

25 February 2005

Mr Owen Walsh
Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600

Dear Mr Walsh,

Senate Committee Inquiry Into the *Privacy Act 1988*

I am writing in reply to correspondence dated 14 December 2004 seeking ACCI's input into the Senate Legal and Constitutional Committee's inquiry into the *Privacy Act 1988*.

ACCI notes that the terms of reference for the inquiry overlap substantially with those of the Office of the Federal Privacy Commissioner's current review of the private sector provisions of the *Privacy Act*. Those issues of concern to business organisations were addressed in our submission to that review.

Accordingly, ACCI refers the Committee to that submission, which can be found attached to this correspondence.

To the extent that the terms of reference raise any issues outside of the Privacy Commissioner's review, in the main, these matters concern the adequacy of the resourcing of the Office of the Federal Privacy Commissioner. ACCI believes that the current level of resources dedicated to the Office are adequate.

If you need to discuss this matter further, please contact Greg Evans, Director of Industry Policy and Innovation, on (02) 6273 2311.

Yours sincerely



Peter Hendy
Chief Executive
Australia Chamber of Commerce Industry

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REVIEW OF THE PRIVATE SECTOR PROVISIONS OF THE PRIVACY ACT

*ACCI SUBMISSION
TO THE
OFFICE OF THE FEDERAL PRIVACY COMMISSIONER*

DECEMBER 2004

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Background

The Australian Chamber of Commerce and Industry (ACCI) is the peak council of Australian business associations. ACCI's members are employer organisations in all States and Territories and all major sectors of Australian industry.

Through our membership, ACCI represents over 350,000 businesses nation-wide, including the top 100 companies, over 55,000 enterprises employing between 20-100 people, and over 280,000 enterprises employing less than 20 people. This makes ACCI the largest and most representative business organisation in Australia.

Membership of ACCI comprises State and Territory Chambers of Commerce and national employer and industry associations. A list of the full membership of ACCI is attached.

Introduction

Australian business has a strong commitment to ensuring appropriate protection is given to personal information. Confidence that a business will respect an individual's right to privacy is fundamental to the relationship of trust between the parties as well as being an important aspect of service provision. Business generally has a culture that respects privacy and, all other considerations aside, this is probably the most important aspect of any enforcement mechanism.

The Privacy Commissioner's review of the private sector provisions provides a timely opportunity to consider the impact the new privacy regime has had upon business and the broader community. ACCI is grateful for the chance to comment upon these issues. Reflecting our position as a peak council of employer organisations, ACCI has chosen to focus its attention in this submission on the core issues of relevance to its constituency, specifically the small business exemption, voluntary codes and the compliance costs for business.

National Consistency

The privacy regime established by the Federal Privacy Act is Australia's most comprehensive in terms of its scope and national application. The operative provisions affect a wide range of industry sectors and potential relationships. There are, however, distinct and increasingly divergent privacy regimes being mandated by legislation introduced by State governments. The public sector in a number of States are subject to separate legislation, as are health service providers in the ACT and Victoria.

At the current stage of development in privacy law there is a tendency for the proliferation of specialist privacy regimes to emerge in relation to discrete subject areas. ACCI believes the general trend toward fragmentation is undesirable, having adverse consequences in terms of magnified compliance burdens, administrative duplication and overlap between the separate regimes. While initially government and industry bear the resulting costs they are eventually passed onto, and borne by, society at large.

All levels of government should work to ensure Australia has a single, national body of privacy law. In the limited circumstances where specific industry sectors require different privacy standards these issues should be addressed at the Federal level. Accordingly there must also be further effort to consolidate the number of regulatory bodies with responsibility for privacy matters, with the objective of all privacy matters being dealt with by the Office of the Federal Privacy Commissioner.

The provision of nationally consistent privacy standards will ensure that regulation is 'business neutral' and the same standards will apply for all businesses regardless of location. It will also ensure there is no duplication, conflict or differences in interpretation of regulatory standards between different levels of government.

National Privacy Principles

The approach to privacy regulation under the Privacy Act is reflected in the National Privacy Principles (NPPs). These very general rules are capable of applying effectively to a wide range of circumstances. Their breadth and generality permit them to evolve over time and adapt to new technologies and mediums of information dispersal. Effectively the operation of the Privacy Act grows organically with the society it inhabits.

