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Submission to

Senate Finance and Public Administration Committee

Inquiry into

Australian Privacy Amendment Legislation –
Exposure Draft

on behalf of

Australian Association of National Advertisers

Submitted by: Scott McClellan
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Introduction to AANA

The Australian Association of National Advertisers (AANA) welcomes the release of the Australian Privacy Principles Exposure Draft and Companion Guide and the opportunity to comment on behalf of our advertising, marketing and media members.

AANA, the peak body for over 80 years, represents the common interests and obligations of companies across all business sectors involved in the advertising, marketing and media industry. AANA also serves to protect the rights of consumers in ensuring advertising and marketing communication is conducted responsibly, including through its development and administration of industry codes and the self-regulatory system.

Advertising and marketing plays a fundamental economic role in society and contributes in excess of \$30 billion to the Australian economy annually. It is the driver of consumer choice and, by promoting competition, helps consumers get better value for money. It enables innovation to be brought to market and stimulates economic growth and jobs. It provides substantial funding to support media and a variety of media content.

AANA supports policy developments to address community privacy concerns and highlights that advertisers and marketers in Australia recognise their role and obligations for social responsibility, including respecting the privacy of consumers. AANA strongly supports and drives effective self-regulatory initiatives that enable advertisers to respond to market and social challenges.

AANA encourages members and others to develop and implement privacy policies and procedures and has been proactive in the AANA self-regulatory scheme and best practice guidance for industry. For example;

- *AANA Code for Advertising & Marketing Communications to Children* requires (2.14) -

Privacy

If an Advertising or Marketing Communication indicates that personal information in relation to a Child will be collected, or if as a result of an Advertising and Marketing Communication, personal information of a Child will or is likely to be collected, then the Advertising or Marketing Communication must include a statement that the Child must obtain parental consent prior to engaging in any activity that will result in the disclosure of such personal information.

- *AANA Practice Guide, Managing Images of Children and Young People* focuses on the principles of consent, dignity and privacy/security¹.

AANA believes that advertisers, marketers and the media are proactively responding to Australian and international (community and government) concerns regarding privacy, including privacy in the online environment by adopting and implementing better practice and self-regulatory measures to meet community expectations. This is important given the speed of evolution (and revolution) of the online and digital environment and the acknowledged difficulties of implementing, and maintaining, adequate legislative protections.

Summary of Recommendations

¹ www.aana.com.au

Recommendation 1

AANA recommends that the new privacy legislation must be introduced with a generous transition period to enable advertisers, marketers and the media to adjust to the changed regulatory environment. This period should include the development of guidance on the application of the principles by the Office of the Privacy Commissioner prior to the legislation taking effect.

Recommendation 2

AANA recommends that the proposed definition of 'record' be amended to reflect its ordinary meaning as per the current definition.

Recommendation 3

AANA recommends that the Commissioner be requested to consult with stakeholders on the development of guidance material on the interpretation of 'personal information' as a priority.

Recommendation 4

AANA recommends that privacy policy requirements be limited to key information requirements and that guidance be separately developed on how to meet the obligation of this principle.

Recommendation 5

AANA recommends that Principle 7 be amended for consistency with other legislative approaches dealing with direct marketing.

Recommendation 6

AANA recommends removal of the small business exemption with appropriate transition arrangements and support.

Recommendation 7

AANA recommends provision 20 be amended to include exemptions to deal with mitigating factors.

General Comment

AANA considers that the Australian Privacy Principles and other proposed legislative amendments in their current draft form raise a number of areas that require further consideration, clarification and resolution before the proposed legislation is introduced. The current proposals also have the potential to impose a substantial practical compliance burden on Australian advertisers and marketers, including significant technical, policy and administrative responses by Australian businesses to ensure regulatory compliance. Some key issues of concern are outlined below.

Recommendation 1

AANA recommends that the new privacy legislation must be introduced with a generous transition period. This period should include the development of guidance on the application of the privacy principles by the Office of the Privacy Commissioner prior to the legislation taking effect.

