

24th May 2012

Government prohibits Direct Marketing under new privacy law

Yesterday, the Attorney General Nicola Roxon introduced the *Privacy Amendment (Enhancing Privacy Protection) Bill 2012* into the House of Representatives. Despite six years of review, the legislation has been re-drafted at the 11th hour to prohibit direct marketing unless certain conditions are met.

The legislation's starting point of prohibiting direct marketing makes it impossible for our industry to accept the legislation in its current form even though the conditions under which direct marketing can occur are specified. If the legislation is introduced without amendment it will make Australia the only country in the world to have such a prohibition.

More importantly however the legislation demonstrates a significant lack of understanding of how the digital economy operates. As direct marketers we will know that hundreds, if not millions, of business models are built around data in both the offline and online world.

Direct Marketing Privacy Principle Opt out Approach too Blunt

Unfortunately the Direct Marketing Privacy Principle then goes on to say that where an organisation has created a direct marketing communication on the basis of personal information about an individual that it has obtained from another party then it must provide **in each direct marketing communication:**

- a) A prominent statement that the individual may make such a request; or
- b) Otherwise draw the individual's attention to the fact that the individual may make such a request

Can you imagine a situation where an organisation has to provide a prominent statement in an online advertisement if the advertisement is in any way reliant on personal information that was obtained from a source other than the individual?

Clearly the legislation is unworkable in its current form. Thankfully there is time to rectify this situation. ADMA is working with Government to ensure that the new legislation recognises the fresh and innovative ways that the digital economy can both protect the consumer and allow businesses to innovate, understand their customers and deliver on their expectations and needs.

Other Significant Issues



There are also other significant issues that can only be remedied through an amendment to the legislation.

ADMA is pushing for vitally important changes to ensure that the legislation is crystal clear that the courts must take into account the systems, practices and processes an organisation had in place to protect data and comply with the privacy regime. We want the legislation to compel a court to take these key issues into consideration when it is considering what civil penalties will apply in the event an organisation has had serious and repeated breaches of the Australian Privacy Principles.

ADMA is also urging the Government that a similar approach should be written into the new privacy law when the Office of the Australian Information Commissioner is considering whether to issue a determination or when the liability of an organisation that has disclosed information to an overseas recipient who then breaches Australian privacy law is being considered by a court.

ADMA is also seriously concerned about the fact that there is no maximum limit on the civil penalties that apply. The legislation is currently drafted such that the maximum penalty per contravention is 2000 penalty units or \$1.1m. The issue is that we have seen courts take the view that per contravention is one individual breach and then impose \$15.3m in fines. What this means is that an organisation that has a data breach of 1m individual records could potentially be liable for a fine of \$1.1bn.

ADMA is strongly urging the Government to consider imposing a legal concept known as a 'totality principle' that will ensure that the court considers the situation as a whole when determining what penalties should apply.

Lastly there is also a serious omission in Australian Privacy Principle 2.2 that doesn't explicitly state that an organisation doesn't need to provide an individual with the option of operating under a pseudonymity if it is impracticable for the organisation to do this.

Despite the issues above the confidential consultation process has allowed ADMA to effect changes on some issues including clarifications:

- a) On the anonymity and pseudonymity provisions
- b) around what is meant by solicited and unsolicited information
- c) cross border disclosure of personal information



High Level Overview of the Draft Legislation

This is the most significant overhaul of Australian privacy legislation since the introduction of the National Privacy Principles in 2001.

This draft legislation has four major components:

- Draft Australian Privacy Principles
- Credit Reporting provisions
- Additional Powers to the Office of the Australian Information Commissioner including the ability to conduct own motion investigations
- New provisions for privacy codes and credit reporting codes

There will be multiple changes that will impact your business that you will need to be aware of. Some of these will be easily implemented others will be more difficult and each will need to be assessed against the individual business models of your organisation.

Key changes that you need to be aware of are:

1. The introduction of civil penalties for serious and repeated breaches of the Australian Privacy Principles with maximum penalties up to \$1.1m per contravention.
2. Additional powers being provided to the Office of the Australian Information Commission to allow them to use enforceable undertakings, apply sanctions and seek penalties in circumstances where they commence an own motion investigation.
3. A change in the structure of the privacy principles to prompt organisations to consider the personal information cycle of collection, notification, use, disclosure, security and destruction before setting about collecting information.
4. The requirement to provide individuals with the ability to interact with an organisation on an anonymous or pseudonymous basis if it's practicable.
5. A new requirement to consider what should be done with unsolicited personal information (personal information that an organisation hasn't sought to obtain)
6. A new requirement to advise consumers, by including in privacy notices and privacy policies information, whether an organisation is likely to disclose information overseas and to what countries the information will be disclosed.
7. Additional requirements on organisations to take such reasonable steps as are necessary in the circumstances to ensure that overseas recipients of personal information will treat personal information in a manner consistent with the Australian Privacy Principles.
8. The placement of a strict liability on organisations that disclose information overseas if the overseas recipient act in accordance with Australian privacy law
9. The shift of emphasis from cross border data transfer to the notion of cross border data disclosure such that cross border obligations only apply if an organisation *discloses* information to another unrelated company whereas the cross border obligations will no longer apply if the information is *transferred* overseas but remains with the control of the organisation.

Key features of the current privacy regime that will be retained are:

1. Notification of the collection of personal information
2. Use or disclosure of personal information
3. Adoption, use or disclosure of government related identifiers



4. Quality of personal information
5. Security of personal information
6. Access to personal information
7. Correction of personal information

[Click here for a copy of the draft Australian Privacy Principles](#)

[Click here for copy of the *Privacy Amendment \(Enhancing Privacy Protection\) Bill 2012*](#)

[Click here for a copy of the Explanatory Memorandum](#)

[Click here for a copy of the Second Reading Speech](#)

How to comply?

There are key changes muted in the draft Australian Privacy Principles that will affect your business. The good news is that you still have some time before these changes become law.

We expect that the legislation will be referred to one, possibly two, parliamentary committees before it is passed (probably around November).

Industry will then have 9 months to implement the changes at which time the legislation will come into effect.

ADMA will be hosting a member briefing in Sydney and Melbourne to walk through what the legislation will mean for you so watch this space.

We will also be providing a detailed guide as a unique member benefit that outlines the new and existing privacy regimes complete with step by step information on what changes your organisation needs to make to comply.

Its important that you start to look at this now so that you can start to thinking about what these changes mean for your organisation and start the process of working towards implementing these changes.

It also means if there are serious issues with the legislation that haven't been identified yet we can take this back to Government on your behalf.

Source: <http://www.admadiologue.com.au>

