



Australian Mobile
Telecommunications
Association



Office of the Australian Information Commissioner - Australian Privacy Principles (APP) Guidelines

Submission
as prepared by:

**Australian Mobile Telecommunications Association and
Communications Alliance**

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Introduction

The Australian Mobile Telecommunications Association (AMTA) and Communications Alliance (the Associations) welcome the opportunity to provide this submission in response to the Office of the Information Commissioner's Draft Australian Privacy Principles (APP) Guidelines (Draft Guidelines).

The Associations have a number of concerns with the Draft Guidelines and their application of the Australian Privacy Principles. In particular, the Associations submit that:

- The collection of behavioural information collected through web browsing should not be within the scope of application of 'collection' of personal information. If an APP entity cannot attribute the information to a person or identify the individual in any way, it should not be considered 'personal' information.
- When APP entities obtain consent from an individual, this should not need to be updated on an ongoing basis. There are ways in which an individual may vary its consent status with an APP entity and this should be considered sufficient.
- Clarification should be provided within the Draft Guidelines that Bundled Consent may be a legitimate form of consent in certain circumstances. The current drafting seems to reflect the unrealistic position that bundled consent is inappropriate in all cases.
- the Draft Guidelines should be amended to allow some flexibility in relation to 'current and specific' consent. Consent that excludes all undefined future uses is impractical and will be difficult to comply with.

Finally, the Associations have serious concerns with the implication of the Draft Guidelines as they relate to Chapter 5 – APP 5 Notification of the Collection of Personal Information. The Draft Guidelines suggest that a reasonable step, when collecting information by telephone, would be to explain the APP5 matters to the individual at the commencement of the call. The Associations contend that this is unreasonable and unworkable. It will have a significant detrimental impact on business operations and revenue through increased call handling times. Further, it is likely to frustrate individuals and could result in a situation in which they may 'reject' or 'tune out' from the information received.

The Associations

Communications Alliance is the primary telecommunications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, equipment vendors, IT companies, consultants and business groups.

Its vision is to provide a unified voice for the telecommunications industry and to lead it into the next generation of converging networks, technologies and services. The prime mission of Communications Alliance is to promote the growth of the Australian communications industry and the protection of consumer interests by fostering the highest standards of business ethics and behaviour through industry self-governance. For more details about Communications Alliance, see <http://www.commsalliance.com.au>.

The Australian Mobile Telecommunications Association (AMTA) is the peak industry body representing Australia's mobile telecommunications industry. Its mission is to promote

an environmentally, socially and economically responsible, successful and sustainable mobile telecommunications industry in Australia, with members including the mobile Carriage Service Providers (CSPs), handset manufacturers, network equipment suppliers, retail outlets and other suppliers to the industry. For more details about AMTA, see <http://www.amta.org.au>.

KEY CONCEPTS

The Associations have concerns with a number of the key concepts outlined in the Draft Guidelines.

Collection (B.16)

In relation to the concept of 'collection' the Draft Guidelines state that the application of this concept *"applies broadly, and includes gathering, acquiring or obtaining personal information... including from: ... information associated with web browsing, such as information collected from cookies"*.

The Associations contend that the collection of behavioural information collected through web browsing should not be within the scope of application of this concept. It is not appropriate to consider the collection of cookies or other behavioural information obtained through an individual's web browsing as personal information, particularly when it is not possible for the APP entity to attribute it to a person or identify the individual in any way.

The collection of behavioural information is increasingly common and is used widely by businesses for tailoring online marketing. If an APP entity is required to notify an individual of the primary purpose of the collection of personal information – as required by APP 5 – when an individual is browsing the web, it will have significant consequences for the way in which businesses can conduct online marketing. The result would be increasingly onerous requirements on businesses to seek consent and a sub-optimal result for individuals.

When data from cookies is collected it is anonymous data and does not conform to the definition of 'personal information'. If data collected from cookies is considered to be personal information just because it comes from that source, this is a significant departure from the existing understanding of personal information.

In keeping with the principle of transparency, the OAIC could choose to recommend in its Guidelines that if an APP entity's website uses cookies that the entity may say so in its privacy policy.

The Associations request that the scope of 'collection' is narrowed and the example of collection of information from cookies is deleted.

Express or implied consent (B.27)

The Draft Guidelines state:

"An entity will be in a better position to establish the individual's implied consent the more that the following factors, where relevant, are met:

- ...
- *if the individual opts out later, they are fully restored, to the circumstances that they would have been in if they had opted out earlier."*

The Associations have concerns with regard to the obligation to fully restore an individual to the circumstances that they would have been in if they had opted out earlier. This obligation is not practical. It is industry's view that obligations on APP entities should be prospective, rather than retrospective.

