SENATE STANDING COMMITTEE ON FINANCE AND PUBLIC ADMINISTRATION

LEGISLATION COMMITTEE

Exposure Drafts of Australian Privacy Amendment Legislation

SUBMISSION

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SUBMITTER

Australian Direct Marketing Association

Submission to Finance and Public Administration Committee on Exposure Draft of the Australian Privacy Legislation Amendments

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1. Executive Summary

The Australian Direct Marketing Association (ADMA) welcomes the opportunity to provide comment on the first of four parts of draft legislation that will revise the *Privacy Act 1988 (Cth)* (Privacy Act).

This first exposure draft of the Australian Privacy Principles (Exposure Draft) represents the culmination of many years of consultation and consideration of the Australian privacy regime of which ADMA has been a party to throughout.

The overall quality of this draft legislation reflects the careful, consultative and rigorous process that has been used in reviewing the legislation. ADMA believes that this Senate Committee inquiry is a valuable part of this approach given the complexity and far reaching consequences of this legislation.

ADMA fully supports the continuation of a technology neutral, principle based approach to Australian privacy legislation. The rapid onset of technologies makes it vitally important that the Australian privacy framework applies and protects personal information regardless of the types of technologies that emerge in the future.

This submission does not provide a line by line analysis of the Exposure Draft and the Companion Guide rather it focuses on those issues that have been identified to date. These include:

a) the definition of personal information
b) The need to impose a limit on the extra-territoriality provisions of the Exposure Draft to organisations that have a presence in Australia
c) three specific areas of concern with draft Australian Privacy Principle 7 (direct marketing)
d) the limitation of use and disclosure of information under Australian law and not under foreign law

The ability of industry to use personal information for direct marketing is vital for a successful and thriving economy. It is not understating the fact that personal information is the lifeblood of many Australian organisations.

Further, ADMA has been involved in the development of Australian privacy legislation since its inception and we have supported a lot of these changes.

ADMA is therefore extremely supportive of the inclusion of a privacy principle which is dedicated to direct marketing and which acknowledges the role of personal information for this purpose in industry and the economy.

ADMA supports the policy intentions of the new draft Australian Privacy Principle 7 however we believe that the drafting has introduced some significant uncertainties and issues that must be resolved before the legislation is passed.

2. About the Australian Direct Marketing Association

ADMA is the principal industry body for information based marketing in Australia.

ADMA was formed in 1966 and has, during its 44 years of operation, been involved in the formulation of law relevant to the direct marketing industry. Predominantly our focus has been the *Privacy Act 1988,* the *Spam Act 2003*, the *Trade Practices Act 1974* and the *Do Not Call Register Act 2006.*

Direct marketing includes any marketing communication which uses personal information where the objective is to actively solicit and produce a tangible and measurable response. Direct marketing includes any marketing that is directed to an individual at a distance and includes marketing via:

a) mail
b) email
c) telephone call
d) SMS or MMS
e) the Internet (including over mobiles)
f) social media networks

ADMA's primary objective is to help companies achieve better marketing results through the enlightened use of direct marketing.

ADMA has over 500 member organisations including major financial institutions, telecommunications companies, energy providers, travel service companies, major charities, statutory corporations, educational institutions and specialist suppliers of direct marketing services.

Almost every Australian company and not-for-profit organisation directly markets to its current and potential customers as a normal and legitimate part of its business activities and the ability to continue to conduct this activity underpins a good proportion of Australia's economic activity.

3 Comment on Exposure Draft of the Australian Privacy Principles and the Companion Guide

Comments in this submission are presented in two parts. The first part outlines comments in relation to draft Australian Privacy Principle 7 and the second part outlines comments that apply to other areas of the Exposure Draft and Companion Guide.

PART A - Draft Australian Privacy Principle 7 – Direct Marketing

ADMA's primary concern with the draft Australian Privacy Principle 7 (APP 7) is the decision to differentiate Sections 2 and 3 on the basis of where information about the individual has been obtained rather than on the basis of whether an individual is an existing customer or not. This change is a significant departure from the recommendations of the Australian Law Reform Commission (ALRC) and the Government's response and will not, as has been stated in the Companion Guide, achieve the same policy outcome at all.

ADMA submits that this new approach is unworkable. Industry's processes cannot be neatly divided into two streams on the basis of whether information was obtained from the individual. Using such a distinction will lead to an environment where consumers, regulators and industry will be unable to easily determine which obligations or rights apply. Further it ignores the approach taken in all modern Australian privacy laws, such as the *Spam Act 2003* (Spam Act) and the *Do Not Call Register Act 2006* (Do Not Call Register Act) that applies different regimes according to the conduct and the business or other relationship.

