



Investment & Financial Services Association Ltd
ACN 080 744 163

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The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

E-mail: privacy@alrc.gov.au

Australian Law Reform Commission Discussion Paper 72: Review of Australian Privacy Law

Thank you for the opportunity to respond to Discussion Paper 72.

The Investment and Financial Services Association (IFSA) represents the superannuation, investment management, and life insurance industries. IFSA has over 140 members which are responsible for investing over \$1 trillion, on behalf of more than ten million Australians. Members' compliance with IFSA Standards and Guidance Notes ensures the promotion of industry best practice.

As stated in our submission of 15 January 2007, IFSA supports the current inquiry. It is good governance and good business practice to continue to take stock of changes in the environment which may compromise our industry and Australia's reputation of valuing privacy protection.

IFSA also supports the simplification of Privacy laws and reduction of any regulatory overlap with Federal and State laws on privacy.

This submission addresses issues for superannuation, investment management, and life insurance product providers. While we are supportive of the review and many of the recommendations, we focused particular attention on those that affect the accessibility or affordability of life insurance.

Specifically, life insurers collect and use information for purposes that are central to their ability to manage risk. This includes:

1. The *collection of medical information*, which allows insurers to assess risk. Any impediments with the collection of such information or too many restrictions on its use would potentially increase the level of risk and in turn, the cost of insurance.
2. The *use of private investigators and surveillance*, which helps reduce fraudulent claims. Fraudulent claims, particularly income protection claims, cost the industry millions every year. Surveillance is an essential tool that identifies such fraud.

In short, the collection and use of medical information and the use of surveillance helps insurers manage risk and reduce fraud, which in turn reduces pressure on the cost of insurance.

This is important because Australia has a chronic underinsurance problem. IFSA's research shows that:

- 60% of people with dependent children do not have enough life insurance cover to look after their loved ones for more than a year if they were to die;
- 69% of professionals and people in small business do not have any income protection insurance, with 75% being unable to maintain their lifestyle for more than six months if they suffered serious illness or disablement.

The industry has committed to promoting the need and value of appropriate insurance coverage amongst the population and to work with government on reforms that encourage more Australians to take up these important products.

It is imperative that any changes to privacy laws support this process rather than impede it. The current review goes a long way to enhancing privacy laws in Australia and we welcome the opportunity to contribute to the process.

Please feel free to contact either myself or Daniel Newlan on 02 9299 3022 should you wish to discuss any of the matters contained in this submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John O'Shaughnessy', is written over a vertical red line.

John O'Shaughnessy
Deputy Chief Executive Officer

Introduction

IFSA fully supports the intent of the Privacy Act and the National Privacy Principles (NPPs) and IFSA's members have made extensive efforts to comply with the private sector provisions of the Act, which came into force in 2001.

The financial services industry has a strong ethic of securing the personal, financial and health information received, as it acknowledges the sensitivity of that information.

On 15 January 2007, IFSA lodged an initial submission in response to the ALRC issues paper No. 31.

This submission addresses two high level issues:

1. Support for a Federal legislative framework.
2. The powers available to the Office of the Privacy Commissioner (OPC).

In addition, we have made specific comments on 15 of the recommendations made by the review:

1. Definition of personal information – Proposal 3-5.
2. Deceased persons – Proposal 3-11.
3. Protection of a right to personal privacy – Proposal 5-1.
4. Use of the Electoral Roll – Proposal 13-2.
5. Specific notification – Proposal 20-2.
6. Openness – Proposal 21-2.
7. Direct marketing – Proposal 23-1 to 23-5.
8. Data quality – Proposal 24-2.
9. Identifiers – Question 27-1 and Proposal 27-6.
10. Private investigators – Question 40-1.
11. Privacy impact statements for projects – Proposal 44-4.
12. Compliance audits – Proposal 44-6.
13. Privacy Codes – Proposal 44-10.
14. Breach notification – Proposal 47-1.
15. Health information – Chapter 57, Paragraphs 57.92- 57.102.

