



AUSTRALIAN HOTELS ASSOCIATION

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Senate Finance and Public Administration Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600
Via Email: fpa.sen@aph.gov.au

Dear Committee Members

SUBMISSION IN RESPONSE TO THE DRAFT AUSTRALIAN PRIVACY PRINCIPLES

The Australian Hotels Association is an organisation of employers in the liquor and hospitality industry registered under the *Fair Work (Registered Organisations) Act 2009*. The AHA comprises more than 5,000 members across Australia serviced by branches in every state and territory plus a Canberra-based national office. The majority of these members are pub-style hotels providing food, beverages and entertainment. In addition, a significant minority of members are accommodation hotels. Both sectors are impacted by the privacy legislation in different ways.

The AHA appreciates the opportunity to contribute the views of the hotel industry to this enquiry. It is essential that Australia's privacy laws maintain the capacity to adequately protect the personal information of citizens in the face of rapidly developing technologies. It is equally important to recognise the impact of compliance requirements on individuals and on businesses. Any measure introduced must produce a benefit that outweighs the cost incurred in achieving the outcome.

Some examples of practices of AHA members involving the collection of personal information include:

- Maintaining a database of guests in accommodation hotels including preferences such as room type, applicable discounts, membership of rewards programs etc designed to provide improved services.
- Storage of credit card information as security against future payment of an account. This practice is undertaken in many different ways in the industry including providing a deposit for an accommodation booking, for a function or conference booking and providing security for a 'bar tab'.
- Utilisation of ID scanning technology in licensed bar areas where minors are not permitted under liquor or gambling licensing laws. This practice is undertaken in a small minority of venues, usually in larger venues in geographic areas where there is a concentration of licensed venues requiring heightened security measures. The use of this technology has been found by venues to both reduce anti-social behaviour and provide information that can be of assistance to police in the event of an incident occurring on the premises.

The AHA has five areas of interest in relation to the Draft Principles, namely:

1. Retaining the current exemption for small businesses.

The AHA notes that the current exemption has been retained “at this stage” but is concerned that “the Government has committed to considering whether the exemption should be retained as part of the second stage response”.¹

Many of the AHA’s members are currently exempt from Privacy Act requirements under this exemption category as their annual turnover is less than the \$3 million threshold. Compliance with the Act for small businesses would introduce both a financial and a ‘red tape’ burden to an industry that is already the subject of significant regulation on a variety of business streams such as liquor licensing, workplace relations and gambling legislation.

The \$3 million annual turnover threshold is not indexed and has not changed since the Government amended the legislation to cover the private sector in 2000. Using ‘bracket creep’ principles, there are significantly more businesses in Australia that are now bound by the Privacy Act. The small business exemption is therefore exempting fewer small businesses every year and there is a case for the \$3 million threshold to be indexed in order to protect against small businesses merely ‘creeping’ past the threshold.

The AHA strongly supports the retention of the current small business exemption as a means of maintaining a manageable regulatory environment for small businesses and also calls for the \$3 million annual turnover threshold for this exemption to be indexed.

2. Retaining the current exemption for employee records.

The AHA notes that the Exposure draft does not mention this current exemption but raises the issue out of concern that other submissions are likely to call for this exemption to be removed. The hospitality industry is one of the most labour-intensive sectors of the economy. Wages and salaries typically amount to more than 20% of turnover, and the high casualisation of the industry workforce results in higher administrative burdens on employers to meet the requirements of the *Fair Work Act 2009* and applicable employment instruments.

The current exemption only applies where the employer’s practices directly relate to the employment relationship between the organisation and the individual and an employee record held by the organisation.²

The AHA submits that it is reasonable and necessary for an employer to collect information about employees for purposes relating directly to their employment. Practices such as surveillance measures to prevent theft or even ‘mystery shopper’ activities designed to improve service standards are common practices in the industry which require the collection of personal information for the purposes of managing the employment relationship. Records of discussions held with employees over performances matters typically include personal information as defined in the Draft Principles. The maintenance of these sorts of records are necessary under workplace relations legislation if the employer needs to discipline or terminate the employee. It should be mentioned that these same records are also used to determine whether an employee is fit for promotion or an increase in remuneration.

