

11 May 2000

Ms Catherine Cornish
The Secretary
House of Representatives Standing Committee on Legal and Constitutional
Affairs
Parliament House
CANBERRA ACT 2600

Send By Facsimile: 02 6277 4773

Dear Ms Cornish

Please find attached a submission from Coles Myer Ltd to the House of Representatives Standing Committee on Legal and Constitutional Affairs, inquiry into the Privacy Amendment (Private Sector) Bill 2000.

Coles Myer Ltd supports the broad thrust and provisions of the Bill and believes that the Bill will afford Australian consumers significant protection against the misuse of their private data. We believe a co-regulatory approach meets community expectations without prescriptive legislation attempting to keep pace with technological innovation.

Coles Myer has already begun to ensure that its operations are compliant with the National Privacy Principles released by the Privacy Commissioner in 1998, which have provided a basis for the Bill. We note that other industry sectors such as insurance and the Australian Direct Marketing Association have already included these Principles in their Codes.

As a member of the original workgroup established to develop the National Principles (NPP's), we are pleased they form the basis of the legislation. The NPP's were the product of extensive consultation and robust discussion among a broad range of groups. It is appropriate that they have been reflected accurately in the Bill.

In our response to the Bill we have limited our comments to areas where we remain concerned or wish to communicate our strong view. Please refer to the next page for our summary.

We are also pleased that the key principles of collection, use and disclosure and access and correction (and others) will not apply to information collected prior to the commencement of this legislation. We are strongly in favour of existing data falling outside the legislation. To include such information would make our databases useless and result in very substantial additional costs.

SUMMARY

1.0 Interpretation of related corporations and the use and legal standing of the note.

The ability of companies to share information across divisions was a key platform on which the NPP's were built. The entities that legally exist within a corporation are often different than the 'brands' that corporations present to the market and to which the consumer would be familiar.

While we believe that the legal note to clause 13B gives clarification to the disclosure and use of information collected by a related organisation, we strongly submit this principle be upheld as consumers will be disadvantaged if related organisations are unable to share and use information in accordance with the NPP's. (Page 4)

2.0 Exemption for employee records

We submit that Workplace Relations legislation better ascribes the relationship between the employee and employer. It is appropriate that this Bill does not contemplate employee records. (Page 4)

3.0 Clause 2.1c) Exemption given for direct marketing activity

Businesses in order to grow their customer base must be able to 'prospect' or bring to a potential consumers attention their product or service. The "opt- out" requirement inherent in this clause protects the consumer from unwanted on-going communication.

Without the exemption for direct marketing, our ability to compete with international companies would be severely restricted. (page 5)

4.0 Definition of sensitive information

The definition of "sensitive information" has been extended from the NPP's to "opinions". However the categories of information cited at 27 subsection 6(1) cover factual matters, except for (a) (ii) political opinions. As a consequence there has been an extension of the ambit of "sensitive information " and this may limit legitimate business activities in the future or increase compliance costs. (Page 6)

5.0 Administrative Decisions (Judicial Review) Act 1977 of determinations

Determinations by a Code Authority subject to ADJR review puts an unnecessarily prescriptive procedure into what should be essentially a conciliation process. This Review could also present a disincentive for Code development to include a complaints handling section. (Page 6)

National Principles

We acknowledge some minor changes, but are pleased that the general intent of the NPP's has not been changed through the drafting process. The department is to be congratulated in adding clarity to many of the Principles through careful drafting.

While it is not clear whether, or in what form the 'notes' in the key provisions will be retained, we submit that these notes should be retained in some form. Further, the guidance notes issued by the Privacy Commissioner should be re-issued, pursuant to the passage of the legislation, as they greatly assist companies to apply the Principles.

We make the following observations:

The requirement in NPP2.2 for a "written note" of the use or disclosure should extend to electronic records. The Evidence Act requirements in relation to records should be the guiding requirement.

Paragraph 6.1(e) is now confined to legal proceedings only. The reference to "dispute" from the NPP's has been omitted. This appears to confine this qualification to court proceedings.

Conciliation, arbitration or mediation proceedings may not be covered by this exemption. Given that such proceedings are usually entered into with the aim of resolving disputes and are often entered into as an alternative to court actions, it would not be unreasonable to extend this qualification on access to information to such proceedings as was the intent of the original NPP.

We believe this wording should be changed back to reflect the previous wording of the NPP's.