In this context ACCI agrees with the high level principle approach articulated in the NPPs. Although subject to interpretational error it is simpler for businesses to comprehend and therefore aids understanding

and compliance. It is also arguable that a principles-based regulatory system favours compliance initiatives that are more in tune with the spirit of the law as opposed to mere technical compliance.

Nevertheless, despite being framed in general terms, the NPPs are reasonably prescriptive. The actual content of the NPPs and the obligations they impose are onerous, involving significant costs for business in dealing with the management and use of information. Prior to their introduction ACCI was afforded an opportunity to comment on the draft NPPs and noted at the time that the guidelines were very prescriptive and contrary to light touch approach ACCI had endorsed throughout the consultation process.

ACCI urges the Privacy Commissioner in conducting the review to undertake a thorough examination of the NPPs with a view to identifying opportunities for rationalisation and streamlining of their provisions. Compliance will be assisted where it is possible to convey the same broad principle in less convoluted terms. If necessary, further clarification of the operation of the principles can be provided in the supporting publications issued by the Office of the Federal Privacy Commissioner.

The issue of compliance costs is critically important to the business community. As all business costs are ultimately borne by the broader community they should also be of considerable concern to enlightened consumer advocates. ACCI is unaware of any significant research having been conducted to date on the costs involved in complying with the private sector provisions of the Privacy Act.

Without access to information of this nature, policy formulation takes place in a vacuum and is susceptible to poor outcomes. ACCI believes this to be unacceptable and urges the commissioning of an in-depth study to examine compliance costs for business. Such an endeavour should define costs to include not only direct outlays but also any increased levels of risk and potential opportunity costs involved in businesses choosing to no longer collect information.

ACCI believes the cost of compliance is considerable. Its exact quantification and detailed information about its nature would greatly assist remedial policy action as well as the administration of the private sector provisions. For these reasons ACCI urges that consideration be given to the production of a report on this issue.

Small Business Exemption

Small businesses with turnover of less than \$3 million are currently exempt from the application of the private sector provisions of the Privacy Act. Certain small businesses, however, are precluded from the exemption, specifically, those which provide health services, trade in personal information or are contracted to provide a service to the Commonwealth. In assessing the potential cost imposed by removing the small business exemption, it is necessary to gauge the number of businesses that fall beneath the \$3 million turnover threshold.

Unfortunately a data source outlining the distribution of businesses by turnover is not readily available. The Australian Bureau of Statistics (ABS), in most instances, defines a small business as a business employing less than 20 people. Accordingly, most data in ABS releases are published on this basis. The ABS reports that using this definition there were 1,233,200 private sector small businesses operating as at June 2003¹. The measure provides only partial assistance in determining the number of businesses that qualify for the small business exemption under the Privacy Act².

While there is a paucity of data on the distribution of businesses by turnover, some indication of the number of businesses with turnover below \$3 million may be discernable from the *Regional Small Business Statistics* publication³.

Regional Small Business Statistics presents experimental estimates of the number of small businesses within regions throughout Australia. The definition of small business used for this data set departs from the typical ABS criteria, defining small businesses as 'those businesses whose total income or expenses were between \$10,000 and \$5 million in the financial year'⁴.

On this basis there were 1,555,796 small businesses operating in Australia in the 2000-01 financial-year⁵. While total income is not exactly equivalent to turnover, the vast majority of income will be constituted by turnover. As such, the income definition used in this publication is a very close proxy to turnover. If we assume that the distribution of these 1,555,796 small businesses by income is uniform over the range of \$10,000 to \$5 million, and that income is equivalent

¹ Australian Bureau of Statistics, *Characteristics of Small Business*, April 2004.

² ACCI notes generally that, given the tendency to define eligibility for, and exemptions from, government programs in terms of turnover, policy formulation would be assisted if statistics were available on this basis.

³ Australian Bureau of Statistics, *Experimental Estimates Regional Small Business Statistics Cat. No. 5675.0*, February 2004.

⁴ *Ibid*, page 3.

⁵ *Ibid*, page 10.

to turnover, we would be led to conclude that in excess of 900,000 small businesses have a turnover of less than \$3 million.

However, there are legitimate reasons to believe that a disproportionate number of small businesses would be clustered around the lower end of the specified income range. Of the 1,233,200 small businesses, as defined by employment, 666,200 were non-employing and a further 389,100 employed between 1 and 4 people. It is reasonable to assume that operations of this nature are unlikely to exceed the \$3 million threshold. While recognising the considerable uncertainty stemming from deficiencies in the application of the official data, for the sake of argument we have conservatively assumed up to 1 million businesses currently qualify for the small business exemption.

