



**PRIVACY AMENDMENT (ENHANCED PRIVACY PROTECTION)
BILL 2012**

**FOXTEL SUBMISSION TO THE SENATE LEGAL AND
CONSTITUTIONAL AFFAIRS COMMITTEE**

JULY 2012

INTRODUCTION

Foxtel welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee (the Committee) about the *Privacy Amendment (Enhancing Privacy Protection) Bill 2012* (the Bill), which was referred to the Committee on 19 June 2012.

Foxtel is a member of the Australian Direct Marketing Association (ADMA) and notes the detailed recommendations set out in ADMA's submission to the Committee. Foxtel's submission provides detail about the potential impact of the amendments set out in the Bill on our business.

This submission is structured as follows:

1. The **Executive Summary** outlines Foxtel's key submissions.
2. **Part A** provides background on Foxtel and gives an overview of marketing practices which would be affected by certain proposals set out in the Bill.
3. **Part B** sets out Foxtel's specific concerns with the Bill.

EXECUTIVE SUMMARY

In overview:

- Foxtel is supportive of privacy reforms which appropriately balance the objectives of protecting the privacy of individuals and permitting legitimate business dealings with, and use of, personal information.
- As currently drafted, provisions of the Bill relating to direct marketing risk confusing and frustrating consumers. This is because they assert that there is a 'prohibition' on direct marketing when there are a range of exemptions which will permit its ongoing practice. The Bill should be amended so that the provisions clarify that direct marketing is permitted subject to conditions. If this language is not amended, and a 'prohibition' is announced, consumers are likely to be confused and frustrated when they receive legitimate direct marketing in the future—and this is likely to lead to unfounded complaints which will drain industry and regulator resources.
- Foxtel submits that direct marketing should be permitted where an individual consents to the use of their personal information for that purpose. However, under the Bill, an organisation is, in some circumstances, required to conduct an additional assessment of whether or not a customer had a 'reasonable expectation' that their personal information would be used for the purpose of direct marketing. We consider that this is an ambiguous concept and should be removed from the drafting. However, if the concept is retained, better guidance should be given in explanatory material such that a customer's consent to receive direct marketing will be considered 'a reasonable expectation' in their mind that they may receive direct marketing messages.
- Foxtel supports the right of consumers to opt-out of direct marketing and considers that information on how to do this should be readily accessible. However, some obligations proposed in the Bill relating to opt-out information are too prescriptive and would be unworkable in practice. For example, it could be impractical to include opt-out information in *each* direct marketing communication in space-limited new media forms such as Twitter and online banner advertisements. In those cases it should be sufficient that the organisation provides a simple alternative means by which the individual can request not to receive direct marketing.
- Foxtel supports data protections where an Australian entity transfers data to overseas organisations, such as overseas call centres. However, Foxtel would be concerned if, after taking reasonable steps to ensure that the overseas recipient does not breach these

requirements, we remain liable for unauthorised access to the information—for example, as a result of hacking.

PART A: BACKGROUND

Foxtel and privacy

Foxtel is one of Australia's most progressive and dynamic media companies, directly employing around 2,500 people, and delivering a diverse subscription television (STV) service to both regional and metropolitan areas over cable, satellite and broadband distribution.

We offer a better entertainment experience every day to each one of our 2.2 million subscribing homes through delivery of exclusive and inspiring programming across all genres, the world's most popular channel brands, and investment in high quality local content.

As constant champions of innovation we have brought customers the latest personal digital recording technology, Australia's largest HD offering, Foxtel 3D, and this year, the most comprehensive Olympic Games coverage Australia has ever seen.

Foxtel is a customer-focussed business. As such, we take the protection of our subscribers' personal information very seriously. Foxtel's Privacy Statement is publicly available and is accessible from pages across our website.¹ Among other things, it explains:

- how and when personal information will be collected by Foxtel and how it will be used (including when personal information will be disclosed to third parties);
- the circumstances in which personal information can be used to undertake direct marketing to provide information about goods and/or services;
- that customers are invited to contact Foxtel to find out what information we keep about them and to advise us if their personal information is not accurate, is incomplete or is not up-to-date; and
- processes relating to information which may be given to a credit reporting agency as permitted under existing law.

Foxtel marketing

Foxtel undertakes a range of marketing practices, including direct marketing and advertising across multiple channels. Direct marketing activities include letter box- and door-drops and distributing marketing messages by email. Online display advertising, including banner ads, is also used by Foxtel.

Foxtel engages in direct marketing because it is an effective way to communicate offers to customers and prospects which are likely to be of value to them. For existing subscribers, direct marketing enables us to strengthen customer relationships and create value for both customers and our company.

