

Personal Data Privacy in the Pacific Rim

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November 30 1999: a news story, 'Packer sets up big brother data store' attracted attention.

On December 1, 1999, Australian tabloids carried the dramatic headline "PRIVACY FEARS"

The headlines referred to a joint venture company owned by Kerry Packer, Australia's richest man, and US data warehouse Acxiom that had announced it had created the most comprehensive database on Australians ever constructed.

For the first time reports of the issue of personal privacy on the Internet broke out of the computer pages and took center stage on page one of our newspapers.

The public reacted with shock and surprise. The vexed and emotive questions about protecting personal privacy against powerful commercial interests in the digital age were forced not just into policy debate, but into the political arena as the Federal Government scrambled to respond.

This was a problem of its own making, as the Government had rejected an opportunity to create Australia's legal privacy framework when it withdrew draft legislation in 1997.

The Federal Government was forced to re-activate that bill. With the public sector already covered, the bill seeks to extend privacy and protection of personal information into the private sector. On November 30, the Attorney General stated "Reports of a data warehouse of personal and financial information being developed by Acxiom highlight the importance of the private sector privacy legislation. The collection of information by Acxiom and its database will be covered by the legislation."

The same public statement stated the Government was "strongly committed to protecting the privacy of all Australians" and that the drafting of the Privacy Amendment (Private Sector) Bill was "well advanced".

This contradicts previous commitments made by the Prime Minister in March 1997 that the Government would not be introducing privacy legislation for the private sector. At the time, the Attor-

ney General made it clear in a statement that instead of legislating, the services of the Privacy Commissioner would be broadened to assist the private sector in the development of voluntary codes of conduct. However there is no public confidence in self-regulation.

The Privacy (Private Sector) Bill 1999 will amend the Privacy Act 1988. The Government is expected to introduce the bill into the Australian Federal Parliament in February 2000. However, it has not yet appeared on the bills list for 2000.

To become law the bill is required to pass through both houses of Parliament. This means that the upper house, the Senate, where the Government does not have an absolute majority, will determine the final shape of the legislation. The Federal Opposition has stated clearly their commitment to a strong, effective co-regulatory model. The Australian Democrats, the minor party with the balance of power in the Senate, has on a multitude of occasions stated their commitment to protecting personal privacy. However any amendments and their nature will not be known until these parties have had the opportunity to analyse the bill upon tabling in the parliament.

The principles behind the bill are the National Principles for the Fair Handling of Personal Information which were revised last year to accommodate legislative language and modified in their application to sensitive and health information. These principles were prepared by the Australian Privacy Commissioner and to date have been useful to the private sector seeking guidance in the establishment of codes of practice and corporate policy.

The Privacy Commissioner is a member of the Human Rights and Equal Opportunities Commission (HREOC) and has a charter that includes giving advice to government agencies, credit providers, credit reporting agencies and others about their obligations under the existing public sector Privacy Act. The Privacy Commissioner also has the specific responsibility of investigating complaints that fall within the Commissioner's jurisdiction, conducting audits of organisations that are subject to the Privacy Act.

In addition to these statutory duties, the Privacy Commissioner has role to promote privacy in the wider community and provide information about privacy and related legislation. However, despite the strong public statements about the need to protect privacy, the resources of the Privacy Commissioner have been reduced with each federal budget under the current government. Given this environment of continued fiscal constraint the Privacy Commissioner will be limited in his or her activities. This highlights specifically the inherent strength of a genuine co-regulatory approach: to harness the active participation of public interest groups and industry bodies, with the Privacy Commissioner having an approval authority for codes of practice makes good practical and political sense. What better way to ensure that codes of practice carry a high degree of relevancy, and therefore credibility for their particular application?

Education and enforcement are the foundations of an effective co-regulatory regime, so attention to the resources and consultative mechanisms supporting any legislative framework is very important, be they public or private. These issues will be a crucial consideration in the parliament in the forthcoming debate. As more information becomes available and public awareness grows about the use of the internet in personal data 'trafficking', political consideration of the human rights implications will become more informed.

With the Acxiom/Packer example as the opener in the public awareness stakes in Australia, there is now a growing interest in electronic marketing strategies behind the dot.coms. Whereas a backward glance at sophisticated marketing technology and methodology reveals a long history of cross-referencing information, the power of the Internet and associated technologies has created a whole new market place. Personal information is valuable to corporations and companies keen to save a little on their advertising budgets by tightly focussed, efficient marketing. In this environment,

principles of obtaining 'permission' from citizens and /or consumers for the purposes of collection and subsequent use of personal information are powerful tools and deserve consideration in identifying the path forward. However, the depth of community education will determine the substance and credibility of such an approach.

This is a challenging landscape for legislators, as product marketing is possibly the least offensive potential use of electronic databases containing comprehensive personal information. Introduce political campaigning, health insurance assessments and criminal intent as potential uses and suddenly the very existence of these databases can provoke anger, distrust and fear.

One particular area of concern is the privacy of personal information collected and managed by the public service that is now being outsourced in massive multi-agency clusters to IT corporations. There is little opportunity to scrutinise the privacy provisions in these contracts through the parliamentary process as the Government supports the call for 'commercial in confidence' protection from the outsourcers. This makes a mockery of the original Privacy Act 1988, as its application ceases in those departments and agencies where the information technology has been outsourced. The only assurance that has been offered by the departments is that the provisions of the Privacy Act 1988 are reflected in a clause in the contract.

With so many uncertainties about future technological capabilities, the strength of a co-regulatory approach lies in the clarity of the legislative framework, with the detail applied through industry codes of practice. Such codes must be developed in open consultation with those potentially affected. Their credibility rests with genuine industry commitment to a community partnership. In the view of the Opposition, it is unacceptable for the Government to merely prescribe to the hilt in legislation, only to water down with exemptions and ineffectual complaint and sanction mechanisms, as is the approach in the draft legislation at present.

Regardless of the level of knowledge about the 'back end' operation of the of the Internet, protection of human rights in relation to personal privacy is being demanded by both netizens and net sceptics alike. As is the case in Australia, legislators will be forced to act. The degree to which the political response is informed and considered, and not reactionary, is in the hands of governments right now. Failure to respond in a meaningful way via a federal legislative framework is guaranteeing an ill-considered reactionary political remedy. This serves the interest of no one, least of all the citizen.

The parliamentary timetable for privacy legislation applying to the private sector in Australia will be known in a matter of weeks. There is a small possibility that the legislative process will be complete by the time the CFP conference takes place. It is more likely that it will be continuing and an updated report on progress of the bill will be presented at that time.

There is overwhelming support within public interest organisations, industry and both state and federal political spheres to enact a genuine co-regulatory approach for the protection of personal privacy, with the legislative framework existing at the federal level. Within that model, the political debate will focus on improving the legislation. This will include consideration of the following issues: the disturbing extent of exemptions and exceptions; enforcement; supporting infrastructure such as provided by the Privacy Commissioner and last but not least the extent to which people as both citizens and consumers are empowered to protect their privacy.