Combining this overall measure with an estimate of the average costs of complying with the Privacy Act provides a broad indication of the aggregate cost to the economy of removing the small business exemption.

ACCI surveyed a number of law firms and determined that, although the cost could vary considerably depending upon the characteristics of the business, the fee for drafting a rudimentary privacy policy was approximated at \$1,500. Supporting documentation, in terms of reference material such as the *Federal Privacy Handbook* (officially endorsed by the Privacy Commission) and the *Privacy Compliance Toolkit* would cost an additional \$900.

In total then, basic fixed costs required to establish a simple privacy regime, at a bare minimum, would total \$2,400 for an individual business. When multiplied across 1 million small businesses, that amounts to an aggregate cost to the economy of \$2.4 billion dollars, or roughly 0.3 per cent of gross domestic product.

Ongoing costs would include implementation of the policy, staff training, updating of the policy and dealing with inevitable complaints (legitimate or otherwise), all of which would entail significant costs in terms of staff time and business resources. While no official data or study has been produced to measure these costs they are likely to equal or significantly exceed the modest estimate of \$2,400 for fixed costs, with the added detriment of being incurred year-after-year as an ongoing cost of business.

These calculations illustrate the potentially large aggregate costs imposed as a result of removing the small business exemption. Even modest costs, as the bare minimums examined here, when imposed on all Australian small businesses leads to sizeable aggregate compliance burdens.

Should removal of the exemption be considered, ACCI is of the view that government must implement an appropriate adjustment scheme for business across Australia, as well as providing additional relevant educational initiatives to explain obligations to small business. The adjustment scheme would need to be similar to the funding exercise that took place on the introduction of the GST and be designed to mitigate the once-off costs associated with the change.

ACCI notes that privacy compliance costs would be additional to the myriad of other compliance burdens stemming from legislative or regulatory requirements, be they in relation to occupational health and safety, industrial relations or, in particular, taxation. ACCI's *Pre-Election Survey 2004* revealed that the complexity of government regulations and their associated cost of compliance were a major or moderate concern for two out of three small businesses. A strong case should be stated before the Australian small business community is burdened any further.

In examining the legitimacy of the exemption it is important to recognise that small businesses may voluntarily submit to the application of the Privacy Act. Ultimately business behaviour is driven by the demands of its consumers. Where adherence to the NPPs in full provides a firm with a competitive advantage, increased custom or the capacity to charge a premium price there will be an incentive to opt-in which may outweigh additional costs. Allowing these businesses to make a determination on a case-by-case basis that the benefits to the business exceed the costs leads to efficient outcomes.

Compliance with legislation that provides little social benefit relative to its cost, imposes a net burden on society. Only 127 small businesses have elected to be bound by the NPPs. ACCI believes this to be strong *prima facie* evidence that in the overwhelming majority of cases, consumer concern regarding privacy issues involved in their dealings with small business have not been sufficient to offset the costs that would be incurred by addressing these concerns through adoption of the NPPs.

There are good reasons to suppose this to be the case, the principal one being that small businesses in general are typically not provided with enough personal information to give rise to customer concern regarding privacy. Those instances that may give rise to privacy concerns are either already covered by preclusion from the exemption or are able to be addressed by the power that exists to extend the operation of the Act.

When the private sector provisions of the Privacy Act were introduced small businesses generally were exempted on the basis that they were unlikely to pose a significant risk to privacy. The issue of cost was also cited as reason for the exemption, especially in the context of the

recently introduced GST. ACCI believes that these original justifications for the exemption have not changed in the two years since the relevant provisions of the Act commenced operation. The small business exemption is an important feature of the Privacy Act and should be retained.

However, ACCI believes that the original turnover threshold was set at too low a level. As established earlier, approximately 1.5 million businesses have a turnover below \$5 million. ACCI believes this to be a more appropriate level of turnover to be used as the cut-off point for the exemption. Firms of this size are much more likely to have a member of staff able to be dedicated to the administration of privacy matters. In any case, robust economic growth over the past several years, in addition to ongoing inflation, both argue for an upward revision to the threshold. ACCI supports an expansion in the small business exemption to encompass businesses with a turnover of up to \$5 million.

