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## Closing the Privacy-Free Zones: An Analysis of ALRC Proposals Concerning Privacy Act Exemptions

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# Closing the Privacy-Free Zones: An Analysis of ALRC Proposals Concerning Privacy Act Exemptions

Nigel Waters, Graham Greenleaf, and Lee Bygrave

## **Abstract**

This submission responds to Part E of the Australian Law Reform Commission's Discussion Paper 72 Review of Australian Privacy Law, September 2007, which deals with exemptions from the Privacy Act 1988 (Cth). The ALRC has proposed a separate part in the Act which would contain all the separate exemptions from the law.

The submission restates the view that many of the current exemptions from the Privacy Act unnecessarily create 'privacy-free zones' where an organisation, or a class of organisations, are given a complete exemption from all Information Privacy Principles and National Privacy Principles, when all that is justifiable is an exemption from, or more likely a modification of, some IPPs/NPPs. The submission welcomes the ALRC's comprehensive review of the justification, or lack of justification, for all the current exemptions. The submission supports the proposed removal of the small business, employee records and political exemptions. The intended tightening up of the media exemption is also welcomed, although the means by which this is proposed are questioned. The proposals for application of the Act to more government agencies, and for a requirement for privacy guidelines for those agencies which need to remain exempt, are also supported, with suggestions for additional refinements.



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# Closing the privacy-free zones: an analysis of ALRC proposals concerning Privacy Act exemptions

*Submission to the Australian Law Reform Commission  
on the Review of Australian Privacy Law Discussion Paper 72 ( DP 72)*

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Note: our submissions number consecutively following on those in our separate submissions on the Unified Privacy Principles, on Promotion and Enforcement and on Credit Reporting Provisions.

*Research for this submission is part of the Interpreting Privacy Principles Project, an Australian Research Council Discovery Project*



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# Closing the privacy-free zones: an analysis of ALRC proposals concerning Privacy Act exemptions

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## Introduction

### Structure of Submission

This submission responds to Part E of the Australian Law Reform Commission's Discussion Paper 72 Review of Australian Privacy Law, September 2007, which deals with exemptions from the *Privacy Act 1988*.

We make separate submissions on Part D – the proposed Unified Privacy Principles (UPPs); Part F - the promotion and enforcement of the principles, Part G - the Credit Reporting Provisions, and on some other parts of DP 72.

### Background – the iPP Project

Research for this submission has been undertaken as part of a Discovery project funded by the Australian Research Council, 'Interpreting Privacy Principles'. The home page for the project, and other publications relating to the project, are at <<http://www.cyberlawcentre.org/ipp/>>. The *iPP Project* is based at the Cyberspace Law & Policy Centre at UNSW Law Faculty. The principal objective of this research is to conduct over the course of the project (2006-09) a comprehensive Australian study of (i) the interpretation of information privacy principles (IPPs) and 'core concepts' in Australia's various privacy laws, particularly by Courts, Tribunals and privacy regulators; (ii) the extent of current statutory uniformity between jurisdictions and types of laws, and (iii) proposals for reforms to obtain better uniformity, certainty, and protection of privacy.

Concerning the first element, a small but rapidly growing body of cases has developed in Australia over the last few years. Around a hundred Tribunal decisions, a similar quantity of mediated complaint summaries, and relatively small number of relevant Court decisions have become available. There has been little systematic analysis of this material. The relative scarcity of Australian interpretative materials means that the objective necessitates consideration of the interpretation of similar IPPs and core concepts in the privacy laws of other Asia-Pacific countries (particularly New Zealand, which has the largest quantity of reported cases) and European jurisdictions. The *iPP Project*, as it develops this analysis, will aim to make further inputs into the ALRC's review and similar privacy reform projects at State level.

## 1. Overview

*Proposal 30–1* The Privacy Act should be amended to group together in a separate part of the Act exemptions for certain categories of entities or types of acts and practices.

The ALRC notes that the “approach of locating partial or full exemptions within specific privacy principles has the potential to render the principles overly complex and unwieldy” (DP72, [30.74]).

*Proposal 30–2* The Privacy Act should be amended to set out in a schedule to the Act exemptions for specific, named entities. The schedule should distinguish between entities that are completely exempt and those that are partially exempt from the Privacy Act. For those entities that are partially exempt, the schedule should specify those acts and practices that are exempt.

