PRIVACY AMENDMENT (ENHANCING PRIVACY PROTECTION) BILL 2012

Inquiry by House Standing Committee on Social Policy and Legal Affairs

AIIA Response

27 July 2012

INTRODUCTION

The Australian Information Industry Association (AIIA) is the peak national body representing suppliers and providers of a wide range of information technology and communications (ICT) products and services. Its membership comprises approximately 400 of the top international corporations as well as small to medium enterprises currently supplying innovative applications in all economic sectors in Australia. AIIA's National Board of Directors includes major multinational corporations doing business in Australia (see Appendix I).

AIIA welcomes this opportunity to provide comment in response to the House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into the New Privacy Amendment (Enhancing Privacy Protection) Bill 2012. AIIA is a strong supporter of privacy and is sensitive to protecting the privacy of individuals in a world where increasingly more communications and business transactions occur online. We understand acutely, the need to ensure citizens feel confident and supported to engage in an online environment which they trust and which appropriately and transparently ensures protection of their privacy. We speak on behalf of all our members in this regard.

We particularly welcome the introduction of a single set of privacy principles - the new Australian Privacy Principles (APPs), which apply equally to the private and public sectors. We anticipate this will bring greater clarity to the privacy protection of individuals and the respective responsibilities of agencies and business.

Our comments in relation the Bill are outlined below.

Response

By way of background we would like to make clear, from the outset, that as an industry our primary interest is in ensuring that strong privacy safeguards and the continued development of smart ICT services coexist for the benefit of individuals, business and our national interests. In this context our current area of focus is in supporting the further development and take up of Cloud Computing.

Cloud Computing, where applications and infrastructure that are traditionally purchased, managed and maintained by individuals or enterprises, are hosted on the Internet. In a recent report commissioned by the AIIA and completed by KPMG, *Modelling the Economic Impact of Cloud Computing* (May 2012), data clearly showed that adoption of cloud computing across 75% of ICT spending would result in an increase in long-run GDP after 10 years of $3.32billion per annum. The report shows Australian businesses across many industries could reap substantial benefits through reduced capital, labour, operating and maintenance costs by adopting public cloud services. These benefits however, are a direct result of the economics of Cloud Computing which depend on reaching a large and diverse group of users from a relatively small number of strategically based data centres – potentially spread across the world. In other words, Cloud is by its nature global and

ubiquitous. Combined with the reality of an increasingly global economy, Australia must ensure that its legislative and policy frameworks are not barriers to our ability to be globally competitive and, indeed relevant to the ubiquitous 21st century digital economy.

With this in mind, AIIA's primary focus is on the implications of APP 8: Cross-Border Disclose of Personal Information. APP 8.1 requires an APP entity, before disclosing personal information to a an overseas entity, to take 'reasonable' steps in the circumstances to ensure the overseas recipient does not breach the APPs in relation to that information (see APP8.1 and Explanatory memorandum pg 83). While AIIA supports the intent of APP 8 to ensure organizations are held accountable for the information they share across borders, the effect of 8.1 (in combination with s16C) is that the entity disclosing information about an individual will be liable for privacy breaches even though they may have taken reasonable steps to ensure the overseas recipient complies with the APP. AIIA acknowledges the Government's objective of moving away from the current 'adequacy approach' (as per NPP 9) to an accountability approach consistent with APEC and Canada but would point out that unlike the proposed APP legislation, the APEC principles *does not* impose a liability on the entity transferring information to a third party where the entity exercised due diligence and took reasonable steps to ensure compliance by the overseas entity. This is a fundamental difference in approach. We acknowledge that the Australian entity may have recourse through contracts with their overseas provider, but make the point that this strict standard will undoubtedly impact the adoption of Cloud services that are hosted overseas. Members are concerned about the practical ramifications of the combination of APP8 and s 16C to the extent we would propose that s 16C is brought into alignment with the APEC accountability principle, which removes absolute obligation on the data transferor with respect the acts of the data recipient. Given the role Australia played in helping to draft the APEC principle, amendment of the legislation along these lines is entirely consistent with Australia's overall positioning on the issue of cross-border information flows.

An alternative option would be a safe harbor provision in which an entity could, as a defense to action against them for a data breach perpetrated by an overseas entity to whom data has been disclosed, put forward evidence that demonstrated that they had taken action that in the circumstances was reasonable. Alternatively the entity could show it has a contractual provision with the overseas entity whereby the overseas entity agrees to indemnify the domestic entity for privacy breaches that occur as a result of its negligence or even as a result of its acts or omissions. We would want to exclude from this provision breaches that are a result of hacking or illegal access to data. Such provisions are very similar to laws in other areas such as ISP responsibility.

Further to the point regarding contractual arrangements between Australian entities and overseas recipients of data, we would suggest that the Explanatory Memorandum strongly advocate the need for robust contractual arrangements in these instances, in any case.

In regards to APP 8.2 we note that this does not explicitly include an exception for international arbitration. While APP 8.2 provides that APP 8.1 (and the related liability requirements) do not apply where the recipient of information is subject to a law or a scheme that has the same

intention of protecting personal information as the APPs and where there are mechanisms for individuals to take action to enforce that protection, the provision to allow for an exception to APP 8.1 where there is recourse through international arbitration is not clear. To be consistent with other APPs where international arbitration can be relied upon, APP 8.2 needs to be clarified.

Some members have also sought clarification of APP7 related to direct marketing. APP 7.2 and 7.3 each require that an opt-out of direct marketing be provided. However, it is not clear that the opt-out be from the recipient of direct marketing that relies on personal information. It currently appears to be drafted as an opt-out of direct marketing altogether. Should direct marketing be interpreted to include advertisements, this would potentially undermine advertising based business models. We therefore recommend that APPs 7.2 and 7.3 are clarified to require opt-out of direct marketing that relies specifically on personal information. This will allow advertisements (in an online environment) to be served that are not based on personal information. This is particularly important where the advertisements are part of a service that is free to access and hence ad-supported.

APPENDIX 1

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