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Committee Secretary
Senate Finance and Public Administration Committee
By Email: fpa.sen@aph.gov.au

Exposure Drafts of Australian Privacy Amendment Legislation

Google appreciates this opportunity to provide comments to the Committee in relation to the Exposure Draft of the Australian Privacy Principles. Google commends the Exposure Draft as a first step towards the enactment of a more streamlined Privacy Act.

Google supports an approach to privacy regulation that allows flexibility for addressing particular characteristics of new technologies, or the organisations delivering those technologies. Technology and the online environment is developing rapidly. For example, since the release of the Australian Law Reform Commission's privacy law report in 2008, we have seen the rise of Twitter, the advent of Foursquare, and the number of hours of content uploaded to YouTube each minute go from 13 to 24. Australia's privacy law applies to a dynamic environment and therefore must be flexible.

As the Internet has given millions of people access to vast amounts of information and created useful--sometimes revolutionary--tools and services, people are increasingly concerned about how to protect their privacy online. Based on our experience, we believe that service providers are motivated to work towards a safe and secure environment for their users. This is fundamental to obtaining and maintaining users' trust – which is key to success as a service provider. Ultimately, it is imperative to a provider's bottom line to get users' privacy and security right. Otherwise, users will switch to a different service. This is most true in the highly competitive world of the web, where an alternative is just a click away.

A key existing protection for users is that individuals can exercise choice online. They can easily move to a different tool or service if they consider their personal information or security at risk or compromised. (For more information on Google's efforts as to privacy and security, see below).

Google provides its services in many countries. Globally, Google maintains industry leading standards of protection of personal information, to meet the expectations of users in privacy aware countries such as Australia. These standards are applied globally by Google - not just in response to differing national regulatory protections of privacy of individuals.

Google supports the proposed Australian Privacy Principles as a further development of a clear, principles-based approach to privacy regulation. Google's comments below principally relate to how to give these principles practical effect in relation to international internet services, without thereby creating confusion and conflict between requirements of a particular country, including Australia, and other countries. Full explanation of these points is provided below, along with an outline of Google's activities, and our approach to privacy.

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Google's activities

Google's mission is to organise the world's information and make it universally accessible and useful. This means giving our users around the world access to the information they want, from the widest variety of sources, wherever they are. We believe this brings people greater choices, new freedoms, and ultimately more power.

Search is at the heart of what we do - we help people find things. From a rare magazine, to a blog for fellow young mums, to an up-to-the-minute stock quote, to a map of a new town you're visiting ... the subject matter ranges from the entertaining to the educational and potentially life-changing.

Part of broadening this access to information means breaking down barriers. We've made web search available in more than 100 languages, and have more than 1,500 local-language versions of our products. We're also attempting to bring more kinds of information to more people - offline information, videos, news, photos, and maps. This is opening a doorway to a whole new world - giving young people in remote parts of Australia access to online, street level imagery of cities around the world, for example.

Google's Sydney office is a central hub for Google in developing innovative products and partnering with local businesses and agencies. We have over 350 employees in Australia in sales, engineering, and business support, and some of Google's most exciting projects - like Google Map - were developed in Australia. More information about Google's activities in Australia is in the Annexure.

Google's approach to privacy

At Google we are keenly aware that privacy is a key determinant of the trust that our users place in us, and of our responsibility to protect their privacy. We have 5 privacy principles[1] that describe how we approach privacy and user information across all of our products:

1. Use information to provide our users with valuable products and services.
2. Develop products that reflect strong privacy standards and practices.
3. Make the collection of personal information transparent.
4. Give users meaningful choices to protect their privacy.
5. Be a responsible steward of the information we hold.

1. Use information to provide our users with valuable products and services.

At Google, we work hard to make sure that the benefit that people get out of our services is worth the information they use to get them. We only ask for the limited information that we need to provide users with the service they want.

Every day, consumers use their information to receive even more useful and convenient services from businesses--from using their credit card number to make a purchase at a department store to using their email address when signing up for a mailing list for travel deals. Offline, a shop assistant might look at the books someone is buying and recommend something else they might be interested in, or a person might see a TV commercial that's

[1] http://www.google.com.au/intl/en/corporate/privacy_principles.html

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targeted based on the audience demographics of the program they are watching. Similarly online, many businesses have algorithms that use website visits, past purchases, or personal or demographic information to make recommendations or show ads for things that might be of interest.