Headline Issues

Key Points

- IFSA strongly supports a single, Federal legislative framework governing privacy.
- We encourage a risk-based and principles-based legislative approach.
- We do not support an expansion to the powers of the OPC.

A single legislative framework

"IFSA supports the present Federal legislative framework and the elimination of duplicate State-based legislation, which causes increased costs and uncertainty."...IFSA submission, 15 January 2007

As an outcome from the Review, IFSA would strongly support a consistent national framework for privacy in the form of Federal legislation providing a single source of reference on privacy matters.

The Privacy Act has not yet achieved its objective of establishing a 'single comprehensive national scheme' for the protection of personal information. As many submissions to this review reveal, national consistency is important to business, to charities and to individuals.

The present mixture of Federal and State legislation addressing the control of medical information adds to business costs, creates uncertainty and increases the chance of error.

At a minimum, we support the ALRC proposal that Commonwealth legislation should override all state-based laws except where such laws apply to State Government agencies. Many of IFSA's companies that are subject to privacy laws operate nationally, across various states and territories and any harmonisation/unification of such laws would represent a significant step forwards.

A risk and principles-based approach

"IFSA strongly encourages a risk-based and principles-based legislative approach and would oppose any attempt to introduce greater levels of prescription."...IFSA submission, 15 January 2007

IFSA members believe that the present risk and principles based legislative approach functions well. We see little evidence that amending the provisions, and in particular, making them more prescriptive would lead to more robust outcomes for the clear majority of consumers.

A greater level of prescription would increase compliance costs and may lead to companies changing their information handling practices, such as withholding too much information out of fear of a breach. This would clearly act as an unintended detriment to consumers.

Additional powers to the Office of the Privacy Commissioner (OPC)

"IFSA believes that the present powers of the Commissioner are adequate and provide a reasonable balance between protecting people's privacy yet not imposing undue additional costs and compliance on industry."....IFSA submission, 15 January 2007

IFSA members are already subject to ongoing regulatory audits by APRA and ASIC. IFSA does not support random compliance audits by yet another government body.

Our industry's good history of sound levels of compliance in handling personal information (firmly evidenced by very low levels of complaints) suggests that random audits are not necessary. IFSA does not object to audits based on reasonable grounds, such as systemic complaints.

In the financial services sector, there has been significant law reform in the past four years, including the introduction of the 'Financial Services Reforms' of the *Corporations Act 2001*, the licensing of superannuation trustees and the introduction of Anti-Money Laundering and Counter Terrorism Financing law.

In recognition of the additional compliance burdens these changes have introduced, we have seen a concurrent process of regulatory reform specifically designed to remove unnecessary regulation and streamline requirements and supervision, as part of the Government's 'Better Regulation' initiatives.

The new powers that allow the Commissioner to conduct audits and investigations and to compel companies to report breaches and follow directions in order to ensure compliance with the Privacy Act will introduce significant compliance burdens that are at odds with the reforms noted above.

Before any recommendations are legislated, the proposals should be subject to a rigorous regulatory impact assessment and cost benefit analysis.

Specific Comments

Key Points

- IFSA supports the review in principle.
- However some recommendations may increase costs and reduce the ability to manage fraud.

Proposal 3-5 - Definition of 'personal information'

The Review proposes that the definition of 'personal information' should be amended. Proposal 3-5 submits that the Privacy Act should define 'personal information' as:

"information or an opinion, whether true or not, and whether recorded in a material form or not, about an identified or reasonably identifiable individual".

The current definition is:

"information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion".

IFSA's view

The amendments to the definition would result in information now being included as 'personal information' if, when put together with other information on the individual the organisation may hold or obtain, the person's identity becomes 'reasonably identifiable'.

The widened definition may require IFSA's member companies to determine all possible information it holds or could publicly obtain on an individual to determine whether the new information would be considered 'personal information'.

