



Australian Government

Office of the Privacy Commissioner

**Communications Legislation
Amendment (Information
Sharing and Datacasting) Bill
2007**

**Submission to the
Senate Environment,
Communications, Information
Technology and the Arts
Committee**

July 2007

1. Office of the Privacy Commissioner

The Office of the Privacy Commissioner (the Office) is an independent statutory body whose purpose is to promote and protect privacy in Australia. The Office, established under the *Privacy Act 1988* (Cth), has responsibilities for the protection of individuals' personal information that is handled by Australian and ACT government agencies, and personal information held by all large private sector organisations, health service providers and some small businesses. The Office also has responsibilities under the Privacy Act in relation to credit worthiness information held by credit reporting agencies and credit providers, and personal tax file numbers used by individuals and organisations.

2. Introduction

In general where an agency or, in the case of the Australian Communications and Media Authority (ACMA), a statutory authority proposes to disclose information they collect to an expanded group of agencies, bodies or persons, the Office believes that where the personal information of individuals will be part of those disclosures, adequate notice should be provided about the expanded use and disclosure of that information.

The Office recognises that regulators and enforcement bodies play an important role in protecting the community and its individuals against loss and harm. However, the Office submits that individuals' privacy rights should be appropriately balanced against these aims.

The Office suggests that the authorised disclosures that will be allowable under the Bill should be balanced by ensuring as far as possible that personal information included in those disclosures remains protected by the Privacy Act 1988.

3. Background

The stated purpose of *the Communications Legislation Amendment (Information Sharing and Datacasting) Bill 2007* (the Bill) is to authorise ACMA to disclose certain information, described as 'authorised disclosure information', collected by ACMA in connection with the performance of its functions or the exercise of its powers under various Acts, including in confidence information. Under section 59 of the Bill ACMA is able to disclose this information to, inter alia, various government agencies at the federal, State and Territory level, the Telecommunications Industry Ombudsman and to overseas media and communication regulators.

4. The proposed Amendment Bill

4.1 Section 3 - Definition of Authorised Disclosure Information / Underlying Intent

The Office notes that the Bill's intent appears to be primarily targeted at commercial transaction information and that the authorised disclosure of personal information has not been addressed in the Bill. The Office understands that the sort of information that is expected to be disclosed under the provisions of the Bill is commercially sensitive or confidential information.

The Office notes that the Bill does not authorise disclosure of information that is prohibited under Part 13 of the *Telecommunications Act 1997* and welcomes the fact that the Bill includes this express prohibition. However, the Office suggests that, irrespective of the prohibition under Part 13, it is probable that some personal information will be disclosed under the information sharing arrangement, for example the personal information of directors and small business operators.

While the Bill does not include provisions relating to the collection of personal information or compliance with the requirements of the Privacy Act 1988, the Office notes that the Explanatory Memorandum references the definition of personal information in section 6(1) in the Privacy Act 1988 (the Privacy Act) and notes that the Privacy Act will apply to the extent that personal information is included in authorised disclosure information. The Office submits that this intention could be explicitly stated in the Bill.

4.2 Part 7A Disclosure of Information

The Office notes that the Bill allows for personal information to be disclosed to agencies and bodies in jurisdictions that do not have privacy regulation. For example, within Australia, Queensland, South Australia and Western Australia do not currently have privacy legislation. Further, under clause 59D(1)(o) media regulators in overseas jurisdictions are entitled to receive authorised disclosure information but may not be covered by privacy regulations similar to the Information Privacy Principles (IPPs) in the Privacy Act. Essentially this means that the information disclosed may not be subject to privacy protections that may prevent for example unintended secondary uses of individuals' personal information. Further, individuals will not be protected by principles that ensure that the accuracy and currency of information is maintained and may lose the rights they currently have under the Privacy Act to seek an investigation and remedy for misuse or mishandling of their personal information.

As the majority of 'authorised disclosure information' will be commercial in nature, the Office asks whether the proposal could achieve its objectives by excluding personal information. Alternatively, the Office recommends that the Bill be amended to provide that, where personal information is disclosed; that those disclosures are made to jurisdictions that are assessed, in ACMA's reasonable belief, to be subject to a law, binding scheme or contract which effectively upholds principles for fair handling of the information that are substantially similar to the IPPs. This requirement is modelled on the

transborder data flow obligations that exist for private sector organisations under National Privacy Principle 9,

Where those jurisdictions are assessed not to be subject to similar privacy laws, the Office suggests that they could be made subject to an agreement under s59H which includes equivalent privacy obligations to the IPPs.

4.3 Section 59H Ability to impose conditions

This clause provides for regulations to be made that could allow the conditions to be imposed on authorised disclosures made by ACMA. The Office considers that this clause could provide a mechanism to impose privacy obligations, for example at least equivalent to those that appear in the Privacy Act, in relation to disclosures of authorised information to jurisdictions not regulated by the Privacy Act.

The Office submits that this clause should expressly provide for the privacy of individuals to be a matter of consideration for the Chair of ACMA and suggests that the power to make regulations under this clause could include a process of consultation with the Privacy Commissioner.

4.4 Disclosure of publicly available information

Clause 59F in the Bill states that an ACMA official may disclose authorised disclosure information if it is already publicly available. The Office considers that this aspect of the Bill is at variance with the IPPs. The Privacy Act provides that if an agency collects publicly available personal information such as from a public register or a newspaper, the agency must comply with the IPPs regardless of whether the information is also publicly available. The Office suggests that further consideration be given to excluding personal information from the operation of clause 59F.

Key Recommendations

The Office submits that privacy protections should be balanced against investigation and enforcement activities. Further, we suggest that encouraging exempt agencies and bodies to implement standards for the handling of personal information will support better decision-making through improved data quality.

With these issues in mind, the Office makes the following recommendations:

1. The Office submits that the reference to the definition of personal information and compliance with the Privacy Act should appear within the Bill;
2. In terms of authorised disclosure information, the Office suggests that:
 - consideration be given to expressly excluding personal information from being authorised disclosure information; or
 - amending the Bill to require jurisdictions to be assessed as having substantially similar principles for fair handling of the information to the IPPs; or be made subject to an agreement under s59H which includes equivalent privacy obligations to the IPPs;

3. The regulation making powers under clause s59H should expressly provide for the privacy of individuals to be a matter of consideration for the Chair of ACMA and the process include consultation with the Privacy Commissioner; and
4. Further consideration be given to excluding personal information from the operation of clause 59F.