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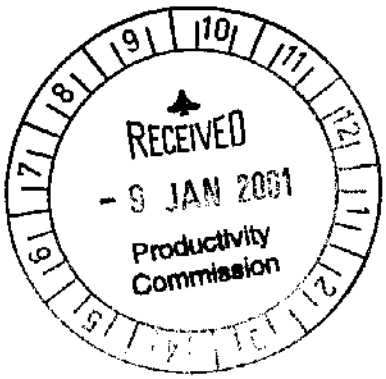
OFFICE OF THE
FEDERAL
PRIVACY
COMMISSIONER

Our reference:
Your reference:



Dr Geraldine Gentle
Assistant Secretary
Productivity Commission
Locked Mail Bag 2
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Dear Dr Gentle

Private Sector Privacy Scheme – Cost Recovery

I am writing this letter to you as a supplement to the more formal return that we are sending to you in response to your Cost Recovery Inquiry Questionnaire.

By way of background, the Office if the Federal Privacy Commissioner (OFPC) separated from the Human Rights and Equal Opportunity Commission (HREOC) in 1 July 2000. Consequently, the information you are seeking in your questionnaire about our Office will form part of the HREOC response. Having said that, the OFPC will be operating with an overall budget of approximately $4.2m pa. Relevant to your inquiry is the fact that of this total amount approximately $650,000 is derived through cost recovery arrangements. For example, approximately $332,000 pa is provided to us from Centrelink for the monitoring function we provide under the Data-matching Act. Also, $250,000 pa is being provided by the Health Insurance Commission for work we are undertaking in respect of health privacy issues. Separate to money received from Commonwealth Agencies, our Office is also in receipt of approximately $79,500 from the ACT Government for the functions we provide as the Privacy Commissioner's Office for the ACT.

There are also some further amounts we receive in regard to payment for speeches and presentations as well as for the sale of certain publications. I believe that in this regard the stage has been set for the broadening of this ability to recover costs within the boundaries of our recently expanded jurisdiction. I will discuss these in more detail below.

As you may be aware, in December 2000 the Parliament past an amendment to the *Privacy Act 1988* that introduces a 'light touch' privacy regime for the private sector, based around a set of National Privacy Principles (NPPs). There are a number of areas of activity under this Act where cost recovery arrangements would help produce a more satisfactory result from a regulatory perspective as well as reduce inappropriate burdens on the taxpayer. However, this letter will focus on a couple of the most outstanding examples.

By 'light touch' the Government's aim was that the legislation would allow for the development of sectoral codes, which, when approved by the Privacy Commissioner, would remove those organisations covered by the code from the coverage of the default legislation. These codes could also include their own complaint handling body. Clearly, for this policy to work as intended, a code, especially one containing a complaint handling function should not generally be more costly

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to business than the default scheme that it replaces. Otherwise, such a situation could "encourage" businesses to rely on the taxpayer funded default scheme.

Under the new legislation, code complaint handling bodies would be funded by the industry/sector that they serve, whereas the default scheme, with the Privacy Commissioner as the complaints handler, will be funded from commonwealth revenue. Clearly, this situation poses a major financial disincentive for industry to establish codes that provide for a complaint handling function, as the same service would be provided, free of charge, by the Privacy Commissioner. As a result, it would be in the financial interests of an industry to produce a code that, while modifying the NPPs, does not provide a process for complaint handling. The only exception may be industries that have already established a complaint handling body that could take on the privacy complaints at little or no extra cost, for example, the Banking Industry Ombudsman.

Similarly, a default scheme that is a "free" service to businesses could encourage large companies not to join an industry association with a complaint handling scheme given that they would have to pay a fee for their membership and possibly a levy for the complaints handling process. This could be the case, for example, where membership of an industry group included mandatory sign up to a privacy code. A large organisation that anticipated that it would receive a significant number of complaints may decide not to be bound by the code so that it would not liable to pay the administrative costs associated with the investigation and resolution of privacy complaints made against it.

A way of neutralising the disincentive to businesses to adopt their own code handling process could be to provide the Privacy Commissioner with the ability to recoup his administrative costs when investigating and resolving privacy complaints under the default scheme or under any other code that does not establish its own code adjudicator.

In the case of complaints under the default arrangements, while it would not be appropriate to charge complainants a fee for lodging a complaint, it may be acceptable to charge the organisation when a complaint is made against it.

This approach has already successfully been implemented in the Telecommunications Industry Ombudsman scheme that deals with complaints against telecommunication carriers and service providers. In fact, one of the functions of the TIO is to investigate privacy complaints in breach of the Privacy Act, but only with respect of the telecommunications industry.

Apart from the TIO scheme, two other complaint resolution schemes have been approved by the Australian Securities & Investments Commission, namely schemes dealing with financial advisers generally and financial advisers in the life insurance industry.

In relation to the Privacy Commissioner's default scheme, an organisation is potentially liable to pay a complaint investigation charge for no other reason than it is an organisation that handles personal information. Without some element of free choice, it is likely that the government would find the charge difficult to justify on the basis that what is being proposed is effectively a tax on business.

However, taking the above issues into account the simplest way to remove any disincentives for businesses adopting their own codes and complaint handling procedures would be for the Privacy Commissioner to be able to recover, from business, the costs of handling a complaint. This approach could also apply where an industry body requests that the Privacy Commissioner's Office undertakes the role of their complaint handling body.

Even where a separate code is developed by business, the same financial disincentive applies to establishing an independent code adjudicator to handle complaints under that scheme. Hence, under the new Act as it stands, we could well see an inappropriate number of codes being proposed that do not include their own adjudicator, so that the Privacy Commissioner is handling complaints under those codes, again at the expense of the taxpayer. Cost recovery from the code subscribers, again as already applies in some schemes such as the Banking Ombudsman arrangements, would address this disincentive.

Under what circumstances could the Privacy Commissioner charge for his services?

On the face of it, there appears to be no policy impediment to arrangement such as those I have described, as long as the Privacy Commissioner has the appropriate power. To introduce an accountability process for this function, I would suggest that cost recovery be limited to "appropriate activities", and if thought necessary, subject to the approval of the Minister.

This could be achieved by Section 27 of the Privacy Act 1988 being amended to allow the Privacy Commissioner to provide services on a commercial basis for types of activities such as:

- Complaint investigation and resolution:
  - on behalf of approved industry codes;
  - at the request of a government or private organisation;
  - for the default scheme;
- In-house training and staff development;
- Development of compliance programs;
- Verification inspections; or
- Code development, (but not code approval).

If some or all of these changes require separate law in the form of tax legislation, the circumstances I have described would fully justify such an approach and there are many precedents in place, from passport fees onwards.

Conclusion

In my view, the Privacy Commissioner must be given cost recovery powers to prevent the default legislative privacy scheme being seen as a "cost free" alternative to a self-regulatory privacy protection scheme for the private sector. I firmly believe that such an outcome would not meet the objectives of the Government nor would it encourage the "level playing field" sort by business through the introduction of this initiative.

I am sending a copy of this letter to Peter Ford, First Assistant Secretary Information and Security Division in the Attorney-General's Department.

Yours sincerely

Malcolm Crompton

Malcolm Crompton
Federal Privacy Commissioner
21 December 2000