Specific Comments

Definitions

- 'Record'

AANA considers the proposed definition to be a perverse interpretation and excessive extension of legislative powers.

AANA notes the *Australian Privacy Principles Companion Guide* (Guide) states that:

*The Australian Privacy Principles regulate collection, holding, use and disclosure of personal information that is included in records or generally available publications...So, while the definition of **record** is very broad, the Act does not cover the record itself. The Act will only regulate dealing with personal information that is contained in the record.*²

and

record This definition is similar to that used in the existing Privacy Act, however, it has been updated to reflect new technologies.³

Current definition:

record means:

- (a) a document; or
- (b) a database (however kept); or
- (c) a photograph or other pictorial representation of a person; ...

Proposed definition:

Record includes:

- (a) a document; or
- (b) an electronic or other device;...

AANA does not consider that the proposed definition is in any manner 'similar' to the current definition. The proposal to include 'devices' extends far beyond what can reasonably be considered to be a 'record', with significant implications for entities including. The potential practical implications in relation to investigations and enforcement action is self-evident.

AANA believes that a 'device' is the mechanism whereby records are held and may contain a range of information, including other personal information, which does not relate to any specific piece of personal information. An entity may have a need for a 'device' but not for a 'record' (current definition). For example, a computer server is a 'device' that will contain a significant range of various information including personal and non-personal. The implications in relation to the internet are evident if the internet itself, or substantial components of it, is the 'record'.

Recommendation 2

AANA recommends that the proposed definition of 'record' be amended to reflect its ordinary meaning as per the current definition.

- 'Personal Information'

² *Australian Privacy Principles Companion Guide*. Part 2 – General Matters, Coverage of the Act, Inclusion in records, p6.

³ *Ibid*, Part 6 – Definitions, p21.

AANA notes the intent that the proposed definition ‘...does not significantly change the scope of the existing concept in the existing Privacy Act.’⁴ However, AANA believes that a revised definition notably changes the scope of the current definition. This view is supported by both the ALRC and the government response to the ALRC report in their recommendations on the need for guidance on a revised definition:

- 6.63 Because of this, elements of the definition of ‘personal information’ will continue to give rise to theoretical uncertainty. While much information will fall clearly inside or outside the definition, there will be a need for ongoing practical guidance in relation to areas of uncertainty. The OPC has suggested that it issue further guidance on the meaning of ‘personal information’. The ALRC agrees that such guidance will be necessary to indicate how the definition operates in specific contexts. In particular, the ALRC recommends that the OPC develop and publish guidance on the meaning of ‘identified or reasonably identifiable’.⁵
- “...that guidance issued by the Office of the Privacy Commissioner would play an important role in assisting organisations, agencies and individuals to understand the application of the new definition, especially given the contextual nature of the definition.”⁶

Recommendation 3

AANA recommends that the Commissioner be requested to develop guidance on the interpretation of ‘personal information’ a priority.

2 Australian Privacy Principle 1 – open and transparent management of personal information

AANA considers that a number of the proposed regulatory obligations in relation to privacy policies and information relating to overseas recipients and (likely) countries (2(4)(f),(g)) are unnecessary and not useful information to an individual. AANA suggests that the intent of these provisions is to alert individuals that an overseas recipient may not be subject to privacy legislation similar to that of Australia. It is suggested that the provision could be revised to reflect that if an entity is likely to disclose personal information to an overseas recipient how this information will continue to be protected.

AANA submits that the provisions relating to privacy policy should be limited to core information requirements and that guidance, as is currently the case, be developed to assist entities in meeting their obligations. For example, the issue of identifying specific countries where feasible would be an example of good practice in meeting the obligations of this principle.

Recommendation 4

AANA recommends that privacy policy requirements are limited to key information

⁴ Australian Privacy Principles Companion Guide.

⁵ For Your Information: Australian Privacy Law and Practice (ALRC 108) – “**Recommendation 6-2** The Office of the Privacy Commissioner should develop and publish guidance on the meaning of ‘identified or reasonably identifiable’.”