For large companies this would create a significant compliance burden and is inconsistent with the Privacy Office's objective to "find privacy solutions that deliver good privacy protection for individual Australians while imposing no undue burdens on the organisations involved"¹.

IFSA recommends that the existing definition remains.

Proposal 3-11 - Deceased persons

The ALRC believes that the Privacy Act does not specifically provide protection for personal information relating to deceased people. Under the current Act, 'individual' is described as a 'natural person' who is taken to be living.

Proposal 3-11 submits that the Privacy Act should be amended to include a new section dealing specifically with personal information relating to individuals that have been deceased for 30 years or less. There would be specific provisions for relating to use and disclosure, access, data quality and data security and, in particular, the use and disclosure of genetic information.

¹ Information Sheet 13, The Federal Privacy Commissioner's Approach to Promoting Compliance with the Privacy Act,

IFSA's View

If specific provisions relating to information about deceased persons are to be developed, IFSA submits that the provisions themselves should be carefully crafted so they do not prevent the trustee of a super fund from processing a benefit payout in the event of death of a fund member.

Many IFSA members are providers of insurance and superannuation benefits and are regularly required to assess the payment of benefits in the event of the death of a client. In the case of superannuation benefits, the trustee of the superannuation fund frequently needs to make inquiries of relatives, friends, the employer or work colleagues of a deceased member to determine whether there are individuals who were dependants of the deceased.

This process necessarily involves the Trustee disclosing some personal information about the deceased member, including the fact that they were a member of the fund, to persons who are able to provide the information needed to pay the benefit. Subsequently the trustee will need to provide further information about the deceased member to individuals who have been identified as potential dependants, in the course of determining the claim.

In this situation the privacy of the deceased individual needs to be balanced against the Trustee's obligation to locate and notify dependants, and the rights of the dependants to receive the superannuation benefits. The principles governing the use of the deceased person's personal information need to allow the use of this information.

Similar disclosures may need to be made to the family of a deceased person where life insurance has been taken out with a life company outside of the superannuation system i.e. where there is no trustee involved.

Proposal 5-1 - *Protection of a Right to Personal Privacy*

Proposal 5-1 submits that the Privacy Act should be amended to provide for a statutory cause of action for invasion of privacy.

IFSA's View

IFSA strongly opposes the introduction of a statutory cause of action that allows individuals a right to sue for invasion of privacy.

The private sector amendments to the Privacy Act, which took effect in December 2001, were widely supported by industry on the basis of their 'light touch' foundations. IFSA opposes the introduction of a statutory cause of action because:

1. It goes against the principles of the 2001 amendments and their respective industry support.
2. It shifts the privacy regime into a litigious environment, which was never envisaged when the laws created.
3. It pre-empts the evolving common law right to sue.
4. The rights and remedies for consumers are adequately provided for by the current legislation and the proposals under Part F of the discussion paper will enhance these rights adequately.

IFSA believes this proposal will encourage people to sue for invasions of privacy, creating a raft of actions similar to what was experienced with public liability, workers compensation and negligence claims in the 1990's.

Proposal 5-1 suggests that unauthorised surveillance is an invasion of privacy.

IFSA's members who operate life insurance businesses are often required to investigate the veracity of statements made to support a claim. This commonly occurs in the assessment of disability insurance claims. Generally only a small minority of claimants are subjected to any surveillance – and only where there are significant discrepancies in the information supplied to the insurance company.

It is critically important to allow the insurance industry to maintain current surveillance practices. Surveillance activity ensures costs and premiums are kept in check by the detection (and subsequent avoidance) of fraud. In short, surveillance allows insurance companies to independently verify that the statements made to them are true.

IFSA believes that the prospect of being surveyed to confirm a claim restrains people from making fraudulent claims and therefore helps minimise increases in premiums for all customers.

