

ADMA Position Summary — Privacy Amendment (Enhancing Privacy Protection) Bill 2012

The ADMA supports both the overall thrust of the Bill, as stated in our submission to the Standing Committee on Legal & Constitutional Affairs (Submission number 7).

The following four points summarise the key recommendations made in that submission:

- 1. Replace the sub heading “Prohibition on direct marketing” with “Direct Marketing” in APP 7.**
Emphasising the notion of a prohibition in APP 7 is inaccurate and confusing. It reduces clarity for consumers and businesses. APP 7 actually permits direct marketing under certain defined conditions. The resulting inaccuracy and confusion reflects negatively on the Attorney-General’s stated intention to “include clearer and tighter regulation of the use of personal information for direct marketing”. See **Attachment 1** for the ADMA’s recommended drafting.
- 2. Include a clause to allow reasonable exceptions to requirements under APP 7.3(d), in order to recognise current technological constraints and the rapid nature of innovation in the sector.**
Many emerging communication platforms are not reasonably able to provide for the requirements under APP 7.3(d)(i) and (ii), particularly in respect to providing an opt-out mechanism in each direct marketing communication with the individual. New social media platforms, communication channels such as Twitter, and other mediums with online advertising do not have the technical capacity to adapt to the requirements of this principle – in its totality – at this time. This requirement would unduly restrict Australians’ access to innovative new media in the digital economy. See **Attachment 1** for the ADMA’s recommended drafting.
- 3. Retain provisions regarding anonymity under APP 2, but remove the provision for pseudonymity to mitigate the impact of this principle on the accuracy of data (APP 10).**
There is a lack of clarity in how APP entities are meant to reconcile the concept of a right to anonymity and pseudonymity under APP 2.1, and the requirements under APP 10.1 for APP entities to “take such steps (if any) as are reasonable in the circumstances to ensure that the personal information the entity collects is accurate, up-to-date and complete.” The use of pseudonyms will lead to duplicate records, and will create difficulties with managing opt-out requests from individuals with multiple entries across databases. This will lead to further frustration for individuals wishing to manage their personal information.

Broadly, there are major concerns that the promotion of anonymity and pseudonymity will further expose industry to an unacceptable risk of sanctions and litigation for slanderous and otherwise unlawful commentary on social media platforms. Such commentary has already proven to have detrimental effects on the community as a whole.

- 4. Re-draft penalty provisions under s 13G (Serious and repeated interference with privacy) so that they specifically define the circumstances and nature of fines which can be imposed by a court.**

The penalty provisions should include:

- a) A definition of “serious” interference with privacy, meaning “reckless, wilful and intentional”.

- b) A reasonableness threshold, to ascertain if an organisation acted reasonably within its powers to prevent the interference with privacy.
- c) An explicit requirement for the courts to consider relevant matters pertaining to the breach, including whether the organisation had systems, practices and processes in place to prevent the breach, when determining fines.
- d) For organisations which have said systems, practices and processes in place, a requirement – when considering fines – to consider whether:
 - a contravention occurred as a result of an error beyond the organisations control (in recognition of the fact that no system is failsafe); or
 - the company was itself subject to a crime, such as hacking by a third party, when a breach occurred.

Further commentary:

The ADMA hopes that the Government will increase funding for the Office of the Australian Privacy Commissioner (OAIC), so that it has the necessary resources to carry out the functions and activities contained in the Bill

Conclusion:

These recommendations aim to ensure that:

1. the new Privacy regime adopted by the Government is technology neutral to ensure the longevity and enhance the applicability of the provisions; and that,
2. the new Privacy regime is sufficiently balanced so that it achieves the stated objective of enhancing privacy protection, whilst avoiding undue restrictions that would hinder Australia's ability to be a leader in the digital economy.

Yours sincerely,

Jodie Sangster

[Redacted signature block]

Attachments: sub 07_attachment 1