¹ *Companion Guide – Australian Privacy Principles* (June 2010) p6

² *Privacy Act 1988* ss7(1)(ee), 7B(3)

3. The various requirements relating to businesses notifying individuals about the collection of personal information.

APP 5 sets out a number of requirements for entities to notify individuals about the collection of personal information. For the purposes of pubs utilising ID scanning technology at the point of entry, the AHA seeks confirmation that appropriate signage containing the prescribed privacy information set out in APP 5 would be sufficient for compliance with the Act. Hotels are already required to display signage at the point of entry and at the point of sale under various state/territory licensing laws and a further signage requirement would be considered a reasonable measure.

- 4. Definition of Personal Information:** Personal information is redefined in the Draft Guidelines as "information or an opinion about an identified individual, or an individual who is reasonably identifiable..."³ which potentially expands the scope of information regulated by the Privacy Act to include individuals who are identifiable (in the sense that they can be singled out from a group), even if their identity (in the sense of name, address and phone number) is unknown. This could place more onerous requirements on maintaining customer databases in accordance with the APPs, which are a key part of doing business and therefore a potential additional cost to business.
- 5. Cross-border disclosure of personal information:** APP 8 refers to cross-border "disclosure" rather than "transfer". APP 8 imposes on the disclosing entity an obligation to take such steps as are reasonable in the circumstances to ensure that the overseas recipient does not breach the APPs in relation to the information, before disclosing personal information outside Australia. Further, the disclosing entity remains accountable for the overseas recipient's acts or omissions. This could affect many accommodation hotels that are part of an international chain, imposing a further regulatory requirement on an essential business process, that of managing their customer database.

6. Penalties

While the Draft Principles do not mention any proposed changes to the enforcement regime, the AHA notes the submission of the Australian Law Reform Council (ALRC) which calls for the introduction of powers for the Privacy Commissioner to accept a court-enforceable undertaking. The ALRC submission uses the example of the Australian Competition and Consumer Commission (ACCC) in its enforcement of the *Trace Practices Act 1974* which "showed that undertakings were frequently used instead of court action, and often encompassed assurances by the offender to undertake a comprehensive compliance program. Undertakings also were made as part of the settlement of court proceedings. Under the TPA provisions, undertakings may be published on the ACCC's website. This approach both lends transparency to the process and serves an educative function."⁴

The AHA agrees with the ALRC's view that empowering the Privacy Commissioner to seek a court-enforceable undertaking to cease an activity that breaches the Act would help to deal with many less-severe cases without the need to launch court action. This measure would negate any perceived need to introduce fines or other civil penalties. Minor breaches can be addressed by

³ *Exposure Draft – Australian Privacy Principles* (2010), p31

⁴ *For Your Information* (2008) Australian Law Reform Commission, s50.53

the Privacy Commissioner accepting an undertaking, while serious breaches should continue to be decided by the courts.

7. Implementation

The ratification of the Australian Privacy Principles will result in new and changed requirements being placed on the majority of organisations in Australia. Many of these organisations, including those which form the AHA's membership, do not see themselves as trading in personal information. Information collected from customers is considered incidental to the requirements of doing business in the hospitality and tourism industry. Compliance and acceptance of the Principles will require an education and awareness campaign by the Commonwealth in conjunction with relevant industry associations such as the AHA. The AHA is willing to assist the Government in the provision of information and materials to hotels across Australia and hopes that any implementation issues can be addressed in a cooperative manner.

The AHA understands that private sector organisations were granted a twelve-month amnesty following the introduction amendments to the Act in 2001 which bound them to observe the legislation for the first time. In these circumstances the AHA urges the Government to provide a similar leniency towards the business community as it manages the implementation of the latest amendments.

Thank you for the opportunity to contribute the views of the hotel industry to this inquiry. The AHA is available to expand on any aspect of this submission through our Corporate Affairs Manager, Steven Fanner, who can be contacted in our Canberra office on 02 6273 4007 or fanner@aha.org.au.

Yours sincerely

Des Crowe
Chief Executive Officer