

**SENATE STANDING COMMITTEE ON
FINANCE AND PUBLIC
ADMINISTRATION**

LEGISLATION COMMITTEE

**Exposure Drafts of Australian Privacy
Amendment Legislation**

SUBMISSION

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SUBMITTER

The Communications Council



Senate Finance and Public Administration Committee
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Australia

The Communications Council

The Communications Council was formed on 1 January 2010, merging the former Advertising Federation of Australia (AFA) with the Account Planning Group (APG) and Australasian Writers and Art Directors Association (AWARD) and more recently the Australasian Promotional Marketing Association (APMA). The Communications Council is the peak body representing agencies in the marketing and communications industry to government, industry, media and the public.

The Council embodies members from a wide spectrum of creative disciplines, ranging from healthcare to design agencies.

We help grow member businesses and develop individual careers through the provision of professional development services, advocacy and support.

The Communications Council represents businesses in the creative industriesⁱ, a sector which contributes \$ 31.1 billion towards Australia's GDP and employs over 315,000 workers. The fastest growing segment of the creative industries is the marketing and advertising segment, with around 15,000 businesses employing 60,000 people.

On behalf of its membership, the Communications Council welcomes the opportunity to submit the following comments in relation to the Committee's inquiry into the Australian Privacy Principles Exposure Draft.

The Communications Council's Self-regulatory System

The Council regularly leads debate, discussion and education on the different acts, codes and guidelines that may impact on marketing communications agencies with the intention to promote legal compliance and reduce legal and commercial risks to advertisers and their agencies.

The Council champions the principle of responsible self-regulation as an effective mechanism to respond to evolving technologies and marketing practices and changing consumer needs.

The Council believes the right to market brands responsibly across all channels is paramount. To this end, the Council supports, often in partnership with other industry organisations, a self-regulatory system.

The Council recognises the industry's role and obligations for social responsibility, including respecting the privacy of consumers and the general public.

Where it concerns privacy protection, the Council believes its members should operate responsibly and within the confines of its self-regulatory system, outlined below as well as relevant state and federal legislation such as the Privacy Act 1988 and Spam Act 2003.

To this end, the Council has sought to educate its members to the best of its ability about the current Privacy Principles and its implications.

Where new legislation may be incoming, the Council will seek to continue to educate its members, and update its current guidelines to reflect newly introduced laws.

The Communications Council is aware that the Minister for Broadband Communications and the Digital Economy, Senator the Hon Stephen Conroy, has previously emphasized the importance of industry self-regulation in the rapidly evolving digital media environment.

The Council welcomes the support for self-regulation in this important area and will continue to work with members and other organisations to ensure effective self-regulation on issues of privacy.

Current privacy protection and industry initiatives

1. Privacy protection on social networking sites

The Communications Council, in partnership with Von Muenster Solicitors & Attorneys, last year released a guide on legal compliance for the marketing communications industry. It highlights the legal issues digital agencies may face in the online space and includes explanations of relevant acts and codes including the Trade Practices Act, the Copyright Act, Do Not Call Register Act 2006 or the Spam Act 2003, and various other codes impacting on agencies operating in this space.

The Council, again in partnership with Von Muenster Solicitors & Attorneys also regularly holds workshops for members around legal compliance on an ongoing basis. Currently it offers workshops on the legal considerations in social media, which outlines agency and client responsibilities in the social space.

The Communications Council is currently in the process of working with Von Muenster Solicitors & Attorneys to review its legal compliance guide in light of political developments and changing technologies.

2. Privacy protection online

In line with the current Privacy Amendment Bill, which encourages industries to draw up their own privacy codes to address their specific industry's privacy considerations, the Council has adopted online privacy guidelines for marketers which are in accordance with the Bill.

The guidelines are provided to members as a help and checklist for the development of all interactive advertising campaigns, customer relationship marketing campaigns and web sites.

More broadly, the online privacy guidelines assist in the development of business-wide actions towards an environment of industry regulation and serve to increase trust between advertisers and consumers, and to foster the protection of consumer's privacy.