PART B: SPECIFIC CONCERNS WITH THE BILL

The Bill contains a broad range of proposed amendments to the *Privacy Act 1988* (the Act), including the introduction of the Australian Privacy Principles (APPs). In considering any new privacy regulation Foxtel notes the importance of striking an appropriate balance between:

- the protection of the privacy of individuals—which is both an important public policy objective and a business imperative; and

¹ Foxtel's Privacy Statement is available at <http://www.foxtel.com.au/about-foxtel/privacy/default.htm>.

- the legitimate interests of entities in carrying out their business functions and activities, including advertising and marketing to acquire and retain customers.

It is good business practice and important to us that we appropriately handle and safeguard our customers' personal information. We will always deal carefully with personal information because this is essential to building and maintaining customer trust and to successful ongoing business relationships with subscribers.

APP 7 – Direct marketing

Foxtel has a number of concerns about proposed APP 7 which relates to direct marketing.

The Explanatory Memorandum (EM) to the Bill states that APP 7 has been included as a discrete principle 'because of the significant community interest about the use and disclosure of personal information for the purposes of direct marketing'.²

Notwithstanding this community interest, Foxtel would prefer to see direct marketing dealt with under general rules in the Act relating to the use of personal information because regulations which single out particular practices can unfairly impose compliance obligations and costs on organisations in one sector that are not imposed on other sectors.

It is worth noting that direct marketing activities are already heavily regulated under the provisions of the Spam and Do Not Call Register legislation, telemarketing standards, the Australian Consumer Law and other self-regulatory codes, such as the Australian Best Practice Guideline for Online Behavioural Advertising and the ADMA e-marketing code of conduct. With the movement to industry-specific, rather than principals-based provisions in the Act there is a risk that this sector will become overly regulated giving rise to confusion about the application of each piece of legislation to different kinds of 'direct marketing' activities.

However, should the Government remain minded to legislate specific rules which apply only to direct marketing we submit that they should be:

- clear;
- avoid consumer and marketer confusion; and
- be workable in practice.

Foxtel considers that APP 7, as currently drafted, does not meet these objectives and requires amendment.

Avoiding consumer and marketer confusion

First, we submit that the heading and content of APP 7.1, which asserts that direct marketing is prohibited, is likely to create consumer and marketer confusion. This is because the subsequent clauses in APP 7 go on to set out a range of circumstances in which personal information *can* be used for the purposes of direct marketing.

Passage of the Bill with APP 7 drafted in its current form is likely to attract headlines about a new 'prohibition' on direct marketing which are likely to create a misapprehension in the minds of consumers that they should never expect again to receive direct marketing.

When organisations which comply with the conditions set out in the Bill continue to engage in direct marketing consumers will be confused, are likely to consider there to have been non-compliance

² *Privacy Amendment (Enhancing Privacy Protection) Bill 2012 – Explanatory Memorandum (EM)*, p 81 – available at <http://www.comlaw.gov.au/Details/C2012B00077/Download>.

with the APP and are likely to complain. Consumers will be frustrated to discover there is no basis for complaint and both the organisation that issues the marketing material and the relevant privacy authorities will have wasted resources dealing with unfounded complaints.

Foxtel submits that APP 7 should be redrafted so that it is clear that there is an entitlement to market directly which is subject to conditions, rather than a prohibition on direct marketing which is subject to exemptions.

Consumer expectation about use of personal information for direct marketing

APP 7.2 provides that an organisation may use or disclose personal information (other than sensitive information) which it has collected from an individual for the purpose of direct marketing if, among other things, the individual would 'reasonably expect the organisation to use or disclose the information for that purpose'.

This concept of reasonable expectation is also present in APP 7.3, which sets out more onerous conditions for use of personal information for direct marketing in two circumstances:

- Where the organisation collected the information from the individual, but the individual 'would not reasonably expect the organisation to use or disclose the information for that purpose'.
- Where the organisation collected the information from someone other than an individual—for example, a third party organisation.

The EM contains limited guidance on how an organisation should make an assessment of when an individual will 'reasonably expect' their personal information to be used for direct marketing. The EM suggests that an individual would not reasonably expect their personal information to be used for direct marketing where it has been collected from a third party, however is silent on situations in which the individual has provided their personal information directly to the organisation that seeks to conduct direct marketing.³

In our view, it should be sufficient that an individual has consented to the use or disclosure of their personal information for the purpose of direct marketing—such consent is regularly obtained when a customer agrees to an organisation's terms and conditions for providing goods and services.

Once consent is obtained we do not believe that an organisation should then be required to assess the consumer's likely state of mind and, in particular, whether they have a reasonable expectation of receiving direct marketing. As such, we submit that references to 'reasonable expectation' should be removed from the provisions of APP 7.

However, if the Government is minded to retain provisions relating to 'reasonable expectation' we submit that further guidance should be given on this matter in the EM. In particular, the EM should make clear that a customer's consent to receive direct marketing will form a reasonable expectation in their mind that they may receive direct marketing messages.