ADMA submits that the legislation should revert to the approach suggested by the ALRC and accepted in the Government's response. That is that Sections 2 and 3 of APP 7 should be differentiated on the basis of whether an existing relationship exists or not.

ADMA notes the Government's decision to try to extend the concept of existing customer relationship to existing relationship

> *The approach taken to the drafting of this principle differs to that outlined in the Government response to the ALRC report. The language used in the Government response focused on persons who are "existing customers" in comparison to those who are not.*
>
> *The language used in the principle is different, but achieves the same policy. The policy that applies to "existing customers" is applied to individuals who have provided personal information to the entity who is undertaking the direct marketing. The policy that applies to "non-existing customers" is applied to those who have not provided personal information to the entity who is undertaking the direct marketing.*[1]

ADMA rejects this new approach, industry's processes cannot be neatly divided into two streams on the basis of whether information was obtained from the individual and it does not serve as an equivalent proxy for whether there is an existing relationship or not.

[1] Page 11, Australian Privacy Principles Companion Guide

The issue of why there should be different regimes for direct marketing approaches that are initiated by an organisation with an existing customer versus direct marketing approaches that are initiated where an existing relationship did not exists were considered at length by the ALRC.

The ALRC concluded in its report *For Your Information Report, Australian Privacy Law and Practice,* May 2008 that

> *The requirements that apply to direct marketing communications to individuals who are not existing customers should be more onerous than those applying in the context of direct marketing to existing customers.*

The Government in it's *Enhancing Privacy Protection First Stage Response* October 2009 noted

> *Individuals may have a broad range of relationships with different types of organisations. The term 'customer' might not best characterise the relationship in all contexts. Accordingly, 'customer' should be construed in a broad sense to recognise the types of relationships individuals may have with a range of organisations, including social groups and clubs, charities, religious organisations and private educational institutions, each of which may conduct direct marketing. The Government will seek the advice of the Office of Parliamentary Counsel about reflecting this intent in the amendment legislation.*

ADMA fully supports this view. The concept 'existing relationship' has been widely adopted by privacy related legislation, such as the Spam Act and the Do Not Call Register Act. It is a term that has become widely understood by industry, consumers and regulators. There is a significant amount of guidance and experience on the interpretation of existing business relationship.

Existing relationship has been based on, without any issue, in the Spam Act and the Do Not Call Register Act whether the existence of a relationship can be inferred from the conduct and the business and other relationships between the individual and organisation concerned.

ADMA notes all the work that is being done with the objective of achieving a consistent and uniform approach to Australian privacy law including the creation of a single federal piece of Australian privacy legislation and the creation of the Unified (now Australian) Privacy Principles. Given all these efforts the arguments for adopting an existing relationship approach, consistent with other Australian privacy laws, are compelling.

On this basis ADMA submits that Section 2 and 3 of APP 7 should be redrafted such that Section 2 becomes 'Personal information used where an existing relationship exists' and Section 3 becomes 'Personal Information used where an existing relationship does not exist'.

Apart from the reasons outlined above there are two additional reasons why the current approach should be amended, namely because the current approach will:

a) introduce significant additional complexity into the current arrangements
b) create an environment where it is impossible for consumers and regulators to easily understand what obligations and rights apply in what circumstances

Significant Additional Complexity

The current draft provisions, if adopted, will require every organisation to sit down and examine on a case by case basis, each campaign and potentially each individual record to determine whether any elements of the information that is being used or disclosed was not obtained from the individual.

The following outlines an everyday example which occurs daily in the commercial world. An organisation sells an individual some household furniture, such as a dining table and chairs. The organisation through gaining the individuals details might combine the individual's information with learnings about buying behaviour which the organisation has developed over the years. The organisation may know that individuals that live in a particular suburb have a higher propensity to buy lounge suites than individuals who live in other nearby suburbs.

Based on this information the organisation may decide to form an untested opinion about the fact that the individual may want to buy a lounge suite and start featuring lounge suites to the individual through its direct marketing communications (either via mail, email or when the individual logins into the organisations website).

In this example under the proposed draft legislation the obligations that apply for the direct marketing communication to this individual under Section 3 apply because the organisation has formed an opinion whether true or not based on data that it has not collected from the individual. The organisation has in fact formed an opinion, whether true or not, about the individual based on the data that the organisation held.

