

## **Related bodies corporate and interaction with exemptions**

- 9.1 The Bill provides a limited exemption from the National Privacy Principles (NPPs) that allows related bodies corporate to share personal information collected by one member of a corporate group with other group members. This gives rise to a number of issues as to whether it is appropriate for information sharing practices of large organisations to be facilitated by a special exemption. The Committee is also concerned to ensure that the related bodies corporate exemption does not have any unintended consequences in terms of its interaction with other exemptions in the Bill.
- 9.2 This chapter examines:
- whether the related bodies corporate exemption is appropriate; and
  - the relationship of the related bodies corporate exemption to the –
    - ⇒ small business exemption;
    - ⇒ employee records exemption;
    - ⇒ media exemption; and
    - ⇒ political acts and practices exemption.

### **Related Bodies**

- 9.3 Clause 13B of the Bill provides that the sharing of personal (but not sensitive<sup>1</sup>) information between related bodies corporate is not an interference with the privacy of an individual. Whether bodies corporate
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1 'Sensitive information' is defined at Item 27 of Schedule 1 of the Bill.

are related to each other is determined in the manner set out in the Corporations Law.<sup>2</sup>

- 9.4 The Explanatory Memorandum to the Bill explains that National Privacy Principle 2.3 clarifies how an organisation may use shared information. NPP 2.3 defines primary purpose in terms of the purpose for which the information was originally collected:

This means that the “primary purpose” is transferred with the personal information when it is shared around the group of related bodies corporate. Each body corporate within the group must use the information consistently with the main purpose for which it was originally collected, and may only use the personal information for a secondary purpose where that purpose is allowed by National Privacy Principle 2.1 (or equivalent provision in an approved privacy code).<sup>3</sup>

- 9.5 The Committee notes that clause 13C of the Bill deals with the transfer of information between successive partnerships. However, the Committee understands that this was included in order to deal with the peculiarities of the law of partnership rather than as a substantive information sharing provision. The Committee will therefore confine its comments to the sharing of information between related bodies corporate pursuant to clause 13B.

## Criticisms of clause 13B

- 9.6 Several submissions were received from individuals criticising the inclusion of a facility to allow the sharing of information between related bodies corporate.<sup>4</sup> For example, Mr Richard Sanders criticised the exemptions in the Bill generally and said that he was ‘...totally opposed to the exceptions allowing large corporations to freely move data between their subsidiaries...’<sup>5</sup>
- 9.7 A number of organisations also criticised the provisions. The Australian Privacy Charter Council wrote that:

There is no justification for this broad exemption from the application of the collection and use & disclosure principles to transfers of information between organisations simply on the basis

2 See Item 35 of Schedule 1 of the Bill which repeals and substitutes subsection 6(8) of the *Privacy Act 1988*.

3 *Explanatory Memorandum* pp.75-76.

4 See submissions from Ms Karen Botten, *Submissions*, p.S18, Mr Steven Cowgill, *Submissions*, p.S118 and Mr Richard Sanders, *Submissions*, p.S205.

5 Richard Sanders, *Submissions*, p.S206.

of an arbitrary company law association. The structure of corporate groups is usually quite opaque to consumers and often bears no relation to functions, activities or lines of business.<sup>6</sup>

- 9.8 In oral evidence, the Council added that in its view the use of the concept of related bodies corporate was inappropriate as it had been developed specifically to be as broad as possible for use in another context that was unsuited to the needs of privacy protection.<sup>7</sup> In addition, it was argued that in any event the National Privacy Principles were drafted in such a way as to make clause 13B redundant.<sup>8</sup> That is, NPP 2 allows information to be used and disclosed provided the use or disclosure relates to the primary purpose of collection and the individual would reasonably expect the information to be used or disclosed in that way. If the disclosure between related bodies corporate falls within the ambit of NPP 2 it would not be an interference with privacy.<sup>9</sup>
- 9.9 The Victorian Government advised the Committee that it was concerned about the potential for abuse of the privacy of personal information through sharing of information by related bodies corporate.<sup>10</sup> It was argued that the exemption could:
- ...support practices that many in the community would see as intrusive. For example, the details about an individual's transactions with one member of a corporate group could be passed to every other member of the corporate group, compiled, analysed and then used for direct marketing purposes (permitted by NPP2.1(c)) without the prior knowledge or consent of the individual concerned.<sup>11</sup>
- 9.10 However, the Victorian Government agreed with the point made by the Australian Privacy Charter Council in relation to the freedom to share information among related bodies corporate already provided by NPP 2.<sup>12</sup>
- 9.11 Professor Graham Greenleaf of the University of New South Wales also noted the possibility of shared information being used for direct marketing purposes and recommended that the provision be removed or, failing that, amended to prevent direct marketing that is contrary to the

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6 Australian Privacy Charter Council, *Submissions*, p.S250.

