

Improvements required by CLA to the Access Card draft Bill of December 2006, and to associated card systems and concepts

Preamble

Civil Liberties Australia supports the concept of using card and other IT advances to make life easier for Australians. As per our previous contribution (see CLA ID card submission 060727), we highlight that any new card system, particularly the database aspects, must be properly protected by appropriate legislation.

As well, the entire legislative spectrum surrounding all cards, data holdings, financial transactions by card and similar means, and the rights of individuals must be analysed, reviewed and improved as part of the process of introducing what will become a vitally important part of Australia's data system.

Introducing a new government card under new legislation dealing piecemeal with important data issues is not the way to proceed. It is far more important to get it right, than it is for a card to meet a Minister/Cabinet-imposed deadline when it is extremely doubtful that Ministers understand the full ramifications of how poorly the data and financial transactions of individuals are currently protected by legislation in Australia.

As the most basic example, financial transactions by Australians in Australia under the main online financial payment system, PayPal, are governed by the laws of the USA and/or Singapore...and not by the laws of Australia.

We strongly recommend that the issue of the Access Card draft legislation, along with all card/data holdings and financial transactions by card/similar methods, be referred to the Australian Law Reform Commission for an 18-month investigation and report and recommendations.

Specific comments on the current draft legislation

- Australians own – and must retain control of – their personal and private information. The proposed legislation does not vest ownership of their own data in Australian individuals. Until it does, it will be inappropriate and unacceptable.
- Special new legislative protections for consumers are needed because the card/database considerably widens the potential for card/data abuses. These protections are not contained in this legislation, which is why the legislation must be referred to the ALRC.

- Introducing a one-stop, Australian card/database requires the establishment of a stand-alone agency to be responsible for managing/monitoring what will become a basic tool of everyday life for all Australians. This is not yet contained in the legislation.
- There must be created an effective, independent Public Interest Monitoring panel, meeting every two months, to ensure the card is implemented correctly, and to immediately draw attention to problems arising.
- No third party outside the agency and the consumer – whether public or private enterprise – must be able to access, store, reference, use, data-mine or sell Australians private information without the individual approval of card/data owners on a case-by-case basis. This most basic protection for individuals is not contained in the draft legislation.
- Should emergency access be required for national emergency or like situations, individuals must be told that their information was accessed, and how, when, where, by whom and for what reason. This is not contained in the draft legislation.

Database:

The draft legislation's failings in relation to the proposed database(s) include that it does not meet these basic principles:

- data must be held more securely than any other data on Australians, because, being a 'centralised' store of personal data, it has more potential to be abused and misused.
- access to the data, and the card, must be limited to only people who have undertaken a rigorous authorisation process.
- any accessing of the data must be traceable, auditable and audited, with reports made at least to a monitoring group (see below).
- people must be able to access their own data to verify and change details simply.
- much harsher penalties must apply to abuse of or negligence surrounding the card/data system (given the very poor track record of Centrelink staff over the past 18 months, this aspect is crucial).
- permanent consumer monitoring is required to ensure ongoing safeguards and protocols are abided by.

Other safeguards, which are mandatory to ensure CLA's ongoing support for the card, and which are not represented in the draft legislation, include:

- Registering on, and providing information to, the national database must at introduction, and always, remain voluntary.
- Individuals must own their own data, and have clear rights and easy ways of checking, verifying and changing/deleting their personal data and any associated data held on them. If anyone accesses an individual's data, the

individual must be told of the access.

- There must be separate integrity checks on data, to the extent of at least 5 per cent of individual holdings, annually.
- The legislation must actively prevent linking medical and/or social services information on an individual's card to government, bank, state/local government or other information. It does not currently achieve this.
- Individuals must have freedom to decide whether and when to use the card, other than for the specified health/welfare reasons and in medical or declared State/National emergencies.
- The legislation must specify that no race, religion, creed, gender, sexual preference or political/social/community affiliation information is held on the database and/or the card, unless an individual gives consent.
- Individuals must not be subject to penalties for not providing information (or for not correcting information) related to database/card and use.
- In terms of providing proper data protection for Australians, it is vital that this opportunity for an overall review of the current data/card legislation in this country is taken:
- The new legislation must form the basis of national, sector-wide legislation which covers all card/database use, and contains robust protections, penalties and compensation consistent across the public and private sectors. The best way to achieve this is to make an referral to the ALRC, and allow the ALRC 18-24 months to produce quality recommendations which provide better legislative protection for Australians than exist currently in relation to data holdings, cards, banking and other transactions, including online.

CLA strongly recommends this course of action.

- Any privacy or security breach of an individual's data, or that of a group of individuals, by government or the private sector must be a criminal offence, involving both punitive detention and monetary compensation to the individual card holder(s). These aspects are not properly covered in the draft legislation - that is, criminality and compensation.
- No government or private entity may sell or trade or give away any information on the national database or on any card without the individual written consent of the individual owners of the data and the cards. This is not covered in the legislation.
- Data on Australians is held physically and electronically within Australia at all times, and not held, duplicated, transited or backed-up outside Australia, and no foreign government or foreign-registered or based entity has, or is given, access to the Australian data unless individual data/card owners give their individual consent. This protection is not guaranteed in the draft legislation.
- No government or private sector entity – other than the national database – may access, use or store data from the individual card (eg, in security systems for airport or building access, in medical situations, etc) in electronic

or printed form. This is not covered by the draft legislation.

