



**Australian
Privacy
Foundation**

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13 August 2010

Submission to the Senate Standing Committee on Environment, Communications and the Arts' inquiry into the adequacy of protections for the privacy of Australians online

Submission by the Australian Privacy Foundation

Introductory matters

1. The Australian Privacy Foundation (APF) is the primary association representing the Australian public's interest in privacy. A brief backgrounder is attached.
2. We welcome this opportunity to comment on the adequacy of protections for the privacy of Australians online.
3. This submission is intended to be made public.

Overview

4. Privacy protection in an online context is a complicated and multifaceted topic. We can here only focus on a selection of issues.
5. In particular, our focus is placed on (1) the privacy of you people, (2) privacy infringements by individuals, (3) the crucial concept of consent, and (4) the challenges associated with cross-border data transfers.

Privacy and Young People

6. The approach taken to young people is of particular importance in the context of online privacy protection. First, young people are often the earliest to adopt newly developed technologies. In that sense, they are at the forefront of online usage. Second, young people may be particularly prone to risk filled online behaviour. Finally, a change in the attitudes of the young people of today will have long term benefits not achievable in other ways.
7. As we have noted elsewhere, different models of the vulnerabilities, capabilities and needs of young people point to different ways of protecting their assumed interests. We suggest encouraging in young people a fundamental lifelong respect for their own and other people's privacy against unwanted intrusions from any source, including government and business as well as 'criminals'.

8. This approach would focus on less intrusive rather than more intrusive technical and legal measures, and adopt the emerging consensus that building individual 'resilience' and self-respect in the face of any current or future challenge online is more likely to be in young people's long term interests than a series of controversial, partial, quickly obsolete and ineffective technical measures, or draconian but rarely used 'law and order' provisions adding to the already very heavy criminalisation and prohibition of a wide range of online activity.

Privacy infringements by individuals

9. The Internet environment, and not least the social networking spaces, provides individuals with an unprecedented ability to be "heard" and "seen". As it has often been pointed out, we can now all be publishers.

10. As publishers, whether on a website, blog or social networking site, individuals can use and disclose personal information. Australia's current regulatory framework is poorly designed to deal with such use and/or disclosure.

11. In light of this, privacy regulation needs to, in some form, be applicable to the conduct of individuals. This can be achieved by a broadening of the scope of application of the *Privacy Act 1988* (Cth), or the introduction of a statutory cause of action for privacy infringements.

Consent

12. While the competition is fierce, the concept of consent is probably the single most serious weakness in Australia's privacy regulation. No matter how dire, there is virtually no type of privacy violation that cannot be justified by reference to the victim having consented to the action in question. Thus, consent works like a miracle cure for conduct that otherwise would have been contrary to the law.

13. The above mentioned absolving impact of consent is wholly disproportionate with the ease with which a data controller can obtain the data subjects consent. This is particularly so in the online context where a data subject's careless click on a button can give the data controller a license to do just about anything it wishes with the personal information in question.

14. To be blunt, privacy protection is virtually meaningless where its protective application can be so easily circumvented, for example, by a Internet user being forced to "consent" to unspecific privacy invasive practices, bundled with pages of other terms and conditions, when signing up for a social networking account.

15. Consequently, for there to be any meaningful privacy protection online, a stricter regulation of consent is necessary, and in this regard, attention could usefully be given to the structure adopted for general consumer protection measures such as section 51AB of the *Trade Practices Act 1974* (Cth).

Cross-border data transfers

16. With the Internet being a global network of networks, there can be little surprise that massive amounts of data travels across geographical borders every minute of the day. That is not necessarily a bad thing, and in any case, it is unavoidable if we are to maintain the Internet of today. The problem is of course that much of that data amounts to personal information and is thereby appropriately regulated by privacy law.

17. One of the most difficult challenges facing anyone seeking to regulate online privacy is to find an approach that allow for a sufficient level of transborder data flow while at the same time ensuring an adequate level of protection for the privacy of Internet users.

18. Australia's regulation of transborder data flows (NPP 9) is ill-equipped to meet this challenge. But unfortunately, the approach proposed in APP 8 is even worse and will leave Australians extremely vulnerable both online and offline.

19. In the change from NPP 9 to APP 8, the law abandons what can be called a 'border protection' approach in favour of the approach mis-described as 'accountability'. The problems with this approach are well-documented, and we share the concerns expressed by Professor Graham Greenleaf and Mr Nigel Waters in their *Submission to the Senate Finance and Public Administration Committee on the Exposure Draft of the Privacy Amendment Legislation*.

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Australian Privacy Foundation

Background Information

The Australian Privacy Foundation (APF) is the primary national association dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues that pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions.

The APF's primary activity is analysis of the privacy impact of systems and proposals for new systems. It makes frequent submissions to parliamentary committees and government agencies. It publishes information on privacy laws and privacy issues. It provides continual background briefings to the media on privacy-related matters.

Where possible, the APF cooperates with and supports privacy oversight agencies, but it is entirely independent of the agencies that administer privacy legislation, and regrettably often finds it necessary to be critical of their performance.

When necessary, the APF conducts campaigns for or against specific proposals. It works with civil liberties councils, consumer organisations, professional associations and other community groups as appropriate to the circumstances. The Privacy Foundation is also an active participant in Privacy International, the world-wide privacy protection network.

The APF's Board comprises professionals who bring to their work deep experience in privacy, information technology and the law.

The Board is supported by a Patron (Sir Zelman Cowen), and an Advisory Panel of eminent citizens, including former judges, former Ministers of the Crown, and a former Prime Minister.

The following pages provide access to information about the APF:

- Policies <http://www.privacy.org.au/Papers/>
- Resources <http://www.privacy.org.au/Resources/>
- Media <http://www.privacy.org.au/Media/>
- Current Board Members <http://www.privacy.org.au/About/Contacts.html>
- Patron and Advisory Panel <http://www.privacy.org.au/About/AdvisoryPanel.html>

The following pages provide outlines of several campaigns the APF has conducted:

- The Australia Card (1985-87)
<http://www.privacy.org.au/About/Formation.html>
- CreditReporting (1988-90)
<http://www.privacy.org.au/Campaigns/CreditRpting/>
- The Access Card (2006-07)
http://www.privacy.org.au/Campaigns/ID_cards/HSAC.html
- The Media (2007-)
<http://www.privacy.org.au/Campaigns/Media/>