⁶ Enhancing National Privacy Protection, recommendation 6.2, p24.

http://www.dpmc.gov.au/privacy/alrc_docs/stage1_austr_govt_response.pdf

requirements and that guidance be separately developed on how to meet the obligation of this principle.

8 Australian Privacy Principle 7 – direct marketing

AANA makes the general observation that non-direct marketing and advertising activities also have potential privacy impacts and considers that, in principle, other forms of advertising and marketing do not require specialized legislative treatment.

AANA considers that the principle as drafted will create difficulties for direct marketers. AANA notes that the requirements in relation to personal information collected from the individual (section 2) and that collected from another person (section 3) differs significantly from the approach taken in other legislation that applies to direct marketers, notably the *Spam Act 2003* and the *Do Not Call Register Act 2006*. The latter acts adopt the concept of ‘existing relationships’ and are well understood both in Australia and internationally.

Recommendation 5

AANA recommends that Principle 7 be amended for consistency with other legislative approaches dealing with direct marketing.

17 Meaning of organisation

AANA notes that the small business exemption will continue and that the Government is committed to re-considering the retention of that exemption in the future.

In consideration of commercial equity and meeting the privacy expectations of the Australian community AANA suggests that the exemption should not continue. Given the community’s exposure to privacy legislation and ongoing publicly raised concerns regarding privacy issues, particularly in the online environment AANA does not consider a further exemption to be justified. AANA understands, and shares, the potential concerns of small business regarding associated compliance costs, however, suggests that these concerns can be ameliorated through sufficient transition period and other significant government support including education and compliance assistance initiatives. In this matter we support the ALRC recommendation that called for the provision of support to small businesses to assist them in understanding and fulfilling their obligations under the Privacy Act. Examples presented included a national hotline for small businesses, education materials and templates to assist in preparing privacy policies.

Small business is the majority business type in Australia and has the highest business enterprise turnover. Many of these businesses operate wholly or partially online. The extent of the potential impact on privacy matters is illustrated by the following Australian Bureau of Statistics (as at June 2007) figures^{7, 8}:

⁷ Australian Bureau of Statistics, 8165.0 - *Counts of Australian Businesses, including Entries and Exits, Jun 2003 to Jun 2007*, www.abs.gov.au

⁸ Australian Bureau of Statistics, 8167.0 - *Selected Characteristics of Australian Business, 2006-07* <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/8167.0Main%20Features32006-07?opendocument&tabname=Summary&prodno=8167.0&issue=2006-07&num=&view=>

- There are approximately 2 million actively trading businesses in Australia;
- 94% of businesses had a turnover of less than \$2m⁹.
25% had a turnover between \$0-\$50k, 37% had a turnover from \$50-\$200k, 32% had a turnover from \$200-\$2m, and only 6% had a turnover above \$2m per annum.
- In the period June 2006-07, entry rates were highest for businesses with turnover of less than \$50k (21%).

Recommendation 6

AANA recommends the removal of the small business exemption with appropriate transition arrangements and support.

20 Acts and practices of overseas recipients of personal information

AANA understands the proposed provision to mean that an Australian entity will be liable to Australian individuals if the overseas recipient acts in a manner to interfere with the privacy of that individual. AANA raises concern of the regulatory burden placed on Australian entities in a global environment even in instances where those entities took reasonable steps to ensure that the overseas recipient would abide by the privacy principles, including through contractual arrangements. In the latter instance, Australian entities may have recourse through those contracts. However, should an Australian entity be liable if the overseas recipient's computer system is 'hacked' and information made publicly available? This type of unlawful act can happen to the most secure computer systems.

AANA does not believe the proposed provision fair or equitable without the additional provision for mitigating factors.

Recommendation 7

AANA recommends that provision 20 be amended to include exemptions to deal with mitigating factors.

AANA hopes that this submission assists the committee in its considerations. AANA would be pleased to speak to this submission to assist the Committee's further deliberations on these complex matters that are the concern of all in the Australian community.

End.

⁹ The current definition in the *Privacy Act 1988* is turnover less than \$3million.