We previously submitted (CLPC IP31 Submission, p.58) that too many exemptions to the Privacy Act create ‘privacy-free zones’ where an organisation, or a class of organisations, are given a complete exemption from all IPPs/NPPs, whereas in fact all that is justifiable is an exemption from, or more likely a modification of, some IPPs/NPPs. We welcome the ALRC’s comprehensive review of the justification, or lack of justification, for all the current exemptions.

**Submission DP72-209: We support Proposals 30-1 and 30-2.**

## 2. Defence and Intelligence Agencies

*Proposal 31–1* The privacy rules and guidelines, which relate to the handling of intelligence information concerning Australian persons by the Australian Security Intelligence Organisation, Australian Security Intelligence Service, Defence Imagery and Geospatial Organisation, Defence Intelligence Organisation, Defence Signals Directorate and Office of National Assessments, should be amended to include consistent rules and guidelines relating to (a) incidents involving the incorrect use and disclosure of personal information (including a requirement to contact the Inspector-General of Intelligence and Security and advise of the incident and measures taken to protect the privacy of the Australian person); (b) the accuracy of personal information; and (c) the storage and security of personal information.

*Proposal 31–2* Section 15 of the Intelligence Services Act 2001 (Cth) should be amended to provide that: (a) the responsible minister in relation to the Defence

*Intelligence Organisation is required to make written rules regulating the communication and retention by the Defence Intelligence Organisation of intelligence information concerning Australian persons; and (b) before making rules to protect the privacy of Australian persons, the ministers responsible for the Australian Security Intelligence Service, the Defence Imagery and Geospatial Organisation, the Defence Signals Directorate and the Defence Intelligence Organisation should consult with the Office of the Privacy Commissioner.*

There may need to be specific exemptions from some privacy principles (principally the collection and access principles) for some intelligence agencies, but there is no justification for these agencies not to be subject to all of the principles in respect of administrative and employment information, or for them to be exempt from, for example, the security and quality principles, even for the personal information they collect operationally.

The fact that access, correction and review and complaint rights might need to be qualified for operational data does not justify lifting the obligation to keep information secure, maintain data quality and delete information once no longer required. The reasonable steps qualification to these principles should adequately deal with the special circumstances of these agencies. Similarly there is no reason why the use and disclosure principles should not apply, with a specific exception similar to that provided in the context of access in NPP 6.1(k) in addition to the normal range of required by law and ‘prejudice to law enforcement’ exceptions – see our response to Chapter 4.

***Submission DP72-210: The agencies listed in proposal 31-1 should not be completely exempt. The extent of any justifiable exemptions to or modifications of specific IPPs should be stated in the Schedule to the Act.***

***Proposal 31–3*** *The Office of National Assessments Act 1977 (Cth) should be amended to provide that: (a) the responsible minister in relation to the Office of National Assessments (ONA) is required to make written rules regulating the communication and retention by the ONA of intelligence information concerning Australian persons; and (b) before making rules to protect the privacy of Australian persons, the minister responsible for the ONA should consult with the Office of the Privacy Commissioner.*

***Proposal 31–4*** *Section 8A of the Australian Security and Intelligence Organisation Act 1979 (Cth) should be amended to provide that, before making rules to protect the privacy of Australian persons, the responsible minister should consult with the Office of the Privacy Commissioner.*

***Proposal 31–5*** *The privacy rules and guidelines referred to in Proposal 31–1 should be made available electronically to the public; for example, on the websites of those agencies.*



***Proposal 31–6** The Privacy Act should be amended to apply to the Inspector-General of Intelligence and Security (IGIS) in respect of the administrative operations of that office.*

***Proposal 31–7** The Inspector-General of Intelligence and Security, in consultation with the Office of the Privacy Commissioner, should develop and publish information-handling guidelines to ensure that the personal information handled by IGIS is protected adequately.*

***Submission DP72-211:** We support Proposals 31-3 to 31-7.*

### 3. Federal Courts and Tribunals

The ALRC suggests that “federal courts should continue to be exempt in respect of matters of a non-administrative nature” (DP72, [32.22]).

In the ALRC’s view, a coordinated approach by federal, state and territory courts and tribunals would provide more consistency in respect of non-party access to court and tribunal records. The ALRC reaffirms its recommendation made in ALRC 98, that SCAG order a review of court and tribunal rules in relation to non-party access to court records, with a view to promoting a national and consistent policy (DP72, [32.54]).

