



Government and Regulatory Affairs

Level 22, 100 Queen Street

Melbourne VIC 3000

Phone 03 9273 6323

Fax 03 9273 4899

www.anz.com

nashj@anz.com

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Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600
Australia

Dear Sir/Madam

Re: Inquiry into the Privacy Act 1988

ANZ appreciates the opportunity to provide comments to the Senate Legal and Constitutional Committee Inquiry into the Privacy Act.

ANZ is interested in Terms of Reference (b) and (c). In response to these issues, ANZ provides with this letter a submission to the Office of the Federal Privacy Commissioner ('OFPC') which was lodged in December 2004. This submission was in response to the OFPC's ongoing review of the private sector provisions of the Privacy Act 1988 (Cth) ('the Act').

ANZ is not experiencing any difficulty in complying with the Act and believes the private sector provisions are working well. As it is early days in the life of these provisions, ANZ believes it is premature to make legislative changes at this stage. ANZ supports improving the effectiveness of the private sector regime and believes this can be achieved through continued industry liaison with the OFPC on measures to improve compliance, including the clarification of National Privacy Principles where appropriate.

Please contact me on 03 9273 6323 if you would like to discuss ANZ's submission.

Yours sincerely

Jane Nash
Head of Government and Regulatory Affairs

Review of the
Private Sector Provisions of the
Commonwealth Privacy Act 1988

Submission to the Office of the Federal
Privacy Commissioner

December 2004



Introduction

ANZ takes its privacy responsibilities very seriously as it goes to the heart of its desire to strengthen our customers' and the wider community's trust in us as a major Australian institution. ANZ recognises that its business depends on the ability to protect and responsibly use customer information.

ANZ appreciates the opportunity we have had to participate in policy discussion in recent years at the Federal level as the framework was developed for privacy protection employed nationally. On-going discussions with the Privacy Commissioner have led to continued refinements in compliance with the Act.

ANZ is pleased to participate in this review process, which affords the opportunity to work through the few practical barriers to implementation we have experienced. We have also identified a few areas where further guidance from the Office of the Federal Privacy Commissioner (OFPC) on the National Privacy Principles (NPPs) would be useful.

Overall, in ANZ's experience the private sector provisions in the Act are working well in the banking sector. It is very early days in the life of the Privacy Act and ANZ would support further work in the area of improving compliance and clarifying the intent and implementation of the NPPs (where that is necessary) but it is premature to be considering legislative change to the Act as part of this review.

Bankers' duty of confidentiality

It is important to recognise in any discussion about privacy protection that Australian banks are bound by a common law duty of confidentiality concerning their customers' affairs. The duty is an implied term of every bank and customer contract and requires that the bank must not disclose the affairs of its customer.

The banker's duty of confidentiality sits above the legislative provisions of the private sector provisions of the *Commonwealth Privacy Act 1988* (the Act) and must be complied with before a bank is able to rely on the provisions of the Act. There are four exceptions to the duty. The bank may disclose:

- with the express or implied consent of the customer,
- under compulsion of law,
- pursuant to a public duty to disclose, and
- where it is in the interests of the bank to disclose (this applies in narrow circumstances such as when a bank becomes involved in legal action that requires it to disclose information to the Court).

ANZ's compliance with the Act

Although it is early days in the life of the Privacy Act, ANZ is not experiencing any major difficulty in complying with the Act and believes that the NPPs and other

provisions are generally working well. Where areas for improvement can be identified, especially for financial services, this points to the need for improved understanding and compliance as opposed to any failure with the legislation or a need for further legislative response.

Few complaints

An analysis of complaints reported through ANZ's formal complaint handling system suggests that privacy-related complaints to ANZ represented less than 1% of total complaints received for the period October 2003-September 2004. Most complaints arise from human error (such as ANZ staff, on occasion, inadvertently disclosing information to a third party) or technology (e.g. the wrong letter being included with the correct letter in an envelope mailed to a customer). ANZ has a rigorous process in place to resolve complaints and to take appropriate action with our staff and systems, including rectifying any technological issues or identifying the need for further training.

