Australian Casino Association Privacy Code (Consultation Draft)

Comments by Australian Privacy Foundation

5 May 2003

Overview

The Foundation welcomes the opportunity to comment on your Association's draft Privacy Code prior to its submission to the Privacy Commissioner for registration.

There are some very positive aspects to the Code — notably the addition of a specific Surveillance principle (Principle 11 — but see criticisms of some parts); the extension of all rights to non-citizens (definition of individual); the addition of a requirement to notify persons to whom personal information has been disclosed about any correction (Principle 6.5(2)) and the extension of the Identifier principle (Principle 7) to cover identifiers assigned by any other person (but see criticism below of missing part of this principle).

We have a major concern about the lack of an independent Code Adjudicator to handle complaints. This function appears to have been given to the Code Administrator. (The Review panel has the appropriate independence but does not seem to have a role beyond the review.) We believe that this structure fundamentally misunderstands both the requirements and underlying intent of the Act, as expressed in s.18BB(3), the prescribed standards and the Commissioner's Guidelines.

Detailed Comments

Our other more detailed comments are as follows:

It seems odd to alter the definition of "agency" to include the CRAA (now Baycorp Advantage) and the Casino Authorities. This changes the commonly accepted meaning of "agency" under the Act in a confusing way and may have unanticipated implications for the way the Code applies. We cannot immediately see what if any advantage is gained by including these entities in the definition — and given their importance in the exchanges of personal information it would be preferable to refer to them expressly in the Code wherever necessary.

We have a general concern about the potential for confusion in the community from re-numbering of the Principles. We realize that some re-numbering is inevitable once you delete or add clauses, but wherever possible we think items within Principles should retain the original numbering from the NPPs in the Act. We suggest therefore that you do not reverse the letter/number format used in for example 1.3, 2.1, and 6.1.

In Principle 1.2, we welcome the deletion of the "or if that is not practicable" qualification — which has been criticized by ourselves and others, including the European Union in the context of a possible "adequacy" assessment.

We note that you have changed 2.1(5) — replacing "relevant persons or authorities" with "relevant persons, an enforcement body or agency". This changes the meaning quite significantly when taken together with your additions to the definition of agency discussed above (Casino Authorities would seem to be covered twice as enforcement bodies and agencies?). It is not in our view acceptable to allow disclosures to the full

range of agencies even covered by the original definition. Disclosures to Casino Authorities clearly belong under this clause but would surely already be covered by "relevant authorities".
Disclosures to the credit reporting agency (Baycorp Advantage) are of a different kind and should not be included in this clause — they are already expressly permitted under Part IIIA of the Act (credit reporting) and as such would fall under 2.1(6) — authorized by law (see below).

You have changed 2.1(6) from "required or authorized by or under law" to "required or expressly authorized by a conflicting legal obligation". We have no difficulty with the addition of "expressly" (we argued for this in the Act) but cannot see why you need to make the other change — firstly "conflicting" is unhelpful , and secondly the other "authorisation" may not be in the form of an obligation — it may be a discretion (as you explain in the comments in the Explanatory Memorandum). We would favour reverting to the wording of 2.1(g) which we think would also cover disclosure to credit reporting agencies (see above).

You have changed 6.1(2) from "serious threat to life and health of any individual" to "serious and imminent threat to the life or health of an individual". The second change - "any" to "an" - is probably inconsequential but we are not clear why you have not retained the greater discretion to disclose health information in situation of serious but not imminent risk?

We applaud the addition of 6.5(2) — another provision which we argued for in the Act itself — this is an important remedy for individuals whose information needs to be corrected.

The change in 7.1 from "assigned by an agency" to "assigned by any other person" appears superficially attractive, but you have also deleted the clause on limits to use and disclosure of other organisations" identifiers (7.2 in the Act) which is an important part of the protection against "function creep". It may be that clause 7.2 could not work in relation to all other identifiers — in which case it might be better to revert to the original wording of 7.1.

9.1 has dropped "or external territory" and substituted "not in Australia" for "in a foreign country". We would like to see some justification for the change.

We note that you have not included an equivalent to 9.1(f) — "reasonable steps ". We have argued that this is redundant as it would be covered by (a) — your 9.1(1) — is this your reasoning too?

In 10.2 we are not sure how (2)(b) would be relevant as Casinos are not likely to be bound by any health profession rules (although their medical staff may be?) — this may need some modification?

We note the deletion of some provisions that are clearly not relevant such as those relating to health research and non-profit organisations.

We welcome the addition of Principle 11 — Surveillance, to deal with a particularly sensitive issue in the context of Casinos, but have some concerns about the detail of the principle:

11.1 is a useful supplement to 1.3.

11.2 is a very valuable control over commercial or "voyeuristic" uses of security cameras and tapes — but should it not be subject to the exception at 2.1(7) as well as (4)-(6)? And to ensure control over inappropriate uses by Casino employees, 11.2 could usefully cover "use" as well as "disclosure".

We are concerned that 11.3 potentially undermines 11.2 by allowing Casinos to gain consent for other disclosures (wider than those allowed by 11.2) by including broader notices on signs. Also, in principle, we are opposed to the use of "spurious" consent, when the proposed uses and disclosures are in fact a condition of service — ie: individuals have no real choice other than not to enter. We think it should be sufficient to notify clients about the limited range of permitted uses and disclosures (in accordance with 11.1 & 11.2) rather than pretend that it is based on consent.

11.4 is a valuable safeguard.

Explanatory Memorandum

We assume that this does not form part of the Code that would be submitted for registration under the Act, but is included here as additional guidance for members. We have not reviewed all the Comments exhaustively but they appear to be both accurate and helpful, subject to the comments we have made above — for instance, we would not agree with the Comments on Principle 11 as they stand.

Schedule — Privacy Statements

Again, we assume these will not (cannot) form part of the Code, but are offered for additional guidance. We welcome this initiative as it will hopefully lead to some consistency across the Casino industry. We have not been able to review these statements in detail and would like to reserve the opportunity to do so at a later stage.

End.