***Proposal 32–1** Federal courts that do not have a policy on granting access for research purposes to court records containing personal information should develop and publish such policies.*

The ALRC does not consider that parties and witnesses to proceedings should have the right to change or annotate court records (DP72, [32.61]).

In Chapter 12, the ALRC proposes that an individual’s right to access or correct his or her own personal information be dealt with in a new Part of the *Privacy Act* instead of under the FOI Act (DP72, [32.102]).

The ALRC’s view is that it is beyond its current Terms of Reference to inquire into access by persons other than the individual concerned to evidence and other documents produced in relation to tribunal proceedings under the FOI Act. Therefore, the ALRC does not propose to consider whether federal tribunals should be exempt from the operation of the FOI Act. As stated above, however, the ALRC reaffirms its recommendation in ALRC 98 that SCAG order a review of court and tribunal rules in relation to non-party access to court records, with a view to promoting a national and consistent policy (DP72, [32.103]).

The ALRC's preliminary view is that there may be some circumstances in which it is not appropriate for an individual to correct certain records, for example, written decisions by a federal tribunal (DP72, [32.104]). The ALRC is interested in views on whether any exceptions should apply when granting an individual the right to access his or her own personal information held by a federal tribunal (DP72, [32.105]).

***Question 32–1*** *Should the Privacy Act be amended to provide that federal tribunals are exempt from the operation of the Act in respect of their adjudicative functions? If so, what should be the scope of 'adjudicative functions'?*

In our view, there should be an exemption for federal courts for their adjudicative functions, but not for their administrative functions. It is very difficult, for example, to see why courts and tribunals should be exempt from data security principles, which only require 'reasonable steps' in the circumstances. Any difficulties that compliance with privacy principles might cause the courts in relation to administrative functions ancillary to their adjudicative functions should be dealt with by means of selective exceptions to particular principles and provisions, but only on the basis of detailed justification.

However, given the 'open justice' and 'separation of powers' arguments, and the difficulties of clearly distinguishing adjudicative and administrative functions, we agree with the ALRC that the current approach of applying the Act to acts and practices of federal courts of 'an administrative nature' (s7(1)(b)) should be continued. This implicitly exempts acts and practices in respect of adjudicative matters. As the ALRC notes, there is an established jurisprudence around the same distinction in the *Freedom of Information Act* (DP72, [32.25]).

In respect of federal tribunals, we note that not all of the arguments for treating the courts differently apply to tribunals. While the one about oversight potentially interfering with adjudicative functions could apply, we note that nearly all federal tribunals currently operate subject to the Information Privacy Principles. The exceptions to particular IPPs, and their own legislation, appear to accommodate their needs, and only the AAT has made a case for partial exemption along the lines of the courts.

***Submission DP72-212:*** *Federal Courts should be exempt from the provisions of the Privacy Act except in relation to acts and practices in respect of matters of an administrative nature, but there should be no equivalent general exemption for Federal Tribunals.*

***Submission DP72-213:*** *We support Proposal 32-1 for all courts to publish policies on access to court records for research purposes.*

We agree with the ALRC that a more substantial review of the application of the *Freedom of Information Act* to federal courts and tribunals is desirable (DP72, [32.103]).

## 4. Exempt Agencies under the Freedom of Information Act 1982 (Cth)

In our view, there is no justification for such broad exemptions for agencies under the *Privacy Act* by virtue of their exempt status under the *Freedom of Information Act*. As we point out above, any difficulties that compliance with privacy principles might cause for any of these agencies should be dealt with by means of selective exceptions to particular principles and provisions, but only on the basis of detailed justification. No agency should be wholly exempt from the obligation to comply with fundamental human rights and administrative law principles. It is very difficult, for example, to see why any agency should be exempt from data quality and data security principles, which only require ‘reasonable steps’ in the circumstances.

