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Mr Timothy Pilgrim
Australian Privacy Commissioner
Office of the Australian Information Commissioner
GPO Box 5218
Sydney NSW 2001 By email: consultation@oaic.gov.au

Dear Commissioner

CONSULTATION DRAFT: GUIDELINES FOR DEVELOPING PRIVACY ACT PART IIIB CODES

The Australian Finance Conference (AFC) appreciates the opportunity to provide feedback to assist finalise Guidelines to support the Code development process provided for through the Government's privacy reform agenda in amendments contained in the Privacy Amendment (Enhancing Privacy Protection) Act (the Amendment Act) to introduce a new Part IIIB - Privacy Codes into the Privacy Act (the Act).

By way of background, AFC membership includes credit providers that operate in both the consumer and commercial markets together with the three major credit reporting agencies that provide credit reporting facilities to inform that lending. AFC members acknowledge the value of personal information, both to the individual and as a commercial asset, and handle it accordingly. The obligations outlined in the Privacy Act provide a framework to support this compliance culture that sees the privacy of the individual appropriately balanced with business imperatives. Both the general information handling principles (the National Privacy Principles [NPPs] / Australian Privacy Principles [APPs]) and the more specific rules for handling credit reporting information (under Part IIIA) are of relevance to our Membership.

We understand that Part IIIB will replace the current Act's provisions dealing with NPP Codes and the Credit Reporting Code of Conduct with a new framework dealing with codes of practice under the APPs (APP Codes) and a code of practice about credit reporting (called a CR Code). As noted in the background of the information-handling practices of our Members, both Code processes are potentially relevant to the AFC.

To date, our Members have not seen need to use the code powers available in the current Act to modify, via a NPP Code, the statutory parameters of the general information handling principles contained in the Act. Looking forwards, our Members are in the process of determining what changes to current practices will be required to ensure compliance with the amended Act from its 12 March 2014 commencement. Based on feedback to date, we do not anticipate a need for the new APP Code provisions to be utilised by our Members, at least in the short term.

In contrast, the compliance processes of our Members are heavily contingent on the current Credit Reporting Code of Conduct. It's replacement, the CR Code, will be equally critical to ensuring continued operation following commencement of the Amendment Act provisions relating to credit reporting.

For this reason, while noting the relevance of the components of the draft Guidelines relating to APP Codes, our consideration of the draft has been largely driven by Member priority and has focussed on the guidelines to the extent that they are relevant to the CR Code.

Our consideration has also taken into account the somewhat unique position that the CR Code has in the reformed statutory framework. Unlike an APP Code where the driver for its making will tend to be an industry or component of an industry sector looking to operationalise components of the Act to meet their particular situation (ie codes voluntarily developed by organisations), the CR Code is required to complete the statutory framework of the amended Part IIIA.

If the CR Code was largely conceptually and operationally the same as an APP Code, one might query the need for Part IIIB to separately provide a process for each. Rather, Part IIIB could have detailed a single framework for privacy codes, and that framework then be utilised either in the context of consideration of the APPs or Part IIIA credit reporting. The fact that the legislature determined it appropriate to separately deal with an APP code from the CR Code is a clear indicator of Parliament's policy position that they are different.

Further, the inclusion of the CR Code process in Part IIIB appears to have its genesis in the Government's response to the ALRC Report 108: FYI Privacy Law & Practice. The ALRC favoured a structure that saw credit reporting modernised in reformed privacy laws with credit reporting regulated:

- under high level principles in an Act, and
- more specific or different obligations for credit reporting information imposed on credit providers and credit reporting agencies prescribed under regulations.

In line with industry submissions, the ALRC also recognised there would be value for industry, to develop operational rules to assist compliance with the regulatory framework (eg reciprocity rules and promotion of data quality through rules relating to consistency and accuracy) and therefore recommended development of a credit reporting code, in consultation with other relevant stakeholders including consumer/privacy advocates and the Commissioner. The ALRC left open the question of the code's precise legal status and governance structure, suggesting these were matters for industry to resolve. Further, the ALRC did not regard this code as essential to the regulatory framework at commencement. Importantly, their view was that the regulations alone should be capable of providing adequate privacy protection for credit reporting in the absence of any code.