- The guidelines stipulate that businesses should adopt and communicate a privacy policy, which gives users the choice and consent over how their information is used and shared.
- The guidelines also recommend giving users access to their personally identifiable information while putting data security and quality, and access measures in place.
- The guidelines suggest that organizations take reasonable steps to destroy or permanently de-identify personal information if it is no longer needed for any purpose.
- The guidelines recommend responsible use of marketing communications via email and other devices such as mobile phones, ie through making communications readily recognizable as marketing messages/solicitations.
- The guidelines propose for agencies to use only use opt-in 'lists' and provide customers the opportunity to easily opt-out in every communication through providing company details and contact information or a link to these details.
- The guidelines also advise members to ensure that the recipient country of data has privacy laws similar to the Australian National Privacy Principles.
- Finally, they recommend responsible Interactive Marketing to Children.

Additional existing Code of Practices

The AANA Code of Ethics was adopted by the Australian Association of National Advertisers (AANA) as a means of advertising and marketing self-regulation in Australia and is intended to apply widely to advertising and marketing communications. It is the building block for other industry codes and an important component of other industry self-regulatory codes and initiatives.

- AANA codes are voluntary, self-regulatory codes that articulate standards for conduct by Australian advertisers. The aim of the codes is to enhance standards throughout the advertising and marketing sector to ensure consumer confidence and public trust is maintained in ethical and responsible advertising.
- The object of the Code of Ethics is to ensure that advertisements are legal, decent, honest and truthful and that they have been prepared with a sense of obligation to the consumer and society and fair sense of responsibility to competitors.
- The code stipulates that advertising and marketing communications ought to comply with Commonwealth law and the law of the relevant State or Territory, which would refer to the current Privacy principles, as well as other legislation on trade practices, the Do Not Call Register Act 2006 or the Spam Act 2003.

The Ethics code is currently under review with the aim to update and where necessary develop the Code to ensure that it continues to meet all stakeholders' requirements and expectations. The review will include discussions on privacy.

The Communications Council is contributing to the ethics review to ensure the code's effectiveness in the long term and to uphold the very highest standards of ethical practice within the advertising industry.

It is anticipated that the final report and a revised Code of Ethics will be completed by year-end 2010.

Specific Provisions relating to Children

The Council has recently submitted its comments on the Senate Committee on Cyber Safety in regard to its inquiry into Cyber Safety.

In its submission it has detailed the provisions around cyber safety that its members comply with, both legislatively and self-regulatory.

The Council is aware that where it concerns minors, marketers and their agencies need to take extra care with regard to safety and privacy of children.

It is worth noting that the Communications Council (previously the Advertising Federation Australia) has long been a supporter of the digital media initiative 'Smart Online, Safe Offline', (SOSO), a collaboration between industry, media and the not-for-profit sector, run by the National Association for Prevention of Child Abuse and Neglect (NAPCAN).

The SOSO initiative delivers online campaigns educating young internet users about the dangers of the online environment. The Communications Council supports the initiative as an important step in digital media industry taking responsibility for the online spaces in which these dangers may be present. It supports any agencies that engage, through research, sponsorship and resources, in partnerships with SOSO.

The Council stressed the importance of this particular initiative and more generally the importance of educating children on how to navigate online safely and securely.

In addition, it has identified advertising in the digital space as an effective vehicle through which children may be made aware of cyber safety threats.

Proposed Privacy Reforms

In recent years an array of digital and interactive media options and channels have become available to advertisers and marketers, giving them unprecedented opportunity to reach and interact with their consumers. At the same time consumers have been empowered with more information, choice and alternative sales channels, changing forever their expectations of brands, their purchase experience and customer service.

The Internet provides the ability to deliver on consumer's expectations of a highly relevant and personal brand and shopping experience. At the same time, the tools that make this possible may raise concerns for consumers about their privacy.

To be successful in the marketplace advertisers must build trust with consumers. The Communications Council fundamentally believes that 'consumer privacy is a right and not a privilege' and that consumers should not have to work to protect their privacy, but rather marketers should have to work to earn their trust and seek permission to develop more personalised and ultimately one-to-one relationships.

The Council encourages agencies to engage in interaction solely where consumers have genuinely consented to be contacted and/ or have opted into receiving communications, whether these are on or offline.