A recent report by the Economist Intelligence Unit, commissioned by the Insurance Australia Group, found that the cost of fraud to the general insurance industry currently adds up to \$73 to every insurance policy taken out in Australia². While there is no equivalent research for the life insurance industry, fraud is a problem for all forms of insurance and any restriction on the industry's ability to manage fraud will invariably add to this cost.

IFSA submits that there is no mischief in this sort of surveillance. On the contrary, it protects the public interest of the community generally as a key tool in the detection of fraud. Surveillance conducted from public property for the purposes of verifying statements and/or other information should not be considered to be the collection of personal information, an invasion of privacy, or require authorisation.

Any requirement for an insurance company to seek a claimant's consent to surveillance will, in most cases, be met with refusal, jeopardising the ability of the insurance company to accurately assess a claim and determine the individual's entitlement to benefits.

Therefore, it's likely that the industry would only approve cover if the applicant agreed in advance to surveillance should a claim arise – a clear deterrent to taking out insurance.

Current arrangements assume that the insurer has the right to verify the veracity of any claim.

In the rare cases that consent is provided, the claimant's change in behaviour would be so stark it would prevent an insurer from ever accurately confirming the facts of the claim.

² The Truth about Insurance Fraud, November 2004

Proposal 13-2 - Use of the Electoral Roll

Proposal 13-2 relates to use of the electoral roll for secondary purposes. It proposes that the Privacy Commissioner should develop and publish protocols that address the collection, use, storage and destruction of personal information.

IFSA View

Paragraphs 13.93-13.99 of the ALRC discussion paper refers to organisations using the electoral roll for the purposes of identifying individuals, such as for Anti Money Laundering.

IFSA is not opposed to proposal 13-2. However, it would be important for the privacy commissioner to consult separately on this issue when developing any such protocols so that it has a comprehensive understanding of the purposes for which the information on the electoral roll is used.

For example, superannuation providers often use the electoral roll as a tool in attempting to locate 'lost members'. It is important that the electoral roll continue to be available to use for such purposes.

Proposal 20-5 – Specific Notification

Proposal 20-5 submits that specific notification must be provided to individuals where information about them is collected from a third party.

IFSA View

IFSA agrees with this proposal in principle, however further consideration needs to be given to life insurance and superannuation arrangements.

IFSA's member companies often collect information on relatives from insurance applicants and superannuation account holders that are central to:

- the assessment of cover, whereby information on family medical history is routinely collected (on a party de-identified basis) to assist with assessing an insurance risk; and,
- the payment of superannuation death benefits, whereby names, dates of birth and addresses of financial dependants are supplied by account holders to a Trustee, who would then pay these beneficiaries in the event of the account holder's death.

Life insurance and superannuation customers may not want family members or dependants to know that they are applying for insurance cover or nominating them as a beneficiary.

Any requirement on companies to notify individuals that details have been supplied would impede the customer's right to their own privacy, particularly where the collection of information was incidental to the product or service offered.

Further, the disclosure of such information during a claims assessment stage would prejudice the insurer's right to investigate false claims.

IFSA submits that a specific carve out for insurance and superannuation arrangements would be needed.

Proposal 21-2 - Openness

Proposal 21-2 submits that an organisation's privacy policy should include information on the period for which each type of record is held, amongst other things.

IFSA View

This requirement would not be practical for the financial services industry due to the number of different records that financial institutions hold and the different retention requirements that exist in a variety of pieces of legislation.

Provision of a statement covering every possible scenario is unlikely to be of any benefit to the customer. Instead, it would likely confuse them when other information in the document would be provided with the aim of being 'clear, concise and effective', one of the key principles surrounding disclosure under the *Financial Services Regime*.

Proposals 23-1 to 23-5 - Direct Marketing

Proposals 23-1 to 23-5 relate to direct marketing and propose that the UPPs should include a specific principle relating to direct marketing.

IFSA View

We question the need for a specific principle relating to direct marketing as direct marketing is just one way in which an organisation may use and disclose personal information.

We also note that legislation and arrangements introducing a 'Do Not Call Register' register was introduced this year. This further diminishes the need for this proposal.

