

# Background to the Privacy Amendment (Enhancing Privacy Protection) Bill

## Communications Alliance Forum

31 October 2012  
Sydney & Melbourne

James Halliday, Partner  
Baker & McKenzie

Baker & McKenzie, an Australian Partnership, is a member firm of Baker & McKenzie International, a Swiss Verein with member law firms around the world. In accordance with the common terminology used in professional service organisations, reference to a "partner" means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an "office" means an office of any such law firm.

© 2012 Baker & McKenzie

# ALRC Report 108 – released May 2008



1

## Key reasons for recommendations

- Improve privacy protection in Australia
- Achieve significantly greater consistency, clarity and simplicity in the Privacy Act
- Give individuals greater power and control over their personal information (e.g. new direct marketing principle)

2

## Key recommendations

- Rationalise the privacy principles to produce common set of principles across public and private sectors.
- More comprehensive credit reporting principles.
- Increased powers for commissioner, including court ordered fines up to \$1.1 million

# Outline

1

Existing law

2

The reform  
process

3

Overview of  
key changes

The existing law

# Overview of the regulatory framework

1

Telecommunications  
Act and National  
Privacy Principles

2

Credit  
reporting

3

Spam Act and  
Do Not Call  
Register

# Commissioner's powers currently



1

Own motion investigations

Commissioner can launch “own motion” investigations  
However, there is no ability for Commissioner to enforce remedies or make determinations

2

Investigation in response to a complaint

The Commissioner can make determinations in response to complaint  
Determinations are not binding unless enforced  
The complainant or the commissioner may seek to have the determination enforced by the Federal Court or Federal Magistrates Court

3

Enforcement

- Historically, limited exercise of determination power
- Inability of Commissioner to prescribe remedies to prevent future harm

The reform process

# The reform process



Government only  
(1988)



Business (2001)



Current

# Background to the amendments in 2001

## Information Revolution/growth of e-commerce

- Rapid development in IT, data networking and e-commerce raised privacy and security issues
- Billions of dollars worth of e-commerce transactions lost because of consumer distrust in the then privacy policy arrangements (\$US1.5 billion in 2002 – predicted by the Forrester Research Report, October 2001)
- “To ensure full advantage may be taken of the opportunities that e-commerce presents for Australian businesses within Australia and overseas” (EM)

## Changing attitudes to privacy

- *Privacy and the Community* survey: highlighted privacy was of substantial concern to Australians and it increasingly affected the way they related to organisations
- Concern centred on protection for personal information: collection, storage, use, accuracy, security, access
- Shift of focus from concern over govt handling of information to use of personal information in the private sector

## Global context

- Global trend to protect personal information and legislate for fair information practices (EU Directive)
- Enforceability of laws for transactions that flow across many national borders

Key changes

# ALRC report

- The Report contain 295 recommendations
- The Government's first stage response included 197 of these
- This Bill implements the majority of the Government's first stage response, including:
  - a single set of principles across government and business, including agencies/organisations which are regulated by both IPPs and NPPs e.g. Australia Post
  - giving consumers greater control over their personal information
    - unsolicited direct marketing
    - movement of data offshore

# Key changes

1

## **New Privacy Principles – Australian Privacy Principles**

### **Creation of new APPs**

- direct marketing
- overseas transfers of information

2

## **Credit Reporting**

Applies to Telco industry

- overlap with TCP Code
- Australia link
- other issues

3

**Greater powers for the  
Commissioner to develop  
and register binding  
codes and new penalties  
for breach**

# Greater powers for the Commissioner

## Own motion investigations

Instigate “own motion” investigations re. breach to the management of personal information (APP 1) without there having to be any interference to the privacy of any specific individual

## Determinations on own motion investigations

On *own motion investigations*, make a determination that includes in it any order the Commissioner considers necessary or appropriate  
Determinations are still non-binding – but either the complainant or Commissioner can commence court proceedings to enforce a determination

## Enforceable undertakings

Accept enforceable undertakings from an organisation to take or refrain from certain actions – Commissioner may apply to Federal court or FMC to compel compliance

## Penalty

Civil penalties regime – serious / repeat interference with privacy potentially attracts fines from \$110,00 to \$1.1 million for corporates  
“Serious” defined in new section 13G, court to consider matters set out in section 80W

# Contact



**James Halliday**

Partner

+61 2 8922 5187

[james.halliday@bakermckenzie.com](mailto:james.halliday@bakermckenzie.com)