2. Develop products that reflect strong privacy standards and practices.
We strive to design products that give our users real and meaningful control -- this means transparency and choice. More information on this is provided below.

Also, at any time a user may want to stop using a Google product, and we do our best to make it easy for a user to leave. Through the Data Liberation project (dataliberation.org) we work hard to make sure users can export any data that they create in (or import into) a Google product. As a company, Google is committed to engineering products that do not lock our users in.

3. Make the collection of personal information transparent.
The Google Privacy Centre (linked to from the Google homepage) has information and videos that explain in plain English what data Google stores and how we use it to provide our users with services like Gmail, Search and more.

From the Privacy Centre or from a user's account, there is a link to the Google Dashboard (google.com/dashboard) which lets users take a look at their privacy settings and control the data associated with their Google Account. Dashboard helps answer the question, what does Google store in my account? It lets a user view and control the data associated with their Google account in one central location. It summarises data for each product they use and provides direct links to better control personal data and settings. Dashboard puts all this in one convenient and secure place so that managing and controlling data is easier than ever.

4. Give users meaningful choices to protect their privacy.
The Privacy Centre also contains information about privacy settings our users can choose when they use our products.

Google strives to design products that put people in control, for example:

- A user can use the Google search engine without signing up for an account and without having to provide a name, email address, or other personally identifying information. If a user does choose to sign up for a Google account by providing a username and email address, we are able to maintain a history of their previous searches in order to make their future searches more relevant to them. However, if a user with a Google account would prefer that Google did not maintain a history of their previous searches, they can turn this feature off. Bottom line: users get to choose how personal or anonymous they want their search experience to be.
- Google Talk's "off the record" feature empowers users to control what information is retained by Google. (Google Talk is an instant messaging service).
- In our Chrome browser, a user can choose to browse privately by selecting "incognito" mode. They also have the ability to pause or delete their Web History.

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- Since January, Google has encrypted Gmail by default (with the ability to opt out), becoming the first major email provider to do so.

5. Be a responsible steward of the information we hold.
We take our responsibility to protect users' information and security very seriously and we recognise that secure products are instrumental in maintaining users' trust.

Google strongly believes in layered protection. We implement this philosophy as follows:

- At Google, the most sensitive information is difficult to find or access. Our network and facilities are protected in both high-tech and low-tech ways: encryption, alarms and other technology for our systems; and strong physical security at our facilities. We are constantly seeking more ways to use encryption and other technical measures to protect data, while still maintaining a great user experience.
- We have learned that security is enhanced by taking an industry-wide approach. We encourage everyone to help us identify potential problems and solutions. Researchers who work at security and technology companies all over the world are constantly looking for security problems on the Internet and we work closely with that community to find and fix potential problems.
- Google also invites its user community to be involved in this process. Google's users are able to report security concerns, which may relate to password problems, login issues, spam reports, suspected fraud, account abuse, suspected vulnerabilities in Google products or security incidents. Google responds swiftly to fix security issues. These combined efforts go a long way in making the Internet safer and more secure.

We constantly work to keep our security processes a step ahead. Google works to ensure that its processes meet and exceed industry standards. By working with independent auditors, who evaluate compliance with standards that hold hundreds of different companies to very rigorous requirements, we add another layer of checks and balances to our security processes.

While we continue to innovate with our products, we also continue to innovate in the world of privacy and security.

We now turn to our suggestions for improvements to the Exposure Draft provisions.

Comments on the Exposure Draft
Google commends the Exposure Draft as a first step towards enactment of a more streamlined Privacy Act. Google supports an approach to privacy regulation that allows flexibility for addressing particular characteristics of new technologies, or the organisations delivering those technologies.

Google notes that Australian privacy law applies to international internet services as part of an international legal environment of interlocking and generally complementary, but sometimes contradictory, national Privacy Acts.

Google provides services globally, including search, Gmail, YouTube, Google Street View and many other applications. Because Google provides its services into many countries, Google maintains industry leading standards of protection of personal information, to meet

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the expectations of users in privacy aware countries such as Australia. These standards are applied globally, not in response to the differing levels of national regulatory protection of privacy of individuals. Users of Google services can therefore have confidence that their privacy will be protected in a way that meets or exceeds industry leading standards for internet based services, regardless of where they are when they access Google's services and regardless of the location of the servers and other infrastructure used by Google.

