

# submission

Privacy NSW submission on the  
Discussion Paper

## **Building Consumer Sovereignty in Electronic Commerce: A best practice model for business**



privacy**nsw**

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Review of the Australian E-Commerce  
Best Practice Model  
Competition and Consumer Policy Division  
Department of the Treasury  
Langton Crescent  
CANBERRA ACT 2600

Dear Sirs/Mesdames

**Privacy NSW Submission on the Discussion Paper: Building  
Consumer Sovereignty in Electronic Commerce:  
A best practice model for business.**

Thank you for providing me with an opportunity to comment on the Review of the Australian E-Commerce Best Practice Model. The review of the Best Practice Model provides an opportunity to reconsider the balance between self-regulation and legal regulation as applied to electronic commerce in Australia. This has a special application where issues of privacy are concerned.

Privacy concerns are often cited as a major reason why many consumers are reluctant to engage in electronic commerce. Businesses engaged in electronic commerce have an obvious economic interest in addressing these concerns by demonstrating their commitment to the privacy of their customers. Behind these immediate concerns, however, there lies a pervasive unease over the capacity of the Internet to capture and accumulate large amounts of personal data and the threat of a loss of control over our lives that this is seen to carry with it. These fears may seem remote and difficult to describe or quantify. However they need to be addressed in any overall privacy protection strategy as much as the purely economic concerns.

Legal regulation of privacy on-line encounters some significant difficulties. The Internet is above all a medium of communication that aims to expedite the exchange of information rather than to restrict or limit it. Privacy on the other hand recognises the rights of individuals and groups to limit the circulation of information about them.

This ostensible contradiction is lessened once we recognise that the purpose of privacy is to support personal autonomy and the building of relationships between people through control and selective disclosure of their information. For instance it has been argued that we develop our personalities by selecting a circle of friends and acquaintances who are largely defined by what we know and choose to reveal about each other. We instinctively recognise it as inappropriate for a stranger to come up and volunteer intimate personal information about themselves before a degree of trust is established. The challenge for businesses involved in e-commerce, where obtaining significant amounts of information from their customers is unavoidable, is to develop a similar basis for trust.

Seen in this light privacy is integral to the way people experience the Internet. We want to use the Internet to communicate but do not want to be overwhelmed by its capacity to make our actions accessible to the rest of the world. This applies as much to information about our values, interests and consumption habits as to details of our credit cards. Because our on-line interactions are not face-to-face we need assurance that they will not expose us to unwelcome attention, scrutiny or ridicule. The special concerns that we have over protecting children on the Internet underline this. Because children are often thought of as more trusting, many Governments have taken special measures to protect them.

The privacy role of business providers offering services through the Internet is therefore to establish a basis of trust so that people can feel comfortable doing business on-line. Privacy principles are simply one way of codifying the kind of conduct that will give us confidence that the relationships we form on-line will be fair and not abusive.

Forming relationships or belonging to a group also entails accepting responsibilities. Unless I choose to live as a hermit I have to accept that my personal autonomy does not mean doing anything I like. This is the basis of the frequently repeated statement that privacy has to be balanced against other interests. But this requires a genuine balancing exercise that takes into account both the strength of the claim to privacy and the claims that compete with privacy. It is at this point that laws regulating privacy are often shown to be deficient. They enact broad general exemptions for certain organisations or activities where this is seen to be in the public interest. The temptation for organisations covered by these exemptions is to see them as removing any responsibility to respect privacy, whereas for many exempted activities such as law enforcement the risks from an abuse of privacy can be seen as greater. There is therefore special value in supporting a framework such as the best practice model that recognises the need to express standards beyond what is legally prescribed.

Apart from monitoring compliance with the NSW Privacy and Personal Information Protection Act, Privacy NSW deals with a range of inquiries and complaints about privacy issues which may not involve a breach of the National Privacy Principles (NPPs) in the Privacy Act 1998 as amended to cover the private sector. The NPPs and similar legislative principles apply to the handling of personal information. They do not always reflect the range of concerns people have about their privacy. They also incorporate a series of exemptions which may be necessary in the context of legal regulation but which should not be seen as insulating the organisations or practices concerned from all considerations of privacy. For instance the exemptions in the Privacy Act for journalism, political parties or employment records do not mean that privacy issues are irrelevant to each of these contexts. Dealing with a broader range of concerns than those covered by the law gives us the opportunity to comment more generally on the way privacy is framed in the Best Practice Model.

