



Banking & Financial Services Law Association

**The 26th Annual Banking and Financial Services
Law and Practice Conference**

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**Privacy Law in Evolution:
Across the Pacific**

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Privacy Law in Evolution: Across the Pacific
Some hot topics for Australia

31 July 2009

Katherine Forrest, Partner

Background

- Review of privacy related matters referred to the ALRC by then Attorney General Philip Ruddock in 2006
- ALRC Report released in August 2008
- Extensive suggestions for reform
- Govt has conducted some further consultation – detailed response and proposals not yet released

Overview

- Credit reporting
- Enforcement powers of the Privacy Commissioner
- Statutory tort of privacy
- Transborder data flows

Credit reporting and credit reform

- Current restrictions on content are prohibitive, query whether it provides sufficiently meaningful content
- Proposal to increase information contained in credit reports
- Introduction of new “responsible lending” obligation
- Comprehensive credit reporting should:
 - promote competition
 - enhance responsible lending decisions
- Credit reports for identity verification?
- Other uses?
- Abolition of section 18N – provision is unnecessary and confusing

Trends in Enforcement Powers Australia

- Privacy Commissioner has traditionally taken a facilitative approach to regulation: assistance, advice and information
- Is a more muscular approach appropriate?
 - enough action taken?
 - enough powers to take sufficient action?
- Reforms proposed to strengthen investigative and enforcement powers – they should be proportionate
- Increase of powers will lead to increased use – be prepared, revisit privacy compliance

Statutory tort of privacy?

- Judicial interpretation of a common law right of privacy is developing – but direction is not yet clear
- Proposed statutory tort – “reasonable expectation of privacy”
- Current state of the law and regulation sufficient? Uncertain? Floodgates?
- If introduced, all common law rights should be superseded by statutory tort.

Transborder data flows

- Sensitive issue – particularly in context of outsourcing
- Balance between customer choice and business imperatives
- Currently requires adequacy of protection or consent
- Proposed introduction of ‘accountability’
- Compare with “consent” only



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