***Submission DP72-214: Exempt agencies under the Freedom of Information Act should not be so broadly exempt from the Privacy Act. The extent of any justifiable exemptions to or modifications of specific IPPs should be stated in the Act.***

***Proposal 33–1 The Privacy Act should be amended to remove the partial exemption that applies to the Australian Fair Pay Commission under s 7(1) of the Act.***

***Proposal 33–3 The Privacy Act should be amended to remove the exemption of the Australian Broadcasting Corporation and the Special Broadcasting Service listed in Schedule 2 Part II Division 1 of the Freedom of Information Act 1982 (Cth).***

***Submission DP72-215: We support Proposals 33-1 and 33-3.***

In the ALRC’s view, the current exemption from the FOI Act that applies to AUSTRAC should also remain (DP72, [33.63]).

The ALRC is interested in views on whether these agencies should continue to be exempt from the general provision in the FOI Act granting an individual the right to access his or her own personal information (DP72, [33.65]).

***Proposal 33–2 The following agencies listed in Schedule 2 Part I Division 1 and Part II Division 1 of the Freedom of Information Act 1982 (Cth) should be required to demonstrate to the Attorney-General of Australia that they warrant exemption from the operation of the Privacy Act: (a) Aboriginal Land Councils and Land Trusts; (b) Auditor-General; (c) National Workplace Relations Consultative Council; (d) Department of the Treasury; (e) Reserve Bank of Australia; (f) Export and Finance Insurance Corporation; (g) Australian***

*Communications and Media Authority; (h) Classification Board; (i) Classification Review Board; (j) Australian Trade Commission; and (k) National Health and Medical Research Council. The Australian Government should remove the exemption from the operation of the Privacy Act for any of these agencies that, within 12 months, do not make an adequate case for retaining their exempt status.*

***Submission DP72-216:*** *We support Proposal 33-2 but submit that AUSTRAC should be included in the list of agencies that should be required to justify any exemption from the operation of the Privacy Act, and also submit that all of the agencies listed should also have to justify any exemption from related provisions of the Freedom of Information Act.*

## 5. Other Public Sector Exemptions

***Proposal 34-1*** *The Attorney-General's Department, in consultation with the Office of the Privacy Commissioner, should develop and publish information-handling guidelines for royal commissions to assist in ensuring that the personal information they handle is protected adequately.*

***Proposal 34-2*** *The Privacy Act should be amended to remove the exemption that applies to the Australian Crime Commission and the Board of the Australian Crime Commission by repealing s 7(1)(a)(iv), (h) and 7(2) of the Act.*

***Proposal 34-3*** *The Privacy Act should be amended to apply to the Integrity Commissioner in respect of the administrative operations of his or her office.*

***Proposal 34-4*** *The Integrity Commissioner, in consultation with the Office of the Privacy Commissioner, should develop and publish information-handling guidelines to ensure that the personal information handled by the Integrity Commissioner and the Australian Commission for Law Enforcement Integrity is protected adequately.*

***Question 34-1*** *Should the Privacy Act be amended to set out, in the form of an exemption, the range of circumstances in which agencies that perform law enforcement functions, such as the Australian Federal Police and the Australian Crime Commission, are not required to comply with specific privacy principles?*

***Question 34-2*** *Should the Department of the Senate, the Department of the House of Representatives and the Department of Parliamentary Services continue to be exempt from the operation of the Privacy Act? If so, what should be the scope of the exemption?*



Again, in our view, there is no justification for broad exemptions for any agencies under the *Privacy Act*. Any difficulties that compliance with privacy principles might cause for any agency should be dealt with by means of selective exceptions to particular principles and provisions, but only on the basis of detailed justification. No agency should be wholly exempt from the obligation to comply with fundamental human rights and administrative law principles. It is very difficult, for example, to see why any agency should be exempt from data quality and data security principles, which only require ‘reasonable steps’ in the circumstances.

***Submission DP72-217: All of the agencies discussed in this section of DP72, or a central agency on their behalf, should be required to justify any exemption from the operation of the Privacy Act and/or related provisions of the Freedom of Information Act.***

***Submission DP72-218: To the extent that any exemptions from the Privacy Act and related provisions of the Freedom of Information Act are justified, information-handling guidelines should be developed in consultation with the Privacy Commissioner and published.***

***Proposal 34–5 Subject to Proposal 4–4 (states and territories to enact legislation applying the proposed Unified Privacy Principles and Privacy (Health Information) Regulations), the Privacy Act should be amended to: (a) apply to all state and territory incorporated bodies, including statutory corporations, except where they are covered by obligations under a state or territory law that are, overall, at least the equivalent of the relevant obligations in the Privacy Act; and (b) empower the Governor-General to make regulations exempting state and territory incorporated bodies from coverage of the Privacy Act on public interest grounds.***