While flexibility in interpretation and implementation may be appropriate, the Associations seek further clarification on the application of this concept.

Bundled Consent (B.32)

The Associations have significant concerns with the description of the concept of bundled consent. As it is currently expressed, it has the potential to seriously inhibit the way in which businesses obtain consent from their customers. The Draft Guidelines state:

“Bundled consent refers to the practice of an APP entity ‘bundling’ together multiple requests for an individual’s consent to a wide range of collections, uses and disclosures they agree to and which they do not.

This practice has the potential to undermine the voluntary nature of the consent.”

It is industry’s view that there may be legitimate circumstances in which the collection of bundled consent is appropriate. If businesses are required to obtain consent in another way – each time an individual’s personal information is used for a slightly different purpose – the result would be commercially burdensome and onerous for consumers.

The current Draft Guidelines suggests a prima facie presumption that bundled consent is unacceptable in all circumstances. As such, the Associations request further clarification and acknowledgement that there may be circumstances in which bundled consent is appropriate.

Current and Specific (B.35)

The Draft Guidelines state:

“An entity should not seek a broader consent than is necessary for its purposes, for example, consent for undefined future uses, or consent to ‘all legitimate uses or disclosures’...”

The Associations submit that it will be difficult to comply with this concept as it is currently drafted. It is concerning to industry that the Draft Guidelines define consent in a way that is so narrow and excludes ‘undefined future uses’.

The practicalities of such a restriction will have significant consequences for business. For example, if a business develops a new idea or business practice, it will not be possible for the business to contact a customer - who may have consented to receiving marketing material – because it is an ‘undefined future use’. This restriction is likely to have unintended negative consequences for both businesses and consumers. Further, the Associations contend that any future technology or business practice that may allow the collection of behavioural information in a way which does not identify an individual should not be affected by such a restriction relating to consent. The intention should be to future proof the Guidelines in a way that does not inhibit or restrict the development and application of new technologies.

Finally, the Draft Guidelines should allow greater flexibility than is captured by restricting an entity from seeking consent to ‘all legitimate uses...’. An APP entity should be able to, reasonably, seek consent for a purpose such as ‘marketing’. While this may be considered a broad consent, it is preferable to a situation in which an entity is required to seek consent from an individual for every marketing campaign it undertakes.

The Associations consider that there should be some degree of flexibility to apply a broader scope of consent in certain appropriate circumstances.

Purpose (B.81)

The current Draft Guidelines require an APP entity to describe the primary purpose of the collection of an individual's personal information as follows:

“... the specific activity for which particular personal information is collected should be identified as the primary purpose.”

The Draft Guidelines also identify a number of examples which may be acceptable as the primary purpose for collection.

The Associations contend that this requirement to specifically define the primary purpose is not practical. The interpretation in the Guidelines means it is unclear whether a purpose such as 'marketing' would be considered too broad.

Further, the assumption that an entity seeks personal information for a singular primary purpose is contrary to the way in which commercial entities operate. It is unrealistic to suppose that an entity can 'prioritise' the purpose for collecting personal information when, in reality, there are many reasons of equal importance which require it do so. As such, the Draft Guidelines should be flexible to acknowledge the reality of commercial operations and the fact that businesses often have multiple 'primary' purposes for collecting personal information.

Industry submits that it is important that the implementation of the APPs should attempt to balance disclosure and transparency of APP entities collecting personal information, while avoiding lengthy and onerous privacy disclosures that may have adverse consequences for consumers. There is a real risk that individuals faced with lengthy privacy consent processes may simply begin to ignore the detail of what they are consenting to, such that the requirements will not have their desired effect.

Chapter 2 – APP 2 - Anonymity and Pseudonymity

Requiring Identification – impracticality (2.20)

At 2.20, the Draft Guidelines provide examples of *“where it may be impracticable to deal with an individual who is not identified”*. The Associations consider that it would be useful to include an example in this section with regard to the need for businesses to identify customers when discussing account information.

When businesses are speaking with customers about their account information, it is necessary for an individual to identify themselves before the conversation can proceed. This is good and accepted business practice and is expected by customers.

The Associations recommend the Draft Guidelines be amended to include an example of businesses requiring verification of identity to discuss account information.

