

Committee Secretariat
Senate Finance and Public Administration Committee

Via Electronic Form - submitted online

23 July 2010

Dear Sir/Madam,

The following submission is made on behalf of National Australia Bank Limited (NAB) in response to the Federal Government's exposure draft of Australian Privacy Amendment legislation.

NAB appreciates the opportunity to contribute to this discussion and commend the Senate and the Department of the Prime Minister and Cabinet's collaborative approach across industry, consumer groups and all interested stakeholders in seeking views on the exposure draft of the Australian Privacy Principles and the draft Companion Guide.

NAB is committed to finding practical positions that will balance consumer, business and public policy goals.

We thank the Senate Committee for the opportunity to contribute to the consultation process. Please contact myself if you require clarification or more information in relation to NAB's feedback.

Yours sincerely

Barbara Robertson
Chief Privacy Officer & Head of Notices

Introduction

National Australia Bank Limited (NAB) welcomes this opportunity to provide feedback to the Senate Finance and Public Administration Committee in relation to the *Australian Privacy Principles Exposure Draft and Companion Guide*.

As one of Australia's largest financial services organisations, NAB has been an interested and active stakeholder since the release of the Australian Law Reform Commission's (ALRC) recommendations on privacy reform including providing two earlier submissions as part of the consultation process.

Summary of Key Suggestions

Please refer to 'Appendix A' for a tabular summary of NAB's feedback.

Response to Selected Sections

For the purposes of presenting this submission, relevant sections of the Exposure Draft have first been extracted and highlighted below.

2 Australian Privacy Principle 1 - open and transparent management of personal information

Compliance with the Australian Privacy Principles etc.

(2) An entity must take such steps as are reasonable in the circumstances to implement practices, procedures and systems relating to the entity's functions and activities that:

- (a) will ensure that the entity complies with the Australian Privacy Principles; and*
- (b) will enable the entity to deal with inquiries or complaints from individuals about the entity's compliance with the Australian Privacy Principles...*

Privacy Policy

(4) Without limiting subsection (3), the privacy policy must contain the following information...

- (g) if the entity is likely to disclose personal information to overseas recipients -the countries in which such recipients are likely to be located if is practicable to specify those countries in the privacy policy.*

While NAB supports the view that organisations should take a pro-active approach to privacy compliance, the new obligation in Section 2(2) to take reasonable steps to implement policies and practices that try to ensure compliance with the Privacy Principles is already implicit in the overriding obligation in the Privacy Act not to breach the Privacy Principles. NAB submits that this additional obligation therefore offers no real further protection to an individual's personal information. NAB also notes that this new obligation in Section 2(2) was not one of the ALRC's recommendations on privacy reform after its extensive review of the effectiveness of the Privacy Act.

NAB also submits it is difficult to see how the requirement in Section 2(4) to list the countries to which personal information is likely to be disclosed, delivers any real value to individuals. NAB considers that the protections offered by the draft Australian Privacy Principle 8 (cross-border disclosure of personal information) make it irrelevant, from a privacy perspective, as to which country the information may be disclosed.

3 Australian Privacy Principle 2 - anonymity and pseudonymity

No submission.

4 Australian Privacy Principle 3 - collection of solicited personal information

NAB submits Section 4(6) should be removed from this principle. Refer to our submission below under 5 Australian Privacy Principle 4 - receiving unsolicited personal information.

5 Australian Privacy Principle 4 - receiving unsolicited personal information

NAB does not consider that there is a need for a separate principle in relation to unsolicited personal information. This is because the draft Australian Privacy Principle 3 already protects against inappropriate collection of any personal information by means of the overriding obligation not to collect personal information unless it is *reasonably necessary for, or directly related to, one or more of the entity's functions or activities*.

NAB also submits that the inclusion of a separate principle in relation to unsolicited personal information does not achieve the objective of reform expressed in the *Companion Guide* of making the law less complex.

6 Australian Privacy Principle 5 - notification of the collection of personal information

(2) The matters for the purposes of subsection (1) are as follows...

(b) if:

(i) the entity collects the personal information from someone other than the individual; or

(ii) the individual may not be aware that the entity has collected the personal information;

the fact that the entity so collects, or has collected, the information and the circumstances of that collection;

(c) if the collection of the personal information is required or authorised by or under an Australian law or an order of a court or tribunal - the fact that collection is so required or authorised (including the name of the Australian law, or which order of a court of tribunal requires or authorises the collection);

...

(j) if the entity is likely to disclose the personal information to overseas recipients - the countries in which such recipients are likely to be located if it is practicable to specify those countries in the notification or to otherwise make the individual aware of them.

NAB submits that the obligation imposed by 6(2)(b) should not be an absolute obligation (as currently drafted) but subject to whether it is reasonable and practical to do so. NAB imagines there will be a number of circumstances where it will be unlawful or interfere with the lawful functions of an entity (particularly enforcement bodies) to notify individuals in all circumstances that an entity has collected their personal information.