In addition individuals or external entities, including regulators, will not be able to independently assess when Section 2 or 3 of APP 7 applies.

In the context of enforcement, it is generally a simple matter to determine whether an existing relationship exists with an individual. It is not a simple matter to determine whether a direct marketing communication has been created on the basis of information solely obtained directly from the individual or another source.

The move to information source represents a significant departure both from the stated policy that different regimes would apply depending on whether an organisation has an existing relationship with the individual, but more importantly does not satisfactorily meet the criteria set by the Government of introducing a simpler regime.

ADMA believes that the process for reviewing the Privacy Act has been rigorous for which officials of the Department of Prime Minister and Cabinet should be commended, however in relation to this particular aspect of Sections 2 and 3 of APP 7 ADMA is at a loss to understand the rationale for the departure for the approach from the ALRC and in particular the Government's response to the ALRC report.

Uncertainty about the use of the term 'organisation'

Significant uncertainty about the responsibilities that apply to organisations has been introduced as a result of Section 4 of APP 7 seeking to differentiate between different types of organisations.

There are many different roles organisations can play in the industry. An organisation can be the originating marketing organisation whose products are being promoted.

Alternatively an organisation can be contracted to the originating marketing organisation to provide services or otherwise engage in facilitating direct marketing on an the originating marketing organisation's behalf.

APP 7 Section 4 (a) imposes obligations on the originating marketing organisation whereas APP 7 Section 4 (b) seeks to impose obligations on an organisation whose purpose it is to facilitate direct marketing but not engage in direct marketing on its own behalf. Similarly, APP 7 Section 4 (c) indicates that any organisation will be required to provide the source of personal information that it holds in a direct marketing context.

ADMA supports and agrees with the introduction of the additional provisions that APP7 Section 4 introduces. We note that the requirement to provide the source of data has been requirement on all ADMA members under the ADMA Direct Marketing Code of Practice for some time.

ADMA however submits that the legislation needs to be clarified with respect to what is meant by 'organisation' in Sections 2 and 3.

ADMA's reading of the intent is that the organisations whose products and services are being advertised (the marketing organisation) will carry the responsibility for receiving and actioning a request by the individual not to have their data used in the future for direct marketing purposes. In such circumstances the marketing organisation may put in place processes for its suppliers (facilitating organisations) to accept and forward on those opt out requests however the facilitating organisations would not in this circumstance be required to not contact the individual again on behalf of other marketing organisations.

ADMA seeks specification in the legislation that facilitating organisations (such as a contact centre operator) will not be bound by the Act to not contact the individual again where a subsequent direct marketing communication is originated by the facilitating organisation on behalf of another marketing organisation that is wholly unrelated to the original marketing organisation that the individual's opt out request was directed.

In addition, ADMA submits that allowance should be made in Section 3 (c) such that facilitating organisations, that do not provide direct marketing communications in their own right, will not be subject to the requirements of APP 7 Section 3 (c).

Similar provisions and clarifications will be needed in Section 2 as well.

Application to Agencies

Throughout the review of the Privacy Act there has been an underlying assumption that organisations are the only entities that engage in direct marketing, however this is not the case. There are a number of agencies including state and Commonwealth government bodies that engage in direct marketing. An example of this may be a management school that is part of a university.

Further it appears that there is adequate provision for government bodies in the more modern privacy related pieces of legislation, the Spam Act and the Do Not Call Register Act, which clearly contemplate and cater for government bodies causing telemarketing calls or sending commercial electronic messages.

ADMA submits that the Exposure Draft does not adequately take this matter into consideration and that agencies could potentially be required to discontinue their direct

marketing activities or to try to assert the right to engage in direct marketing under APP 6. ADMA submits that if agencies were forced to rely on APP 6 consumers would not receive the same levels of protection provided in the case where organisations market to them.

To remedy this situation ADMA submits that references to organisation should be changed to entity in APP 7.

Recommended Change – APP 7 references to organisation should be changed to entity.

PART B – Other comments in relation to the Exposure Draft and Companion Guide

B.1 Definition of Personal Information

ADMA supports the new definition of personal information as outlined in the Exposure Draft and the Companion Guide.

The inclusion of a 'reasonable' test acknowledges the fact that whilst it might be technically possible for an organisation to identify an individual it may not be practically possible for the organisation to do so. Examples of situations where this might be the case include where there are logistical, legal or contractual restrictions.