Google will of course need to comply with laws in the countries from which it operates and in which it collects and holds personal information about individuals, wherever those individuals may be. Google submits that it is appropriate for national laws to recognise this and to allow disclosures of personal information in those unusual circumstances where disclosures are required by a court or by law in the countries from which it operates and in which it collects and holds personal information about individuals.

Google seeks to ensure that it complies with applicable laws in each country in which its services may be accessed. To facilitate this compliance by services developed for global distribution, Google promotes the development of privacy regulation that facilitates provision of services across national borders, such as the nine privacy principles within the APEC Privacy Framework as adopted by the APEC Ministers in November 2004 as Asia Pacific good privacy practice.

Google recognises that the proposed Australian Privacy Principles are a further development of the principles-based approach to privacy regulation and supports this development. Google's concerns outlined below principally relate to how to give these principles practical effect in relation to international internet services, without thereby creating confusion and conflict between requirements of a particular country, including Australia, and other countries.

It is important that appropriate geographical nexus provisions apply to national Privacy Acts so that international internet services can be supplied with reasonable clarity as to the laws applicable to those services and in particular the rules governing collection, use and disclosure of personal information by organisations carrying on business in particular jurisdictions.

One difficulty with the Privacy Act 1988 is that the intended geographical scope of operation of its provisions is not clear and accordingly it is difficult to apply these current provisions in relation to international internet services. The proposed Australian Privacy Principles take a sensible approach of clarifying the jurisdictional boundaries around the proposed operation of the statute, in particular by introduction of the new concept of an "Australian link". Google commends this approach to ensuring that organisations such as Google can ascertain the intended scope of operation of the Australian legislation. Google's comments principally concern certain aspects of the territorial operation of the draft Bill that should be further clarified to ensure that the intended scope of operation of the Act is clear and workable in practice.

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Clause 4 – ***Australian Privacy Principle 3 – collection of solicited personal Information***
and **Clause 19 –** ***extra territorial operation of this Act***
APP3 will apply to Australian organisations and also apply to any organisation that both carries on business in Australia and collects or holds personal information in Australia.

Where information is collected in the course of operation of an overseas Internet site by an organisation which does not conduct business in Australia, it is appropriate that the activities of that organisation are regulated by the jurisdictions in which that organisation conducts business and that the organisation is not subject to double jeopardy or conflicting application of Australian privacy law and the laws applicable in the jurisdictions in which the organisation carries on business. The proposed Australian Privacy Principles generally and commendably apply this principle.

The concept of "Australian link" sensibly applies to an organisation that carries on business in Australia and collects or holds personal information in Australia. It is not, however, clear from the drafting that information is "collected" at the place at which the activity of collection is conducted. That is, clause 19(3)(g) does not clearly state that information is "collected" at the place (that is, in the jurisdiction) of the service provider collecting the information, not the place where the user is or may be presumed to be at the time that the information is collected. In any event, the service provider collecting the information often will not be in a position to know where the user is at the time that that information is collected. For example, a user may be transacting anonymously or roaming from the user's location. An IP address or other transaction data may not be sufficient to enable the internet service provider to identify the location of the user. For clarity, clause 19(3)(g) should state that an organisation collects personal information where the information is collated, processed or stored.

Subclause 4(5)(a) requires an entity to collect personal information about an individual only from the individual unless the entity is required or authorised by or under an Australian law, or an order of a court or tribunal, to collect the information other than from the individual. An entity may be regulated under Australian privacy law and also regulated under foreign laws. Google will of course need to comply with laws in the countries from which it operates and in which it collects and holds personal information about individuals, wherever those individuals may be. Google submits that subclause 4(5)(a) should be amended so that the requirements of foreign laws are allowed for.

Clause 6 – ***Australian Privacy Principle 5 – notification of the collection of personal information***
Similar to our submission in relation to subclause 4(5)(a), Google notes in relation to subclause 6(2)(c) that an entity may be regulated under Australian privacy law by virtue of carrying on business in Australia and also regulated under foreign privacy law by virtue of either carrying on business in another jurisdiction or collecting or otherwise doing an act which affects personal information of an individual in that foreign jurisdiction. The reference in subclause 6(2)(c) to "Australian law" should be amended so that the requirements of foreign laws are encompassed within subclause 6(2).

