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Office of the President

Your Ref: Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (Cth)

Quote in reply: 21000332.50 – TIPS Committee

9 July 2012

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary,

PRIVACY AMENDMENT (ENHANCING PRIVACY PROTECTION) BILL 2012 (CTH)

We write on behalf of the Technology and Intellectual Property Committee of the Queensland Law Society in relation to the proposed amendments to the *Privacy Act 1988* (Cth) ("the Act.")

The *Privacy Amendment (Enhancing Privacy Protection) Bill 2012* (Cth) ("the Bill") encompasses a large number of amendments. Whilst the Society is not in a position to provide comprehensive comments on the complete Bill due to time constraints, the Society would like to make comments on a few discrete areas of the Bill.

Direct Marketing

The Privacy Commissioner appears to have recognised (in the 2001 *Guidelines to the National Privacy Principles*) that an organisation may collect information, but may not collect it from someone:

> If an organisation collects information from a generally available publication NPP (National Privacy Principles) 1.5 may not apply depending on the circumstances.

However unless personal information is collected from the individual or from someone other than the individual, the blanket prohibition on the use of personal information for direct marketing in APP (Australian Privacy Principles) 7.1 would apply. This is as a result of the drafting of the exception in APP 7.3(a).

The Society considers it is not appropriate to exclude, from use or disclosure for direct marketing, self-generated/developed personal information about someone. The Society therefore recommends an amendment to APP 7.3(a)(ii) as follows:

7.3 Despite subclause 7.1, an organisation may use or disclose personal information (other than sensitive information) about an individual for the purpose of direct marketing if:

(a) the organisation collected the information from:

(i) the individual and the individual would not reasonably expect the organisation to use or disclose the information for that purpose; or

(ii) ~~someone~~ other than the individual; and~~. . .~~

Interrelationship with Spam Act

The Society considers the interrelationship between APP 7 and the *Spam Act 2003* (Cth) is very unclear. This uncertainty is a result of the drafting of APP 7(8) which states:

Interaction with other legislation

7.8 This principle does not apply to the extent that any of the following apply:

(a) the Do Not Call Register Act 2006;

(b) the Spam Act 2003; . . .

It is uncertain as to which part of this principle is not to apply. The Society asks whether it is the part that says the organisation must not do something (APP 7.1) or the parts which say that the organisations may do something (APP 7.3 – 7.5). Does APP 7(8) mean that the APP doesn't apply at all or that the DNCR Act and the Spam Act always apply as well as APP 7? This is of high importance give the prevalence of electronic direct marketing.

Territorial Issues – the cloud

The principle of proposed APP 8 and s 16C appears to be that as between an APP entity and an individual, the risk of privacy transgressions by an overseas person to whom the APP entity has disclosed the individual's personal information is to be borne, up to a point, by the APP entity. The point is reached where the APP entity has taken "*such steps as are reasonable in the circumstances to ensure the overseas recipient does not breach the APPs*" in relation to the information. It will be difficult for lawyers to advise on the application of this pivot point in the cloud environment. The Society suggests that the pivot point should be moved back a notch to reflect what reasonable entities do in like situations:

> ...the entity must take such steps as ~~are~~ a reasonable entity in the entity's position would take in all of the circumstances to ensure that the overseas recipient does not breach the Australian Privacy Principles...

Thank you for the opportunity to provide comments on the proposed legislation. For any further information, please contact Policy Solicitors,

Yours faithfully

Dr John de Groot
President