***Proposal 34–6 The Privacy Act should be amended to provide that, in considering whether to exempt state and territory incorporated bodies from coverage of the Privacy Act, the Minister must: (a) be satisfied that the state or territory has requested that the body be exempt from the Act; (b) consider: (i) whether coverage of the body under the Privacy Act adversely affects the state or territory government; (ii) the desirability of regulating under the Privacy Act the handling of personal information by that body; and (iii) whether the state or territory law regulates the handling of personal information by that body to a standard that is at least equivalent to the standard that would otherwise apply to the body under the Privacy Act; and (c) consult with the Privacy Commissioner about the matters mentioned in paragraphs (ii) and (iii) above.***

***Submission DP72-219: We support Proposals 34-5 and 34-6.***



## 6. Small Business Exemption

*Proposal 35–1* The Privacy Act should be amended to remove the small business exemption by: (a) deleting the reference to ‘small business operator’ from the definition of ‘organisation’ in s 6C(1) of the Act; and (b) repealing ss 6D–6EA of the Act.

As we have argued previously (CLPC IP31 Submission 5-6), the small business exemption threshold is completely arbitrary, and in any case is a misnomer as many medium-sized businesses would have lesser turnovers.

*Submission DP72-220: We support Proposal 35-1 to remove the small business exemption.*

*Proposal 35–2* Before the proposed removal of the small business exemption from the Privacy Act comes into effect, the Office of the Privacy Commissioner should provide support to small businesses to assist them in understanding and fulfilling their obligations under the Act, including by: (a) establishing a national small business hotline to assist small businesses in complying with the Act; (b) developing educational materials—including guidelines, information sheets, fact sheets and checklists—on the requirements under the Act; (c) developing and publishing templates for small businesses to assist in preparing Privacy Policies, to be available electronically and in hard copy free of charge; and (d) liaising with other Australian Government agencies, state and territory authorities and representative industry bodies to conduct programs to promote an understanding and acceptance of the privacy principles.

*Submission DP72-221: We support Proposal 35-2.*

## 7. Employee Records Exemption

The ALRC is of the view that privacy protection of employee records should be located in the *Privacy Act* to allow maximum coverage of agencies and organisations and to promote consistency (DP72, [36.90]).

*Proposal 36–1* The Privacy Act should be amended to remove the employee records exemption by repealing s 7B(3) of the Act.

As we have argued previously (CLPC IP31 submission 5-9), there is no justification for the private sector employee records exemption, and it represents one of the major gaps

and weaknesses in the Privacy Act. Experience in other jurisdictions (including the IPP regime applying to Commonwealth agencies) shows that employees are one of the main categories of user of privacy rights. This is unsurprising given that the implications of non-compliance can be very far-reaching and serious in an employment context.

***Submission DP72-222: We support Proposal 36-1 to remove the employee records exemption.***

***Proposal 36–2*** *The Privacy Act should be amended to provide that an agency or organisation may deny a request for access to evaluative material, disclosure of which would breach an obligation of confidence to the supplier of the information. ‘Evaluative material’ for these purposes means evaluative or opinion material compiled solely for the purpose of determining the suitability, eligibility, or qualifications of the individual concerned for employment, appointment or the award of a contract, scholarship, honour, or other benefit.*

We oppose this proposal. Modern HR practice can and should accommodate openness of referee reports etc – UPP 6 has an exception for ‘intentions’ and the access and correction provision of the FOI Act provide a similar exception.

***Submission DP72-223: We oppose Proposal 36-2. There is no need for such a sweeping exception to the access principle.***

## 8. Political Exemption

The ALRC proposes that the political exemption be removed but notes that this is not intended to displace more specific legislation that permits the collection and use of personal information by registered political parties and political representatives, including the *Commonwealth Electoral Act*, the *Do Not Call Register Act* and the *Spam Act* (DP72, [37.51]).

***Proposal 37–1*** *The Privacy Act should be amended to remove the exemption for registered political parties and the exemption for political acts and practices by: (a) deleting the reference to a ‘registered political party’ from the definition of ‘organisation’ in s 6C(1) of the Act; (b) repealing s 7C of the Act; and (c) removing the partial exemption that is currently applicable to Australian Government ministers in s 7(1) of the Act.*

As we have argued previously, there is no justification for political parties or political acts and practices to be wholly exempt. Most individuals, if they were aware of the increasingly sophisticated database operations of political parties, would see them as one of the clearest examples of information processing that needs the protection of the privacy principles (CLPC IP31 Submissions 5-7 and 5-8).

