

26 March 2014



Office of the Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

By email: consultation@oaic.gov.au

Dear Sir or Madam,

RE: Office of the Information Commissioner's Privacy Regulatory Action Policy and Guide to undertaking Privacy Impact Assessments

Communications Alliance welcomes the opportunity to provide comment on the following consultation documents:

- Office of the Information Commissioner's Privacy Regulatory Action Policy; and
- Guide to undertaking Privacy Impact Assessments consultation information

Office of the Information Commissioner's Privacy Regulatory Action Policy (Regulatory Action Policy)

Communications Alliance contends that the draft Regulatory Action Policy fails to provide businesses with meaningful and practical guidance regarding the Office of the Information Commissioner's (OAIC) approach to regulatory intervention. The draft Regulatory Action Policy is too broad in scope and does not provide entities with any understanding regarding the specific issues or thresholds which would trigger the OAIC to commence regulatory action. As such, it fails to provide any certainty or clarity to businesses seeking guidance from this document.

It is understood that, as a result of the introduction of new privacy laws, there will be a corresponding increase in scope of the OAIC's regulatory powers. However, rather than a direct reflection of the extended scope of the OAIC's powers, it would be more useful if the Regulatory Action Policy provided guidance as to the way in which regulatory action will be approached.

The current Regulatory Action Policy is drafted in such a way as to give the OAIC broad scope for regulatory intervention at any time.

For example, the 'Goals of taking privacy regulatory action' stated within the draft Regulatory Action Policy are:

- *Ensure compliance with personal information handling obligations*
- *Increase knowledge of personal information handling rights and obligations and the Information Commissioner's privacy regulatory powers*
- *Assist and influence entities to adopt best practice personal information ;handling practices*
- *Deter contravening conduct (both specifically and generally)*
- *Secure remedies where contraventions have occurred*
- *Address systemic issues in relation to personal information handling*
- *Instil public confidence in the OAIC's role of ensuring the protection of personal information*

These stated goals are very broad in scope and do not provide entities with any concrete guidance as to the enforcement priorities of the OAIC. Rather, these goals are a reflection of the powers of the OAIC and provide rationale for the OAIC to commence regulatory action on any issue at any time

Under the heading 'Prioritising matters for privacy regulatory action' the OAIC states that "*the OAIC will use discretion to select and target matters that warrant privacy regulatory action*". Communications Alliance contends that more guidance needs to be provided to APP entities as to when and how this discretion will be used to make the policy useful.

Working With Entities

Paragraph 22 of the Regulatory Action Policy states that the 'OAIC's preferred regulatory approach is to work with entities to encourage compliance and best practice privacy practices'. Communications Alliance is supportive of such an approach. However, the way in which the OAIC intends to work with entities needs to be more clearly articulated in the policy.

Further, the assertion that the OAIC will work with entities seems to be contradicted by Paragraph 55 which states: "*the OAIC will aim to contact an entity it is taking enforcement action against in advance of making a public statement if it is possible and appropriate in the circumstances. However, the OAIC generally will not provide an individual or entity with an assurance that the OAIC will not publicise its regulatory action or that it will give advance warning*".

Communications Alliance is very concerned that the OAIC would consider making a public statement without first consulting with, or advising, the entity concerned. Failing to advise an entity of the OAIC's intention to proceed with regulatory action means that the entity will have no opportunity to understand and assess the issue and develop an appropriate response prior to the public comment by the OAIC. This approach could also have the inadvertent consequence of unnecessarily alarming customers as the entity may not have had an opportunity to inform them if they are or are not affected by the issue in question.

Timeliness

There is no reference within the draft Regulatory Action Policy relating to timeliness. Communications Alliance considers that the timely consideration and resolution of complaints is critical and as such should be a transparently stated aim of the OAIC.

Guide to undertaking Privacy Impact Assessments (Privacy Impact Assessments Guide)

Communications Alliance's strong preference is that the Privacy Impact Assessments Guide is re-drafted and limited to high level principles which can be applied by APP entities in a flexible way. At present, the document is too prescriptive and the level of detail included makes it unsuitable for use in a business context.

Further, the Privacy Impact Assessments Guide should include a clear statement relating to the intent of the document and how it should be used by regulators, including the OAIC. Without this clarification, the draft Privacy Impact Assessments Guide could be applied as a template or checklist for investigations into privacy complaints. Communications Alliance considers that this would be an unfavourable outcome which would not reflect the intent of the APPs.

Many entities already have processes in place to incorporate privacy considerations – along with other commercial considerations – at the outset of a project. It is not necessary for the OAIC to prescribe the way in which an entity must consider its privacy obligations.

In the section 'About this Guide', the OAIC states "*while different organisations and agencies might use different processes when they undertake PIAs, ideally these processes should address each of these steps in some way*". Communications Alliance contends the Privacy Impact Assessment Guide should describe principles entities may apply when undertaking a privacy impact assessment and state explicitly that these principles are to be used as a guide only.

If the OAIC considers it necessary to include more detailed guidance for agencies, then it should be made very clear that this is the reason for its inclusion. The prescriptive detail is not to be used as a way for a regulator to assess whether a business conducted an appropriate privacy impact assessment or not.

Finally, clarity about the intention of the guidance is necessary to ensure that other regulators use the document appropriately. For example, in the telecommunications sector, privacy is within the remit of the Australian Communications and Media Authority, as well as the Telecommunications Industry Ombudsman as a recognised external dispute resolution body. It is important that the status and scope of this document is understood and applied consistently.

Thank you again for the opportunity to comment. If you would like to discuss any of the concerns raised within this letter, please do not hesitate to contact me.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'John Stanton', written in a cursive style.

John Stanton
Chief Executive Officer