7 Australian Privacy Charter Council, *Transcript*, p.167-168.

8 Australian Privacy Charter Council, *Transcript*, p.168.

9 Ibid.

10 Victorian Government, Department of State and Regional Development, *Submissions*, p.S198.

11 Ibid.

12 Victorian Government, Department of State and Regional Development, *Transcript*, p266.

individual's reasonable expectation at the time of the original collection of the personal information.<sup>13</sup>

9.12 The Communications Law Centre argued that the:

...concept of related bodies corporate was developed for the purposes of corporations law rather than privacy protection. ... It is unreasonable to expect that consumers would have any knowledge of the increasingly complex corporate links between businesses or any expectation that their personal information would be disclosed in this way. The provision is inconsistent with the core requirements of privacy protection...<sup>14</sup>

9.13 The Australian Privacy Foundation suggested to the Committee that the sharing of personal information should be:

...restricted to the reasonable expectations of customers. ... A privacy law that permits the unlimited exchange of information within large and diverse business groups is not protecting people's privacy – rather, it is giving the tick to massive privacy invasion.<sup>15</sup>

9.14 The Australian Consumers' Association appeared to endorse the view of the Australian Privacy Foundation in its submission which stated that the:

...effective extension of organisations to include entities related as defined under the Corporations Law makes the umbrella impossibly large for effective protection of consumers' rights to opt out of information sharing.<sup>16</sup>

9.15 The Association went on to recommend that clause 13B be amended to limit the availability of information sharing to 'the extent that it does not exceed the reasonable expectations of that individual.'<sup>17</sup>

9.16 In addition, the Delegation of the European Commission made a submission to the Committee expressing its concern that individuals are not able to opt-out of having their data shared amongst members of a corporate group.<sup>18</sup> The Delegation noted that its concern in this regard was heightened by the inclusion of the small business exemption in the Bill.<sup>19</sup>

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13 Professor Graham Greenleaf, *Submissions*, p.S307.

14 Communications Law Centre, *Submissions*, p.S336.

15 Australian Privacy Foundation, *Submissions*, p.S521.

16 Australian Consumers' Association, *Submissions*, p.S88.

17 Ibid.

18 Delegation of the European Commission, *Submissions*, p.S613.

19 Ibid.

## Support for clause 13B

- 9.17 Support for the retention of the ability to share information between related bodies corporate was expressed by a number of businesses and business organisations. Coles Myer, for example, called for some changes to the way the provisions is drafted but noted 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...then the customers expectations are being met.<sup>20</sup>

- 9.18 AMP argued that clause 13B reflected commercial reality and would allow it to operate in a way that would reflect best privacy practice.<sup>21</sup> AMP also endorsed the exclusion of sensitive information from clause 13B and submitted that:

Large corporate groups, such as AMP, are made up of separate legal entities. These arrangements exist for technical legal purposes and may change from time to time. We present ourselves to our customers and to Australia at large, however, under a single brand. We want our customers to associate high quality products, seamless service standards and high levels of privacy protection with the AMP brand. We do not expect or require them to be aware of which particular legal entity within the corporate group they may be dealing with and believe it would be unreasonable to do so.<sup>22</sup>

- 9.19 The Australian Bankers’ Association submitted that a ‘fundamental concept in the Bill is the ability of related companies in a corporate group to share and use customer information responsibly.’<sup>23</sup> The Association endorsed the idea advanced in the Bill and the Explanatory Memorandum that the primary purpose of collection of information shared around a corporate group is the primary purpose of the original collecting

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20 Coles Myer, *Submissions*, p.S41.

21 AMP, *Submissions*, p.S177.

22 Ibid.

23 Australian Bankers’ Association, *Submissions*, p.S555.

organisation.<sup>24</sup> However, the Association argued that the Bill should explicitly recognise that there may be more than one primary purpose of collection.<sup>25</sup>

9.20 The submission made by the Australian Chamber of Commerce and Industry also supported the inclusion of clause 13B noting that it:

...is a reality of Australian corporate life that many Australian businesses operate separate legal entities under the umbrella of corporate groups. ACCI believes the proposed provisions on the use of personal information by related bodies corporate will be adequate to cope with current commercial practices.<sup>26</sup>

## Conclusion

9.21 The Committee accepts that it is not realistic to ignore the reality that many businesses structure themselves in a way that uses more than one legal entity. The Committee acknowledges that the exact structure of many businesses may not be apparent to consumers, but believes this is justification for requiring companies to provide greater information about the likely use of any data collected, rather than preventing them from sharing information with other members of their corporate groups.