***Submission DP72-224: We support Proposal 37-1 for the removal of the exemption for political parties and political acts and practices.***

***Proposal 37-2*** *The Privacy Act should be amended to provide that the Act does not apply to the extent, if any, that it would infringe any constitutional doctrine of implied freedom of political communication.*

The implied constitutional rights to freedom of political expression and communication would define the ambit of any exemption in any case, but there is no harm in making this express in the Act.

***Submission DP72-225: We support Proposal 37-2.***

***Proposal 37-3*** *Before the proposed removal of the exemptions for registered political parties and for political acts and practices from the Privacy Act comes into effect, the Office of the Privacy Commissioner should develop and publish guidance to registered political parties and others to assist them in understanding and fulfilling their obligations under the Act.*

***Submission DP72-226: We support Proposal 37-3***

## 9. Media Exemption

In the ALRC's view, the most appropriate means of reconciling the sometimes competing interests of media freedom and privacy is to grant media organisations a limited exemption from the operation of the *Privacy Act* (DP72, [38.65]).

The ALRC suggests that the definition of 'media organisation' should remain as it currently stands (ALRC DP72, [38.69]), but proposes a limiting definition of 'journalism' for the purposes of the media exemption. This has the effect of limiting the effect of the exemption to news, current affairs and documentary, and not the much wider 'information', which does however remain in the media organisation definition.

***Proposal 38-1*** *The Privacy Act should be amended to define 'journalism' to mean the collection, preparation for dissemination or dissemination of the following material for the purpose of making it available to the public: (a) material having the character of news, current affairs or a documentary; or (b) material consisting of commentary or opinion on, or analysis of, news, current affairs or a documentary.*

The proposed definition of ‘journalism’ achieves the objective of limiting the scope of the media exemption to those activities where there is a genuine competing public interest to be balanced against privacy.

***Submission DP72-227: We support Proposal 38-1.***

The ALRC proposes several specific actions in support of the more limited media exemption:

***Proposal 38–2*** *In consultation with the Australian Communications and Media Authority and peak media representative bodies, the Office of the Privacy Commissioner should establish criteria for assessing the adequacy of media privacy standards for the purposes of the media exemption.*

***Proposal 38–3*** *The Office of the Privacy Commissioner should issue guidelines containing the criteria for assessing the adequacy of media privacy standards established under Proposal 38–2.*

***Proposal 38–4*** *Section 7B(4)(b)(i) of the Privacy Act should be amended to provide that the standards must ‘deal adequately with privacy in the context of the activities of a media organisation (whether or not the standards also deal with other matters)’.*

***Proposal 38–5*** *The Office of the Privacy Commissioner should issue guidance to clarify that the term ‘publicly committed’ in s 7B(4) of the Privacy Act requires both: (a) express commitment by a media organisation to observe privacy standards that have been published in writing by the media organisation or a person or body representing a class of media organisations; and (b) conduct by the media organisation evidencing commitment to observe those standards.*

***Submission DP72-228: We support Proposals 38-2 to 38-5, but with the qualification that guidelines proposed in 38-3 should instead be binding rules (see DP72 Proposal 44-2), and that the standards and commitments referred to in Proposals 38-4 and 38-5 must include a requirement to submit to an approved EDR scheme (see DP72 Proposal 45-2).***

## 10. Other Private Sector Exemptions

### *Related bodies corporate*

The ALRC agrees with the conclusion of the 2000 House of Representatives Committee inquiry that, in the interest of business efficacy, companies having a shared ownership or

controlling interest should be able to share non-sensitive personal information (DP72, [39.29]).

We remain concerned about the breadth of the ‘related bodies corporate’ exemption in s.13B which can result in uses of information which are contrary to the reasonable expectations of individuals. Many corporate relationships are obscure and customers of one trading enterprise are often unaware of other ownership or control relationships. In our view, the law should require businesses to legitimise transfers of information to related bodies corporate by informing individuals. The only purpose of s13B seems to be to prevent transparency about business relationships. There seems no legitimate reason to have a special exemption – businesses should be able to meet one of the tests in the exceptions to the proposed UPP 5.