Staff training

ANZ internal testing indicates a high level of compliance with the Privacy Act. All staff are required to undertake privacy training to ensure awareness of, and compliance with, the Privacy Act. The training is delivered via ANZ's online system called eTrain. ANZ Group Compliance tracks the completion of privacy training and reviews and updates the privacy training periodically. Where breaches occur, staff are counseled and any training needs identified and rectified.

Obtaining consent

Our customers expect periodic communication from their bank given the existing relationship that is established. ANZ seeks to communicate with its customers about services and products, especially as they are improved or new offers arise that may be beneficial for a customer's circumstances.

Following consultation with the OFPC, and an assessment that, for financial institutions, very few uses and disclosures fall outside the primary purpose of collection rule, ANZ simplified its privacy clause to ensure consents are only obtained where they are needed. ANZ also removed, wherever possible, consents from Terms and Conditions, and placed them in documents (e.g. application forms and signature cards) to which customers actively agree. This means the customer is providing specific consent and as a result, the consent process is more transparent to the customer.

ANZ believes the opt out provisions for customers to decline receiving marketing material from us are working well. Around five per cent of ANZ's customers have elected, to date, not to receive direct marketing material from ANZ. Given that the opt out provisions are working well and that it is still early days in the life of the Privacy Act, ANZ believes it is premature to consider whether there is a need for a legislated opt out provision – an issue raised in the OFPC Issues Paper. This would be inconsistent with the original intent of a 'light touch' regime based on privacy principles.

Should the OFPC identify issues needing further attention, ANZ remains willing to work through those issues as part of its on-going communication with the OFPC.

Issues for further consideration

Complying with anti-money laundering (AML)

The proposed new Australian anti-money laundering legislation, and specifically areas involving the collection of enhanced data gathering and potential disclosure for law enforcement purposes, will potentially raise tension with privacy obligations and create additional consumer impost. ANZ is of the view that the specific AML issues should be dealt with under the specific AML legislation. The OFPC has an opportunity to provide inter-departmental guidance to those discussions that impact on customer privacy with the aim of striking a balance between these important issues.

Transborder privacy

The OFPC could consider publishing advice on overseas jurisdictions with adequate privacy regimes.

Nationally consistent legislative framework

The Act delivered the critical public policy objective of a nationally consistent approach to privacy legislation that also permitted State and Territory laws to continue to operate so long as they are not directly inconsistent with the NPPs. ANZ strongly endorses this approach and the positive impact the Federal legislative framework has had, to date, in establishing this approach.

However, ANZ is concerned that a patchwork of State legislation may develop covering issues such as spamming, telecommunication interception and workplace surveillance. We are concerned that Australia will end up with differing laws between States that are confusing to customers and unnecessarily increase costs and compliance complexity for business. ANZ believes there is a role for the Federal Privacy Commissioner to ensure a nationally consistent approach to these issues that are consistent with the NPPs and consistent across State borders.

Workplace surveillance

An example of a trend towards state-based legislation is the issue of workplace surveillance. There are important reasons why banks need to carry out surveillance in the workplace. These reasons include protection and safety of the workplace, duties under legislation and detection of fraud and other criminal and security related activities. Banks and other authorised deposit taking institutions have prudential obligations with respect to operational risk and business continuity management. Prudent management of risks such as technological risk, reputational risk, fraud, compliance risk, legal risk, outsourcing risk, business continuity planning and key person risk is an essential part of a bank's prudential obligations. Monitoring of banks' systems and activities are necessary elements for properly managing these risks.

The Privacy Act private sector amendments were introduced for a number of reasons including because individual States were proposing to enact their own legislation. The States agreed at the time that acceptable national legislation governing the private sector was the preferred alternative and the Privacy Act amendments were the result.