The proposed design of the reformed provisions was altered in the Government's response to the ALRC recommendations. While supporting a three component structure, the Government did not accept the framework proposed by the ALRC. Instead, the Government preferred that regulation of credit reporting:

- should continue to be primarily under a Privacy Act with provision for specific regulation where necessary. In effect, to the extent possible general information handling principles should apply to information, including credit reporting information.
- Where it was necessary for different or more specific protections to apply to this category of information, this would be dealt with primarily under targeted provisions within the Act.
- Importantly, the Government also supported development of a code as a flexible means of ensuring operational procedures consistent and compliant with the Act.

The Government saw the code operating in line with a proposed binding code power for the APPs but as a separate concept to them. The CR Code was to set out how credit providers and credit reporting agencies were to practically apply the credit reporting provisions without seeking to over-ride or apply lesser standards than outlined in the Act. Further, while there would be provision for development of the CR Code by the industry, final approval would be required by the Commissioner to ensure that the code appropriately balances the needs of industry to have efficient and effective credit reporting with the privacy needs of individuals. The CR Code was to be binding, and breach would be deemed to be breach of the Act.

Of note, the Government also acknowledged that industry may wish to outline matters in the code which are outside the jurisdiction of the Privacy Act and that these could be included though may need consideration and oversight through relevant approvals processes, including the ACCC.

The Guidelines for developing the CR Code appear to have been drafted with this context.

However the separation of the development process and statutory basis of the CR Code and the APP Code appears to have been lost.

Should there have been provision in the guidelines for a CR Code to be developed based on a model outlined by the Government (ie including provisions within the jurisdiction of the Privacy Act and provisions outside its jurisdiction), then the guidelines made need to have been drafted taking into account matters like consideration of resource requirements for Code development – including resources allocated to establishing an appropriate code administrator to oversee the operation of the code and financing the development and ongoing administration of the code in relation to regularly reporting on, and independent reviews, of the code. Given the position that appears in the draft indicates a view which would mean there is limited opportunity for a CR Code to be developed to cover other than matters in the Privacy Act, we find difficulty understanding the reason for their apparent application to a CR Code developer.

Under the Privacy Act, as amended, you or others appointed as Commissioner, are the statutorily appointed administrator of the registered CR Code and through appropriate review powers (eg through inclusion of an appropriate provision with the registered CR Code) will have the ability to ensure currency in the CR Code's operation. The review appropriately provides the opportunity for stakeholder (including industry) input.

Further, in other areas like complaint handling, which might necessitate resource allocation and review considerations if included in a code, in contrast to an APP Code, the inclusion in Part IIIA of the amended Act of a complaint handling process together with a mandatory obligation on a credit provider to be a member of a Commissioner-approved external dispute resolution scheme in order to get access to the credit reporting information imposes a different paradigm for an organisation subject to the CR Code than an APP Code which may contain its own EDR process and administrator for complaints handling.

For these reasons, we submit that it is not appropriate for the Guidelines to try to deal with the development and registration of a CR Code under the same type of framework that would apply to an APP Code. We further submit that a code administrator process separate from the Commissioner (eg in relation to monitoring or governance is not needed appears at odds with Parliament's intention). To the extent that the current draft Guidelines seek to impose considerations that are not relevant to development of a CR Code given its unique role with the amended Privacy Act, we submit the guidelines should be revised.

AFC Recommendation

In conclusion, the AFC recommends that, in line with the Government's and the Parliament's clear intention to provide separately for a process to support a binding APP code and a process for a CR Code, the draft Guidelines for Part IIIB Privacy Codes be revised to consist of two parts: one confined to APP Code development and the other with the CR Code development. We submit that this would achieve the underlying policy intention of Part IIIB and reflect the form which it has followed, would minimise the potential for confusion, and on the basis of what has been outlined above, avoid an unintended outcome that may arise through the inclusion of suggestions that monitoring and reporting compliance with the code beyond the statutorily appointed regulator, the Commissioner, is required to be taken into account by CR Code developers.

We would be happy to discuss our comments in more detail or provide additional material to support the position recommended. Please feel free to contact me either through or through .

Kind regards.

Yours truly

Corporate Lawyer