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A Submission to

Senate Legal and Constitutional Affairs Committee

Inquiry into the Privacy Amendment (Enhancing Privacy Protection) Bill 2012

on behalf of

Australian Association of National Advertisers
27 July 2012

1. Executive Summary

- AANA represents Australia's national advertisers.
- The advertising, marketing and media industry plays a fundamental economic role in society and contributes in excess of \$30 billion to the Australian economy annually.
- Advertisers fund the advertising self regulatory system, which was established by AANA in 1997. Since the introduction of the self regulatory system, new codes have been introduced and existing codes have been amended to keep pace with the ever evolving advertising, marketing and media industry.
- The self regulatory system provides a number of protections relating to personal information and privacy and demonstrates advertisers and marketers commitment to protecting consumers' data.
- It is the self regulatory model which allowed for the development and launch of a self-regulatory framework for Online Behavioural Advertising and a consumer education initiative concerning online behavioural advertising and online privacy.
- The current regulatory regime, as supported and endorsed by the self regulatory system and initiatives, provides significant protections for consumers should their information be disclosed in an unauthorised way.
- AANA opposes additional regulation as an unnecessary additional regulatory burden on business.

Introduction

The Australian Association of National Advertisers (AANA) provides this submission to the Inquiry into the Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (the “Bill”).

As the peak industry body, AANA has represented national advertising for over 80 years. It represents the common interests and obligations of companies across all business sectors involved in the advertising, marketing and media industry.

AANA serves to protect the rights of consumers in ensuring advertising and marketing communications are conducted responsibly, including through its development and administration of industry codes and the self-regulatory system.

The advertising, marketing and media industry plays a fundamental economic role in society and contributes in excess of \$30 billion to the Australian economy annually.

It is the driver of consumer choice and, by promoting competition, helps consumers get better value for money. It enables innovation to be brought to market and stimulates economic growth and jobs. It provides substantial funding to support media and a variety of media content.

Advertisers and marketers in Australia recognise their role and obligations regarding social responsibility, including respecting the privacy of consumers. AANA strongly supports and drives effective self-regulatory initiatives that enable advertisers to respond to market and social challenges.

Both advertisers and the media are proactively responding to Australian and international community and government concerns regarding online privacy by adopting and implementing better practice and self-regulatory measures to meet community expectations. This is important given the speed of evolution of the online and digital environment and the acknowledged difficulties of implementing, and maintaining, adequate legislative protections.

AANA has a strong ongoing commitment to self regulation. AANA designed and delivered the self-regulatory component of regulation controlling advertising and marketing communications in Australia. AANA’s self regulatory system applies to all media and all forms of advertising and marketing communications. The issue of privacy is a key matter that AANA and its members have been proactively addressing for more than 15 years.

This submission comments on the following issues in response to the Issues Paper:

Section 2: AANA’s commitment to privacy in AANA Codes

Section 3: Privacy in the on line environment

Section 4: The Case for Self regulation

Section 5: Specific Issues with the Bill

Section 6: Conclusion

Section 2: AANA's commitment to privacy in AANA Codes

Since the establishment of AANA's self-regulatory framework in 1997, the issue of privacy has been a key matter that AANA and its members have been proactively addressing.

AANA introduced the Advertising & Marketing Communications to Children Code effective 2007, revised after extensive consultation in May 2008, and which requires (clause 2.14):

Privacy

If an Advertising or Marketing Communication indicates that personal information in relation to a Child will be collected, or if as a result of an Advertising and Marketing Communication, personal information of a Child will or is likely to be collected, then the Advertising or Marketing Communication must include a statement that the Child must obtain parental consent prior to engaging in any activity that will result in the disclosure of such personal information.

In 2009, and with a particular focus on children, AANA published the Practice Guide: Managing Images of Children and Young People. The Guide applies to the use of images in all media; however, it is particularly relevant to online media. The guide, acknowledged internationally as a world's first, assists advertisers and marketers to ensure that practices and procedures enable the protection of children and young people involved in the industry. In particular, it recognises the balance between:

- the right to privacy and protection from exploitation or abuse;
- the right to freedom of expression and involvement in the media, including advertising and marketing; and
- the right to not be unduly restrained because of the improper actions of others.

2. Privacy in the on line environment

AANA last year convened a cross-industry forum, with other relevant industry associations, to develop a self-regulatory framework for Online Behavioural Advertising (OBA) practices and a consumer education initiative.

Recently, the advertising and marketing industry has faced mounting worldwide scrutiny over the standards it applies to digital advertising and marketing practices, in particular, around OBA. Critics question whether OBA is sufficiently transparent and fair to consumers. Regulators in the US and the EU have called on industry to respond through self-regulation to privacy concerns arising in the context of OBA. If the industry is seen to fail to self-regulate effectively, regulators in those jurisdictions are threatening to step in.