### Recommendation 21

**The Committee recommends that the Privacy Commissioner establish guidelines for use by companies in determining the extent of information they should provide to consumers pursuant to National Privacy Principle 1 about the nature of their corporate groups and the information that will be shared with the members of that group.**

9.22 These guidelines should specify that a company must provide sufficient information to consumers to allow them, if they choose to do so, to provide their informed consent to the collection of the information. The Committee believes that if adequate information as to the intention and relationships of the collecting organisation is made available to consumers, many of the concerns noted above will be satisfied.

9.23 The Committee understands that, as result of the operation of NPP 2.3, an organisation that receives personal information pursuant to the related bodies corporate provisions must treat the primary purpose for collection of the original collector of the information as the primary purpose for

24 Australian Bankers' Association, *Submissions*, p.S556.

25 Ibid.

26 Australian Chamber of Commerce and Industry, *Submissions*, p.S567.

which the related body collected the information. This means that the primary purpose flows with the information and binds the subsequent recipient of the information in its use of that information.

- 9.24 The Committee's acceptance of the retention of the related bodies corporate provisions is based on this understanding. If the Committee is incorrect in its interpretation, it suggests that the Government clarify that the intention of the legislation accords with the Committee's view.

## Interaction of Exemptions

- 9.25 The interaction of the related bodies corporate exemption with the other exemptions of the Bill is a matter of serious concern to the Committee. The Committee considers that it would be unacceptable if the effect of one of the general exemptions in the Bill could be transferred to another organisation by the means of the related bodies corporate provisions.

## Small business exemption

- 9.26 The small business exemption provides that a small business with an annual turnover of \$3 million or less will be exempt from the Bill unless it:
- provides a health service and holds health information;
  - discloses personal information for a benefit service or advantage;
  - provides a benefit, service or advantage to collect personal information;
  - is a contracted service provider for a Commonwealth contract; or
  - is prescribed by regulation.<sup>27</sup>
- 9.27 The Committee has recommended that the exemption be clarified to ensure that a small business will lose its exemption if it collects or discloses personal information without the consent of the individual concerned. In addition, the Committee has recommended that the exemption be limited in relation to the handling of employee records by small business employers.<sup>28</sup>
- 9.28 If the Committee's recommendations are implemented, it is the Committee's understanding that a small business that sought to share information with a related body corporate without the consent of the data subject would lose the benefit of the small business exemption. In such a

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<sup>27</sup> See clauses 6D and 6E of the Bill.

<sup>28</sup> See Chapters 2 and 3.

situation, both the small business and the recipient organisation would be subject to the National Privacy Principles.

- 9.29 Where the consent of the individual to whom the information relates is obtained, the small business would retain its exemption, but the recipient business would be required to comply with all of the National Privacy Principles other than those dealing with the collection of information (National Privacy Principle 1).
- 9.30 The Committee has identified this as a possible flaw in the provisions. The related body corporate exemption effectively removes the requirement of the collecting organisation to observe NPP 1. This means that the organisation may not have to take steps to provide the information to the individual that the Principle requires. This issue is discussed further beginning at paragraph 9.45.

### **Employee records exemption**

- 9.31 The employee records exemption provides that acts or practices of an organisation will be exempt if the acts or practices are directly related to:
- a current or former employment relationship; and
  - an employee record.<sup>29</sup>
- 9.32 The Committee's suggested amendments to the exemption in Chapter 3 will, if adopted, limit the employee records exemption by restricting it to a particular subset of employee records which will be called 'exempt employee records'.
- 9.33 The Committee understands that there is limited capacity for a related body corporate of an employer to obtain any unintended benefit from the employee records exemption. The exemption is limited to acts or practices directly related to a particular employment relationship. A company that received an employee record from an employer company to which it was related could not then make use of the employee record exemption as the recipient company would not be a party to the requisite employment relationship.
- 9.34 However, the Committee notes that the receiving organisation may not have to comply with NPP 1 in respect of the information that is provided to it. This issue is discussed further beginning at paragraph 9.45.

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29 See clause 7B(3) of the Bill.

## Media exemption

- 9.35 The media exemption provides that acts and practices done in the course of journalism will be exempt from the Bill.<sup>30</sup>
- 9.36 The Committee's recommendations will not alter this aspect of the exemption, although they will create additional requirements before a journalist or media organisation can claim the exemption.<sup>31</sup>
- 9.37 Media organisations may be part of a large corporate group. The potential exists, therefore, for information to be shared between a media organisation and its related affiliates. However, because the exemption is expressed to be only available in relation to acts and practices done in the course of journalism, the Committee understands that information passed from a media organisation to a related entity such as a marketing company would not carry with it the benefit of the exemption.
- 9.38 The Committee's notes that its understanding of the effect of the exemption is shared by the Australian Press Council as discussed in Chapter 4 above.
- 9.39 Again however, the receiving entity may not have to comply with the requirements of NPP 1. This issue is discussed further beginning at paragraph 9.45.