Proposal 24-2 – Data Quality

Proposal 24-2 relates to an additional requirement that an organisation take reasonable steps to ensure the personal information they collect, use or discloses is relevant.

IFSA View

IFSA submits that this requirement is unnecessary as the Privacy Act already states that personal information can only be collected where it is necessary to provide a product or service – in the case of an insurance application, this is information required to underwrite the risk. As this is a specialty area, there may be some questions which do not appear relevant to the consumer, but may be relevant from an underwriting and actuarial perspective.

Inserting the word 'relevant' into the definition of 'personal information' is not going to provide any better explanation to the consumer. It would also mean that existing documentation, such as the privacy statement, would have to be changed. In short, the cost of the amendment exceeds the value of the amendment.

In addition, the requirement of 'relevance' is one which the market self regulates. It is not sound business practice to collect irrelevant information as it wastes space and raises the ire of the consumer, to the detriment of the insurer and its business.

Question 27-1 – Identifiers

Question 27-1 asks should the Privacy Act regulate the assignment of identifiers by agencies, organisations or both.

IFSA View

IFSA does not support the regulation of identifiers.

Identifiers are used regularly by organisations within the financial services industry to limit the possibility of confusion between clients with same or similar surnames or details and they generally classify the account or policy rather than the individual.

Identifiers may be shared with other organisations where the account (such as a superannuation account) is transferred from one organisation to another at the client's request. Again, the identifier serves to confirm the correct details and assists in resolving any queries which may arise with the transfer. In our view the use of identifiers does not represent a threat to the privacy of individuals and should not be regulated.

Proposal 27-6

This proposal relates to a review by the Office of the Privacy Commissioner, in consultation with the ATO and relevant stakeholders, of the Tax File Number Guidelines issued under the *Privacy Act*.

IFSA View

The current guidelines were issued in the early 1990's. Since that time there have been substantial changes in technology and the processes which industry members use when managing documents containing TFN's.

Furthermore, there are a number of different legislative provisions which deal with TFN's. It is important that there is a consistent approach adopted and therefore stakeholders such as the ATO and APRA should be involved in any consultation process together with industry participants.

IFSA therefore strongly supports this proposal.

Question 40-1 - Private Investigators

Question 40-1 asks "Should the Australian Government request that the Standing Committee of the Attorneys General consider the regulation of private investigators...?"

That is, should private investigators be exempt from the Privacy Act?

IFSA View

In line with our view that regulation of privacy should be regulated consistently at both State and Federal levels, Private Investigators should be subject to consistent regulation insofar as their activities impact upon the privacy of individuals.

The insurance industry relies upon the activities of private investigators to assist in reducing fraudulent claims and consequently would be opposed to any restrictions on their ability to provide this legitimate investigative role for the industry.

Proposal 44-4 - Privacy Impact Statements for Projects

Proposal 44-4 states that an organisation should provide privacy impact assessments to the Privacy Commissioner in relation to a new project or development that may be seen to have a significant impact on the handling of personal information.

IFSA View

We strongly oppose this proposal as it is not consistent with the 'light touch' approach taken in the past, nor is it consistent with the Government's recent 'better regulation' initiatives which are designed to reduce 'red tape'. The Privacy Principles should adequately cover privacy considerations for all parts of doing business - projects should not be treated any differently.

Proposal 44-6 - Compliance Audits

Proposal 44-6 submits that the Privacy Act should be amended to empower the Privacy Commissioner to conduct audits in relation to compliance with the UPPs.

IFSA View

IFSA opposes any increase in the powers of the Privacy Commissioner, particularly where there is no audit trigger, such as a series of potentially systemic privacy complaints. This proposal is pre-emptive rather than based on evidence of large scale breaches.

IFSA is concerned that if enacted, these reforms would add significant compliance burdens on the industry despite there being no obvious evidence that such reforms are necessary.

