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By email:
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30 September 2022

Feedback – Possible changes to the notification rules under the Privacy Act 2020

1 About Dentons Kensington Swan

1.1 This submission sets out feedback from Dentons Kensington Swan on the possible changes to the notification rules under the Privacy Act 2020 ('**Privacy Act**'). This submission is made by the firm and not on behalf of any client of the firm.

1.2 We have extensive experience advising a range of agencies in various industries who collect, hold, and process personal information. We act for consumer-facing organisations, social media platforms, government departments, software developers, users of cloud technology, and a wide variety of other agencies who use personal information in the course of their business.

1.3 We assist clients in New Zealand and overseas with their regulatory compliance obligations, and initiatives aimed at proactively addressing risk to our clients, and their customers and employees in respect of the treatment of personal information.

1.4 Our lawyers have also advised clients, in New Zealand and overseas, in relation to their compliance obligations under the European Union's General Data Protection Regulation ('**GDPR**'); its United Kingdom equivalent; and the California Consumer Privacy Act.

2 General comment

2.1 We do not believe that any changes to the Privacy Act to address indirect collection of personal information are warranted. In our view, the existing regime contemplated by the IPPs (and in particular, IPPs 2, 3 and 11) is sufficient.

2.2 We do not understand there to be an identified policy problem that requires the indirection collection of personal information to be specifically addressed any more so than it is currently, and we are concerned that the imposition of additional notification requirements are likely to result in, as the Ministry has identified, both 'notification fatigue' and increased compliance costs (without a corresponding tangible benefit for consumers).

2.3 While we do generally support changes to New Zealand privacy law that will result in a harmonisation of practices in Aotearoa with practices in other key jurisdictions, such as the EU, the UK and Australia, we think that any proposed changes:

a must be assessed in the context of the 'principles'-based approach of the Privacy Act, which is much less prescriptive than the approach followed by other more formal data protection regimes such as the GDPR; and

b must also recognise that the imposition of similar indirect notification requirements under the laws of other jurisdictions are likely to have led to a realisation of the concerns identified by the Ministry – that is, 'notification fatigue' and increased compliance costs – and accordingly should only be implemented with a view to securing tangible benefits for consumers (and not just 'for the sake' of harmonisation).

2.4 That said, we are always supportive of changes to the Privacy Act which will result in New Zealand maintaining its status of adequacy under the EU and UK GDPRs. Our view is that the benefits that New Zealand's 'white list' status bring are significant, and most likely underappreciated by New Zealand agencies. Our experience dealing with cross-border transfers involving jurisdictions other than 'white list' jurisdictions has given us a solid insight into the significant challenges faced by businesses looking to sell into the EU or the UK who aren't able to benefit in the same way as New Zealand businesses can. If the proposed changes to the Privacy Act are a 'necessary evil' – that is, a condition of New Zealand maintaining its adequacy status – then we think such changes are ultimately a price worth paying.

3 Feedback on the Ministry's questions

(1) What factors do you think are most important when considering changes to indirect collection of personal information? / (2) What are the advantages or benefits of broadening the notification requirements, for both individuals and agencies? What might the disadvantages be?

3.1 The factors that we think are most important, and the likely advantages and disadvantages of broadening the notification requirements, are as follows:

Whether the proposed changes will bring a tangible benefit to consumers, who will end up 'better informed' about the use of their personal information.	We think that is unlikely. Agencies who collect personal information directly from individuals (in this feedback, 'collecting agencies') are already under an obligation under IPP 3 to make appropriate disclosures regarding the purposes for which their information is to be collected, and the intended recipients of that information. If collecting agencies are not making appropriate disclosures in their privacy statements or otherwise informing individuals at, or as soon as practicable after, the time of collection, then those agencies are not fulfilling their obligations under IPP 3. Collecting agencies – who form the initial relationship with the individuals from whom the information is collected – are the best-placed to make the disclosures and provide the information that an individual needs to understand the likely journey of their personal information.

	Retaining the onus on collecting agencies to include appropriate disclosures in their privacy statements also helps ensure that individuals are able to retain some control about how their personal information is to be used in the future, since the individuals are informed at the time of their collection who might receive the information, and the purposes for which it may be used. In our view, that is the appropriate time: in particular, in circumstances where the proposed future use of their information may be a relevant consideration as to whether the individual wishes to proceed to engage with the collecting agency, taking into account the collecting agency's privacy practices. This further emphasises that the onus must fall on the collecting agency to properly describe the intended recipients of, and purposes for using, the individual's personal information. We also share the Ministry's concerns regarding 'notification fatigue'. Our view is that requiring additional disclosures, from agencies who receive personal information from a collecting agency (in this feedback, 'recipient agencies') – all relating to effectively the 'same collection – is likely to result in consumers 'switching off' to 'yet another email or tick box exercise'. Our preference would be to see more guidance, and more enforcement, in relation to IPP 3, encouraging a more transparent and engaging 'user journey' regarding the disclosures that a collecting agency is required to make at the time of initial collection from the individual.
The likely compliance costs for agencies required to comply	Our expectation is that many agencies operating in New Zealand rely on the indirect collection of personal information in their day-to-day operations. They do so, in theory, in reliance on their ability to collect that personal information from another agency under IPP 2. In theory, agencies who initially collect the personal information from the individuals concerned and make that information available to the other agency do so on the basis of disclosures which comply with IPP 3 and in accordance with IPP 11 respectively. That framework already provides a solid basis on which a recipient agency may collect personal information from a collecting agency, in circumstances which – provided that IPP 3 and IPP 11 have been complied with – should result in personal information being collected and disclosed in the manner anticipated by individuals. The introduction of a new privacy principle or changes to existing privacy principles will require a significant review of public-facing privacy disclosures, only a short time after most agencies have reviewed theirs in light of the new Privacy Act coming into force in late 2020. In the absence of any tangible enforcement action being taken against agencies that do not make appropriate

