New Zealand Banking Association
Te Rangapū Pēke

Submission

to the

Justice Select Committee

on the

Privacy Amendment Bill

14 June 2024

NEW ZEALAND BANKING ASSOCIATION – TE RANGAPŪ PĒKE
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About NZBA

1. The New Zealand Banking Association – Te Rangapū Pēke (**NZBA**) is the voice of the banking industry. We work with our member banks on non-competitive issues to tell the industry's story and develop and promote policy outcomes that deliver for New Zealanders.

2. The following eighteen registered banks in New Zealand are members of NZBA:

- ANZ Bank New Zealand Limited
- ASB Bank Limited
- Bank of China (NZ) Limited
- Bank of New Zealand
- China Construction Bank
- Citibank N.A.
- The Co-operative Bank Limited
- Heartland Bank Limited
- The Hongkong and Shanghai Banking Corporation Limited
- Industrial and Commercial Bank of China (New Zealand) Limited
- JPMorgan Chase Bank N.A.
- KB Kookmin Bank Auckland Branch
- Kiwibank Limited
- MUFG Bank Ltd
- Rabobank New Zealand Limited
- SBS Bank
- TSB Bank Limited
- Westpac New Zealand Limited

Contact details

3. If you would like to discuss any aspect of this submission, please contact:

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Introduction

4. NZBA welcomes the opportunity to provide feedback to the Justice Select Committee (**Committee**) on the Privacy Amendment Bill (**Bill**). NZBA commends the work that has gone into developing the Bill.

5. It is essential that any proposed changes to current notification regime strike the right balance between transparency and overloading customers and organisations with unnecessary information and requirements.

6. In our view, and as expanded upon below:

    6.1. The gap identified in the current regime is not material enough to warrant legislative change.

    6.2. As currently drafted, the proposed changes risk an overload of information, causing confusion and notification fatigue for customers, and placing a disproportionate compliance burden on businesses.

7. Further, more detailed feedback on various other aspects of the Bill is set out in Appendix 1.

The gap the Bill is seeking to address is not material

8. Any proposal for legislative change should always include careful consideration of the problem it is seeking to address.

9. In this case, we understand the key purpose of the Bill is to address a current gap where there is no requirement for an agency (public or private) to notify an individual when it collects personal information about the individual indirectly (i.e. from a source other than from the individual concerned).

10. NZBA queries whether there is in fact a material gap in the current notification regime that warrants legislative change. It is unclear, from the regulatory impact statement, what the quantifiable issue is, other than alignment with overseas regulatory frameworks.

11. In our view, the gap is not material for the following reasons:

    11.1. Under Information Privacy Principle (**IPP**) 2, agencies must generally collect personal information directly from an individual unless an exception applies.

    11.2. In practice, these exceptions are only invoked on a limited basis. In instances where they are applicable, it may not be appropriate to notify the individual for legitimate reasons.

11.3. Under IPP 3, agencies are already required to notify an individual when they intend to share personal information with any third parties – an individual should be informed from the outset about where their information is, or if any is to be held.

11.4. Banks already include detail in their IPP 3 collection notices on indirect collections.

Disproportionate consequences on consumers and businesses

12. NZBA considers that as currently drafted, the Bill will impact both consumers / individuals and businesses / agencies who collect information from, or share information with, a third-party source.

13. For consumers, these changes could result in an overload of information, causing undue anxiety and confusion. This would likely lead to increased complaints and disputes, and an overall worse customer experience.

14. While banks have clear collection and disclosure statements in their privacy policies, a number of issues will arise if the Bill passes in its current form, including:

14.1. Banks already have lengthy IPP 3 privacy collection notices, given their complex business models. NZBA queries how granular any proposed new notification requirement would be, as further detail may generate overly complicated disclosures.

14.2. Interference with reasonable and required embedded business processes may arise as a result of this change, such as credit checks, identity verification checks or mortgage broker arrangements.