The financial services industry regularly has ASIC, APRA, Tax Office and State Revenue Office auditors conducting audits in company offices. Adding yet another regulator to this list would represent a serious drain on company resources and ultimately, the economy through falls in productivity.

Moreover these significant increases in regulatory powers will result in a commensurate increase in resources and funding without which, such powers will be difficult to enforce. As noted above, this proposal is also not consistent with the 'light touch' approach or the Government's 'better regulation' initiatives.

Proposal 44-10 – Privacy Codes

Proposal 44-10 submits that the Privacy Commissioner should have the power to request the development of a code and to develop and impose a code that applies to particular agencies and organisations.

IFSA View

IFSA's recommendation is that organisations should retain the right to comply with the National Privacy Principles.

An organisation that has elected to comply with the National Privacy Principles has already incurred the expense of initial and on-going compliance. It should not be exposed to the possibility that the Privacy Commission will devise a code specific to that industry.

Proposal 47-1 - Breach Notification

Proposal 47-1 submits that an organisation should be required to notify the Privacy Commissioner and affected individuals when personal information:

"..has been or is reasonably believed to have been acquired by an unauthorised person and the ... organisation or Privacy Commissioner believe that the unauthorised acquisition may give rise to a real risk of serious harm to any affected individual".

The organisation would not be required to notify the individual if, amongst other things, the information was acquired in good faith or the organisation was acting for a purpose permitted under the UPPs.

IFSA View

We oppose this proposal as we do not think it is necessary to report individual breaches to the Privacy Commissioner.

This proposal would create significant uncertainty, whereby companies would first have to identify whether a breach could possibly have occurred, assess the extent of that breach then make its own determination on whether the breach could result in serious harm.

Again, this is not consistent with the 'better regulation' initiative, with the financial services industry required to report breaches to yet another industry regulator.

However, we recognise that there is evidence in the United States of privacy breaches that could ultimately lead to identity theft, a growing global problem.

If the ALRC determines that the breach reporting proposal should proceed, then it would be necessary to ensure that, in relation to breaches that need to be reported to the privacy commissioner, there was a materiality test that was not inconsistent with other regulators such as APRA and ASIC and could include a threshold relating to systemic privacy breaches rather than having to report individual breaches.

Chapter 57 - Health Information

Chapter 57 and in particular, Paragraphs 57.92 - 57.102 discuss issues relating to the collection and use of health information. The discussion paper raises a point about the collection of family medical history where a person can be identified. The ALRC suggests that the industry may need to apply to the Privacy Commissioner for a Public Interest Determination (PID) to ensure that the Privacy Act is not being breached through current collection methods.

IFSA View

The proposals suggest that insurers would be restricted in their ability to seek information on the medical histories of third parties without the consent of those parties.

However this information is an essential aspect of assessing risk and determining the level of premium for an insurance applicant. The process may involve collecting details of family medical histories where the persons concerned can be identified, even where their name is not collected.

Any requirement for the consent of those third parties would extend the underwriting process and ultimately, placing pressure on premium costs. It is also a well known fact within the industry that extensive underwriting delays are a contributor to underinsurance. In extreme cases, insurance could be denied where information is not able to be obtained to adequately or accurately assess the risk.

IFSA recommends an exemption for life insurers, similar to health services, in lieu of a requirement for Public Interest Determinations. This would result in a greater degree of legislative certainty.

The ALRC Report 96 *Essentially Yours* makes an explicit recommendation (28-3) that insurers have a specific exemption to support the industry practice of collecting genetic information from insurance applicants. IFSA would welcome a similar exemption to PID9 and 9A for the collection of family medical history known by an applicant and would like the exemption to extend to include the nomination of beneficiaries as highlighted above.

Essentially Yours also recommended the insurance industry be required to develop policies on the use of family medical history. This recommendation was accepted by the life insurance industry resulting in IFSA Standard No 16.00 Family Medical History which took effect from 1 January 2006. All IFSA members are compelled to comply with its standards.