Another feature of people's concerns about information privacy is that they are far from uniform. Surveys have consistently shown responses ranging across the spectrum, from a high degree of concern to little concern. Closer analysis suggests that a majority of people adopt a pragmatic approach to the protection of their personal information and are prepared to trade off privacy against other issues depending on the context and perceived benefits. Broadly expressed legal standards

may inspire confidence that privacy is being safeguarded, but may fail to satisfy significant proportions of the population in all the circumstances where privacy issues are likely to arise.

When it comes to treat the specific issue of privacy in paragraph 4.3, the Discussion Paper notes the need to adapt the section of the Best Practice Model to take account of the passage of the Privacy Amendment (Private Sector) Act 2000. However it says little more than this. To suggest that the earlier National Principles for the Fair Handling of Personal Information provided a minimum standard which has now been surpassed by the National Privacy Principles could be seen as somewhat misleading. The Privacy Act amendments enact a series of exceptions that in fact narrow the scope of the original principles. For instance NPP 2.1(c) is relatively permissive in relation to the secondary use and disclosure of personal information for direct marketing and provides significantly less protection than privacy laws in many other jurisdictions.

From what has already said it should be clear that privacy best practice in relation to electronic commerce is not simply resolved by the transition from a voluntary self-regulatory framework to a legal one. Even when an organisation is permitted to collect, use or disclose personal information under applicable legal privacy principles or exemptions, it is appropriate to ask whether this is fair or consistent with customer expectations, or has been adequately explained to customers.

The Federal Privacy Commissioner has recognised the need for an expansive approach to compliance with the National Privacy Principles in his published guidance documentation. For example he has emphasised that exemptions based on what is reasonable and practicable should be narrowly interpreted and has been critical of attempts to rely on implied or enforced consent to evade the scope of the principles.<sup>1</sup>

A best practice approach should return to the basic principles which underlie much information privacy legislation, for example the OECD Privacy Guidelines which emphasise openness and accountability as well as purpose based collection, use and disclosure.<sup>2</sup> It should also identify more recent innovations in privacy thinking, for example:

- recognising people's right to enter into transactions anonymously where identification is not a critical issue;
- the use of privacy enhancing technologies to provide automated support for people exercising their privacy rights; and
- the growing adoption of privacy impact assessment as a tool for including privacy considerations in the basic planning for new information systems.

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<sup>1</sup> Office of the Federal Privacy Commissioner, Information Sheet 18 - *Taking reasonable steps to make individuals aware that personal information about them is being collected* (June 2003) available on-line at: <http://www.privacy.gov.au/business/infosh/index.html>  
*Guidelines to the National Privacy Principles* September 2001 Key concepts, consent available on-line at [http://www.privacy.gov.au/publications/nppgl\\_01.html](http://www.privacy.gov.au/publications/nppgl_01.html); "Consent tactic a threat to privacy", *Financial Review* 23 July 2003 page 28

<sup>2</sup> OECD *Guidelines on the protection of privacy and transborder flows of personal data* 1981

Privacy issues also arise in the Discussion Paper's treatment of security in paragraph 4.1.2 and unsolicited messaging in paragraph 4.2. To suggest in the context of on-line security that the Privacy Act protects financial and credit card details which consumers upload to on-line business sites could be seen as misleading. National Privacy Principle 4 only imposes security obligation on organisations in relation to the information they hold and not to the process of establishing secure connections. The Discussion Paper recognises the contribution which a variety of industry codes can make to the problem of spam, but doesn't really face up to the disparities between the standards which these codes seek to apply, or to the limited effectiveness of what is now recently passed anti-spam legislation.

There is a growing realisation that there is a need for new approaches to respond to the challenges of a global information system. The 12 December 2003 Declaration of Principles of the United Nation's World Summit on the Information Society (*Geneva Declaration*) emphasised the need for cooperation partnership and new forms of solidarity to build an inclusive information society. A democratic global information system requires not only greater equality of access, but also a framework of rights to ensure that individuals and groups are not disadvantaged in the way they are included. Broadly interpreted privacy should provide an important part of this framework.

Respect for privacy is sometimes described as an aspirational value, meaning that it represents a goal, which we should constantly aim at without expecting to achieve it as an ultimate or permanent state. However our efforts and commitment and the trust and confidence they inspire provide the ultimate justification. Such an approach is appropriate to best practice in an area as innovative as electronic commerce. It does however require looking beyond the limited and temporary compromise of existing legislation to broader values of fairness, trust, openness, accountability and freedom of choice.

Yours sincerely

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