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Clause 7 – *Australian Privacy Principle 6 – use or disclosure of personal information*
Similar to our submission in relation to subclauses 4(5)(a) and 6(2)(c), Google notes in relation to subclause 7(2)(b) that an entity may be regulated under Australian privacy law by virtue of carrying on business in Australia and also regulated under foreign privacy law by virtue of either carrying on business in another jurisdiction or collecting or otherwise doing an act which affects personal information of an individual in that foreign jurisdiction.

For example, a foreign country may mandate disclosure of personal information in response to a subpoena issued by a court exercising jurisdiction over the operations of the service provider in that foreign country. It would be inappropriate to place the service provider in jeopardy under Australian law for responding to valid court process in a foreign jurisdiction.

Another example would be a law requiring the internet service provider to disclose the details of a person alleged to have engaged in illegal activities, such as the duty of a service provider to report instances of child pornography as set out in section 2258A of 18USC (http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1476#6).

The reference in subclause 7(2)(b) to "Australian law" should be amended so that the requirements of foreign laws are encompassed within the relevant exceptions within subclause 7(2).

Clause 9 – *Australian Privacy Principle 8 – cross border disclosure of personal information*
Google broadly supports the approach set out in clause 9. In particular Google supports requiring organisations to be accountable for the information that they share across borders. However the current drafting of this provision places an Australian entity at inappropriate jeopardy, as set out below.

Google supports the approach of requiring disclosing entities to take such steps as are reasonable in the circumstances to ensure that the overseas recipient does not breach the Australian Privacy Principles. However Google is concerned that an entity disclosing personal information about an individual to an overseas recipient is subject to strict liability (by virtue of clause 20 - *Acts and practices of overseas recipients of personal information*), even if that entity took all reasonable steps to ensure that the overseas recipient complies with the Australian Privacy Principles.

Further, subclause 9(2)(c) only protects an entity regulated by the Act in relation to *disclosures to an overseas recipient* and not subsequent disclosures by the overseas entity as required by law or an order of a court or tribunal in that overseas jurisdiction. The net effect is that an overseas entity may be required under compulsion of law in operation in the country where the personal information is held to make a disclosure of information properly disclosed to it by (for example) an Australian entity and thereby place the Australian entity in jeopardy of breach of APP8, pursuant to the operation of clause 20(2). That is, the Australian disclosing entity would be in breach of the Australian law because an overseas entity made a legally required disclosure of personal information to a regulator or a court in the country in which the information was held.

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If subclause 20(2) is to be enacted in substantially similar form to the current draft, it should be qualified so as to permit disclosure by the overseas entity of information as required by or under any applicable law or the order of a court or tribunal. This is necessary at least to ensure that the disclosing entity is not placed at jeopardy by compliance of the overseas entity with legal requirements in the country in which the information is held.

Clause 12 – *Australian Privacy Principle 11 – security of personal information*
Similar to our submission in relation to subclause 4(5)(a), Google notes in relation to subclause 12(2)(c) that an entity may be regulated under Australian privacy law by virtue of carrying on business in Australia and also regulated under foreign privacy law by virtue of either carrying on business in another jurisdiction or collecting or otherwise doing an act which affects personal information of an individual in that foreign jurisdiction. The reference in subclause 12(2)(c) to "Australian law" should be amended so that the requirements of foreign laws are encompassed within subclause 12(2).

Clause 13 – *Australian Privacy Principle 12 – access to personal information*
Similar to our submission in relation to subclause 4(5)(a), Google notes in relation to subclause 13(3)(g) that an entity may be regulated under Australian privacy law by virtue of carrying on business in Australia and also regulated under foreign privacy law by virtue of either carrying on business in another jurisdiction or collecting or otherwise doing an act which affects personal information of an individual in that foreign jurisdiction. The reference in subclause 13(3)(g) to "Australian law" should be amended so that the requirements of foreign laws are encompassed within the exceptions in subclause 13(3).

Clause 15 – Definitions – definition of "personal information"
The definition of "personal information" is extended in the manner recommend by ALRC and adopted by the Government, namely "information or an opinion about an identified individual, or an individual who is reasonably identifiable".