1.0 Related Bodies Corporate Section 13B

While we recognise the draft Bill acknowledges the sharing use and disclosure between inter-related company's, we note with great concern that the definition of organisation has changed significantly from the time of development of the NPP's.

The legal note at 13B allows of the use of data collected by one entity by another related entity, so long as that use is in accord with the NPP's.

We would prefer to see this 'use' provision incorporated in the body of the Bill. We submit the definition of organisation under the NPP's was more clear in the direction as to the use and collection/disclosure of personal information across companies.

This concept recognised that in commerce today, the way companies are structured legally has more to do with accounting requirements than the way companies present themselves to the consumer marketplace. In short, the entities that legally exist within a corporation are often different to the 'brands' that corporations present to the market and with whom the consumer would believe they are dealing.

We submit that so long as the customer would reasonably expect their information would be shared between different divisions of the one company, and their personal information is being managed by all divisions in accordance with the NPP's (ie. to the same privacy standards), then the customer's expectations are being met.

In practice, customers often do not know they are dealing with different entities. It would actually work against the consumer if they had a number of different products or services with the one organisation but these services were administered through different divisions. If customer information were unable to be shared and used across the organisation, the customer would be forced to contact the organisation multiple times just to advise of a change of address!

We often have the response from customers "but you already have that information", this would become a very common complaint if companies were unable to share and use information.

2.0 Exemption for employee records

We submit the exemption for employee records is justified as Workplace Relations legislation better serves the relationship between employee and employer.

In practice, many companies choose to have very open policies with their employees allowing comprehensive access to their personal information.

In Coles Myer Ltd, employees have access to performance information as well as standard employee records such as pay, holiday's and other entitlements and so on. However, there are some evaluative records which would present a difficulty for employers if employees had ready access. For example if employees had access to career progression information this could create friction through unfulfilled expectation or be de-motivating for employees if expectations are not met.

Further, employees with good employment histories would be disadvantaged as employers would be unwilling to give references for fear of privacy implications.

Exemption for direct marketing activity Schedule 3 2.1c)

This principle is important as in order to grow a customer base, companies must be able to make potential customers aware of their product or service.

In practice, much money is invested to ensure marketing effort reaches potential customers. Companies don't want to spend money marketing to people who are unlikely to be interested in their product.

Technological advancement has and will continue to allow marketing activity to become better targeted, ie rather than relying on mass mediums such as TV and radio, businesses are able to choose message delivery options that are distributed to more tightly defined market segments.

As advertisers move away from mass marketing, those who have limited access to mass media are more likely to be disadvantaged through reduced information on new products and services . Direct marketing has the potential to become an increasingly important distribution medium in providing information on new products and services available in the general marketplace, no matter where the customer lives.

The requirement that the consumer at the first contact be given the option to "opt-out" of any future marketing at nil cost, is significant protection.

Companies may see a competitive advantage in gaining consent for direct marketing before undertaking this activity, however, this should be a **market** response, not a **regulated** one.

In the global marketplace such legislation or regulation does not exist. We submit the Bill on this point provides the consumer with both protection and benefit, while allowing business to achieve growth in an increasingly internationally competitive environment.

4.0 Sensitive information

The definition of “sensitive information” has been extended to “opinions”. However the categories of information cited in paragraph (a) cover factual matters, except for (a) (ii) political opinions. We seek clarification as to why the definition has been extended to “opinions”, as we believe a consequence has been the extension of the ambit of “sensitive information”. This over time could either limit legitimate business activities or increase costs in the design and flexibility of databases.

We note further that the definition of sensitive information covers additional attributes than those defined in the NPP’s, however we have no cause for concern regarding the additional categories.

5.0 Administrative Decisions (Judicial Review) Act 1977 review.

While a decision has not yet been made to join our company to a Code, parts of our organisation are already covered by the ADMA code. This Association’s code includes a complaints handling procedure administered by an independent Code Authority

We believe that to have determinations by the Code Authority subject to ADJR review puts an unnecessary prescriptive procedure into what should be essentially a conciliation process. This will also increase costs of conciliation for both parties.

This form of review could also present a disincentive for Code development to include a complaints handling section. Almost by default, the Federal Privacy Commissioner’s office will become the main body for conciliation and investigation of privacy complaints. It is not clear that the Privacy Commission is sufficiently resourced to perform this role

I thank the Committee for the opportunity to raise our concerns on this important issue.

Yours sincerely

Jon Wood
Managing Director e.colesmyer