The Council does however note that in order for agencies to design and develop successful campaigns which deliver value to clients, they are reliant on the right for an agency to get customers participating and interacting with them. From the stages that an agency is generating ideas for campaigns, through to focus groups, through to contacting customers to increase brand experience or data collection from promotions, these are reliant on the marketers' right to contact customers and collect their data.

The Council notes that in particular in the area of promotional marketing, which is designed to stimulate a customer to take action towards a buying decision, and often relies on collecting consumer information for future engagement, the right to contact customers and collect their data is crucial to ensure effective campaigns.

In considering any reforms the Council therefore states that the right of agencies and their clients to contact consumers is paramount and should be preserved.

In addition it would submit that while incoming legislation should be designed to provide clear privacy protections, it should also seek to reduce existing complexity and inconsistency around entities' compliance with their obligations in relation to personal information.

Technological neutrality

The Council has noted the Australian Law Reform Commission's Recommendation 18-1 that the Australian Privacy Principles (APP's) should be technologically neutral. The Council supports this proposition as it submits it is the best way to ensure the principles remain relevant and current in context of rapidly changing technologies.

In view of our industry being at the forefront when it comes to monitoring and using new digital technologies, The Council would also propose that where future technology is set to impact privacy, industry should work with government to ensure safe digital environments for consumers and educate them about the risks and benefits of emerging technologies.

Implications of the Exposure Draft Australian Privacy Principles upon Agencies and their Clients

In order for the Committee to get a better understanding as to how these measures will be impacting the marketing communications sector, the Council has outlined the exposure drafts' implications for agencies and their clients.

1. Privacy Policies

- Under the proposed draft, entities will be required to redraft their privacy policies to provide new information for compliance with the specific requirements set out in the Australian Privacy Principles.
- This includes requirements on entities to disclose whether the entity is likely to disclose personal information to overseas recipients as well as the countries where these overseas recipients are likely to be located, where practicable.
- The principle also requires entities to take reasonable steps to develop and implement internal policies and practices that facilitate compliance with the principles.

The Council notes under the proposed draft principles agencies and their clients may face increased compliance costs as a result of the requirements to update privacy policies and to implement new internal policies and practices.

It also notes that internal policies and practices may be particularly burdensome for companies who collect large quantities of data from different sources.

2. The Definition of “Personal Information”

- Under the new principles, “*personal information*” is defined as “*information or an opinion about an identified individual, or an individual who is reasonably identifiable: (a) whether the information or opinion is true or not; and (b) whether the information or opinion is recorded in a material form or not*”.

The Council notes that there has been an expansion of the definition of “*personal information*” and may now apply to information that can be linked to other information that can identify an individual.

The Council is concerned that this increase in the scope of what is considered to be “*personal information*” will likely result in more stringent and strict controls on entities. This may mean increased expenditure should tighter measures to identify an individual be required.

3. Direct Marketing

- The Council notes that under the new direct marketing principle seven, entities will need to significantly review their direct marketing practices, particularly to determine whether, and how, they can continue to market to individuals if their information has been collected from a third party.
- APP 7 is a new principle that places extra limitations on private sector organisations that use or disclose personal information to promote or sell goods or services directly to individuals and requires that an organisation be capable of identifying the source of the personal information if a person seeks this information after the collection has occurred.
- The Council notes that direct marketing will be permitted where consent has directly been obtained (and not later withdrawn) and where a simple opt-out facility is available.
- It also notes that the provisions that where personal information is collected indirectly from an individual (i.e. either from a third party or in circumstances where a person would not reasonably expect their personal information to be used for direct marketing), a simple opt-out facility and a prominent opt-out statement must be included in each direct mail communication.

The Council is concerned that privacy principle seven introduces a number of potentially onerous requirements on organisations who engage in direct marketing services. Stricter opt-out procedures will need to be complied with, and organisations may need to change their CRM or related databases to ensure that they have accurate records about the source of data relating to each individual, unless this is impracticable or unreasonable.

The Council notes in addition that it will be particularly onerous for organisations who purchase or rent lists to ensure that the provider of the personal information has identified the source of personal information for each individual.

It also notes that the proposed obligation on entities to respond to an individual's request in relation to their personal information collected for a direct marketing purpose may force entities to change current direct marketing business practice and management to be able to respond to individuals within the specified timeframe and include opt-out statements in communications.

