Council of Australia, *Submissions*, p.S429.

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**The Committee therefore recommends that clause 18BF(1)(b) be amended to require the Privacy Commissioner to consult with all affected stakeholders before making guidelines relating to making and dealing with complaints under approved privacy codes.**

### Lack of appeal rights

- 10.13 Some submissions expressed concern that, particularly in relation to code adjudicators, no appeal rights were provided for other than through ADJR, which is a formal administrative review that focuses on legal process rather than the merits of a decision. Some submissions noted that this would make it difficult for complainants to obtain a review of the merits of a decision by a code adjudicator.<sup>6</sup>
- 10.14 Both the NSW and Queensland Tenants' Unions argued that requiring complainants to go to the Federal Court in order to seek review of a decision placed too much of a cost burden on complainants.<sup>7</sup> The NSW Tenants' Union suggested the lodgement fees alone in the Federal Court would be beyond the means of most people, especially tenants'.<sup>8</sup>

### Review under the Administrative Decisions (Judicial Review) Act 1977

- 10.15 The provisions allowing parties to a privacy dispute to seek judicial review under ADJR were criticised by a number of witnesses. Coles Myer, for example, argued that making ADJR available in relation to disputes under privacy codes 'puts an unnecessary prescriptive procedure into what should be essentially a conciliation process.'<sup>9</sup> This would, according to Coles Myer, increase the costs of conciliation for both parties and act as a disincentive for the inclusion of dispute resolution as part of a privacy code.<sup>10</sup>
- 10.16 AMP stated that it was concerned that the threat of judicial review would tend to make complaint handling bodies more 'formal and legalistic'.<sup>11</sup>

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6 See for example Australian Consumers' Association, *Submissions*, p.S85; Australian Charter Privacy Council, *Submissions*, p.S252; Australian Privacy Foundation, *Transcripts*, p.98.

7 Tenants' Union of NSW, *Submissions*, pp.S475-476; Tenants' Union of Queensland, *Submissions*, p.S528.

8 Tenants' Union of NSW, *Submissions*, p.S475.

9 Coles Myer, *Submissions*, p.S43.

10 Ibid.

11 AMP, *Submissions*, p.S177.

10.17 The Insurance Council of Australia argued that allowing dissatisfied parties to seek review under ADJR was at odds with the concept of self-regulation.<sup>12</sup> In addition, the application of the ADJR Act to private sector code adjudicators was criticised as a 'legal fiction'.<sup>13</sup> The Insurance Council of Australia noted that subjecting the Privacy Commissioner to judicial review was:

...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.<sup>14</sup>

## Conflict of interest

10.18 Several people queried whether it was appropriate for the Privacy Commissioner to be given so many roles.<sup>15</sup> The Commissioner's roles are envisaged to include:

- advocate for privacy;
- negotiation and formulation of standards and guidelines;
- approval of codes;
- investigation of complaint; and
- issuing determinations.

10.19 The potential for some conflict in the execution of these roles seems apparent.

## Civil penalties

10.20 Some submissions noted the absence of any defined penalties for breaches of privacy.<sup>16</sup> This observation leads to consideration of the possibility of the inclusion of civil penalties. In particular, to cover the situation where behaviour may not necessarily result in complaints from individuals but

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12 Insurance Council of Australia, *Submissions*, p.S422.

13 Insurance Council of Australia, *Submissions*, p.S426.

14 Ibid.

15 See for example Chamber of Commerce and Industry, Western Australia, *Submissions*, p.S213; Australian Consumers' Association, *Transcript*, p.117; Australian Privacy Charter Council, *Transcript*, p.172.

16 See for example Consumers' Health Forum, *Submissions*, p.S275.

may indicate systemic problems or gross abuses of privacy within an organisation.

## Process

- 10.21 The process for handling complaints by the Privacy Commissioner appears, on its face, to be cumbersome and to expose both complainants and respondents to a process that is time consuming and taxing—both financially and emotionally—for both parties. The unenforceable nature of the Commissioner’s determinations reinforces this view. It may be necessary to consider ways of simplifying the process of handling privacy complaints.

## Comments

- 10.22 Given the time available for the conduct of this inquiry, the Committee is not in a position to draw any general conclusions about the adequacy of the enforcement mechanisms in the Bill. Nor is the Committee able to make any general recommendations to the Government about the enforcement regime. The Committee draws the Government’s attention to the fact that concerns were expressed. There was insufficient evidence to suggest solutions to some of the problems raised. This is clearly an area of the Bill that requires immediate attention.
- 10.23 Some members of the Committee noted that the enforcement processes in the Bill were affected by the intention that it introduce ‘light touch’ regulation. It was noted by those members that without effective enforcement mechanisms to back up the National Privacy Principles, the privacy protection offered by the Bill could be limited.

Kevin Andrews MP  
Chair

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