In recent developments, NSW has released an exposure draft of a *Workplace Surveillance Bill 2004* (NSW) and the Victorian Law Reform Commission is considering regulatory options related to surveillance in the Victorian workplace.

Should NSW or Victoria introduce their own workplace privacy regulation, this would re-open the prospect of non-uniform laws throughout Australia. Nationally operating entities, such as banks, could be subjected to contradictory laws affecting their national workforces. This would be likely to create significant additional compliance costs due to systems modifications, altered practices and staff training in order to manage the differences and ensure compliance. A state-by-state approach also fails to recognise that technology does not recognise borders, and the provisions in these developments ignore the technologically neutral objective of the Federal Privacy Act. On this last point, technology neutrality is an essential principle of the Act and assists organisations to comply with the Act. It also maintains the Act's relevance regardless of technology developments. Specifically requiring privacy requirements on systems could destroy this principle and result in a difficult to administer compliance framework for organisations.

Under the Privacy Act the Privacy Commissioner has powers to develop guidelines on activities of organisations that may impact the privacy of the individual. The Privacy Commissioner also has a broad role for recommending legislative or administrative action in the interests of privacy of individuals.

While recognising that State-based consideration of legislation on this issue derives from a desire to ensure privacy protection for workers, a self-regulatory option involving nationally applicable best practice guidelines would be preferable. For example, there would be scope for the Privacy Commissioner, through a consultative process, to develop guidance for employers on processes for carrying out workplace surveillance. The issue of workplace privacy could be dealt with in this way and so avoid a patchwork of State and Territory legislation while delivering an agreed standard of privacy protection for workers balanced with the needs of employers to protect their business and customers.

National consistency in complaint handling

On occasions, customers with privacy complaints may choose to go to the Banking and Financial Services Ombudsman (BFSO) who also handles privacy complaints. Recently we had a case where the customer took part of their complaint to the BFSO and the privacy section to the Privacy Commissioner. With the customer's permission, ANZ approached the Privacy Commissioner to enquire whether we could address the privacy complaints at a conciliation conference held between the customer, the bank and the BFSO. The Privacy Commissioner was comfortable with this and all issues were resolved at the

conciliation conference. This case points to the imperative of good communication between privacy bodies, complainants and the body complained about as well as the need for coordination between privacy and other bodies in managing complaints.

Resourcing the Office of the Privacy Commissioner

ANZ has established a good working relationship with the OFPC and in our experience its decision making process is sound. The area where improvement could be made is the time taken to:

- advise us a complaint has been received (e.g. in one case the complainant wrote to the Commissioner and 12 months elapsed before the complaint was forwarded to ANZ); and
- resolve the complaint.

We acknowledge the OFPC is aware of these issues. Swift resolution of complaints is essential to ensure the privacy regime in Australia is held in high regard by complainants, other stakeholders and the community more generally. Delays can have the unintended impact of undermining trust in the regime and lead to calls for a stronger legislative approach, when all that is needed is full use of existing powers and processes. Delays can also impact the bank's relationship with its customer, especially where we are unaware a complaint has been made. ANZ would support additional resources for the OFPC if that were required to ensure satisfactory timeframes for the resolution of complaints.

A well resourced and funded OFPC could also strengthen its leadership role in ensuring a nationally consistent approach to privacy, and related, legislation, across State and Territory jurisdictions. Leadership through guidance notes and other best practice benchmarking would be very helpful to the private sector in interpreting and complying with some of the more challenging aspects of the practical implementation of the Act.

Conclusion

In ANZ's experience, we believe the provisions in the Privacy Act are working well in the banking sector. As it is early days in the implementation of the Act more time is needed to improve compliance, finetune the application of the NPPs and raise awareness in the community. Further legislative amendment is not required at this stage.

ANZ would be pleased to be involved in further discussions with the OFPC and can be contacted as follows:

Ms Jane Nash
Head of Government & Regulatory Affairs
ANZ
Level 22, 100 Queen Street
Melbourne VIC 3000
(03) 9273 6323
nashj@anz.com