## Political acts and practices exemption

- 9.40 The political acts and practices exemption provides that, in relation to activities connected with an election, referendum or participation in another aspect of the political process:
- members of parliament; and
  - contractors, subcontractors and volunteers of members of parliaments and political parties
- are exempt from the operation of the National Privacy Principles.<sup>32</sup>
- 9.41 The Committee has recommended a number of amendments to this exemption to clarify that its operation is in relation to electoral or parliamentary matters.<sup>33</sup> The Committee has also recommended restricting the sale or disclosure of personal information obtained by virtue of the exemption.

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30 See clause 7B(4) of the Bill.

31 See Chapter 4.

32 See clause 7C of the Bill.

33 See Chapter 5.

- 9.42 The Committee understands that the exemption is limited to particular activities by organisations that are in a particular relationship or position. This, in the Committee's view, should be effective to prevent any flow on effect of the exemption. For example, a company contracted by an MP to conduct a mail out campaign will only be exempt in relation to its handling of personal information provided its acts and practices remain connected to the relevant activities of an MP or political party.
- 9.43 If that company sought to share information acquired while working for the MP with a related entity, the related entity would not be in the requisite relationship to claim the political acts and practices exemption.
- 9.44 Again however, the receiving entity may not have to comply with the requirements of NPP 1. This issue is discussed further beginning at paragraph 9.45.

### **National Privacy Principle 1**

- 9.45 National Privacy Principle 1 (NPP 1) deals with the collection of personal information. It requires organisations collecting personal information to provide certain information to the individual whose information has been collected such as the identity of the organisation, how to contact it and the purpose of the collection.
- 9.46 Clause 13B allows bodies corporate to collect personal information from other related bodies corporate without observing the requirements of NPP 1. The explanatory memorandum to the Bill notes that the original collecting organisation must comply with NPP 1 before it will be in a position to be able to disclose personal information to its related bodies corporate.<sup>34</sup> This gives individuals the opportunity to know who has their personal information, why it was collected and to whom it would normally be passed.
- 9.47 However, the Committee understands that an organisation that benefits from an exemption under the Bill will not have to comply with NPP 1 when it collects personal information. In that event, the organisation can pass the information to a related body corporate and, although the related entity will have to comply with all of the other National Privacy Principles, it will not have to provide the information required by NPP 1.
- 9.48 This potentially leaves the individual in a situation where their personal information has been collected without their knowledge and has subsequently been passed on. Although the recipient organisation has to provide a right of access and correction to the personal information it

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34 *Explanatory Memorandum*, p.75.

holds pursuant to NPP 6, there is no way for the individual to be aware that it holds the information.

- 9.49 The Committee considers this to be an inadequacy in the way that the related bodies corporate exemption relates to the rest of the Bill. While the need for the exemption is recognised, it should not come at the expense of the right of individuals to be aware of the information held about them simply because the original collector qualified for some other form of exemption.

## Conclusion

- 9.50 The Committee's understanding of the relevant provisions is that if a body corporate subject to an exemption passes information to a related body corporate the recipient does not also gain the benefit of the exemption other than in the case of NPP 1 which is discussed above. However, if the Committee's interpretation is not correct, it urges the Government to ensure that there is no flow on benefit in the event that an exempt organisation passes personal information to a related body corporate.
- 9.51 In any event, as the interaction of the exemptions remains untested, the Committee therefore encourages the Government and the Privacy Commissioner to monitor the interaction of each of the exemptions in the Bill and the operation of clause 13B in order to ensure that any unforeseen problems can be identified and dealt with at the next review of this legislation.
- 9.52 The Committee is extremely concerned about the possibility of a situation arising where neither the original collecting organisation or a related body corporate to whom the information is passed is obliged to provide the information required by NPP 1 to the individual to whom the information relates.
- 9.53 The Committee recommends that the provisions dealing with the exchange of information between related bodies corporate be amended so as to ensure that, in the event an organisation disclosing personal information to a related body has not complied with NPP 1, the collecting related body must do so.

## Recommendation 22

**The Committee recommends that clause 13B of the Bill be amended to ensure that if an organisation that is not required to comply with National Privacy Principle 1 discloses personal information to a related body corporate, the collecting organisation is required to comply with National Privacy Principle 1 prior to disclosure.**

