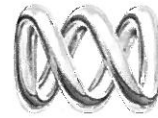


13 July 2012



Australian
Broadcasting
Corporation

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

Corporate Affairs

ABC Ultimo Centre
700 Harris Street
Ultimo NSW 2007
GPO Box 9994
Sydney NSW 2001
Tel. +61 2 8333 5261
abc.net.au

Dear Sir/Madam

Privacy Amendment (Enhancing Privacy Protection) Bill 2012

The Australian Broadcasting Corporation (ABC) welcomes the opportunity to comment on the Committee's inquiry in the *Privacy Amendment (Enhancing Privacy Protection) Bill 2012* (the Bill).

The ABC notes that the second stage of the Government's response to the Australian Law Reform Commission's (ALRC) report 108 (For Your Information: Australian Privacy Law and Practice) is yet to be released. The Government's response could have a significant impact on the ABC's (non-journalistic) media endeavours. The ABC reserves its position on the issues to be addressed in the second stage response.

The ABC is committed to procedures and policies which ensure appropriate and sensitive collection and storage of personal information. The ABC supports the creation of a single set of privacy principles across private and public sector organisations and also supports measures to enhance individuals' awareness of, and control over, how their personal information is being collected and used.

The ABC supports the implementation of privacy protections which carefully balance the need to protect the interests of individuals, and the need to ensure entities are not subject to overly onerous and financially burdensome regulation, or unnecessarily interfere with the provision of services to individuals.

The Corporation considers that care must be taken in the formulation of expanded privacy obligations so as not to create an overly onerous set of obligations which unduly limit the innovative use of information and technology for the public benefit. Obligations that can more easily be implemented on an organisation-wide basis are preferred (as opposed to the creation of a complex series of overlapping but distinct obligations that require a larger number of compliance strategies).

This is particularly relevant to the ABC as it seeks to engage and interact with its audience using online and social media technologies. Personal information is increasingly provided by ABC audience members who wish to customise their content experience, tailor program promotions receive content alerts and/or content on an individualised basis through social media. As a result, this personal

information is collected and stored by the Corporation for the purpose of complying with audience demands.

The ABC wishes to provide comments on a limited number of issues arising from the drafting of the Bill.

Australian Privacy Principle 5

Proposed new APP 5 creates notification obligations for APP entities at or before the time of collecting personal information. This obligation is subject to a reasonableness test, with entities only required to make such notification as is 'reasonable in the circumstances.'

Whilst the Explanatory Memorandum to the Bill states that the phrase 'reasonable in the circumstances' is an objective test, the ABC is concerned that there is a degree of ambiguity in the framing of the notification obligations in APP 5. This makes it difficult to assess the extent of the compliance burden created by this obligation.

If interpreted narrowly, APP 5 would create onerous obligations for large organisations or agencies such as the ABC which increasingly manage personal information. For example, it would be onerous if instead of a single, adaptable privacy statement (or a small number of statements), the ABC was required to create individual privacy statements for each different point of interaction with its audiences online.

Additionally, the requirements in APP 5.2 will mean that entities will be required to create lengthier privacy collection statements and the ABC is concerned that as privacy statements become more complex, the likelihood of individuals reading and understanding the statement decreases.

The ABC requests that further clarity and guidance be provided in the legislation around what notification matters will be 'reasonable in the circumstances', and that consideration be given to reducing the list of requirements in APP 5.2

Australian Privacy Principle 8

The ABC also wishes to bring to the Committee's attention the compliance burden which will be created by proposed new APP 8.

APP 8.1 creates an obligation to ensure that before personal information is disclosed to an overseas recipient, the entity must take reasonable steps to ensure an overseas recipient does not breach the APPs in relation to that information.

An exception is provided in APP 8.2 in circumstances where the entity expressly informs the individual that if they consent to disclosure, the obligations in 8.1 will not apply.

The ABC believes that 8.2 provides an adequate means by which an entity can address concerns about offshore disclosure of personal information in circumstances where individual contact can be made with the person in question. This would apply, for example, in circumstances where a user can be notified and can consent to the disclosure of their personal information offshore through the ABC's use of international social media networks such as facebook.

However, the ABC has concerns with the compliance burden associated with APP 8 in the circumstances such as third-party agreements for cloud computing. Proposed new APP 8 would

appear to require entities to investigate whether a third-party uses computer servers which are located overseas, and then assess whether the privacy protections in those countries are adequate having regard to the APPs.

Such an obligation possibly could be accommodated when entering into new contracts for cloud services, depending on the negotiating strength of entities. However it is not clear from the drafting whether entities would be required to review and assess existing third party agreements. If this is required, it would represent an onerous compliance burden and impose substantial costs on APP entities.

The ABC requests drafting to clarify that the obligations of APP 8 do not apply to existing third-party agreements. The ABC suggests that closer consideration should be given to the implications of the Bill for cloud computing.

Australian Privacy Principle 12

APP 12.1 creates an obligation for entities to give access to an individual's personal information if requested.

APP 12.2 and 12.3 create exceptions to this obligation for agencies and organisations. The ABC is concerned that organisations are provided a much broader range of circumstances in which they will not be required to comply with 12.1. For example, organisations will be excepted from 12.1 where the request for access is frivolous or vexatious.

It is not clear why this exception (and others) will not be available to agencies. Agencies are just as likely to receive frivolous requests as organisations and the administrative and financial burden of such requests will be the same regardless of whether the entity is a private or public sector one.

The ABC submits that the set of exceptions in 12.3 should apply for both agencies and organisations.

The ABC notes that there are a range of exemptions to the obligation to provide access to personal information in the *Freedom of Information Act 1982* (FOI Act) which are referred to in 12.2. However, the list of exemptions in 12.3 is significantly broader than that provided under the FOI Act for agencies.

The ABC appreciates the opportunity to provide its comments on the Bill. If you would like to discuss the above with the Corporation, please contact me on _____ or by email at _____

The ABC would be willing to appear before the Committee to provide further information related to its submission, should this be required.

Yours faithfully

Michael Millett
ABC
Director, Corporate Affairs