



18 July 2012

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
By email: legcon.sen@aph.gov.au

RE: *Privacy Amendment (Enhancing Privacy Protection) Bill 2012*

About Yahoo!7

Yahoo!7 is one of the most comprehensive and engaging online destinations for Australian consumers and advertisers. Formed as a 50-50 partnership between the Seven West Media Group and Yahoo! Inc. Yahoo!7 brings together the successful Australian internet business, Yahoo! Australia & NZ, and the online assets and television and magazine content of the Seven Network, one of Australia's leading media companies. The company also combines the strengths of Yahoo! search and communications capabilities and its global internet network, with Seven's rich media and entertainment content and marketing capabilities. Yahoo!7 has a significant local presence employing over 360 people based across our businesses in Australia and New Zealand.

Yahoo!7 offers a range of content, navigation, ecommerce, information and 'social networking' services through our products Flickr (photo sharing), Yahoo!7 Video (commercial and user generated video sharing), Yahoo!7 Answers (knowledge sharing), Spreets (online group buying) and Yahoo!7 free mail and instant messenger.

As an Internet pioneer with over 17 years experience in this domain, Yahoo! has dealt with privacy related issues in different parts of the world, acquired experiential wisdom and developed valuable expertise.

In a dynamic, fast-changing industry users can vote with their clicks and advertisers can vote with their budgets. If they don't trust us, they will find a site that they do. Our incentives are to provide a compelling and relevant experience and to keep people coming back. We therefore have a thoughtful approach to privacy based on transparency and informed choice. Our aim is to earn user trust by providing individuals the opportunity to truly understand how their information is being collected and ultimately used. For more information about Yahoo!7's privacy features please visit: <http://info.yahoo.com/privacy/au/yahoo/>

Privacy has always been a priority for Yahoo!. We innovate with privacy in mind and see advanced privacy features which are able to adapt to context and circumstance as a competitive advantage and key to fostering the innovation that is required to drive the digital economy.

Submission

Yahoo!7 welcomes the opportunity to participate in the Senate Committee Inquiry into the *Privacy Amendment (Enhancing Privacy Protection) Bill 2012* ("the Bill") which is currently before Parliament and to provide its unique perspective on the drafting of the Bill which is informed by Yahoo!'s 17 years of experience operating within the dynamic global online privacy landscape.

This submission proposes a different position on two specific aspects of the Bill to that presented in the submission jointly lodged by Yahoo!7, Facebook, Google and IAB Australia.

Subsection 6(1) definition of *Personal Information*:

Yahoo!7 would like to provide comment in relation to two aspects of the definition. Firstly, clarification is sought about the intention of the inclusion of the wording: "**in a material form or not**". If the intention is to capture both physical and electronic records Yahoo!7 believes that some ambiguity could be avoided by deleting "**in a material form or not**" and replacing with "**in a physical or electronic form**".

Secondly, to ensure certainty for entity's engaging in the collection, use and disclosure of personal information Yahoo!7 proposes the following amendment to the definition of Personal Information: delete each reference to "**opinion**" and add "**by an entity**" to the end of the first sentence such that the definition would read:

personal information means information ~~or an opinion~~ about an
4 identified individual, or an individual who is reasonably
5 identifiable by an entity:
6 (a) whether the information ~~or opinion~~ is true or not; and
7 (b) whether the information or opinion is in a physical or electronic form
~~recorded in a material~~
~~8 form or not.~~

We believe that the concept of "information" is sufficiently broad to encompass opinion. The inclusion of a specific reference to opinion simply adds uncertainty about what material does in fact fall within the realm of "information".

The reasoning for the addition of "**by an entity**" is to cover circumstances where the same piece of information can be personal in the hands of a one entity and functionally anonymous in the hands of another. If a specific identification, while possible, is not a significantly probable event, this information should not fall under the scope of the definition. For instance, license plates in the possession of an insurance company can reasonably be considered as "personal information," where that license plate is registered on file with other identifying information. This same information, when contained in the tape of a security camera of a service station, will require considerable extra efforts in order to identify an individual.

So too is this the case with online identifiers. An IP address is used as a basic piece of technology to enable websites to return information back to users' computers. IP addresses are issued by telecommunications providers, who have a record of the account holder, and personal information attached to that record. We might consider IP addresses in the hands of the ISP (Telco), then, a form of personal information, whereas in the hands of an online service

provider, which does not have access to ISP records, they would merely be a unique anonymous identifier.

