



11 July 2012

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

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Dear Committee Secretary,

Re: *Inquiry into the Privacy Amendment (Enhancing Privacy Protection) Bill 2012*

The Australian Industry Group (Ai Group) makes this submission to the Senate Legal and Constitutional Affairs Committee (**Committee**) in response to its inquiry into the *Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (Bill)*.

Ai Group is one of the largest national industry bodies in Australia representing employers in manufacturing, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, airlines and other industries. Together, Ai Group and its affiliates represent the interests of approximately 60,000 businesses which employ in excess of 1.2 million staff.

Ai Group has considered the Bill and the Explanatory Memorandum and various concerns and proposed amendments are set out below.

Schedule 1 – APP 7 – Direct Marketing

Ai Group does not support AAP 7. Businesses need to retain their ability to market and sell their products and services to other businesses and consumers. AAP 7 would seriously impede this.

If AAP 7 is to be retained the following changes should be made:

- The term “direct marketing” should be defined in a reasonable and narrow manner;
- Subclause 7.1 should be deleted (and as a consequence subclauses 7.2 to 7.5 will not be needed);

- Subclauses 7.6, 7.7 and 7.8 should be renumbered subclauses 7.1, 7.2 and 7.3 respectively.

Schedule 3 – APP codes – employee records exemption

Schedule 3 replaces the provisions of the Act dealing with privacy codes with a new Part IIIB dealing with codes of practice under the APPs (**APP codes**).

The Explanatory Memorandum for the Bill provides that an APP code can deal with acts or practices of organisations that are exempt from the operation of the Act. The Explanatory Memorandum uses the example of an industry including obligations in an APP code dealing with employee records, which are otherwise exempt from the Act.

Ai Group is opposed to the development of a code which attempts to override the employee records exemption under the Act.

The regulation of employee records is appropriately dealt with under the *Fair Work Regulations 2009*. Subdivision 1 of the Regulations sets out a number of employer obligations in relation to employee records including:

- The form and content of records;
- Transfer of business situations;
- Inspection and copying of records;
- Providing information concerning records; and
- The accuracy of records.

In an employment relationship, an individual's right to privacy needs to be balanced against their employer's need to keep and utilise records for a wide range of legitimate business purposes, including:

- The efficient operation of the business;
- Compliance with a wide range of legal obligations under industrial, OHS, workers' compensation and other laws;
- Ensuring the health and safety of employees;
- Facilitating staff development, including identifying training needs and recording past training undertaken;
- Facilitating EEO and diversity objectives within the business;
- Identifying deficiencies in an employee's performance;
- Identifying inappropriate or unlawful behaviour by an employee;
- Permitting effective risk management;

- Enabling employers to defend claims made by employees and ex-employees under unfair dismissal, underpayment of wages, EEO, workers' compensation and other laws; and
- Enabling employers to adopt sound recruitment and selection processes when engaging new staff, including enabling information to be obtained about job candidates from former employers.

When a person accepts employment with an organisation they should, and generally do, accept that their employer will keep and utilise a wide range of records. Employers have a common law duty of "reasonableness" towards their employees, which extends to the reasonable use of employment records.

The above factors were no doubt important considerations for the Federal Government when it decided to support an exemption being inserted into the *Privacy Amendment (Private Sector) Act 2000* for employment records.

The Explanatory Memorandum for the *Privacy Amendment (Private Sector) Bill 2000* stated that:

"The Government has agreed that the handling of employee records is a matter better dealt with under workplace relations legislation. An act or practice engaged in by a current or former employer of a person in relation to an employee record will be exempt from the operation of the legislation if the act or practice is directly related to the current or former employment relationship. The requirement of a direct link to the employment relationship has been included to ensure that employers cannot use employee records for commercial purposes unrelated to the employment context".

Schedule 4 – Item 2 – Subsections 5B(1) and (1A)

The proposed extension to the extra-territorial operation of the *Privacy Act 1988*, as drafted, is unreasonable. Many companies with Australian links have operations overseas and should retain their ability to establish policies, procedures and systems which are consistent with overseas laws, markets and conditions.

Consistent with existing s.5B(1) of the *Privacy Act 1988*, s.5B(1A) of the Bill must not apply to an act or practice unless *"the act or practice relates to personal information about an Australian citizen or a person whose continued presence in Australia is not subject to a limitation as to time imposed by law"*.

Schedule 4 – Item 50 – Section 13G

The level of penalty in the proposed new s.13G of the Bill is excessive. The penalty units in s.13G translate to a penalty of \$220,000 for an individual and \$1.1 million for a body corporate. A civil penalty of 60 penalty units would be more appropriate (ie. \$33,000 for a body corporate and \$6,600 for an individual).

Ai Group would be happy to provide additional information in support of the views outlined above, should the Committee require this.

Yours sincerely

Stephen Smith
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