NAB also submits that the new requirement in 6(2)(c) to include the name of the law or order of a court or tribunal authorising or requiring the collection of personal information is too onerous and impractical for an entity to comply with. In particular, the financial services sector is regulated by a large number of laws applying to the provision of those services most of which would require financial institutions, either directly or indirectly, to collect personal information from their customers.

The requirement to name all of those laws would unreasonably add to the costs of compliance for entities operating within such complex regulatory environments including potential costs occurred in having to obtain legal advice to ensure that all relevant laws are identified and named.

NAB also submits that this requirement is also unlikely to deliver any real benefit to individuals as individuals are already adequately protected from the “unnecessary” collection of personal information by the draft Australian Privacy Principle 3.

NAB also notes that the new requirement in Section 6(2)(c) to name the law or order of a court or tribunal was not one of the ALRC’s recommendations and, as an alternative, the draft legislation should adopt what was originally recommended by the ALRC that the individual simply be made aware of the ‘*fact, where applicable, that the collection is required or authorised by or under law*’.

In relation to the requirement in Section 6(2)(j) to list the countries to which personal information is likely to be disclosed, refer to our submission above under **2 Australian Privacy Principle 1 - open and transparent management of personal information**.

7 Australian Privacy Principle 6 - use or disclosure of personal information

No submission.

8 Australian Privacy Principle 7 - direct marketing

NAB supports a separate principle for direct marketing however believes this principle as currently drafted does not achieve the objectives of reform expressed in the *Companion Guide* in making the law more consistent and less complex.

As a starting position, NAB does not consider this draft principle adequately covers circumstances where an organisation collects personal information from an individual for the primary purpose of direct marketing. This is not consistent with the Use and Disclosure principle (draft Australian Privacy Principle 6) which provides that if an entity holds personal information about an individual that was collected for a particular purpose (the primary purpose), then it may use and disclose the information for that purpose without the need for a further assessment as to whether ‘*the individual would reasonably expect the organisation to use or disclose the information for that purpose*’ (per Section 8(2)(b)).

NAB further submits that the separation of direct marketing into a discrete privacy principle presents an opportunity to align the Privacy Act more closely with other marketing laws contained in the SPAM Act 2003 (SPAM Act) and Do Not Call Register Act 2006 (DNCR Act). NAB submits that if the Direct Marketing principle adopted the same concept of **inferred consent** as contained within the SPAM Act and the DNCR Act this would still achieve the same policy approach of distinguishing between direct marketing to existing customers from direct marketing to non-existing customers and organisations could adopt uniform protocols in relation to all forms of marketing (i.e. direct mail, commercial electronic messages and telemarketing). NAB notes that with the inclusion of Section 8(6) within the draft Direct Marketing principle, the Privacy Act will now only effectively apply to marketing activities via direct mail.

In summary, NAB is in favour of dealing with direct marketing in a separate privacy principle and that privacy principle should (a) recognise that direct marketing may itself be the primary purpose for which some personal information is collected and (b) be aligned with principles already contained in other legislation such as the SPAM Act and DNCR Act.

9 Australian Privacy Principle 8 - cross border disclosure of personal information

Refer to our submission below under **20 Acts and practices of overseas recipients of personal information**.

10 Australian Privacy Principle 9 - adoption, use or disclosure of government related identifiers

No submission.

General /Further comments

The requirement in 10(2)(d)(ii) that it first be unreasonable or impractical to obtain the affected individuals consent is not consistent with the current regime under National Privacy Principle 7 which never included consent as an exception to the use or disclosure of Identifiers.

11 Australian Privacy Principle 10 - quality of personal information

12 Australian Privacy Principle 11 - security of personal information

No submission.

13 Australian Privacy Principle 12 - access to personal information

No submission.

General /Further comments

NAB supports the addition of the exception in 13(9)(c) to give reasons for the refusal to access personal information.

14 Australian Privacy Principle 13 - correction of personal information

(1) If:

(a) an entity holds personal information about an individual; and

(b) either:

i. the entity is satisfied that, having regard to a purpose for which the information is held, the information is inaccurate, out-of-date, incomplete or irrelevant; or

ii. the individual requests the entity to correct the information;

the entity must take such steps (if any) as are reasonable in the circumstances to correct that information to ensure that, having regard to the purpose for which it is held, the information is accurate, up-to-date, complete and relevant.

NAB submits that the new obligation introduced by Section 14(1)(b)(i) may be difficult to reconcile with the obligation under draft Australian Privacy Principle 3 to collect information about an individual only from the individual (unless unreasonable or impractical). It is uncertain which obligation would take precedence should an entity learn from a source other than the individual that personal information may be inaccurate or out of date.

