

Privacy and Consumer Regulation – Some Common Issues

FORMULATING A NEW APPROACH TO PRIVACY AND TRUST IN THE INFORMATION AGE

Sydney
Wednesday, 4th July 2007

Let me explain - I am not a privacy advocate; I'm a consumer advocate. This was my first thought when I was asked to speak today. I guess that says something in itself.

In Australia, the privacy lobby and the consumer lobby have generally been quite separate, although issues such as credit reporting and tenancy databases have brought us closer together in recent years. Information held about credit or tenancy histories can impact on whether a consumer has access to products such as housing, a car loan – even a phone service – and in some cases the price of that product. In some cases it can impact on the debt collection processes used to pursue someone for payment. These surely, are consumer issues.

Consumer advocates have had to develop a better understanding of privacy regulation – but I don't think I'm the only one to feel that compared to the consumer protection framework we are used to working with, privacy regulation seems to come from a different world – and speak a different language.

However, personal information privacy (particularly as it relates to the private sector) is a consumer issue, and questions being raised today about the value of disclosure and choice in protecting individual privacy are also being raised in other consumer areas – and for similar reasons.

My presentation today will discuss some of the common issues that are being talked about in “consumer circles” – and we have recently been doing some talking due to the current Productivity Commission Review of the Consumer Policy Framework. I refer you to submissions on the Productivity Commission's website by our Centre and CHOICE if you want a better “feel” for these issues. I haven't come to any conclusions at this stage about the extent to which privacy issues may need different regulatory tools than other consumer issues, but I invite you to consider that question.

Let me start with:

Disclosure

You would find broad agreement from all sides that in consumer protection we rely too heavily on disclosure, and that disclosure on its own is largely ineffective. I am not familiar with the history of privacy regulation, but if you take financial services

regulation as an example, the initial industry response was to strongly support disclosure. Finance sector industry participants and Treasury saw disclosure as regulation of least interference.¹ I think this is important, because this is not the only area where industry has strongly supported detailed disclosure – basically because they would rather disclose something than be prevented from doing something! In Peter Kell's² words "Anything goes, as long as you disclose". However, currently many finance industry groups are unhappy with the blow-out in information required in Public Disclosure Statements (**PDS**) and consequent compliance costs.³ Sound familiar?

Effective disclosure is important for transparency and to assist consumer decision-making. For example, in relation to privacy, I believe that it is important that consumers are aware that one cost of the benefits of a loyalty scheme, is the provision of personal information. However, disclosure is rarely effective on its own – and it should not be used to excuse, or allow, unfair industry practices.

I think there would be general support from consumer advocates for reducing disclosure requirements in a range of areas, if the problems it was designed to address were tackled in more effective ways. That is, of course, a challenge – part of which is our view that industry wants to do away with excessive disclosure, but is less enthusiastic about accepting alternative, and more effective, regulation.

So, what might some of these key elements of effective regulation be?

Some Elements of Effective Consumer Regulation

Give regulators the power to prohibit unfair contract terms and unfair practices. We have unfair contract terms regulation in Victoria. This allows the regulator to require that particular terms are not used in contracts, as well as allowing an individual to seek redress on the basis of an unfair term. We believe that similar legislation should be extended to cover unfair practices. Without such regulation, only individuals can legally challenge unfair practices or unfair terms – and that would rarely have any impact on an industry-wide practice. Perhaps in the privacy setting, the regulator should have the power to declare various uses or collection methods as unfair. One example might include the 'bundling' of products and services in such a way as to give individuals no real choice but to consent to unwelcome secondary uses of personal information.

Implement regulation that places obligations on regulators to undertake appropriate enforcement action. It is our view that all consumer protection regulation would be much more effective if regulators had the resources, powers and motivation to enforce the law. I also believe this is a key requirement to gain consumer trust. Regulators should be required to provide more transparent reporting of their priorities, their goals, and the reasons for adopting a particular approach. We support a "super complaints" mechanism as exists in the UK, that requires regulators to formally investigate and respond to a complaint made by particular organisations (such as consumer organizations) about a systemic issue.

¹ CHOICE, *Submission to Taskforce on Reducing the Regulatory Burden on Business*, December 2005.

² CEO, CHOICE.

³ Ibid.

Appropriate penalties. The penalties, and the risks of being caught, must be adequate to ensure that the cost to business is adequate to outweigh the financial benefits of non-compliance. This should include “accidental” non-compliance as well as intentional non-compliance. I’m also concerned with some commentary that emphasises only penalising conduct that causes significant harm. I guess it depends what you define as significant harm, but how do we make industry behave? Take the person I saw the other day, who had a recent demand from a debt collection letter in one hand, and an old letter confirming that the debt was paid in the other. She has little chance of getting damages and there is little chance the businesses will be penalised.

Consumer behavioral research should be taken into account when planning a regulatory response, rather than a theoretical view of what a “rational” consumer might do. If there was a small fraction of the effort put into using consumer behavioural research for better regulation design, as there is to applying it to marketing products, we’d have better regulation. Acceptance that regulation must involve more than disclosure and choice is a good start.

Accessible complaints handling for individual consumers. This must be seamless – consumers shouldn’t be given the runaround. This is a particular challenge in the privacy area, where a complaint may involve a number of businesses that have collected, reported or used the information. However, if consumers have to go from place to place they will give up. It is also vital that any complaints process must be efficient in identifying potential systemic problems.

Any regulation (even self-regulation) must be enforceable in practice. I’m not suggesting that self-regulation works, however co-regulation – where there is an effective enforcement “hook” can work, depending upon the structure. Some examples include the industry ombudsman schemes (where membership for some is compulsory, and standards are monitored by the regulator) or the Banking Code of Practice, where the Code forms part of the terms of consumer agreements between banks and customers. Whatever the regulatory tools, it is vital that there are no weak links.

Value

Finally, I’d like to say something about the reference to the “value” of personal information. We know this is of value to industry, and there seems to be an assumption that it is of “value” to consumers – if only we knew what was good for us!

The assumption appears to be – and excuse me if I’m wrong – that as long as the privacy concerns are addressed, everyone benefits from the use of this information, due to the ability for businesses to more efficiently give us what we want.

I don’t think it should be assumed that because the marketing we receive relates to product that might interest us, that we are happy about that marketing – or that use of our personal information.

I am particularly concerned about the use of personal information to identify consumers who are likely to be profitable. Anecdotally we've all heard of the "people who will buy anything" database, and I'm sure businesses use lists of consumers who are vulnerable to various marketing techniques. Some consumers will suffer due to those techniques. We also see people who receive marketing for exploitative loans and other services once a Court judgment is recorded against them – products that can cause serious damage.

Certain credit card marketing is targeted at those who don't – or can't – pay off their credit cards rather than those who might use that credit more carefully. We know that gambling providers use information about the habits of their customers for marketing purposes – is the data analysed to identify those who have the occasional flutter, or those who are more likely to be at risk?

If privacy is a consumer issue – and I think it is – then a regulatory approach must take into account the uses of this information, rather than being based on the assumption that as long as the analysis is accurate, there is no harm in the targeted marketing that results.

It has been suggested that business and consumer interests align in relation to privacy regulation. I suggest that rather than align, they intersect. It is important to establish where the common interests lies, and to work to resolve those areas where there is tension between business and consumer interests.

Carolyn Bond
co-CEO
Consumer Action Law Centre