

Building consumer trust in electronic commerce

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The privacy compromise

Our privacy laws are a unique blend of economic interest and human rights. Michael Kirby reviewed the principles on which our laws are based in 1999:

This unexpected child, conceived in a union of economics and human rights, born in 1980, is now 20 years old. Its parents have acknowledged and praised it. Yet the world of today, particularly the world of technology, has changed beyond recognition from the world into which it came nearly 20 years ago. It is timely to consider the changes and some of their implications.¹

In 2008, the ALRC delivered a definitive Australian review. The Report does some important basic maintenance. But more will need to be done if consumer trust is to be assured and the information economy is to prosper.

Trust and the information economy

Digital information is being produced and stored at exponentially growing rates. One estimate has digital production at 281 billion exabytes in 2007, with tenfold growth over the next five years.² Much of this information is stored and networked.

The trust on which depends the flow of this information risks collapse in the face of massive loss or misuse of data. Laws still seem ineffective to prevent such events.

Growing information complexity is spawning ever more complex laws. Yet legal complexity may actually undermine, rather than build, consumer trust.

ALRC Report

For your information does some basic maintenance needed to secure consumer trust, but does not recommend the fundamental rebuild that will be necessary in future.

That rebuild would probably be too difficult right now. Fragmented privacy laws need to be restored to a single fabric before more ambitious reform is possible. Until then, sectional interests are probably not manageable.

The maintenance of the foundations recommended by the ALRC includes:

- Clearer definitions of personal information and clearer objectives (Recommendations 6: 1-7 and 5: 1-4)
- Stronger powers for the Privacy Commissioner in the private sector (Recommendations 47:1-8)
- Uniform Privacy Principles
- Data breach notification

Weak proposals for regulation of information networks point to future reform. Health and credit information is expected to be shared among a known network for public (and individual) good. Yet proposed regulation is complex, with two or three tiers of regulation (UPPs, regulations and Code) and a profusion of regulators (three in the case of credit reporting).

Information networks, fixed or open, are the growing substance of the information economy. We will need to get much better at regulating them if we are to hold consumer trust and foster the information flows.

¹ Kirby, J *Privacy protection, a new beginning: OECD principles 20 years on* keynote address to the 21st International Conference of Privacy and Data Protection Commissioners in Hong Kong on 13 September, 1999 <http://www.austlii.edu.au/au/journals/PLPR/1999/41.html>

² ICD Corporation *The Diverse and Exploding Digital Universe* March 2008 <http://www.emc.com/leadership/digital-universe/expanding-digital-universe.htm>

Economic interest and human right – an uncomfortable marriage

Complexity of regulation may be intrinsic to the founding compromise described by Michael Kirby – a marriage between economic interest and human right.

The marriage is becoming increasingly uncomfortable.

For example, credit reporting regulation is intended to redress information asymmetry in credit markets – a public good. Yet it is regulated in a human rights instrument whose fundamental objective is to limit the circulation of personal information. Complexity is aggravated by balancing an individual's rights with collective interests – the public good of information flow, and the collective interest in a data set rather than a record. And as many of my privacy advocate colleagues have argued, a human right should not and cannot be traded.

Consumer consent, trust and complexity

The mechanism chosen to balance these interests is individual consent, now widely thought not to be operating effectively.³ Michael Kirby pointed out recently:

The notion that you could control this penumbra of information about yourself, the zone of privacy...was very quickly overtaken by technology⁴

As the information economy becomes bigger and more complex, so also the economic incentives to 'load up' consent grow. To guard against this 'loading', advocates seek more detailed drafting in more complex laws.

But the economic incentives are powerful, and complex laws invite avoidance.

So complexity doesn't foster trust because it is not effective at balancing interests.

As a colleague points out in a personal 'theory'⁵ the law is never great at balancing individual versus collective interests. This is a task much better left to the courts.

What could be done – direction of future reforms

The law needs to govern complexity with much greater simplicity.

The current crisis in world credit markets shows how directly trust depends on good, muscular regulation.

Clear, simple muscular laws are needed to set out behavioural standards - but not to prescribe process. These need to be matched with a strong regulator, and ample scope for courts to decide issues of balance. This is much like the mechanism for balance we have sought in trade practices law.

We need to take the weight off the consumer consent mechanism, and give much greater weight to data governance, with greater public scrutiny and accountability, and greater enterprise flexibility.

Future reforms, like the **cause of action**, and **stronger regulator powers**, are a key part of the mix.

Unless we rebalance the framework, with simpler laws coupled with flexible, accountable enterprise data governance, the law will collapse under its own weight of complexity. And with it consumer trust.

The kernel of these future reforms is in the ALRC report with recommendations the government has deferred until stage 2, removal of exemptions, stronger powers for the regulator and the cause of action.

Waiting for stage 2, the government can act, committing to simpler drafting and less prescription. These don't always coincide. But if we can make them meet, complexity may recede, and consumer trust rise.

³ See ALRC For Your Information chapter 19

⁴ Kirby J, speech to Internet Industry Association 21 February, 2008

⁵ Olga Ganopolsky, privacy lawyer and Head of Legal Compliance at Veda Advantage