***Submission DP72-229: There is no justification for the exemption for related bodies corporate (s13B) and it should be removed.***

A specific issue taken up by the House of Representatives Committee in its inquiry into the 2000 private sector amendments was the application of this exemption to direct marketing.

In Chapter 23, the ALRC proposes that an organisation involved in direct marketing be required to take reasonable steps, upon request, to advise the individual from where it acquired the individual’s personal information; and present individuals with a simple means to opt out of receiving direct marketing communications. These proposals should help ensure that individuals are able to opt out of direct marketing from a related company to whom their personal information is disclosed (DP72, [39.32]).

We agree that the proposed Direct Marketing principle (UPP 6) should address concerns about direct marketing by related bodies corporate.

### ***Partnership changes***

In certain circumstances, an act or practice is not an interference with the privacy of an individual if it consists of passing personal information from an old to a new partnership (DP72, [39.34]). In the ALRC’s view, the exemption is a sensible approach to avoid an unnecessary burden on partnerships to obtain consent from individuals for the transfer of their personal information from the old partnership to the new one each time a partner joins or leave a partnership (DP72, [39.38]).

The ALRC agrees with the OPC that it is desirable for the new partnership to write to their customers to advise them of the change, but concludes that this should be a matter of good practice rather than a formal statutory requirement (DP72, [39.39]).

We support this conclusion.

## 11. New Exemptions

We do not see the need for any other total exemptions, and are not aware of any other entities or types of activities which need selective exceptions. Carefully designed selective exceptions should be able to accommodate any new or currently unrecognised compliance difficulties.

*Question 40–1 Should the Australian Government request that the Standing Committee of Attorneys-General consider the regulation of private investigators and the impact of federal, state and territory privacy and related laws on the industry?*

We see no need for any special review of the impact of privacy laws on private investigators.

In the ALRC's view, there is no compelling reason to propose an exemption or exception from *Privacy Act* obligations in relation to personal information disclosed to valuers by real estate agents, or more generally (DP72, [40.32]).

The ALRC does not propose any reform in relation to exempting or excepting archivists or archival organisations from obligations under the Act. (DP72, [40.40]).

We agree with the ALRC that there is no need to consider exemptions or exceptions for real estate and valuation, or archives.

*Question 40–2 Should the Privacy Act or other relevant legislation be amended to provide exemptions or exceptions applicable to the operation of alternative dispute resolution (ADR) schemes? Specifically, should the proposed: (a) 'Specific Notification' principle exempt or except ADR bodies from the requirement to inform an individual about the fact of collection of personal information, including unsolicited personal information, where to do so would prejudice an obligation of privacy owed to a party to the dispute, or could cause safety concerns for another individual; (b) 'Use and Disclosure' principle authorise the disclosure of personal and sensitive information to ADR bodies for the purpose of dispute resolution; and (c) 'Sensitive Information' principle authorise the collection of sensitive information without consent by an ADR body where necessary for the purpose of dispute resolution?*

We accept that special provision does need to be made to allow the collection, use and disclosure of information, including sensitive information, without express consent, in the course of dispute resolution. As regards an exemption from the 'specific notification' principle UPP 3, we are not persuaded that ADR bodies need this in relation to safety concerns which are addressed by UPP 3.3(b). However, we can see the case for an exemption from having to notify third parties whose information is collected 'incidentally' in the course of dispute resolution. This case rests not on the grounds of

duties of confidence, which we do not think have been clearly explained. In our view, a better justification for this exemption is the sheer practicality of ADR bodies having to locate and contact third parties and the potential disruption this could cause to the resolution of a dispute.

We have also considered whether these exemptions should be limited to ADR *bodies*. If they were to be, we suggest that a better exemption would be for ‘approved External dispute resolution (EDR) bodies’ as this is a concept included in ALRC Proposal 45-2 concerning enforcement. However, we suggest that the exemption should instead apply to the function of dispute resolution, whether internal or external, as the same issues arise. It will however be necessary to impose some conditions on such a wide exemption to prevent abuses under the guise of internal dispute resolution.