With input from AANA, the World Federation of Advertisers (WFA) in July 2009 released the Global Principles for self-regulation of online behavioural advertising.

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These seven principles have formed the basis of industry self-regulatory initiatives internationally, particularly in the US and UK. The WFA 7 principles are:

1. Education
2. Transparency
3. Consumer Control
4. Data Security
5. Material Changes to Existing Online Behavioural Advertising Policies and Practices
6. Sensitive Data
7. Accountability

The Australian cross-industry forum has set out to pursue the development of a domestic, implementation framework. In particular, this group noted that Australian privacy legislation, and proposed privacy regulatory reform, provided a higher level of consumer protection in Australia than in some overseas jurisdictions where privacy concerns re OBA have been more prominent.

The OBA cross-industry group is driving two initiatives for the Australian advertising industry and the public:

(1) industry self-regulatory guidance on the above principles and;

(2) a consumer education initiative.

The industry initiative was launched in March 2011. The number of signatories since launch has doubled and there are now 10 signatories offering an active “turn off” function; they are Ninemsn Advertising, Adconian Media Group, Microsoft Advertising, Yahoo, Google, Fairfax Digital, News Digital Media, realestate.com.au, Sensis Digital Media and Ten.

The cross industry group has also engaged with consumer advocates to develop a complaints handling mechanism which will have two levels; complaints directly to publishers with an option for complaints to be escalated to a committee of signatories.

The cross industry group has also developed a consumer education campaign to drive traffic to the youronlinechoices.com.au website. Consumer feedback indicates that people are generally satisfied for data about their anonymous on line browsing activity to be collected and used for OBA purposes.

3. The Case for Self regulation

Self-regulation, which includes a range of initiatives such as codes of practice and best practice guidance documents, provides a flexible mechanism to meet the challenges of ever evolving advertising and marketing practices, media environment and consumer expectations. The marketing environment is experiencing a ‘revolution’ in that advertisers are no longer exclusively driving consumer demand. There is a growing movement towards consumer driven marketing. This will require

business to engage in marketing practices that not only comply with 'legal' privacy principles but meet consumer expectations regarding their collection and use of personal information.

AANA welcomed government recognition of the role of self-regulation in the online environment. In February 2010 at the AANA Congress, in his address, the Minister for Broadband Communications and the Digital Economy, Senator the Hon Stephen Conroy, acknowledged AANA's role in developing advertising codes of practice and emphasised the importance of industry self-regulation, particularly in a rapidly and ever evolving digital media environment.

Senator Conroy reiterated this sentiment in June 2010:

In relation to the [AANA] codes, I am pleased that the AANA has moved to ensure that the codes do cover internet advertising and websites and I urge the AANA to work with relevant bodies, and online publishers like Google and others, to ensure that self-regulation is as effective in the online space as it is in the traditional media.

If the industry wants to avoid the imposition of government regulation in this space it must get behind the AANA and self-regulate online advertising as actively and effectively as it does all other forms of advertising.¹

4. Specific Issues with the Bill

AANA raises the following specific issues with the Bill.

- a) **Definition of Personal Information.** The proposed definition of personal information goes beyond traditionally acceptable notions of the types of information which should be protected by privacy legislation.

The current definition could potentially capture within the regulations, information through which a particular individual cannot be identified. It is the identification of a particular person and their personal information which Privacy regulation is intended to protect. The proposed definition brings within the regulation a range of information which does not lead to the identity of an individual.

AANA understands that it is not the Government's intent to capture such information within the legislation.

AANA recommends that Guidelines be developed to clarify the scope of the definition personal information.

- b) **Prohibition on direct marketing.** The Bill prohibits direct marketing, unless certain conditions are met. AANA is concerned that this provision will mislead

¹ <http://www.aana.com.au/MinistercallsonadvertiserstosupportAANAinonlineadvertisingselfregulation.htm>

the public as it appears to ban direct marketing completely. In addition there is no definition of direct marketing provided in the legislation. This provision will create confusion for consumers as it gives the impression that all direct marketing is prohibited.

AANA understands that this is not the case.

AANA recommends the section be amended to include a definition of direct marketing and to be redrafted to permit direct marketing, unless certain conditions are made out.

- c) Third Party Information.** The proposed third party provisions do not draw a distinction between customer information and prospect information. The definition as currently drafted will mean in practice that if a data provider engages a third party to clean or maintain their data, that the data will become third party data.

This will then trigger the opt out requirements which attached to third party data and will impose an unnecessary regulatory burden on advertisers.

5. Conclusion

AANA advises that we are actively moving to ensure effective self-regulation in the online advertising environment. We believe the self-regulatory system has proven effective in addressing privacy concerns, as an adjunct to existing statutory protections. In this context, additional regulatory burdens are an unreasonable and unnecessary regulatory burden on business that will damage Australia's competitiveness and place jobs and economic growth in jeopardy by making Australia the only developed country to have imposed such regulation at the national level.