14.3. Notification may often be impractical as the collector agency will not necessarily have a relationship with the individual concerned. In effect, the proposed IPP 3A would be forcing more personal information to be collected (for example addresses and contact details) in order for agencies to comply with the Bill.

14.4. There will be increased compliance burden with no clear corresponding benefit (as explained in the previous section). Existing bank processes are, in our view, transparent and more than sufficient to ensure that customers understand how they are handling and protecting their information. Further disclosures made to individuals in addition to these existing processes, in each instance that information is shared, may result in compliance burden and notification fatigue. We acknowledge that the regulatory impact statement discusses initial compliance costs, but it does not in our view reflect the extent of actual, ongoing compliance costs and resourcing it will create for businesses.

14.5. Contact centres will need to have scripting ready for the range of scenarios that may now present because of the proposed, overly complicated disclosures.

14.6. There will likely be an increase in compliance costs in keeping disclosures current, and these would need constant updating for each new agency or supplier. Furthermore, it would be difficult to deal with the frequency of the changing status of vendors and third parties.

15. Due to the above, NZBA considers it vital that the Bill strikes the right balance between being transparent, without overloading customers with information or draining organisational resource with no appreciable benefit.

16. The above points are carefully considered to reach this balance, specifically the narrowing of the proposed IPP 3A so that it only addresses the particular concern at issue, including sufficient carve-outs and exceptions for instances where notification would be unnecessary.

17. Further to this, and in relation to keeping up with international best practice, as referred to in the regulatory impact statement:

17.1. We understand that in Australia, there are exceptions available under Australian Privacy Principle 5 for third party collection of information in certain instances, and that agencies have flexibility and are only required to disclose such matters as are reasonable in the circumstances.

17.2. We also note that some global organisations comply with the General Data Protection Regulation (**GDPR**) Article 14 requirements by placing the notification onus on the third party providing the information to the collecting agency (in contract). For example, if Party A has a direct relationship with an individual and provided personal information to Party B, the parties have an agreement that Party A will notify the individual rather than Party B.

17.3. By adopting a similar approach in New Zealand, this could help avoid some of the issues noted in this submission. From a global perspective, there are risks that compliance becomes disjointed and complex if our privacy regime looks to align with some elements of other jurisdictions' regulatory frameworks without fully reflecting other relevant requirements in the same regime. This could lead to detrimental effects on the New Zealand economy (for example, multinational companies may be reluctant to offer products in New Zealand if it requires a different approach for privacy compliance).

Further guidance

18. NZBA is supportive of the Office of the Privacy Commissioner (**OPC**) issuing guidance to provide further clarity for businesses moving forward. Since the Privacy Act is

principle-based, guidance would be welcomed to assist businesses in meeting their regulatory obligations, provide the best possible service, and support their customers.

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APPENDIX 1 | DETAILED FEEDBACK ON THE PRIVACY AMENDMENT BILL

Topic	NZBA Feedback
Disclosure	We currently assume that the new obligations proposed in IPP 3A will not apply when an agency shares personal information with a third party who is not able to use that information for their own purposes (i.e., they are retained purely as a service provider to Party A). Currently, this is not deemed a "*disclosure"* under Section 11(5) of the Privacy Act. It would be helpful if this could be verified, either by way of an example in the Bill or by subsequent OPC guidance.
What constitutes taking *"steps that are, in the circumstances, reasonable to ensure that the individual is aware of"* the IPP 3A(1)(a) to (f) requirements	NZBA suggests examples are given (either in the Bill or by way of subsequent OPC guidance) as to what constitutes "*taking steps that are, in the circumstances, reasonable*" to ensure that an impacted individual is aware of the IPP 3A(1)(a) to (f) requirements. For example, whether Party A can rely on provisions in its contractual relationship with Party B. By way of comparison, the Australian Privacy Act (APP 5) does have specific Office of the Australian Information Commissioner (OAIC) guidance that states in para 5.6 that this could include the situation where the entity collects personal information from another entity, ensuring that the other entity has notified or made the individuals aware of the relevant APP 5 matters on its behalf (such as through an enforceable contractual arrangement).
Notification of IPP 3A(1) requirements should have an *"as are reasonable in the circumstances"* threshold incorporated	The way IPP 3A is drafted, suggests that unless an exception applies, the collecting agency must take any steps that are, in the circumstances, reasonable to ensure that the individual is aware of all the IPP 3A(1)(a) to (f) requirements. As an alternative, NZBA strongly suggests that consideration be given to the Australian Privacy Act APP 5.2 approach, which only requires the entity "*to notify the individual of such matters ... as are reasonable in the circumstances*". Given that it is impossible to cater for all circumstances, this would allow for a pragmatic solution to be taken where warranted.