Chapter 3 – APP 3 - Collection of Solicited Information

The Australian Communications and Media Authority is currently consulting on a proposed regulatory change that aims to establish a more efficient and effective set of identity verification requirements for prepaid mobile carriage services (set out in the draft Telecommunications (Service Provider – Identity Checks for Prepaid Mobile Telecommunications Services) Determination 2013). The key proposed change is to allow

carriage services providers (CSPs) to verify a person's evidence of identity information through a range of new methods, including government online verification services such as the Attorney General's Document Verification Scheme (DVS). This service will be used to check, in real time, whether a Government-issued evidence-of-identity document is accurate and up-to-date.

Given the fact that businesses will be using the DVS, and that ID checks in relation to prepaid mobile services are a regulatory requirement and not a business requirement, the Associations consider that it would be useful to make explicit reference to the DVS in the Draft Guidelines.

Chapter 4 – APP 4 - Dealing with Unsolicited Information

The Associations have concerns with the way in which the Draft Guidelines considers the collection of unsolicited information, particularly as it relates to the online environment.

For example, the collection of unsolicited information through the online environment is likely to be with individuals who have no relationship with the business. That is, there is no other way of identifying, contacting or interacting with these individuals.

Chapter 5 – APP 5 – Notification of the Collection of Personal Information

The Associations have concerns with the statement in the Draft [Guidelines](#) that an example of a reasonable step, in complying with APP 5, an entity should take includes:

5.5 if personal information is collected by telephone – explaining the APP 5 matters to the individual at the commencement of the call (perhaps following a template script).

To explain all the matters listed in APP 5 at the start of each call would be a significant detriment to the customer's experience and a significant impost on business.

The notification requirements may be appropriate for some methods of communicating with customers, but not all. In its 2008 report '[For Your Information](#)' the Australian Law Reform Commission similarly noted that:

23.28 Agencies and organisations, however, should be able to rely on other means of ensuring that an individual is aware of specified matters. To insist on notification in every case would be prescriptive. It could increase unnecessarily the compliance burden and costs, as well as overloading individuals with information of which they are already aware.

Case Study:

A telecommunications provider has undertaken a detailed analysis to quantify the costs of implementing the reforms proposed in Chapter 5 of the Draft Guidelines.

- The total annual revenue loss due to higher AHT, lower conversion, and less sales calls handled, equates to \$19.3 million.
- Operating Costs to support this change increases by up to 60%, based on the additional AHT requirements to adhere to the change. For Telesales this equates to an increase in operational cost of \$1.8 million **per month**.
- Total impact to organisational EBITDA approximately \$40.9 million.

This lost revenue equates to:

- the potential loss of 368 front line FTE (staff)
- the potential loss of approximately 818 frontline staff (total EBITDA impact)

Assumptions: The provider produced a script of the information that would need to be provided when collecting personal information. This resulted in an additional 3 minutes to average handling times of sales calls when this information is collected.

The case study above can be used to demonstrate the potential cost to business if these Draft Guidelines are not amended. As these losses would be multiplied across the telecommunications industry and the broader telemarketing industry, the revenue losses would be in the billions of dollars.

Further, such an imposition on business is likely to impact smaller telecommunications providers disproportionately where those businesses rely more heavily on telemarketing activities and have less in-store presence than their larger competitors. This is likely to have a negative impact on the competitive telecommunications landscape.

There are already a myriad of information disclosure requirements in the communications market and adding a very prescriptive list of notification requirements may serve to further confuse and frustrate consumers and may result in worse decision-making. As the Better Regulation Executive and National Consumer Council noted in its seminal research [report](#) in 2007:

although information can be a powerful tool it is neither fail safe nor costless. When presented to consumers, many of the pieces of information from our case studies were not having the desired outcomes. Consumers rejected much of the information because there was too much of it and because it was presented in a complex and unappealing format ... Some of the more vulnerable groups we spoke to found overly complex information not only difficult but also humiliating. Across society, our research found a desire for simple, succinct information.

Prescriptive notifications applying to telephone calls would also have a cost consequence for many consumers who call businesses on their mobile. Thousands of customers call their telecommunications provider each month on their mobile phone. This reality is reflected in recent [research](#) from the ACMA which highlighted that close to 3.3 million Australians aged 18 and over —19 per cent of the population—were mobile-only users at the end of 2012, replacing their fixed-line home phone with a mobile.

Industry Engagement

Given the critical concern the telecommunications industry has with regard to contents of the Draft Guidelines, the Associations request that the OAIC conducts further consultation with industry prior to the Guidelines being finalised.