Workable opt-out requirements

APPs 7.2 to 7.5 list exceptions to the proposed rule against direct marketing. As noted above, Foxtel strongly submits that these provisions should be redrafted as conditions under which direct marketing may be conducted, rather than exceptions to a prohibition.

In addition, Foxtel submits that amendments are required to clause 7.3 which deals with situations in which an individual would not reasonably expect his or her personal information to be used for direct marketing or where the information has been collected from a third party.

³ EM, pp 81–82.

Our concerns are with the specific requirements of this clause, not with the more general proposition that individuals should be entitled to choose not to receive direct marketing.

As currently drafted, APP 7.3 provides that where an individual would not reasonably expect his or her personal information to be used for direct marketing, or the information has been collected from a third party, an organisation may only use or disclose that information for direct marketing if:

- the individual has consented (or it is impracticable to obtain consent);
- the organisation has provided simple means by which an individual can opt-out;
- *each direct marketing communication* includes a prominent statement that the individual may request to no longer receive direct marketing or the organisation otherwise draws their attention to the fact that they can opt-out; and
- no request is made.

By contrast, under APP 7.2, where the individual would reasonably expect an organisation to use personal information for direct marketing, the organisation must provide a simple means by which the individual can request not to receive direct marketing, but does not need to remind the individual of this entitlement in every single marketing communication.

Foxtel submits that the requirement in APP 7.3 to include opt-out information in every single direct marketing message should be removed, leaving the less prescriptive requirement that a simple means of opting-out must be provided—for example, a page on the organisation’s website.

This would be far more workable for new media direct marketing channels such as Twitter and online banner ads, which we believe could fall under APP 7.3 because they are third party services through which an advertiser may collect information.

The functionality of Twitter, an online social networking and microblogging service, limits the length of text-based posts, or ‘tweets’, to 140 characters.⁴ This means there is very limited capacity to include both a meaningful marketing message and an opt-out message in a tweet. For example, the phrase ‘*to opt-out of receiving direct marketing messages go to www.foxtel.com.au*’ contains 64 characters which would mean nearly half of the message would be taken up with the opt-out information.

We submit that Twitter users expect what the company describes as ‘short bursts of information’ and it would not be consistent with their experience or expectations of the service to have lengthy opt-out information in each tweet.

Furthermore, there is functionality built in to Twitter and other social media channels which already allows users to opt-out easily. While tweets are available to anyone interested in reading them, it is only subscribers to, or ‘followers’ of a particular account who receive every message. Should the user wish to stop receiving messages they can simply unsubscribe or cease following the organisation.

Space constraints are also a concern in online banner advertising. Banner advertisements are a form of online advertising which is delivered by an ad server, a type of technology that places online advertising in a way that delivers targeted ads that are intended to match the user’s

⁴ See an overview of Twitter at <https://twitter.com/about>.

interests. Banner advertisements are embedded into various web pages—for example, newspaper websites—and contain a link to the website of the advertiser.

There is no definition of ‘direct marketing’ in the existing Act or the amendments contained in the Bill, but the EM to the Bill describes it as involving ‘...communicating directly with a consumer to promote the sale of goods or services to the consumer’.⁵ The EM notes that direct marketing could be delivered by mail, telephone, email or SMS, but this is not an exhaustive list. It notes that direct marketers compile lists of consumers and contact details from a variety of sources—and while the examples given are sources that have been in existence for a long time, including the white pages and electoral rolls, it is possible that the process of collecting and using a web user’s browsing details to target banner advertisements could be considered to be direct marketing. We are concerned that as there is no definition of ‘direct marketing’ it is possible that these types of activities may fall within the scope of APP 7.3.

Therefore, the practicality of including opt-out information in each banner advertisement must be considered. Banner advertisements are typically small in size and focus on images designed to catch the viewer’s attention and encourage them to click through. They may contain a logo and tag line, but rarely contain detailed text. We submit that to add lengthy opt-out information to such a graphic is unnecessary when the viewer could, upon clicking through, request to opt-out on the advertiser’s website.

APP 8 – Cross-border disclosure of personal information

Finally, Foxtel notes that it supports the proposition set out in the new APP 8 that where an Australian entity transfers data to overseas organisations, such as a contracted service provider, it should take reasonable steps to ensure that the overseas recipient does not breach the APPs and is accountable for a privacy breach under the regime proposed.

However, Foxtel remains concerned that where an organisation takes such reasonable steps, including reviewing its security controls and protocols, the accountability provisions may still apply even where access to the relevant information is unauthorised, such as by hacking.

Foxtel submits that the EM should provide further guidance to exclude this sort of ‘disclosure’ from falling within the new accountability regime in APP 8.

⁵ EM, p 81.