Direct Marketing Section Three

The initial government response to the Australian Law Reform Commission focused on persons who were existing customers versus persons who were non-existing customers.

The draft principles however refer to individuals who have provided personal information versus persons who have not provided personal information.

The Council submits that these formulations do not achieve the same policy outcome.

The Council is particularly concerned that the new definition will impact upon a client or agencies' relationship with an existing customer.

Under the draft principles existing relationships with customers may fall under section three when a company uses information from an individual, for instance age or location to make inferences on customer interest in purchasing products or services.

Under the new principle, marketing as a result of such inferences may all under section three (i) and therefore have the more onerous requirements of providing opt-out facilities and opt-out statements.

The Council submits that such obligations will have an adverse effect on direct marketing and jeopardises marketing agencies' existing relationships with individuals.

The Council therefore strongly proposes that the Committee review the present terms back to 'existing and non-existing customers'.

4. Accuracy of Information

Australian Privacy Principle 13 obliges entities to correct personal information if it is inaccurate, out-of-date, incomplete or irrelevant.

The Council would submit that agencies and their clients rely on information being accurate at the time of its collection and individuals correcting information where needed. As APP13(1) requires an organisation to correct information if it is satisfied the information is inaccurate.

The Council would submit that it may be impractical for agencies and their clients to check the ongoing accuracy of personal information it has collected.

It would also submit that the obligation to advise individuals and third parties of corrections under APP13(3) is likely to be particularly administratively burdensome for large organisations with automated systems and raises real concerns regarding compliance costs.

The Council also submits the concept of 'relevance' may be problematic as what is 'relevant' information to an individual may not coincide with what constitutes 'relevant' information to an agency or its client.

5. Cross-Border Disclosure

- Entities will need to consider whether, and how, they can continue to transfer personal information overseas as a result of greater accountability imposed on entities under Principle eight.
- Australian entities will be liable to Australian individuals if the overseas recipient acts inconsistently with the principles. This is even so where the Australian entity exercised due diligence and took reasonable steps to ensure that the overseas recipient would abide by the APPs.
- Under section 20, the overseas recipient's act or practice will be taken to be that of the entity who disclosed the information to the overseas recipient and the act or practice will be taken to be an interference with privacy for the purposes of the *Privacy Act*.

The Council notes the effect of APP 8 may include increased compliance costs due to the increased accountability faced by entities that transfer personal information overseas.

It also notes that whether entities are likely to disclose an individual's personal information to overseas recipients and where those recipients are located may change over time depending on the service provider's operations and infrastructure arrangements. The obligation to inform persons of changing circumstance on an ongoing basis may be administratively burdensome and costly.

6. Anonymity and Pseudonymity

- The draft principle two requires individuals to have the option to deal with entities by not identifying themselves, or by using a pseudonym, unless required by Australian law or if it is impracticable for an entity to deal with individuals who have not identified themselves.
- This will significantly impact upon the way in which an entity interacts with individuals, particularly online, as an entity will need to first consider whether it is *necessary* to collect personal information at all. An entity will be prevented from collecting personal information from an individual if the entity does not need to. This is likely to call into review, and ultimately limit, the circumstances in which entities can request personal information from individuals.

The Council notes this principle is a reiteration of the principle that an organisation or agency should not collect personal information unless this is necessary for one or more of its functions or activities.

It would however welcome clarification regarding the definition of 'necessary'.

Small business exemption

The Council has noted that the proposed principles maintain the small business exemption. The Council is aware the exemption will be subject to discussion at a later date but would like to express its support for the exception at this stage. Its support the exemption as responsibilities on agencies in regards to opt-out procedures and keeping records about the source of data would be particularly onerous for small business.

It would also submit however that many small businesses opt-in voluntarily to industry codes on privacy or federal privacy laws.



Closing Remarks

The Council thanks the Committee for the opportunity to comment and welcomes the opportunity to discuss this submission in further detail.

Yours sincerely,

Daniel Leesong
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The Communications Council

ⁱ Creative industries comprise advertising, marketing, architecture, design and visual arts, film, tv and radio, music and performing arts, publishing, software and digital content.