- No data-mining of any type be permitted on the database, unless for a medical emergency or in a declared State and/or National emergency, or where judicial approval has been given under warrant. The draft legislation does not contain this protection.
- Data-mining requests from medical, research and other interests are prohibited unless individual approvals are given in advance. This protection of Australians' information is not contained in the draft legislation.

Production of card:

- Producing/showing/use of the card always remains voluntary, at the discretion of the individual owner ...except in a medical emergency or a declared State and/or National emergency situations, or where judicial approval has been given under warrant. The draft legislation does not adequately provide for this.

Theft/misuse:

- Any theft or misuse of the card, or use of information obtained from the national database without the consent of the individual owner, shall be subject to financial compensation by the entity, government or private sector, and person(s) whether government- or private sector-employed, responsible for the security of the card and/or information. There is no financial compensation in the draft legislation.
- This financial recompense shall extend to downstream effects of the card/information being illegally accessed or used (eg, to cover the costs of restoring a person's financial affairs and reputation if the card/information is used in 'identity theft' situations where the card/information owner is not responsible for the theft/illegal use, or bears a minor responsibility for the theft/illegal use). This is not contained in the draft legislation.

Linking:

There shall be no linking of information between the national database/card system and any other information system, except for a medical emergency or in a declared State and/or National emergency. The draft legislation does not preclude this happening.

Governance issues:

CLA in its earlier submission recommended the following, which has not been proposed in the draft legislation. Such a body is required NOW.

- That, in addition, a Public Interest Monitoring panel (or Consumer Protection Panel) is established from first quarter 2007 to:
 - Monitor the ongoing planning for the card/database;
 - Monitor use of the system; and
 - Monitor and decide on, in the public interest, any requests for access to the database for research, medical or similar reasons.
 - Monitor planning for any future developments of the system; and

- Advise on possible future extensions and additions to the card/database system.
- The panel to have representatives of organizations such as:
 - Civil liberties
 - Human rights
 - Privacy
 - Legal
 - Aged
 - Youth
 - Disabled

...and the CPP to meet at least six times a year.

CLA states again that such a Public Interest Monitoring panel is required, and is required immediately, as the final legislation and the technical specifications are being developed. The draft legislation does not constitute such a PIM panel.

Overall

As stated at the outset, CLA supports the use of cards and IT to make life easier for Australians, provided there are proper personal and legislative safeguards in place. However, even though we support the concept, we are more concerned now than when we made a submission in 2006 because:

Benefits Government

The Government claims that the card is being introduced to benefit Australians, by reducing 17 cards down to 1. CLA estimates that the card/regime would benefit the Government, its Departments and Agencies to about 90% and individual Australians about 10%. For credibility, the Government, Minister Hockey and Departmental promotions people should drop the claim that the card is being introduced primarily for the benefit of individuals.

The card is a national single-identity card

The card as proposed by the current draft legislation is a national, single-identity, Access Card. That is, by any name, a 'national ID card'. The card as proposed by the legislation would be a de facto national ID card within 12 months of being introduced. No amount of legislative double talk will prevent this happening, unless the legislation is rewritten from a consumer viewpoint.

Inadequate protections

The draft legislation is written from the Government perspective - that is, any nuances advantage Government and its agencies. The legislation should be rewritten from scratch from a consumer/individual Australian perspective, with nuances advantaging people.

Database protection

The draft legislation does not go anywhere close to providing the proper protection for individual's information held on the proposed database, or other databases, in Australia.

Review of data/card/financial transaction legislation needed urgently

When presented with a positive opportunity, such as with the proposed card, to review Australia's inadequate and outdated legislative system around data, database(s), card(s) and financial transactions, the Minister and Government appear to be going for a 'quick fix' answer which will inevitably add to the overall problem, rather than helping.

The Minister and Government probably have three iterations of public consultation to go before the proposed 'Access Card' is anywhere near right. We expect this process to take at least 18 months. The writing of specifications and the contracting of suppliers should not be undertaken until the process is completed.

Accepting of suggestions and recommendations

If the Government is not proposing to consider and to accept the most fundamentally-needed, simple and basic changes to the proposed card system and draft legislation, there is no use from an NGO's perspective of trying to contribute to a 'consultation' process.

The amount of notice taken of the Task Force report, based on earlier NGO submissions and hearings, was virtually nil in all the important aspects. If the Government is not prepared to accept recommendations contained in this document, and the documents of other liberties/privacy advocates, the supposed 'consultation' process is a sham.

CLA started out supporting the proposed card, provided there was robust database protection legislation; however, the actions and decisions of the Minister and Government are rapidly causing us to re-think our position. Both continuing support, and proper consultation, are two-way processes, not the one-way process occurring so far.

(signed)

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ENDS



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