



## Privacy Act – What it Means for Online Marketing

### ***The New Law***

On 21<sup>st</sup> December 2001, the new provisions of the *Privacy Act 1988* came into effect and govern the use of personal information for, among other things, marketing purposes.

### ***What is “Personal Information”***

Personal information is any information about an individual that can be identified with that individual, directly or indirectly. This includes information about an individual that is “associated with” such information – for example, if information is requested on the same form as identifying information, or is stored in a database in a way that allows it to be correlated with identifying information, then the information will be “personal information”.

One of the possibly unexpected consequences of this is that even information about a business contact can be personal information, because it

might identify the person. For example, the person’s name, job title, direct telephone number, mobile phone number, and email address, could all be identifying information in some circumstances, thus rendering those details, and any details stored with them, to be personal information.

### ***The Commissioner’s Guidelines***

The privacy commissioner has drawn up some guidelines designed for people without legal qualifications. These are available from the Privacy Commissioner’s web site at [http://www.privacy.gov.au/publications/nppgl\\_01.html](http://www.privacy.gov.au/publications/nppgl_01.html) and [http://www.privacy.gov.au/publications/nppgl\\_01.pdf](http://www.privacy.gov.au/publications/nppgl_01.pdf). For more complete information about how to comply with the new laws, you should obtain a copy of those guidelines. This brochure is limited to describing the requirements for marketing under the new laws when you are doing business online.



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### ***The Privacy Principles***

The new laws are divided into the administrative provisions in the body of the Act, and the *privacy principles* (also known simply as the *principles*) which are in Schedule 3 of the Act. Under the Act, businesses with an annual turnover of \$3million or more (and certain other businesses) must adhere to the *principles*, as well as satisfy the administrative requirements.

### ***Obtaining Permission and the Marketing Exception***

The marketing exception in the *principles* is in section 2.1(c). This item allows for the use of personal information for marketing purposes if it is impracticable to obtain permission in advance of that particular use [2.1(c)(i)], provided certain other actions are taken.

The use of the words “that particular” in the *principles* is confusing to many, and the time for obtaining permission

and the relevant practicability is not explicitly stated in the Act.

In order to answer this question, a court would look at two things. The first is the purpose of the section – and the purpose is perfectly clear – the purpose of the section is that a business should obtain consent to use personal information for direct marketing purposes in advance if it is not going to be impracticable.

The second thing the court will look at is the effect of interpreting the section with each possible meaning. A meaning which requires the business to obtain permission at the time of collection is clear enough, and also clearly supports the purpose of the provision. On the other hand, a meaning which only takes into account the practicability at the point just before the use for direct marketing will mean that it would always be impracticable to obtain permission. This would mean that



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section 2.1(c)(i) of the *principles* had no effect at all – not only would the provision not support its purpose, it wouldn't serve any purpose.

In addition to interpreting provisions of laws in a way that supports the purpose, if there are two ways of interpreting a provision, one that gives it a purpose and one that does not, courts will interpret in a way that gives it a purpose.

The result of this is that if it is practicable to get permission at the time of collection, and the business knows that they either do, or might want to, use that information for the purposes of marketing, they must obtain the permission at the time of collection, otherwise the information cannot be used for marketing purposes.

The remaining problem then becomes the interpretation of the phrase “before that particular use”. Courts will insist

on giving the word “particular” an effect that goes beyond just “before that use”. The most likely meaning for this phrase is that, even though you may not have been able to obtain permission when the information was collected, and you may have taken advantage of the exception provided by 2.1(c) previously, if it becomes practicable to obtain permission after that, you must take that opportunity to obtain permission before any further use.

When doing business online, this means that if, for example, the customer comes back to make another order, you have an opportunity to include a request for permission on the order form. If you do not obtain permission at that time, you will no longer be able to take advantage of the exception provided by 2.1(c).

### ***What You Need To Do***

Firstly, make sure your web forms that collect email addresses and other



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contact details are set up to ask for explicit permission. CAUBE.AU recommends the use of either radio buttons or a drop-down list with no default – that way your forms can ensure that your customer has made a choice by checking the button. More information on this technique is available at <http://www.caube.org.au/buspref.htm>.

Secondly, if you do avail yourself of the exception offered by *principle* 2.1(c), you need to make sure that you:

- Include an electronic mail address, 1-800 number and contact name prominently in all marketing materials, with an explanation that the customer can use those contact details to opt-out. CAUBE.AU recommends placing this at the bottom of at least the first page of any printed marketing materials.

- Honour these requests.
- Don't charge for these requests.
- Include your business address and telephone number in all marketing material, and if the material was sent by fax, your fax number, and if sent by email, your email address.

These measures are not required if you have obtained permission, but it is good practice regardless.

### ***Careful What Information You Collect***

One of the requirements of the *principles* is that businesses should not collect information they do not need. This means that if the customer has not given permission for marketing, and you ask profiling questions for marketing purposes, you must not collect the profiling information. This is a complication that is easy to overlook.