NAB also submits that it should not be open to individuals under Section 14(1)(b)(ii) to determine or decide whether an entity holds "relevant" information as individuals cannot be expected to know or decide on behalf of an entity what types of information are relevant for it to hold. It is submitted that the protections sought by this reform are already inherent within draft Australian Privacy Principles 3 and 11 in prohibiting entities from collecting "unnecessary" information and in the obligation to destroy or de-identify information if it no longer needed for any purpose.

NAB also submits the concept of relevance may also be problematic. For example, a former address may be considered to be irrelevant for some purposes but relevant for other purposes (such as the need to investigate a complaint about a change of address).

General/Further comments:

NAB supports the addition of the exception in 14(4)(c) to give reasons for the refusal to correct personal information.

15 Definitions

Australian law means:

- (a) an Act of the Commonwealth or of a State or Territory; or*
- (b) regulations or any other instrument, made under such an Act; or*
- (c) a rule of common law or equity*

General/Further Comments:

It is unclear why the definition of law is qualified by the term "Australian". NAB notes the separate definition of an "order of a court or tribunal" not is subject to such qualification. It is also unclear, for example, would be the status of a rule of common law or equity that is not Australian but may be persuasive on an Australian Court.

15 Definitions

Consent means express consent or implied consent

NAB submits this definition should not apply to Australian Privacy Principle 7 -direct marketing. Refer to our submission above under **8 Australian Privacy Principle 7 - direct marketing**.

20 Acts and practices of overseas recipients of personal information

(1) This section applies if:

- (a) an entity discloses personal information about an individual to an overseas recipient; and*
- (b) subsection 9(1) applies to the disclosure of the information; and*
- (c) the Australian Privacy Principles do not apply, under this Act, to an Act done, or a practice engaged in, by the overseas recipient in relation to the information; and*
- (d) the overseas recipient does an act, or engages in a practice, in relation to the information that would be a breach of the Australian Privacy Principles (other than Australian Privacy Principle 1) if those Australian Privacy Principles so applied to that act or practice)*

NAB notes that the *Companion Guide* states that an entity is made accountable for an overseas recipient's acts and practices by Section 20. It is therefore clear that this section is designed to be read in conjunction with Section 9(1) and that accountability will apply if all the circumstances outlined in Section 20(1) apply. It is unclear however from the drafting of these provisions how these two sections interact in circumstances where the Australian Privacy Principles apply to the overseas recipient such as where the overseas recipient is an organisation who has an Australian Link (the definition of Section 19(3)).

In these circumstances, it appears Section 20 does not apply however Section 9(1) still appears to require an entity to take reasonable steps to ensure the overseas recipient (who is not the entity) does not breach the Australian Privacy Principles. It is therefore submitted that any error in drafting Section 9(1) be corrected to make it consistent with Section 20(1).

Concluding Remarks

NAB believes a modern privacy law should provide robust protections for individuals around the collection and use of their personal information but should also seek to reduce inconsistency and complexity around an entity's compliance with its obligations in relation to personal information.

In this regard, NAB has sought to highlight in this submission a number of further opportunities for improvement to the proposed Australian Privacy Principles as well identify areas of practical concerns in the operation of the principles.

Please contact myself if you require further clarification or more information in relation to NAB's submission.

Barbara Robertson
Chief Privacy Officer & Head of Notices
National Australia Bank

Appendix A

Principle	Section	Feedback & Suggestions
APP 1	2(2) 2(4)	<ul style="list-style-type: none"> • Additional obligation adds complexity - intent implicit within Act • Recommend remove requirement to list countries
APP 3 APP 4	4(6) 5	<ul style="list-style-type: none"> • Merge APPs by removing separate concept of 'unsolicited' personal information
APP 5	6(2)(b) 6(2)(c)	<ul style="list-style-type: none"> • Introduce 'reasonable/practical' test • Remove requirement to name law or order of court/tribunal
APP 7	8	<ul style="list-style-type: none"> • Support separate principle; provide consistency via 'inferred' consent regime
APP 9	2(d)(ii)	<ul style="list-style-type: none"> • Intended to provide 'consent' as exception for Identifiers?
APP 12	13(9)(c)	<ul style="list-style-type: none"> • Support inclusion of exception
APP 13	14(1)(b)(i) 14(1)(b)(ii) 14(4)(c)	<ul style="list-style-type: none"> • New obligation difficult to reconcile with APP3 • Individuals not decide what is "relevant information" • Support inclusion of exception
Part B	15	<ul style="list-style-type: none"> • Clarify why include "Australian" when referring to law • Consent definition be reconsidered relative to APP7 comments
Part B	20	<ul style="list-style-type: none"> • Reconsider drafting to correct inconsistency between s20(1) and s9(1) (APP8)