	disclosures (including the many agencies which have failed to update their privacy statements to take into account the changes in 2020), New Zealand agencies may suffer from 'compliance fatigue' and may refuse to, or may delay, making any changes necessary. This is particularly likely to be the case where the Ministry is unable to clearly explain the rationale for imposing an additional compliance obligation on New Zealand agencies, where there is no obvious or well-articulated tangible benefit to consumers.
Retention of New Zealand's status of adequacy	We think that the benefits that New Zealand's 'white list' status bring are significant, and most likely underappreciated by New Zealand agencies. If changes to New Zealand privacy law are necessary in order to ensure that we maintain this status, then ultimately we think such changes are likely to be worthwhile (despite the other drawbacks of the changes identified in this feedback).

(3) What form do you think the proposed changes to notification rules under the Privacy Act should take? Please elaborate on your preferred option and explain why you think the other options are not appropriate. / (4) If you are a New Zealand business, are there any practical implementation issues you can identify in complying with the proposed changes? / (5) Are there any other risks or mitigations to the proposed changes you can identify that are not mentioned in this document?

3.2 As noted above, we think that changes are unnecessary on the basis that the existing regime contemplated by the IPPs (and in particular, IPPs 2, 3 and 11) is sufficient.

3.3 However, if changes are necessary, we would support a change which continues to place the onus on (or, indeed, emphasises the existing obligation on) the collecting agency to make sufficient disclosures to individuals about where their personal information will end up.

3.4 This is because it is the collecting agency which forms the 'relationship' with the individual concerned, at the time of collection of the personal information. Collecting agencies are best-placed to provide the information about the likely 'journey' of the personal information, including details of the other agencies likely to receive that information, and the purposes for which they might be disclosed that information. Where practicable, that agency can also provide contact details for the recipient agencies, to facilitate individuals exercising their access and correction rights.

3.5 In our view, this approach is the most practical to implement, in that:

a it will result in only a single notification to consumers, at the time of collection of their personal information (or shortly afterwards) – that is, when consumers are more likely to be engaged – thereby being less likely to lead to notification fatigue;

b in theory, a collecting agency's existing disclosure that complies with IPP 3 should contain most, if not all, of the information that would be made available to consumers.

3.6 We expect that implementing this approach would require, at most, a few 'tweaks' to IPP 3 (or, perhaps only some guidelines), which could contemplate that the collecting agency must include in its IPP 3-compliant disclosure to individuals:

a contact details about each recipient agency to whom the collecting agency is likely to disclose personal information (and in this regard, the collecting agency may need to be under an express obligation to keep the details of the likely recipient agencies up-to-date on its website);

b more specifics about the purposes for which disclosures may be made to the likely recipient agencies.

3.7 We think changes of this nature are likely to result in the least administrative burden – in particular for agencies that already follow best practice when it comes to the transparency and clarity of their privacy statements – yet are still likely to deliver the same (if not more) benefits that the other proposals, due to the likely mitigation of 'notification fatigue' through the single notification approach.

3.8 With respect to the proposed changes contemplated by the consultation paper:

a We think that any extension of IPP 3 which would require a privacy statement to be disclosed to individuals at the time the recipient agency collects personal information from a collecting agency:

i is more likely to lead to 'notification fatigue' and confusion, especially since the individual may have forgotten the initial contact with the collecting agency which has led to the further disclosure;

ii may be difficult to implement in practice, especially if the recipient agency has not received contact details for the individual concerned (or, it could lead to an additional disclosure of personal information, and a corresponding risk to individuals, if the collecting agency is required to disclose contact details to the recipient agency to enable the recipient agency to fulfil its notification obligation).

b We think that an amendment to IPP 11 to require a collecting agency to make a further privacy disclosure at the time of disclosing personal information to a recipient agency is more likely to lead to 'notification fatigue' and confusion. Such a disclosure would not be built into the initial 'user journey' at the time of collection, but would instead have to be integrated into a further engagement between the collecting agency and the individual concerned, which may be seen as intrusive or overwhelming for the individual.

c We do not think that an amendment to IPP 2 that would narrow the exceptions that allow indirect collection of personal information is warranted. Those exceptions are, in our view, reasonable, and so far as we are aware, there is no obvious policy reason to restrict the ability of agencies to indirectly collection personal information.

(6) Should the proposed changes only apply to personal information collected indirectly from individuals overseas, or should they also apply to personal information collected indirectly from individuals in New Zealand?

3.9 We see no reason to distinguish between individuals overseas and individuals in New Zealand (unless to do so is the bare minimum required for New Zealand to maintain adequacy status).

4 Further information

4.1 We are happy to discuss any aspects of our feedback on the possible changes to the notification rules under the Privacy Act.

4.2 Thank you for the opportunity to provide feedback.

Yours faithfully

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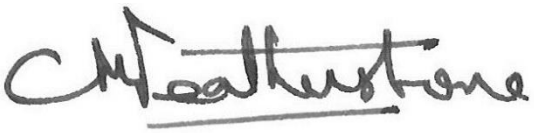

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