ADMA submits that it is vitally important that a 'reasonable' test is included in the Explanatory Memorandum for the definition of personal information of the Privacy Bill that will emerge at the end of this inquiry.

B.2 Limit the extra-territoriality provisions to organisations that have a presence in Australia

ADMA supports the proposed changes to the extra-territoriality provisions as proposed in the Exposure Draft and outlined in the Companion Guide to the extent that non Australian permanent residents' and citizens' data that is handled by an organisation in Australia should also have the protections of the Privacy Act.

ADMA is also fully supports an outcome that results in companies with a presence in Australia being subject to the Australian Privacy Act when dealing with Australian citizens' and permanent residents' personal information.

However it appears that the extraterritorial provisions of the Exposure Draft go significantly further than could possibly be intended.

The legislation, in its current form, will mean that every subsidiary or related corporation of every organisation with an Australian link, wherever it may be and regardless of the fact that it is processing personal information of individuals who have no link with Australia will be subject to Australian privacy legislation.

A purely hypothetical example of this might include a well known company that is an everyday brand throughout the world. This company may have its parent company in Europe and have a presence in 50 different countries including Australia (giving the company an Australian link). The effect of the bill as it is currently written would be that

this company's operation in Italy where it predominantly processes Italian national's personal information would be subject to the Australian Privacy Act.

ADMA submits that a possible solution to this problem is to limit application of the extra-territoriality provisions of the legislation to companies with a presence in Australia.

B.3 Draft Australian Privacy Principle 6 – Use and Disclosure of Information

Use and Disclosure of Information if required by Laws of Foreign Countries

Currently under National Privacy Principle 2 (h) an organisation may use or disclose personal information if the use or disclosure is required or authorised by or under law.

Under new proposed APP 6 an organisation may only use or disclose information if the use or disclosure of the information is required or authorised by or under Australian law, or an order of a court or tribunal but there is no longer a provision for the use or disclosure if required under laws that apply outside Australia.

There are other provisions under APP 6 for the use and disclosure of information:

a) to lessen or prevent a serious threat to life, health or safety of any individual or to public health and safety (APP 6 Section 2 (c))
b) to enforcement bodies or for enforcement related activities (APP 6, Section 2 (e))
c) to assist in the location of missing persons (APP 6, Section 2 (g))

Notwithstanding the exceptions outlined above there are other laws in other countries which require the use and disclosure of personal information where the use and disclosure is not permissible under the other provisions of APP 6.

Examples of these laws that Australian organisations that have overseas operations may be subject to which would require disclosure that is not covered by a, b and c above include:

a) laws that apply in a foreign country that mandate disclosure of personal information in response to a subpoena issued by a court in a foreign country
b) laws that require a company to disclose details of a person who is allegedly engaging in illegal activities (for example child pornography)

ADMA submits that it is inappropriate for Australian law to knowingly place organisations in a situation where it will be in breach of Australian law by seeking to comply with a law of a foreign country.

To remedy this situation ADMA submits that the legislation should be amended as follows.

Recommended Change – APP 6, Section 2 (b) be amended to read "the use or disclosure of the information is required or authorised by or under ~~an Australian~~ law, or an order of a court or tribunal."

Inclusion of Misconduct of a Serious Nature

ADMA fully supports the inclusion of "misconduct of a serious nature" under APP 6 (h). This will provide organisations and agencies with the ability to not only report unlawful activity but also matters of professional misconduct.

B.4 Draft Australian Privacy Principle 11 – Inclusion of a new term Interference

ADMA notes that a new term 'interference' has been included in the draft Australian Privacy Principle 11 (security of personal information) (APP 11).

The term interference, whilst used in the current Privacy Act, is not defined and that the term itself is used very broadly. As a consequence ADMA seeks additional clarification and explanation as to what is intended by including 'interference' in the provisions of APP 11 and how broadly the obligations that stem from this inclusion would be expected to apply.

B.5 Interaction with State and Territory Laws

The Government's current intention is that Section 3 of the current Privacy Act that preserves the effect of any State or Territory law that makes provision about interferences in privacy, if it is capable of operating concurrently with the existing Privacy Act.

ADMA submits that this view should be reconsidered. The process of simplifying and harmonising Australian privacy law into a single federal code should not be done half heartedly and that states and territories should not be permitted to create other, isolated privacy requirements. The benefit to Australia business of knowing, without doubt, that all privacy requirements are stated in a Commonwealth Privacy Act will to a large extent be undone if this is permitted to occur.