Voluntary Codes

The co-regulatory approach of the Privacy Act is reflected in the provision made for industry sectors to develop their own privacy codes. Generally speaking, provided the proposed code establishes obligations at least equivalent to the NPPs the Privacy Commissioner may approve the code. These codes are voluntary as a business must consent to their application before they become binding.

The voluntary code mechanism provides business with some degree of flexibility in terms of tailoring their privacy protection to the unique circumstances of their industry and the information they handle. ACCI is supportive of the nature of this system, it allows businesses to augment the basic standards outlined in the NPPs should an increased level of privacy be demanded by their clientele. In contrast to a mandatory, prescriptive regime, the use of voluntary codes permits increased responsiveness to changing consumer demands and more effective protection of privacy.

To date only three codes have been approved. Rather than stemming from a deficiency in the approval mechanism, ACCI would suggest this in part reflects the relative priority consumers place on privacy matters in dealing with business. Australian businesses generally have a good track record in terms of respecting the rights of their customers and as a result the demand for an increased standard is probably minimal.

Where consumers express demand for an increased privacy standard the Privacy Act is sufficiently flexibility to allow businesses to adopt additional undertakings which are then enforceable. Again, as in the

case of the number of small businesses opting into the privacy regime, businesses appear to have chosen not to adopt a higher standard on the basis that the benefits to consumers do not outweigh the costs. A low number of voluntary codes in such circumstances could therefore be viewed as a success rather than a failing.

There are, no doubt, other reasons for the absence of more extensive development and implementation of voluntary codes. The NPPs are arguably adequate to deal with most business transactions involving personal information. Indeed, they are reasonably comprehensive for a principles-based system.

In addition, voluntary codes take time to develop. In light of the fact the privacy provisions have only been operational for three years it would be premature to conclude there is any deficiency in the current legislative or administrative mechanisms. ACCI believes more time will need to pass before a definitive conclusion can be drawn in relation to the efficacy of voluntary codes.

Conclusion

The private sector privacy provisions recognise that privacy is not an absolute right and attempt to balance these interests with business efficiency. The terms of reference of the review have required the Privacy Commissioner to render an assessment of the success in achieving this accommodation.

ACCI believes it to be essentially impossible to reach a considered position on this issue until more detailed information is available on the size and nature of the business community's compliance burden. For that reason ACCI urges research be commissioned to investigate and report on these costs as an outcome of the review.

It is clear, however, that the balance of interests surrounding the exemption of small business from the privacy regime is in favour of at least the status quo. ACCI strongly supports the retention of the small business exemption. There has been no change in the original circumstances that gave rise to the exemption and on that basis alone its continuation is justified. The effluxion of time does however warrant an increase in the scope of the exemption to a turnover threshold of \$5 million.

On the issue of national consistency, ACCI believes that privacy issues are best dealt with at the Federal level by a single government regulator. An effort must be made to resist the emergence of multiple, separate State-based systems.

**APPENDIX A:
AUSTRALIAN CHAMBER OF COMMERCE AND
INDUSTRY MEMBERS**

Chambers of Commerce and Industry:

ACT & Region Chamber of Commerce and Industry
Australian Business Limited
Business SA
Chamber of Commerce and Industry of Western Australia (Inc)
Chamber of Commerce Northern Territory
Commerce Queensland
Employers First™
State Chamber of Commerce (NSW)
Tasmanian Chamber of Commerce and Industry Ltd
Victorian Employers' Chamber of Commerce and Industry

National Industry Associations:

Agribusiness Employers' Federation
Association of Consulting Engineers Australia
Australian Beverages Council Ltd
Australian Consumer and Specialty Products Association
Australian Entertainment Industry Association
Australian Hotels Association
Australian International Airlines Operations Group
Australian Made Campaign Limited
Australian Mines and Metals Association
Australian Paint Manufacturers' Federation Inc
Australian Retailers' Association
Housing Industry Association
Insurance Council of Australia
Investment and Financial Services Association Ltd
Master Builders Australia Inc
Master Plumbers' and Mechanical Services Association of Australia
National Electrical and Communications Association
National Retail Association Ltd
NSW Farmers Industrial Association
Oil Industry Industrial Association
Pharmacy Guild of Australia
Plastics and Chemicals Industries Association Inc
Printing Industries Association of Australia
Restaurant & Catering Australia
Standards Australia
Victorian Automobile Chamber of Commerce