Topic	NZBA Feedback
Third party name and address details in Privacy Statement – IPP 3A(1)(d)	Ideally, NZBA's members would like to rely on the privacy statement disclosure process for IPP 3A(3) purposes. However, we are concerned that the proposed carve-out in the proposed new IPP 3A(3) requires the impacted individual to be made aware of all IPP 3A(1)(a) to (f) requirements, including exact details about which agency has collected and which agency is holding the information (IPP 3A(1)(d)). In our view, it is not feasible for banks to include this proposed IPP 3A(1)(d) granularity of detail. NZBA considers such an undertaking would be inconceivable for agencies, such as large banks, to present individuals with bespoke privacy statements in every situation e.g., a statement which only lists specific third parties that their personal information will be shared with, and/or which third parties we will be receiving personal information from. It is not market practice to include this type of granularity in a privacy statement. Reference is typically made to the kinds of entities, for example, "*banks or financial institutions*", "*insurance companies*", "*credit reporting agencies*" or "*debt recovery agencies*", amongst the third parties our members work with. We consider this provides the customer with the information they need to understand how their information may be shared. More details can be requested if it is of particular interest to a customer. We also consider it will be extremely difficult to keep these types of details up to date and accurate. Banks work with a large number of third parties, with whom they share personal information (to assist with functions and activities), both by way of information flowing to a third party and/or from a third party. Consequently, we consider Party A and Party B in the scenario provided would need to maintain a running schedule of third parties as an appendix to their privacy statement. In addition, we argue that if an individual was presented with a lengthy list of third-party names and addresses, it is likely that individual would not be able to readily identify the particular third party that their personal information has been shared with. Further, a review would also need to be undertaken to ascertain whether these third parties our members receive indirect personal information from (such as mortgage advisers) would be comfortable to include a bank's name and address details in their privacy statement, as well as a regular check to ensure it remained present and correct. The same approach would apply for parties relying on a bank's privacy statement, which might require regular reviews throughout a year to ensure third parties' details remained accurate, and privacy statements are already

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	substantial documents. As such, we hold concern that this proposed requirement for additional information may generate overly complicated disclosures, lead to notification fatigue, as well as be of limited benefit to customers. In addition, while privacy statements record 'usual' indirect collections and disclosures that occur regularly, under agreed arrangements (or that can be reasonably be predicted or anticipated), they do not typically include indirect collections and disclosures that occur in exceptional or special circumstances. As an alternative, NZBA suggests that New Zealand aligns with the Australian APP 5 OAIC guidance paragraph 5.11[1], where it is accepted that it may be reasonable for an entity to notify *some* but not all IPP 3A(1)(a) to (f) requirements. For example, where the agency collects information from a wide variety of entities, it allows the agency to instead indicate the kinds of entities from which it collects that information from or the categories of agencies to whom it will disclose personal information. This generalised approach would mitigate the likelihood of burdensome notification and disproportionate compliance costs.
IPP 3A(3)	IPP 3A(3) currently reads as if it is up to agencies to decide where the notification responsibility lies. In line with section 11 of the Privacy Act, we are assuming responsibility lies with the controller (and not the agent) in a data processing arrangement but verification of this would be appreciated either via an example in the Bill or subsequent OPC guidance. Further, the exception as currently worded would provide, in our view, limited practical use given the individual is required to be made aware of all the IPP 3A(1)(a) – (f) requirements.
1 June 2025 Commencement Date	Agencies like banks are likely to require more time to comply and implement: at least 12 months, but ideally two years, from the date of commencement of the Privacy Amendment Act. Realistically, the Bill is unlikely to receive Royal Assent before the third quarter of 2024, which would currently provide less than 12 months for agencies to achieve compliance before the 1 June 2025 commencement date. We believe more time is required given the need for further OPC guidance (e.g., what constitutes taking "steps that are, in the circumstances, reasonable"), the increased compliance burden, large-scale documentation