A definition that would categorize as “personal” any type of information, regardless of the possibility of that information being able to single out an individual or not will put entity who collect, use and disclose personal information in the position of seeing existing business procedures undermined (and having to invest resources in applying measures designed for personal data to so many other types of information).

This could quickly become a competitive disadvantage in relation to more balanced regimes and severely hamper not only the ability of established companies to innovate, but also impact the environment necessary for start-ups and new ideas to flourish.

We also request that the EM is amended in reference to Item 36, para 6 which says “generally, the information would have to be able to be linked to other information that can identify the individual” by replacing “**would have to**” with “**has to**”. We believe this small amendment will provide greater certainty.

We ask the Committee to adopt the proposed amendments so that a norm may be created which is clear and certain for individuals and data controllers alike while durable enough to survive the constantly evolving technological environment.

Australian Privacy Principle 3

APP 3 is focused on the rules applying to the collection of personal and sensitive information. The Explanatory Memorandum provides an expansive explanation of what amounts to a “collection” under the proposed privacy laws, including under paragraph 5B(3)(c). Yahoo!7 submits that APP 3 should be redrafted in a form which takes into account a number of practical factors before imposing a unique legitimate basis for collection and processing.

A modern privacy framework should, in our opinion, contemplate and encourage other alternatives to consent which would foster both the necessary protection of individuals and the development of innovative services and tools that they want to access.

One alternative currently being discussed in several fora is the concept of ‘legitimate interests’. The EU Data Protection Directive includes legitimate interests as one of the six independent legitimate bases for processing personal data. In the US, the debate is around the term of Commonly Accepted Practices, whereby the Federal Trade Commission has indicated such practices should not require any consent. Following are some principle-based, high level criteria, which we believe could comprise the definition of such a ‘legitimate interest’ concept and which we encourage the Senate Committee to endorse:

- (a) Processing and collection present a benefit for consumers;
- (b) The benefit outweighs possible risks and harms;
- (c) If the risks are low or moderate, mitigation measures should be put in place;
- (d) Transparent policies are in place; and
- (e) Implementation of risk assessments and accountability programs by the entity collecting the personal data are in place.

By adopting compliance programs and providing transparent, easily accessible and intelligible information to users, some important results can be achieved:

- (a) Data protection compliance system is the real safeguard for individual respect, thus, once the collecting entity complies with it, processing and transborder data flows could take place without being subject to consent (and, probably, also the other legal options would lose their original function);
- (b) Users who provide personal information can enjoy opportunities, services or other benefits, without being subject to the alternative of either giving consent or abandoning the transaction;
- (c) Once data processing is in place, users can be well aware of the consequences of processing as well as of their possible right to objection and have confidence thanks to compulsory compliance programs; and
- (d) People would not be frustrated by the usual practice of “please, sign here for privacy”.

General – Jurisdiction

As regards the concept of jurisdiction and accountability in an age where international data transfer and global transaction is the norm, Yahoo!7 submits that a privacy framework which ignores basic international law principles and treaties and proclaims universal extraterritorial applicability, by, for instance, determining the law is applicable to any citizen or resident, regardless of where they may be located can result in an irresolvable conflict of laws, especially for multinational corporations. We support a sensitive while at the same time protective approach which detaches focus on the location of the consumer or the terminal and directs obligations instead on the entity engaging in the collection, use and disclosure of personal information through an ‘accountability’ style programme that is contemplated in both OECD and Canadian frameworks.

Accountable organizations, particularly in the digital sector that operate Cloud services, would be ones that have programmes in place to protect the privacy of information no matter where (or to what jurisdiction) that data flows, and stand ready to demonstrate and account to regulators what those protections are, and how they are put into practice within the company. This approach is one of the leading and most promising tracks to enhance the goal of interoperability (mutual respect) between privacy regimes in different regions and is a major feature of emerging modern legal frameworks on privacy.

Yahoo!7 looks forward to continuing to work with the Government in implementing these privacy initiatives in order to promote a domestic regulatory framework which will allow Australia’s innovators to thrive within the global digital economy.

For any questions in relation to this submission please do not hesitate to contact me at any time. My direct line is: _____ and email: _____

Yours sincerely

Nick O’Donnell
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