



Real Estate Institute of Australia

**REIA SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL  
COMMITTEE INQUIRY INTO THE PRIVACY ACT 1988**

**PROPOSAL**

1. The Real Estate Institute of Australia (REIA) proposes that the Senate Legal and Constitutional Committee give consideration to a range of issues pertaining to the extension of the Privacy Act 1988 to the private sector, and the work of the Privacy Commission, specifically:
  - a. that the Privacy Commission should work closely with the Ministerial Council on Consumer Affairs to influence early finalisation of the current review of tenancy database operations;
  - b. that the Privacy Commission should develop supporting mechanisms such as industry-specific guidelines to support the Act, given that industry codes of conduct have not received significant support from industry;
  - c. that current small business exemptions to the Act should be retained;
  - d. that guidelines and/or exemptions should be made possible under the Privacy Act to specifically allow property valuers to undertake their professional duties with timely and full access to the personal and property information required for such duties.

**BACKGROUND**

2. The REIA represents the professional interests of the real estate industry in Australia. The REIA has been in extensive discussions with the Office of the Privacy Commissioner over the past three years on a range of issues including implementation of the private sector provisions of the Privacy Act, tenancy databases, and the impact of legislative requirements on property valuers.
3. In August 2004, the Attorney-General asked the Privacy Commissioner to conduct a review of the amendments made to the Privacy Act in 2001 which extended its coverage to the private sector. In October 2004, the Privacy Commissioner released an Issues Paper inviting organisations and individuals to give their views about the operation of the private sector provisions of the Privacy Act 1988 that came into effect on 21 December 2001.
4. The REIA has made a separate submission to the Privacy Commission's current review. This submission to the Senate Legal and Constitutional Committee is based on the submission to the Privacy Commission, and addresses Terms of Reference (b): the effectiveness of the Privacy Amendment (Private Sector) Act 2000 in extending the privacy scheme to the private sector, and any changes which may enhance its effectiveness.

## ISSUES

### **National Consistency**

5. National consistency in the regulation of privacy is important to both consumers and business and is a stated aim of the Commonwealth Government. This is not being achieved in some areas, because of the range of legislation dealing with privacy issues, developed by both the Commonwealth Government and by the State and Territories. An example of the lack of consistency, which is impacting negatively on consumers and business, is the various legislation relating to tenancy databases.

6. In its submission to the Ministerial Council of Consumer Affairs in February 2004, the REIA advocated that a nationally consistent framework should be developed for the operation of tenancy databases with guidelines for their efficient and effective use, in order to provide protection for all stakeholders including the consumer and the real estate industry. This framework should take into account the professional requirements of the real estate industry as well as the rights and responsibilities of property owners and of tenants.

7. The government review was informed by a ruling from the Privacy Commission on a national database operator. More than 50 submissions were subsequently received by the Ministerial Council, which lists tenancy databases as being one of its key initiatives for 2003/04, but no further progress has been made to date. The REIA remains concerned that this issue is taking so long for Federal Government to address, and the situation is exacerbated because the NSW Government unilaterally took action in September by introducing State legislation. Further delay by the Federal Government may cause other unilateral action by State governments which will make nation-wide consistency more difficult to achieve.

### **Codes of Conduct**

8. While the Privacy Act provides for industry and organisation codes, the Issues Paper notes that there have been very few applications for code approval and only three codes have been approved. The REIA is concerned about the multiplicity of government agencies and statutory bodies, eg the Office of the Privacy Commissioner, the ACCC and the Australian Communications Authority, seeking to use industry or organisation codes to regulate business practice in order to achieve consumer protection objectives. In some States/Territories, mandatory codes of conduct already exist for the real estate industry.

9. While the REIA recognises, in principle, the value of a co-regulation approach to industry codes of conduct, it is also concerned that mechanisms for ensuring consumer protection should not result in a heavy cost burden being shifted from government to industry. The substantial costs associated with development of industry codes and management of co-regulatory compliance would be an onerous impost for many industry associations, including the REIA. There is significant potential for disharmony amongst a range of industry codes, some voluntary and some mandatory, applying to a single industry.

10. Conversely, there are benefits associated with industry organisations such as the REIA playing a lead role in developing the code of conduct for the industry they represent. The industry brings its expertise and insights into the marketplace and consumer requirements to code development. A sense of ownership within the industry, and therefore the potential for greater knowledge and compliance, would be cultivated.