***Submission DP72-230: An exemption as suggested in Question 40-2 should apply to all dispute resolution, subject to conditions that should be the subject of further consultation.***

The ALRC notes that it received few comments on whether Part VIA constitutes an adequate and appropriate regime for handling personal information in the context of emergencies. Given that the regime has only recently been enacted, the ALRC considers that it would be premature to propose changes before there has been any opportunity to evaluate how the provisions operate in practice, in the event of a declared emergency. In view of this consideration, the ALRC does not intend to make Part VIA a particular focus of further consultation (DP72, [40. 69]).

We agree with the ALRC that there is no need at this stage for further exemptions in relation to emergencies, but we note our opposition to the proposed removal of the qualifying word ‘imminent’ from the harm exceptions to several of the UPPs.



## References

CLPC IP31 – Greenleaf, G., Waters, N, and Bygrave L, January 2007 - Cyberspace Law and Policy Centre - 'Implementing privacy principles: After 20 years, its time to enforce the Privacy Act', Submission to the Australian Law Reform Commission on the Review of Privacy Issues Paper 31.



## Index of Submissions

Note: our submissions number consecutively following on those in our separate submissions on the Unified Privacy Principles, on Promotion and Enforcement and on Credit Reporting Provisions.

1. Introduction

2. Overview

Submission DP72-209: We support Proposals 30-1 and 30-2.

3. Defence and Intelligence Agencies

Submission DP72-210: The agencies listed in proposal 31-1 should not be completely exempt. The extent of any justifiable exemptions to or modifications of specific IPPs should be stated in the Schedule to the Act.

Submission DP72-211: We support Proposals 31-3 to 31-7.

4. Federal Courts and Tribunals

Submission DP72-212: Federal Courts should be exempt from the provisions of the Privacy Act except in relation to acts and practices in respect of matters of an administrative nature, but there should be no equivalent general exemption for Federal Tribunals.

Submission DP72-213: We support Proposal 32-1 for all courts to publish policies on access to court records for research purposes.

5. Exempt Agencies under the Freedom of Information Act 1982 (Cth)

Submission DP72-214: Exempt agencies under the Freedom of Information Act should not be so broadly exempt from the Privacy Act. The extent of any justifiable exemptions to or modifications of specific IPPs should be stated in the Act.

Submission DP72-215: We support Proposals 33-1 and 33-3.

Submission DP72-216: We support Proposal 33-2 but submit that AUSTRAC should be included in the list of agencies that should be required to justify any exemption from the operation of the Privacy Act, and also submit that all of the agencies listed should also have to justify any exemption from related provisions of the Freedom of Information Act.

6. Other Public Sector Exemptions

Submission DP72-217: All of the agencies discussed in this section of DP72, or a central agency on their behalf, should be required to justify any exemption from the operation of the Privacy Act and/or related provisions of the Freedom of Information Act.

Submission DP72-218: To the extent that any exemptions from the Privacy Act and related provisions of the Freedom of Information Act are justified, information-handling guidelines should be developed in consultation with the Privacy Commissioner and published.

Submission DP72-219: We support Proposals 34-5 and 34-6.

7. Small Business Exemption

Submission DP72-220: We support Proposal 35-1 to remove the small business exemption.

Submission DP72-221: We support Proposal 35-2.

8. Employee Records Exemption

Submission DP72-222: We support Proposal 36-1 to remove the employee records exemption.

Submission DP72-223: We oppose Proposal 36-2. There is no need for such a sweeping exception to the access principle.

9. Political Exemption

Submission DP72-224: We support Proposal 37-1 for the removal of the exemption for political parties and political acts and practices.

Submission DP72-225: We support Proposal 37-2.

Submission DP72-226: We support Proposal 37-3

10. Media Exemption

Submission DP72-227: We support Proposal 38-1.

Submission DP72-228: We support Proposals 38-2 to 38-5, but with the qualification that guidelines proposed in 38-3 should instead be binding rules (see DP72 Proposal 44-2), and that the standards and commitments referred to in Proposals 38-4 and 38-5 must include a requirement to submit to an approved EDR scheme (see DP72 Proposal 45-2).

11. Other Private Sector Exemptions

Submission DP72-229: There is no justification for the exemption for related bodies corporate (s13B) and it should be removed.

12. New Exemptions

Submission DP72-230: An exemption as suggested in Question 40-2 should apply to all dispute resolution, subject to conditions that should be the subject of further consultation.

References

Index of Submissions