[1] Version 1.2 (July 2019).

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	review, possible third party contract uplift and internal process related disclosure updates likely required to comply. It may even require interlinking privacy collection notices between agencies as currently proposed. As it stands, the Bill will impact many business areas for banks, and NZBA therefore considers it is only reasonable that more implementation time is provided. For example, a list of parties that our members will need to consider for this work that are not currently covered by proposed exceptions, includes (but is not limited to): • co-borrowers • agents/authorised signatories • parents/guardians • guarantors • external financial advisers (distributors) • brokers/custodians/solicitors who introduced the individual to a bank • mortgage advisors • credit reporting bureaus • recruitment agents/referees • card partners • financial dispute resolution schemes • valuation agencies • other banks for fraud and payment/ transaction processing purposes • insurance partners • identity verification processors • government departments We note that, for the purposes of Article 14 compliance, GDPR impacted organisations had two years to come up to speed and update their compliance arrangements by way of comparative example.
"*As soon as reasonably practicable after the information is*	NZBA asks for alignment with Article 14 in GDPR, where there is an "at the latest within one month" period to comply – see 3(a): Art. 14 GDPR – Information to be provided where personal data have not been obtained from the data subject - General Data Protection Regulation (GDPR) (gdpr-info.eu)

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collected' timing in proposed new IPP 3A(2)	
Exceptions –IPP 3A(4)	NZBA encourages incorporating other exceptions from the GDPR (Article 14), such as where: (i) the individual already has the information, which would cover off joint account / where individual is represented by an authorised third- party scenarios/parents/guardians (ii) it would be impossible or involve a disproportionate effort, or effort (iii) it would contravene another law or secrecy / confidentiality obligation. We also recommend an exception for situations where authorisation and consent are specifically built in to collection, to ensure existing business processes where upfront consent is collected are not impacted. We note that one of the proposed Bill exceptions is where it is "*not reasonably practicable in the circumstances of the particular case*" (IPP 3(4)(e)). This statement leaves room for ambiguity, and therefore we consider it would be significantly useful to provide examples (either in the Bill or by way of subsequent OPC guidance) to help provide clarity for this section. For instance, following the Australian Privacy Act's APP 5 and its OAIC guidance, where the agency collects information from a wide variety of entities, and it would not be practicable to give a separate notice in relation to each entity, it allows the agency to instead indicate the kinds of entities from which it collects that information.
Difficulty contacting some individuals to comply	NZBA understands that notification may often be impractical as the collecting agency will not necessarily have a relationship with the individual concerned. For example, in some situations, such as for card arrangements, banks may receive information about individuals from another corporate agency (i.e. their employees). In some cases, the customer of that corporate agency that sent the information may be a corporate / entity themselves, so the party a business receives the information from might not have the individuals' contact details. For example, the underlying investors in a fund, sent to a bank by their financial adviser, may deal with an individual's employer but may not have a relationship with the individuals themselves. This would, in effect, force banks to collect more personal information (address, contact details) than is required for the original purpose simply in order to comply with the proposed new IPP 3A.

Topic	NZBA Feedback
	Minors' parents / guardians are typically required to complete application forms and instruct banks for minors aged under 12. Consequently, it will likely be difficult for banks to contact these customers directly, as they may not have their own contact details.