11. In-principle, the REIA supports the notion of co-regulation because this provides for involvement of the industry. Notwithstanding the benefits of co-regulation, the REIA believes that the co-regulation process would have significant cost implications for industry associations. The proposal will result in the costs of industry regulation and compliance being shifted largely from government infrastructure to an industry association that represents most, but not all, of the industry. For example, there would be significant implications for resources and funding for:

- a. an industry reference committee,
- b. reporting requirements,
- c. consumer communication requirements,
- d. training requirements for the industry,
- e. a code administration body, and
- f. complaints investigation and action

12. Additionally, the enforceable nature of a code of conduct is questionable. While the industry association might be able to regulate compliance amongst its members, it cannot be responsible for non-members whose actions might reflect negatively upon complying members. The REIA represents about 75% of real estate agencies across Australia.

13. It would seem that alternative supporting mechanisms such as industry-specific guidelines on the Privacy Act would provide practical information for compliance by businesses.

### **Small Business Exemption**

14. The REIA supports the current exemption for small business. Regulatory 'red tape' and compliance costs have a major detrimental impact on the viability of small businesses in Australia. Increasing these costs by further imposition of requirements of the Privacy Act would be a highly undesirable outcome of this review. The majority of real estate businesses are small businesses; for example, a recent ABS survey concluded that 73% of real estate agencies are nine people or less. Building effective relationships with their clients is essential to their business success, as is consumer confidence in their business practices. However, regulating the information flow between clients and small businesses through the Privacy Act is not the best way to achieve good business practices or consumer protection. Such increased regulation would only add to the cost burdens faced by small businesses, making them less competitive or even unviable. The end result of such increased regulation would be industry sectors dominated by large businesses.

## Property Valuers

15. The REIA has raised separately with the Privacy Commissioner the difficulties encountered by property valuers in undertaking their professional duties because of limitations resulting from the Privacy Act on the property information they are able to source from Real Estate Agents. This problem derives from the National Privacy Principles requirement that an organisation obtain consent for uses and disclosures of personal information for unrelated secondary purposes. Bundling consent to a wide range of uses and disclosures of personal information is a strategy adopted by some industry sectors and the Issues Paper notes a range of problems associated with bundled consent. The REIA requests the Office of the Privacy Commissioner to give consideration to the development of a more effective mechanism to deal with business situations such as property valuation where access to personal information is essential to provide a service demanded by the market place. The REIA acknowledges that the Commissioner has recently agreed to undertake a case study of property valuers with the REIA in order to address the problems.

16. Valuers are being unduly curtailed in the performance of their profession with adverse consequences for the consumer in business and as an individual, through unintended consequences of the Privacy Act. Essentially, as a result of the privacy legislation, valuers are unable to collect personal and property information in a timely way from real estate agents and other sources. They are unable to obtain up-to-date and reliable sales and leasing data necessary for the preparation of valuation reports.

17. Detailed valuations are required by private parties, corporations, financial institutions, trustee companies and government bodies including the courts. They are needed for sales and leasing transactions for all types of properties, residential and commercial. Government bodies also require valuations for land tax and stamp duty assessments. In nearly all States, valuers are licensed and regulated by State legislation that imposes strict confidentiality obligations. The courts recognise the important role of the valuer and the need for comparable property data.

18. There is an overriding public need for people engaged in property transactions to be able to obtain comparable sales and leasing data. They rely on valuers to obtain this data and to prepare comprehensive valuation reports. State bodies which regulate information have placed a restricted interpretation on information needed by valuers. Unfortunately, the privacy legislation is creating property information monopolies in large corporations, affecting the reliability, availability and independence of property data.

19. Inaccurate, unsubstantiated and out-of-date property data will place people and corporations at a higher risk of financial loss and increased litigation. There will be increased costs and interest rates passed on to the community generally.

20. The REIA proposes that the Privacy Commission consider to undertake to:

- a. acknowledge regulations in place through State legislation; and
- b. acknowledge that valuers already protect information; and
- c. create an exemption for valuers under privacy legislation; or

- d. allow valuers to enter into a specific undertaking through guidelines provided by the Privacy Commissioner specifically to allow collection, use and disclosure of information for property valuers.

### **SUMMARY**

21. The lack of nationally consistent legislation relating to privacy is an issue of concern for the REIA. The problems associated with tenancy databases highlight the significance of this issue for both businesses and consumers. Another area of impact on the real estate industry is the unintended consequences of the legislation on the ability of property valuers to undertake their professional duties and provide a public service. Either exemption is needed for valuers or specific guidelines prepared which will allow valuers to use property data. The REIA supports the current arrangement for exemption of small businesses. However, it does not believe that a co-regulatory approach based on industry codes is a workable mechanism to support the Act – industry-specific guidelines would be more practicable.

Prepared by:

Secretariat  
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