The Companion Guide at page 27 states:

> "The aspect of the definition that the individual be reasonably identifiable ensures that the definition continues to be based on factors which are relevant to the context and circumstances in which the information is collected and held. Generally this would mean that the information must be able to be linked to other information that can identify the individual. The 'reasonable' test limits possible identification based on the context and circumstances. While it may be technically possible for an entity to identify a person by the information it holds, it may be that it is not practically possible (for example due to logistics, legislation or contractual restrictions). The test requires consideration of all the means that are reasonably open for an information holder to identify an individual."

This explanation should appear in the Act itself, or at least in the explanatory material that may be used to guide interpretation of the Act: that is, the legislation should itself make clear that the context and circumstances in which information is held is to be taken into account in determining whether information is or is likely to be aggregated or combined so as to enable an individual to be reasonably identifiable.

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Circumstances in which it is technically possible for information to be aggregated or combined to identify an individual but where it is not practically possible for an entity to do so include where it is logistically impracticable to do so, or where to do so would be contrary to law, industry code of practice or contract between the entity and an individual or an undertaking given by an entity to the public generally in relation to provision of a service by that entity.

Clause 19 – ***extra territorial operation of this Act etc***
See our comments in relation to clause 4 above.

Clause 20 – ***Acts and practices of overseas recipients of personal information***
See our comments in relation to clause 9 above.

Google appreciates the opportunity to provide these comments. We would be pleased to discuss these matters with the Committee further.

Kind regards

Ishtar Vij
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ANNEXURE

Google in Australia

Our Sydney office is a central hub for Google in developing innovative products and partnering with local businesses and agencies. We have over 350 employees in Australia in sales, engineering, and business support, and some of Google's most exciting projects - like Google Maps - were developed in Australia.

We help users

We help millions of Australians connect with information, customers, audiences, users and colleagues in Australia and throughout the world.

- Our engineers localise Google products to make them available and relevant for Australians, including local movie and stock price searches, Real Estate Search and Transit in Google Maps.

- We're committed to partnering with local organisations like the National Association for Prevention of Child Abuse and Neglect (NAPCAN), Inspire, The Alannah and Madeline Foundation, Kids Helpline and Bravehearts.

We develop innovative products

Google's Australian engineers develop a wide range of global and local products and have an strong track record of innovative products and services.

- Our local engineers work on pioneering innovations in geospatial web applications, collaborative software, network infrastructure and more.
- Products developed in Australia include Google Maps, Google Apps and Blogger

We support Australia's IT sector and broader community

We support Australia's vital IT sector through employment, industry engagement, education, access to code and initiatives to encourage a new generation of IT professionals.

- We are active members of local industry bodies such as the IIA, AIIA, IAB, ISOC
- We have close involvement with university IT and engineering departments and sponsor programs and prizes such as the Google Eureka Prize for Innovation in Computer Science and the Australian and New Zealand Anita Borg scholarship to encourage women engineers.
- Google Australia mentors many young programmers to put their ideas into practice: Summer of Code, Code Jam, the Highly Open Participation Program, and we have a program of summer internships for university students and Google Student Days for school students.
- We support the Australian developer community through opening many of our products to the open source community, advocating for more public sector information to be available for developers to build innovative services, and next month we will host five Developer Days in Australia.

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- We recently partnered with research institute AARNet to launch Measurement Lab tools to help researchers and Australians better understand the performance of their broadband Internet connections.

We make local businesses more competitive
Thousands of Australian businesses use Google products - Search, AdWords, YouTube, Google Maps and Google Apps - as a core part of their business.

Small business in Australia is a vital sector for Google and one we're investing in. We want all small businesses to be able to participate in the digital economy, many thousands are already doing so but there is a long way to go. There are around 1.6 million businesses in Australia with less than 20 employees, making up 80% Australian businesses in total. From research conducted by Research International, 40% of those businesses do not use email or the Internet at all for business and a further 34% do not have a stand alone website.

Online advertising is already gaining traction with Australian small businesses. Google's research found that online advertising is the one marketing channel on which small businesses are planning to increase their spending over each of the next one, three and five years. We provide small business training in digital marketing through webinars, the Australian AdWords Online Classroom, Coupons for free AdWords and in-office seminars.